CITE AS:

34 Van Natta ___ (1982)

RALPH CASTRO, Claimant
Merrill Schneider, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02536
December 4, 1981
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Mulder's order that required SAIF to pay compensation pursuant to the decision of the Court of Appeals that found claimant's occupational disease claim to be compensable. The Referee also assessed penalties and attorney fees against SAIF for its prior failure to pay compensation due pursuant to the decision of the Court of Appeals. Claimant cross requests review protesting that the penalty imposed by the Referee is too low.

On review of the Court of Appeals, the Supreme Court remanded the compensability issue to the Court of Appeals for further proceedings. The Court of Appeals in turn remanded to the Board where that issue is now under advisement. The fact remains, however, that this claim has been in accepted status since the original Court of Appeals decision and, although that status is subject to change in further proceedings, all compensation due must be paid unless and until further proceedings produce a different result than the Court of Appeals originally reached. ORS 656.313.

The Board affirms and adopts the order of the Referee with one exception. There is no justification on the facts of this case for imposition of anything less than one maximum penalty.

ORDER

The Referee's order dated October 27, 1980 is modified. The SAIF Corporation shall pay claimant additional compensation equal to 25% of the amount of compensation due between the date of the decision of the Court of Appeals and the date of the Referee's order in this case.

Claimant's attorney is awarded $600 as a reasonable attorney fee for services rendered on this Board review, payable by the SAIF Corporation.

The balance of the Referee's order is affirmed.

JODA M. RUHL, Claimant
Powers & Carman, Claimant's Attorneys
Minturn, VanVoorhees et al, Defense Attorney

WCB 80-05855
January 8, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests review of that portion of Referee Daron's order which held them responsible for (1) stapling gastric fundoplasty procedure in June 1980 and post-surgery related treatment and (2) a left foot plantar fascitis condition.

We agree with the Referee that claimant has proved (albeit by the barest possible weight of the evidence) the left foot plantar fascitis condition is a compensable consequence of the September 19, 1979 accident.

We disagree with the Referee regarding compensability of the stapling gastric fundoplasty. We find that surgery was not a compensable consequence of the accepted injury.

The contested surgery was performed to aid claimant in her efforts to lose weight, that is, treat her "morbid obesity". The obesity pre-existed the compensable injury to her left foot. All of the medical evidence indicates the pre-existing obesity is a complicating factor retarding claimant's recovery; some doctors believe it to have been the primary cause of the plantar fascitis. The obesity did not arise out of the injury nor was it in any way aggravated by the injury; no medical opinion in this record even suggests any causal relationship. We know of no rule of law or logic which requires the workers compensation system to help solve a worker's non-injury related health problems in order to effectuate recovery from a compensable injury. In fact, the law requires the injured worker to assist to the fullest in promoting recovery, in this case meaning weight loss. The responsibility for weight loss was the claimant's not the employer's.

ORDER

The Referee's order dated May 21, 1981 is modified.

That portion of the order dealing with the stapling gastric fundoplasty is reversed.

In all other respects the order is affirmed.

WAYNE R. BATDORF, Claimant
Robert K. Udziela, Claimant's Attorney
Darrell E. Bewley, Defense Attorney

WCB 79-05894
January 11, 1982
Order on Remand

On review of the Board's Order dated March 22, 1981, the Court of Appeals reversed the Board's Order.

Now, therefore, the above-noted Board Order is vacated, and this claim is remanded to the carrier for acceptance and payment of benefits in accordance with law.

IT IS SO ORDERED.

LEONARD BRADBURY, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06805
January 11, 1982
Order of Dismissal

The Board issued its Order on Review herein on September 18, 1981. Claimant thereafter requested reconsideration. The Board's Order on Review was abated by order of September 30, 1981. Claimant has now withdrawn his request for further consideration by the Board, indicating his desire to have an order of dismissal entered.

Claimant's request for Board review is dismissed.

IT IS SO ORDERED.

JAMES L. GAULE, Claimant
Gary Galton, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06041
January 11, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant and the SAIF Corporation seek Board review of Referee Ail's order which (1) granted claimant compensation for 50% loss of the left leg, (2) granted compensation for 10% back disability, (3) ordered payment of Dr. Puziss' bill and Dr. Rosenbaum's bill plus a penalty on the latter bill, and (4) assessed a penalty on temporary total disability compensation paid from July 17, 1979 through August 10, 1979 and from May 15, 1980 through May 29, 1980. Claimant contends he is permanently and totally disabled. SAIF contends claimant is not permanently and totally disabled and that the Referee's rulings on medical bills and penalties should be reversed.

We concur with the Referee's award of 50% disability for loss of the left leg. We do not find claimant is permanently and totally disabled and will consider his back disability based on the guidelines set forth in OAR 436-65-600, et seq. Claimant's back impairment is only 3% based on the objective findings in the record. Claimant is 64 years old with an eleventh grade education. Although he is restricted to sedentary work (which would serve to boost his disability rating quite high), we find this is due primarily to his leg disability and not due to his minimal back impairment. We conclude that a more proper award of compensation for claimant's back disability would be 64° for 20% unscheduled disability.

We concur with the Referee's conclusions regarding the bills of Drs. Puziss and Rosenbaum and the corresponding penalty. That portion of the order will remain unchanged.

With respect to the penalties granted on portions of claimant's temporary total disability compensation, we disagree. A penalty on the period July 17 1979 through August 10, 1979 was proper as the payment was not made until August 9, 1979. But the Referee's 25% penalty is excessive under the standards in Zelda M. Bahler, WCB Case No. 79-06095 (October 30, 1981). The delay of payment was less than 25 days; the penalty will be reduced to 15%. However, the period between April 28, 1980 and June 12, 1980 is a different situation. The Referee determined the first installment was made only one day late and, therefore, was not due to unreasonable conduct on the part of SAIF. This payment was actually due on May 19, 1980 and made on May 21 (fourteen days after the employer had knowledge of claimant's inability to work due to the injury). We agree that this is not sufficient delay to warrant a penalty. Bahler, supra. The Referee then found the next payment was due on May 29 and not paid until June 4. The Referee's computation was incorrect. Fourteen days from May 19 is June 2. Again, the payment was two days late as was the following installment. The three payments were made exactly fourteen days apart. No penalty is due for these time periods.

ORDER

The Referee's order dated May 30, 1981 is modified. The 50% award for loss of the left leg is affirmed. Claimant is granted compensation equal to 64° for 20% unscheduled disability for his back condition. This is in lieu of that granted by the Referee. Claimant's attorney is allowed a fee equal to 25% of the increased compensation granted by this order, not to exceed $3,000.

That portion which assessed a penalty of 25% on the period May 15, 1980 through May 29, 1980 is reversed. That portion which assessed a penalty of 25% on the period July 17, 1979 through August 9, 1979 is modified to make the penalty 15%.

The remainder of the Referee's order is affirmed.

FRANK A. HAMEL, Claimant
Don Swink, Claimant's Attorney
Ridgway K. Foley, Jr., Defense Attorney

WCB 79-00690
January 11, 1982
Order on Remand

On review of the Board's Order dated May 21, 1981, the Court of Appeals reversed the Board's Order.

Now, therefore, the above-noted Board Order is vacated, and this claim is remanded to the carrier for acceptance and payment of benefits in accordance with law.

IT IS SO ORDERED.

BARBARA HOLDER, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-00244
January 11, 1982
Order on Reconsideration

This case is before us on motion for reconsideration of our August 27, 1981 Order on Review filed by both SAIF and claimant.

SAIF's motion challenges our assessment of a penalty for its failure to compute and pay claimant's temporary total disability benefits on the basis of her actual wages at the time of injury, SAIF having paid temporary total disability on the basis of claimant's lower base wage which did not include her shift differential pay. It may well be, as SAIF argues, that prior Board decisions did not make its duty as clear as we previously suggested in our August 28, 1981 Order on Review. However, all prior Board decisions and all other elements of the law, especially OAR 436-54-212, all point in the direction--that temporary total disability is computed on the basis of actual wages at the time of injury. We adhere to our conclusion about assessing a penalty.

Claimant's motion for reconsideration requests that we award a carrier-paid attorney's fee of $1,050. Since our August 28, 1981 Order on Review in this case, we held in Zelda M. Bahler, WCB Case No. 79-06095 (Order on Reconsideration, October 30, 1981) that an ORS 656.382(1) carrier-paid attorney fee is mandatory in cases of refusal to pay compensation. This is a refusal case. A carrier-paid fee will be imposed.

The amount of attorney's fee suggested by claimant's attorney is, however, not warranted. In Charles L. West, 31 Van Natta 106 (1981), we noted the incongruity of a claimant's attorney's fee exceeding the claimant's recovery of compensation. We will not perpetuate such an incongruity here. SAIF underpaid claimant's time loss benefits by the amount of $4.85 per week. The record does not state how much time claimant missed from work, but assuming it was as long as one year, the weekly difference would only total about $250. We will award an attorney's fee in that amount.

ORDER

The Referee's order dated August 28, 1981 is readopted and republished with the one addition that the SAIF Corporation shall pay claimant's attorney a fee of $250 pursuant to ORS 656.382(1).

DIANNE L. JAMES, Claimant
Sidney Galton, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 77-06474
January 11, 1982
Order on Application for Attorney's Fee

The Board issued its Order on Remand on December 18, 1981, finding claimant's psychological condition compensable. Claimant's attorney thereafter moved the Board for an award of an attorney's fee for services rendered before the Board.

Attorney fees may be awarded only when expressly authorized by statute. Uris v. Compensation Department, 247 Or 420, 429 (1967); Geise v. Safeway Stores, 10 Or App 452 (1972), rev. den.; Bailey v. Morrison-Knudsen, 5 Or App 592, 598-600 (1971).

The Board finds it is without authority to award claimant's attorney a reasonable attorney's fee at this stage of the proceedings, there being no statutory provision for a carrier-paid attorney's fee for services rendered before the Board on remand from the Court of Appeals. We have found no case law interpreting ORS 656.382(2) or 656.386(1) in any procedural context other than review of a lower tribunal's order.

ORDER

The application for a reasonable attorney's fee is denied.

Thomas Leary, Claimant
Benton Flaxel, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-10944
January 11, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Seifert's order which approved SAIF Corporation's denial of temporary total disability from November 14, 1980 to December 22, 1980.

Claimant was medically stationary, released for work, and regularly performing work when he was laid off on November 14, 1980 as part of his mill shutdown.

The Board affirms and adopts the Referee's order.

ORDER

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

CHARLES G. McARTHUR, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05966
January 11, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by the SAIF Corporation on behalf of a non-complying employer, and said request for review now having been withdrawn by SAIF as abandoned by the employer,

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.

JERRY J. REUST, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-00038
January 11, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Wolff's order which granted claimant an increased award of compensation for a total equal to 208° for 65% unscheduled disability for injury to the low back. SAIF contends this award is excessive and, in fact, claimant's earlier awards totalling 15% are adequate.

Claimant sustained a compensable injury on September 12, 1975 to his low back. His claim is currently before us on the sole issue of extent of disability. The Referee failed to take into consideration the guidelines set forth in OAR 436-65-600, et seq. We will do so now. In determining the amount of claimant's impairment, we turn to Dr. Bolin's report of July 7, 1980 for a comprehensive analysis of claimant's disability. Claimant's loss of range of motion of the low back adds up to 8%. Taking into consideration his disabling pain and sensitivity, we conclude impairment is 15%. This is consistent with the medical opinions that claimant is "mildly" impaired. Other factors include claimant's age (45), his education (ninth grade), his limitation from heavy to light or sedentary work and his past work experience. See OAR 436-65-600, et seq. We conclude claimant would be more properly and adequately compensated with an award of 112° for 35% unscheduled disability. The Referee's order should be so modified.

ORDER

The Referee's order dated May 22, 1981 is modified. Claimant is hereby granted compensation equal to 112° for 35% unscheduled disability for injury to the low back. This award is in lieu of that granted by the Referee's order which, in all other respects, is affirmed.

WILLIAM WINCHESTER, Claimant
Alan Scott, Claimant's Attorney
SAIF Corp Lega, Defense Attorney

WCB 80-07496
January 11, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Williams' order which affirmed a Determination Order dated August 8, 1980 which awarded claimant 160° for 50% unscheduled permanent partial disability for low back disability. Claimant contends that he is permanently and totally disabled or, in the alternative, that his award is insufficient.

The Board agrees with the Referee that claimant has failed to prove permanent total disability. We review de novo, and our determination of permanent partial disability differs from the Referee's. Taking into consideration both low back surgeries, loss of motion and psychological factors, we find claimant's impairment to be 40%. Combining the 40% impairment with all other relevant socio/vocational factors using OAR 436-65-600, et seq, as a guideline, we find claimant's unscheduled permanent partial disability to be 60% of the maximum.

ORDER

The Referee's order dated May 5, 1981 is modified. It is ordered that claimant is awarded 60% unscheduled permanent partial disability. This award is in lieu of all previous awards.

Claimant's attorney is granted, as and for a reasonable attorney's fee, 25% of the increase in claimant's award not to exceed $1,000.00.

MELVIN T. WYRICK, Claimant
Thomas E. Wurtz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-08788
January 11, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation requests Board review of Referee Braverman's order which set aside its denial of claimant's claim for a right hand condition.

The sole issue on appeal is compensability of claimant's right hand condition.

We agree with and adopt the Referee's conclusion that this claim is compensable. We are persuaded by Dr. Murdock's explanation on causation and find his conclusion supported by the weight of the other evidence.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 20, 1981 is affirmed. Claimant's attorney is granted $350 as a fee for his services on Board Review, payable by SAIF.

ARNOLD WYTTENBERG, Claimant
David Hytowitz, Claimant's Attorney
Daniel L. Meyers, Defense Attorney
R. Michael Healey, Defense Attorney

WCB 81-01180, 81-1284 & 81-00050M
January 11, 1982
Order Denying Motion to Dismiss

The claimant has moved to dismiss employer's request for review on the grounds that employer failed to mail the request for review to all parties within the 30-day period, pursuant to ORS 656.295(2). See ORS 656.289(3).

The Motion to Dismiss is denied. Barbara Rupp, WCB Case No. 80-01803 (Order Vacating Order of Dismissal, March 4, 1981); Michael J. King, WCB Case No. 80-07413 (Order on Reconsideration of Denial of Motion to Dismiss, December 18, 1981).

IT IS SO ORDERED.

DENNIS BERLINER, Claimant
Peter McSwain, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 79-09454
January 14, 1982
Order on Remand

On review of the Board's Order dated March 18, 1981, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated June 24, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

IT IS SO ORDERED.

ORLANDO RUSSELL, Claimant
Larry Bruun, Claimant's Attorney
Ronald Atwood, Defense Attorney

WCB 80-10049
January 14, 1982
Order of Abatement

The Board has received a motion for reconsideration of its Order on Review dated 12-31-81.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and claimant is requested to file a response to the motion for reconsideration within ten days.

IT IS SO ORDERED.

JOSEPH W. BARDELL, Claimant
Bernard Jolles, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01014
January 15, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation requests Board review of Referee Gemmell's order and amended order which rescinded their denial of claimant's intercostal neuritis condition and found claimant to be permanently and totally disabled.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated February 10, 1981 and amended order dated February 19, 1981 are affirmed. Claimant's attorney is awarded $600 as and for a reasonable attorney fee, payable by SAIF.

CLARENCE BOYEAS, Claimant
Douglas S. Green, Claimant's Attorney
Eugene Buckle, Defense Attorney

WCB 80-10456
January 15, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee James' order which granted an additional 32° unscheduled permanent partial disability for a total award of 64° for his low back condition. Claimant contends the claim was prematurely closed, or in the alternative, he is entitled to a greater award.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 26, 1981 is affirmed.

HAROLD BUCKNER, Claimant
Rolf Olson, Claimant's Attorney
John Klor, Defense Attorney

WCB 80-04310
January 15, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Leahy's order which affirmed a Determination Order issued February 25, 1980 which awarded temporary total disability from July 16, 1979 through January 27, 1980. Claimant contends his claim was prematurely closed, that spinal fusion surgery performed in August 1980 was related to his industrial accident and that he is entitled to penalties and attorney fees in that the carrier unreasonably submitted the claim for closure and failed to follow OAR 436-69-130 regarding elective surgery.

Claimant, a timber faller, was injured July 16, 1979 when struck on the head by a falling limb. The blow knocked him out, and he fell to the ground. He was taken to the hospital emergency room where the initial diagnosis was "cervical strain" with complaints of severe neck pain. On July 18, 1979, he was seen by Dr. Davis, a chiropractor, who diagnosed injury to neck, cervical strain, cervical subluxation, injury to legs bilateral, left leg 12 mm short, cervical cephalgia, visual disturbance all based on complaints of headache, visual disturbance and full spine pain. Dr. Davis obtained the following history: "I fell a tree and a limb struck me on hard hat and knocked me out. Hurt my neck and back." Claimant's symptoms persisted, so Dr. Davis referred him to Dr. Campagna, a neurosurgeon who saw him October 15, 1979. At that time claimant's chief complaints were low back pain, tingling in toes of both feet and occasional headaches. He had a constant dull aching which was mostly in his low back. Dr. Campagna's diagnostic impressions were lumbar sprain, cervical sprain, cerebral concussion all secondary to the July 16, 1979 accident and lumbar spondylolysis. (Dr. Campagna made no comment on the etiology of this latter condition.) Both Dr. Davis, the chiropractor, and Dr. Campagna, the neurosurgeon, continued to

follow the claimant with treatment and advice. On January 28, 1980, Dr. Campagna reported claimant's condition was stationary, his claim could be closed and there was no disability as a result of the accident of July 16, 1979. Dr. Davis had previously reported on December 14, 1979 that claimant's low back pain had "improved" and treatment was to continue.

On February 25, 1980 a Determination Order was issued which awarded temporary total disability from July 16, 1979 through January 27, 1980 and no permanent partial disability. There is no evidence in the record indicating whether Dr. Davis concurred with Dr. Campagna prior to issuance of the Determination Order. The last report of record from Dr. Davis indicates he was continuing to treat claimant's low back condition.

August 29, 1980, Dr. Campagna wrote a letter to the carrier's attorney which states in part:

> "...it is my considered medical opinion that the procedure recommended by Dr. Wilson is not related to the patient's industrial injury of July 16, 1979 which was a lumbar sprain. Furthermore, it appears the proposed surgery is for a mechanical instability secondary to his pre-existing lumbar spondylolysis."

Evidently, the genesis of this report is explained by the following exerpt from carrier's attorney's opening statement:

> "We have at issue here, we have an industrial injury on July 16, 1979 which was treated with Dr. Campagna and the case was closed without disability. July [claimant's attorney] wrote our office and said Mr. Buckner is going to have a fusion and I want you guys to pay for it. Well, I wrote him back and said I don't have any medical's to support the fact that he even needs one and things like that."

The claimant's contention is that the injury of July 16, 1979 caused the need for a spinal fusion. The carrier contends otherwise, saying the spinal fusion was done to correct a congenital pre-existing condition (spondylolysis) which was neither caused by, nor worsened by, the July 16, 1979 injury.

According to claimant's testimony, Dr. Davis referred him to Dr. Wilson, an orthopedist, sometime in June 1980. The referral was made according to claimant because: "Well, I'd been going to Dr. Davis for like a year, and he couldn't do nothing about that one spot in my back and he figured it was time to refer me to somebody because his service was about done." Claimant, in his testimony, goes on to explain that the "spot" that would not clear up was in his low back "just about where your backbone starts from your thighs."

Dr. Wilson first examined claimant in June 1980. The hearing was in September 1980. The only medical information from Dr. Wilson in the record is a deposition taken in November 1980 (some five months after he first saw the claimant). In his deposition, Dr. Wilson says:

1. He first saw claimant in June 1980.

2. Claimant gave a history of being hit on the head by a "widow maker," was knocked a little goofy and continued to have low back pain and posterior thigh pain pretty much continuously since the time of the incident.

3. He diagnosed spondylolisthesis grade one.

4. He performed a spinal fusion in August 1980 to correct the spondylolisthesis.

5. Spondylolisthesis is ordinarily considered to be a congenital defect.

6. He diagnosed spondylolisthesis grade one from a reading of Dr. Campagna's x-rays. The diagnosis was confirmed at surgery.

7. The condition causes instability in the affected area of the spine, allowing abnormal movement thus causing symptoms.

8. The claimant's low back pain was secondary to low back instability which was secondary to the spondylolisthesis which by history had been aggravated by the July 1979 accident.

Dr. Campagna's deposition was taken post hearing. His testimony is essentially the same as the opinions contained in his written reports.

We are persuaded that the condition for which the surgery was performed by Dr. Wilson is a compensable consequence of the July 1979 accident. The claimant had no significant symptoms of a low back condition before the accident; he developed complaints indicative of low back injury within days of that accident, a low back injury was diagnosed, he did not recover from that low back injury and the surgeon who performed a low back spinal fusion provides a logical and persuasive reason to relate the condition to the accident.

We find the claim was procedurally properly closed by the February 25, 1980 Determination Order; however, in retrospect, we now know the closure was in fact premature. See William Bunce, WCB Case No. 80-00051 (November 20, 1981). Here as in Bunce we will not award penalties for unreasonableness. The carrier had received two reports from Dr. Campagna advising them the claimant's injury-related condition had become stationary. They submitted the claim for closure; this action, at that time, was proper and cannot now be said to have been unreasonable.

As for the claimant's contention that the carrier failed to follow OAR 436-69-130 concerning elective surgery, we find that rule does not establish a mandatory obligation on the carrier to seek independent consultation to determine the need for surgery. No penalties will be awarded because the carrier failed to exercise its OAR 436-69-130 option.

ORDER

The Referee's order dated December 22, 1980 is reversed.

The carrier's denial of claimant's medical services claim for his August 1980 back surgery is set aside. The Determination Order issued February 25, 1980 is set aside and this claim is remanded to the carrier for processing in accordance with law. Claimant shall be paid temporary total disability compensation from January 28, 1980 until this claim is closed pursuant to ORS 656.268, less time worked.

Claimant's attorney is awarded $1,000 for services rendered at the hearings and Board levels on the issue of denial of medical services, payable by the carrier. Claimant's attorney is also allowed an additional fee equal to 25% of the increased compensation, not to exceed $750, payable from claimant's compensation.

Claimant's requests for additional relief are denied.

MICHAEL DICKERSON, Claimant
Douglas Green, Claimant's Attorney
John Snarskis, Defense Attorney

WCB 81-00672
January 15, 1982
Order on Review

Reviewed by the Board en banc.

The employer seeks Board review of that portion of Referee Knapp's order which assessed a penalty in the sum of 25% on the temporary total disability benefits granted by the Determination Order of June 9, 1981 for the carrier's unreasonable delay in payment of compensation.

The majority of the Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 24, 1981 is affirmed. Claimant's attorney is awarded $250 as and for a reasonable attorney's fee, payable by the carrier.

Board Member McCallister, Dissenting:

I respectfully dissent from the opinion of the majority. I agree with appellant that the triggering event in an aggravation claim which starts the clock running on the carrier's duty to pay compensation is "medically verified inability to work." ORS 656.273(6). The "medical verification" of inability to work was received by the carrier on May 4, 1981 and time loss compensation was paid ten days later. No penalty or penalty-related attorney fee should be assessed.

It can be argued that the carrier could have more diligently or differently pursued the matter of inability to work. This record indicates the treating physician was sending confusing signals to the carrier; once the signal was clear and unequivocal on time loss, the compensation was promptly paid.

I would reverse the order of the Referee on the penalty issue.

MARK D. FULLER, Claimant
Douglas Minson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10512
January 15, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Fink's order which affirmed the Determination Order of November 13, 1980, whereby claimant was granted additional temporary total disability but no further permanent partial disability beyond the 16 degrees unscheduled permanent partial disability already awarded. Claimant contends he is entitled to 48 degrees unscheduled permanent partial disability.

The Board affirms and adopts the Referee's order.

ORDER

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

MILLARD A. GIBBONS, Claimant
SAIF Corp Legal, Defense Attorney

WCB 79-08953
January 15, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

SAIF Corporation seeks Board review of that portion of Referee Neal's order which set aside its denial of claimant's occupational disease claim that job related stress caused his hypertensive condition. SAIF contends that claimant has failed to prove job stress caused or aggravated his hypertension. We agree.

We adopt the facts as set forth in the Referee's order but reach a different conclusion.

This is a case where the demands of law meet the limitation of medical science because high blood pressure or hypertension is of unknown cause as attested to by both Drs. Allen and Bittner. Dr. Allen, the treating physician, testified that claimant's hypertension was probably related to his job stress. There is no evidence Dr. Allen considered any other possible cause. Dr. Bittner, an internist, testified:

> "Q. And to make something else perfectly clear, is it your opinion that the claimant's work activities aggravated his hypertension from the period '74 to '78?
>
> "A. I feel that his work activities could have aggravated his hypertension which was created.
>
> "Q. Is that from a reasonable medical probability that he did or did not?
>
> "A. I feel it is a possibility. I won't say

Dr. Bittner further testified that "public health studies have shown of people aged fifty-five to sixty-five, 363 people out of 1,000 will be hypertensive," and that heredity could also cause the condition. Dr. Bittner pointed out that claimant's highest blood pressure readings occurred when he was off work for three months recuperating from a hernia operation. Dr. Bittner thus concluded that there was no correlation between claimant's job stress and his hypertension.

We are more persuaded by Dr. Bittner because his opinion has the weight of additional expertise and because it more closely follows from the totality of the evidence. Hammons v. Perini Corp., 43 Or App 299 (1979).

We find the medical evidence indicates that claimant's age and heredity are strong contenders as possible causes of his hypertension. Even if job stress is considered, the medical evidence indicates it is but another possible cause. Thus, age, heredity and job stress are all equally possible causes of claimant's condition. This is insufficient to establish the compensability of an occupational disease claim. James v. SAIF, 290 Or 343 (1981); Thompson v. SAIF, 51 Or App 395 (1981); Kay L. Murrens, WCB 79-01573 (December 7, 1981).

ORDER

The Referee's order dated March 27, 1981 is modified. SAIF Corporation's denials of claimant's hypertension condition are affirmed. The remainder of the Referee's order concerning the non-compensability of claimant's eye condition is affirmed.

ROBERT GUMM, Claimant
Robert Muir, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-08489
January 15, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Knapp's order which affirmed the carrier's denial of his esophageal reflux condition and granted him compensation for 15% unscheduled disability (30% total award). Claimant contends the esophageal reflux condition is compensable and that he is entitled to an additional award of compensation for his head injury.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 29, 1981 is affirmed.

HARRY HOFFMAN, Claimant
Richard Sly, Claimant's Attorney
Paul Bocci, Defense Attorney

WCB 80-04503
January 15, 1982
Order Denying Motion to Dismiss

The employer has moved to dismiss claimant's request for review which was filed with the Board in a timely fashion on October 22, 1981. Claimant requested review of the Presiding Referee's October 12, 1981 order dismissing his request for hearing. The basis of the motion is the failure of claimant who is proceeding in his own behalf on this review without benefit of counsel to serve employer or employer's counsel with a copy of his request for review. See ORS 656.289(3) and 656.295(2).

The employer received actual notice of claimant's request when the Board mailed its customary acknowledgment form to the parties. Employer's counsel thereafter requested from the Board a copy of claimant's request which was provided.

The employer received notice of the request for review within 30 days of the date of the Referee's Order of Dismissal although notice was received from the Board rather than from claimant. No claim of prejudice is made; nor is it likely that any prejudice to the employer could be shown. Barbara Rupp, WCB Case No. 80-01803 (Order Vacating Order of Dismissal, March 4, 1981); Michael J. King, WCB Case No. 80-07413 (Order on Reconsideration of Denial of Motion to Dismiss, December 18, 1981).

ORDER

The employer's Motion to Dismiss claimant's request for review is denied.

CARL E. HUGHES, Claimant
Thomas Caruso, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06856
January 15, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Knapp's order which affirmed the award of permanent partial disability for his left hand injury in a Determination Order issued February 15, 1981, awarded additional temporary total disability and assessed a variety of penalties.

Claimant contends his permanent partial disability is greater than the 10% loss of the left forearm awarded by the Determination Order. However, claimant's brief does not cite, mention, discuss or even indicate an awareness of any of the relevant rules for the rating of disability, OAR 436-65-501 to 436-65-532. Such mention could have been made. Dr. Eckhardt's closing report of January 14, 1981 suggests a possible loss of about 50% of grip strength in claimant's left hand. If permanent--a point not addressed in the record--under OAR 435-65-530(5)(a), this would translate to a 20% loss of the left forearm.

But we will not modify the Referee's order because of: (1) Claimant's failure to state any reason under the relevant administrative rules why it is incorrect; (2) lack of evidence of permanence of loss of grip strength; and (3) even if claimant was undercompensated by his permanent partial disability award, under the standards of Zelda M. Bahler, WCB Case No. 79-06095 (October 30, 1981), he was over compensated by the penalties awarded by the Referee. On balance, we cannot improve on the Referee's disposition.

ORDER

The Referee's order dated April 20, 1981 is affirmed.

ALLAN L. LARSON, Claimant
Alan Scott, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-01776
January 15, 1982
Order on Remand

This case is before us on remand from the Court of Appeals for reconsideration in light of James v. SAIF, 290 Or 343 (1980). Before the court's remand, both a Referee and the Board had ruled that claimant's occupational disease claim for his psychological condition was not compensable.

The Board's prior Order on Review concluded: "Claimant's employment merely provided a forum for claimant to display his problem." On reconsideration we adhere to that conclusion.

Moreover, the record documents abundant possible nonwork causation. One of claimant's children died as an infant. Two other children were injured when hit by a car. There is a history of marital discord. There is a history of friction between claimant and his father and stepmother. Claimant's treating psychiatrist reported in March of 1978: "Probably the most significant [stress factor in claimant's life] is an on-going pressurized situation with his own family who have recently moved to Portland."

On this record claimant has not established any preponderance, much less a significant preponderance, of work causation of his psychological condition. Kay L. Murrens WCB Case No. 79-01573 (December 7, 1981).

ORDER

The Board on reconsideration, adheres to its Order on Review dated May 7, 1980; the Referee's order dated August 30, 1979 is again affirmed.

EUGENE NEAL, Claimant
Jeff Gerner, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 80-02319
January 15, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Knapp's order which affirmed the Determination Order that awarded claimant 30% unscheduled permanent partial disability for his lung condition. The issue is extent of disability. We modify the Referee's order.

Claimant developed respiratory symptoms after working in a grain grinding mill for two years. Subsequent treatment identified: (1) Restrictive lung disease, probably caused by exposure to grain dust; and (2) obstructive lung disease, probably caused by claimant's 40 years of cigarette smoking. A medical report submitted after the hearing raised for the first time the possibility that part of claimant's physical problems were caused by anemia.

Claimant requests that we remand to the Referee to consider "new" evidence that, claimant contends, contradicts the anemia diagnosis. The request to remand is denied for several reasons: (1) Claimant has offered no explanation of why he did not seek to have the hearing record kept open for receipt of the evidence he now wants to introduce, an explanation required by Robert A. Barnett, WCB Case No. 79-11012 (June 26, 1981); (2) claimant's "new" evidence, a two sentence letter from Dr. Done and laboratory report, would not contribute materially to decision of the issue in this case--contrary to claimant's repeated assertions. Dr. Done does not contradict Dr. Bardana's anemia diagnosis, Dr. Done only says claimant's "blood picture has improved"; and (3) unlike the Referee, we attach little weight to the anemia issue in determining the extent of claimant's disability.

Claimant argues he is permanently and totally disabled. We agree with and adopt those portions of the Referee's order finding to the contrary.

Claimant argues his permanent partial disability is greater than that awarded by the Determination Order. We agree. Applying the relevant administrative rules, we find that the combined positive values for impairment (436-65-675), age (436-65-602), education (436-65-603), work experience (436-65-604), adaptability (436-65-605) and labor market findings (436-65-608) come to 64; that the combined negative values for education (436-65-603) and mental capacity (436-65-606) come to 19.

> "The final negative combination value is then taken as a percentage of the final positive combination value, and is subtracted therefrom. The result, when rounded to the nearest five percent, represents the percentage loss of earning capacity to be compensated." OAR 436-65-601(4)."

The result is a 50% loss of wage earning capacity.

ORDER

The Referee's order dated March 16, 1981 is modified. Claimant is awarded 50% permanent partial unscheduled disability in lieu of all prior awards. Claimant's attorney is allowed 25% of the increased compensation granted by this order, not to exceed $2,000.

Claimant's motion for remand is denied.

CHARLES R. SMITH, Claimant
Steven Yates, Claimant's Attorney
Noreen Saltveit, Defense Attorney

WCB 79-03919
January 15, 1982
Order on Remand

On review of the Board's order dated December 1, 1980, the Court of Appeals reversed that part of the order which held that claimant was not entitled to reimbursement for travel expenses incurred in seeking medical services. The remainder of the Board's order was affirmed.

Now, therefore, that portion of the Board's order which was reversed is hereby vacated, and the claim for reimbursement for travel expenses is remanded to the employer for payment in accordance with law and the order of the Court.

IT IS SO ORDERED.

TERESA E. WATHEN, Claimant
John Svoboda, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06296
January 15, 1982
Order Denying Motion to Amend/Remand

SAIF Corporation has moved the Board for an order allowing it to amend its request for review or, in the alternative, remanding this claim to Referee McCullough in order to address an issue SAIF calls "jurisdictional."

The issue SAIF seeks to raise now, and which it placed before the Referee after filing its request for review, does not appear to be an issue concerning jurisdiction. Rather, this is an issue on the merits involving a res judicata argument. SAIF is free to amend its request for review or raise any argument in its brief to the Board. However, whether the record developed before the Referee will support a res judicata argument is another matter. Absent the parties' stipulation, this Board is not at liberty to consider evidence that was not made a part of the record before the Referee. See Brown v. SAIF, 51 Or App 389 (1981); OAR 436-83-720(1).

Based upon the affidavit of counsel submitted in support of the motion, it appears that the "newly discovered" evidence that would be submitted to the Board or, alternatively, the evidence that would be developed at a hearing on remand would be evidence that was available at the time of the hearing. Furthermore, it is apparent that this evidence had to have been somewhere in SAIF's possession prior to the hearing, although possibly in some other file separate from the claimant's file involved in this claim.

SAIF's affidavit does not amount to a showing that this additional evidence was not obtainable with due dilligence prior to the hearing. Accordingly, remand is not proper. Robert A. Barnett, 31 Van Natta 172 (1981). Counsel's affidavit does suggest that the cause of SAIF's failure to raise a res judicata issue and bring this evidence before the Referee at the proper time was poor claims processing which is not justification for remand under the rationale of Barnett, supra.

MERRIE J. BLAUVELT, Claimant
Cash Perrine, Claimant's Attorney
James Larson, Defense Attorney

WCB 81-01768
January 18, 1982
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.

BRUCE C. BONNER, Claimant
Catherine Riffe, Claimant's Attorney
Roger Warren, Defense Attorney

WCB 80-05193
January 18, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Mulder's order which granted claimant an award of 15% loss of the right hand in lieu of the award made by the Determination Order of 2.4 degrees for 10% loss of the right index finger. We affirm and adopt.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated July 16, 1981 is affirmed. Claimant's attorney is awarded $300 as and for a reasonable attorney fee, payable by the carrier.

THOMAS L. LEARY, Claimant
Benton Flaxel, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-10944
January 18, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated January 11, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

MICHELLE C. MENDOZA, Claimant
Malagon, Velure & Yates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-07482
January 18, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Leahy's order which affirmed SAIF's denial of her claim. In affirming SAIF's denial the Referee, in part, relied on a finding of credibility. The Referee saw and heard the claimant testify. Certainly the Referee could have and maybe should have more accurately recited the evidence on which he based his credibility finding. Having made this observation, we conclude the Referee's finding on credibility should not be disturbed. We further observe, that even if we were to find claimant credible that on this record, as the Referee also found, she still would not have carried the burden of proof. We are not persuaded that claimant suffered a compensable injury or disease. The Referee's order is affirmed.

The Board affirms and adopts the Referee's order.

ORDER

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

VERLA PARKER, Claimant
David Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05945
January 18, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of that portion of Referee McCullough's order which upheld SAIF's denial of an aggravation claim for claimant's back condition. The Referee's orders, especially his March 26, 1981 Order on Reconsideration, carefully, clearly and cogently point out that the fact that claimant's compensable minor back strain accelerated her underlying degenerative disease established the original compensability of claimant's claim, not here in issue, but does not remotely tend to prove that her condition has worsened since the March 9. 1978 Determination Order. We affirm and adopt the Referee's orders.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's orders dated March 2, 1981 and March 26, 1981 are affirmed.

DAVID R. PLATZ, Claimant
Malagon, Velure & Yates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Keith Skelton, Defense Attorney

WCB 79-07758 & 80-08821
January 18, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Neal's order which states, "Claimant is not entitled to have either claim reopened and is not entitled to a permanent disability award on either claim." The claimant contends his claims, or one of them, should be reopened and in the alternative, he is entitled to a permanent partial disability award in both or at least one of his claims. We disagree with claimant's contentions and find no compelling evidence nor argument by claimant that persuades us otherwise.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 22, 1981 is affirmed.

HARVEY W. ROWTON, Claimant
David Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08991
January 18, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The SAIF seeks Board review of that portion of Referee Peterson's order which ordered it to accept responsibility for claimant's psychotherapy provided by the Psychology Center in the amount of $2,035 for the services provided from March 2, 1979 through March 15, 1980 and any additional services that have been or were necessary for claimant's psychological condition; ordered it to pay to claimant an additional amount of 25% of $1,635 as a penalty for its unreasonable resistance to the payment of bills; ordered it to pay claimant's attorney a total fee of $1,150. We affirm and adopt.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 26, 1981 is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee, payable by SAIF.

ORVILLE A. BALES, Claimant
Benton Flaxel, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-03397
January 19, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Johnson's order which affirmed the SAIF Corporation's denial of claimant's claim for a myocardial infarction.

The Board affirms and adopts the Referee's order.

ORDER

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

MARILYN BIDWELL, Claimant
David Hittle, Claimant's Attorney
Joseph Robertson, Defense Attorney

WCB 79-09674
January 19, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of that portion of Referee McSwain's order which affirmed the self-insured employer's denial of compensation for claimant's lumbar and cervical conditions. Claimant contends the Referee erroneously substantively relied on evidence (Exhibits 66 to 69) that was admitted only for impeachment; and that without substantive reliance on that evidence claimant has proven the compensability of her back conditions. The employer cross-appeals contending the evidence in question could properly be used substantively as "admissions of a party opponent"; and that the Referee's award of 25% loss of use of claimant's right leg is excessive.

The Board agrees with and adopts the Referee's recitation of the facts.

It is not clear from the Referee's order, however, whether the Referee relied on Exhibits 66 to 69 substantively or only for impeachment. That matters not at this point. For the reasons that follow, on de novo review, we rely on Exhibits 66 to 69 only for impeachment.

Abstractly, we agree with the employer; admissions of a party can be considered as substantive evidence. But that abstraction does not aid the employer's position here. OAR 436-83-400(3) states:

> "As soon as practicable and not less than 10 days prior to the hearing each party shall file with the assigned referee and provide all other parties with legible copies of all medical reports and all other documentary evidence upon which the party will rely except that evidence offered soley for impeachment need not be so filed and provided." (Emphasis added.)

The employer did not provide copies of Exhibits 66 to 69 to the assigned referee and opposing counsel "not less than 10 days prior to the hearing." Those exhibits were thus admissible "solely for impeachment" when offered. OAR 436-83-400(3).

The evidence that could support the compensability of claimant's back conditions consists of her testimony and certain medical opinions that are based to a large degree, if not exclusively, on the history claimant gave her doctors. There are significant and irreconcilable discrepancies between claimant's testimony and Exhibits 66 to 69, especially the latter two. Because of this successful impeachment of claimant, we are not persuaded by her testimony or medical opinions based on a history she gave doctors. Claimant has not convinced us that her lumbar and cervical conditions are causally related to her September 1, 1978 industrial accident.

We turn to the question of the extent of claimant's right leg disability. A Determination Order issued August 8, 1980 awarded 22.5° for 15% loss of use. Stating the "judgment is subjective," the Referee found 25% loss of use. The Referee was incorrect. OAR 436-65-550(1) provides that awards for loss of use of the knee joint are based, as is here relevant, on loss of flexation and loss of extension. In his June 1980 closing report, Dr. Teal, claimant's treating physician, found knee flexation was decreased by 15° and knee extension was decreased by 5°. Based on these findings, under OAR 436-65-550(1) the 15% award of the Determination Order was proper, if not generous.

ORDER

The Referee's order dated March 31, 1981 is affirmed in part and reversed in part.

Those portions upholding the self-insured employer's denial for claimant's lumbar and cervical conditions and denying compensation for alleged left ankle disability are affirmed.

Those portions granting greater compensation for right leg disability and an associated attorney fee are reversed.

ELZIE CHARLTON, Claimant
Robert Grant, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01396
January 19, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which ordered it to accept claimant's aggravation claim for worsened low back and left leg pain and left leg anesthesia.

After review of the entire record, we find that claimant has failed to prove by a preponderance of the evidence that his present complaints are a result of his October 10, 1977 low back injury.

Claimant has had a history of low back and leg (predominantly left leg) problems since he slipped on a wet spot in a restaurant in 1964. He had a lumbar laminectomy performed to free-up L5 and L6 nerve roots on the right. At the same time portions of the L4-L5 disc were removed from the right and left sides.

In 1968, claimant suffered a lifting accident which compressed the S-1 nerve on the left causing electric-like pain shooting down the left leg. A laminectomy with fusion of L4 to S1 was performed. Claimant continued to suffer low back and left leg pain complaining that his leg gave out resulting in falls.

In 1973, claimant stepped off a porch and again suffered low back and left leg pain. His condition was diagnosed as recurrent herniated disc at L5-S1. He had a total laminectomy to decompress the L5 and S1 nerve roots on the left. The surgeon found that claimant had stenosis of the cauda equina (narrowing in the lower spinal canal).

In 1976, claimant slipped off a pipe resulting in weakness in his left leg. In 1977, in the months preceding the October industrial accident, claimant reported low back pain and the feeling that his legs were going to collapse. He also reported left sciatic-type radiating pain and numbness and tingling in the left foot.

On October 10, 1977 claimant suffered an industrial injury lifting a tire. It was at this point that the employer and its insurance carrier became involved. The claim was accepted. The claimant complained of right leg pain only. He denied left leg problems. The doctors diagnosed pseudoarthrosis (false joints) at the L4-L5 and L5-S1 fusion sites. They performed laminectomies from L4 to S1, a diskectomy at L5-S1 on the right and decompressed the L5 and S1 nerve roots on both the right and the left.

The claimant points to this decompression on the left as the cause of his October 1979 aggravation of left leg symptoms. His theory is that lumbar laminectomy and decompression surgery can, at a later time, by subsequent changes in a disc space or formation of adhesions, affect either one or both sides of the spinal column as far as nerve radiation and weakness is concerned. Although that may be true in some cases, claimant has not proved that was the situation in this case. In fact, out of claimant's several back injuries, it is notable that the claimant disclaimed left leg problems in this particular incident making it even more unlikely that claimant's theory applies to the October 10, 1977 incident rather than to the other incidents where claimant specifically complained of left leg problems.

To continue the chronology of events, claimant received 20% unscheduled permanent partial disability compensation for his October 10, 1977 claim. A stipulation by the parties approved on April 23, 1979 added an additional 10% unscheduled disability award.

Claimant testified that in June and July of 1979 his left leg started bothering him again to the point that it gave out in August and September. On October 20, 1979 claimant's leg gave out on him causing him to twist and fall. Dr. N. J. Wilson began treating claimant for the first time and diagnosed recurrent lumbar nerve root compression secondary to a ruptured intervertebral disc.

Dr. Wilson felt that the 1979 aggravation claim was related to the October 10, 1977 claim because:

"It is medically sound to consider that each one of [the previous accidents and surgeries] have contributed something to Mr. Charlton's present situation. I would feel that anything beyond that on a logical medical basis would be impossible in my opinion."

SAIF Corporation's consulting doctor, Dr. Eugene Tennyson, studied a very complete history of claimant's back troubles and opined that claimant's left leg weakness was more likely a residual of his injuries and surgery previous to the October 10, 1977 accident. Considering the chronology of claimant's left leg symptoms and the fact that claimant specifically denied left leg problems at the time of the October 10, 1977 accident, we agree with Dr. Tennyson. Although it may seem impossible to separate out the October 10, 1977 accident as a direct cause of the October 1979 aggravation, claimant must do so to meet his burden of proof by a preponderance of the evidence. Claimant has failed in that burden.

Claimant's claim for aggravation is not compensable.

ORDER

The Referee's order dated February 4, 1981 is reversed. SAIF Corporation's denial dated January 30, 1980 is approved.

MARY LOU CLAYPOOL, Claimant
Richard Nesting, Claimant's Attorney
Dennis VavRosky, Defense Attorney

WCB 81-04210
January 19, 1982
Order Denying Motion to Dismiss

Claimant has filed a Motion to Dismiss the employer's request for review. Claimant's motion is denied.

The employer filed a timely request for review of Referee Gemmell's order of October 22, 1981 which ordered the employer to comply with a Disputed Claim Settlement entered into by these parties in WCB Case No. 80-07653 and approved by Referee Williams on April 2, 1981. Claimant initiated the proceedings in this case, which was assigned WCB Case No. 81-04210, by filing a request for hearing alleging the employer's failure to comply with the disputed claim settlement agreement and requesting an award of penalties and attorney fees in addition to an order directing compliance. Referee Gemmell's order (WCB Case No. 81-04210) granted the relief requested by claimant, and the employer's request for Board review followed.

Claimant responded to the employer's request for review by filing a cross-request for review in WCB Case No. 81-04210, dated November 23, 1981, which was received by the Board November 24, 1981.

On December 10, 1981 the Board received claimant's Motion to Dismiss under cover of a letter dated November 23, 1981. This motion refers to WCB Case No. 80-07653 and alleges that the employer's request for Board review in WCB Case No. 80-07653 should be dismissed because the employer failed to request review in WCB Case No. 80-07653 within 30 days of April 2, 1981, the date of the Referee's approval of the parties' Disputed Claim Settlement.

Some confusion has been generated by the assignment of a separate case number to the proceedings initiated by claimant's request for a hearing seeking to compel the employer's compliance. This confusion has been fostered by the employer's assignment of both case numbers in its request for review of Referee Gemmell's order which was entered in WCB Case No. 81-04210.

Without deciding the issue of whether or not an appealable order was ever entered in WCB Case No. 80-07653, the Board denies claimant's Motion to Dismiss. The parties should identify all further submissions with WCB Case No. 81-04210 which is the case in which Referee Gemmell's order was entered, which will be reviewed in due course by the Board.

Claimant may raise the argument on review that she has raised in her motion, and it may be considered by the Board in reviewing this claim after the transcript has been received and the issues have been fully briefed.

In its response to claimant's motion, the employer requested oral argument on the motion and on Board review. It is implicit in this order that the request for oral argument on the motion is denied. At the time the briefs are submitted, either party may renew the request for oral argument on review.

The employer's response also contained a suggestion that claimant's cross-request for review be dismissed. If the suggestion was intended as a request for dismissal, it is denied. Although it is unclear what basis claimant might have for requesting cross-review, the Board anticipates that claimant's brief(s) will specify whatever relief she is seeking.

ORDER

Claimant's Motion to Dismiss the employer's request for Board review is denied.

GARY DUYCK, Claimant
Tomas Finnegan Ryan, Claimant's Attorney
Frank Susak, Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-08798 & 79-02624
January 19, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Neal's orders which granted him compensation equal to 27 degrees for 20% loss of the right foot and 27 degrees for 20% loss of the left foot. Claimant contends this award of compensation is inadequate.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated March 23, 1981 and amended order dated April 9, 1981 are affirmed.

MICHAEL FIDDELKE, Claimant
James Francesconi, Claimant's Attorney
Dennis VavRosky, Defense Attorney
David Horne, Defense Attorney

WCB 80-04761 & 80-06985
January 19, 1982
Order on Review (Remanding)

Reviewed by Board Members Barnes and McCallister.

The employer's former carrier, Employers Insurance of Wausau, seeks Board review of Referee Foster's order which set aside its denial of claimant's aggravation claim. The first issue, common to both cases, is whether claimant established any compensable worsening of his compensable condition. If that question is answered in the affirmative, the second issue is whether that worsening is Wausau's responsibility on the theory of an aggravation of claimant's December 1976 claim (WCB Case No. 80-04761) or, instead, whether that worsening is the responsibility of Willamette Industries which became self-insured in 1978 on a theory of a new injury in 1980 (WCB Case No. 80-06985).

Claimant's original 1976 claim was for bilateral carpal tunnel syndrome. Surgery was separately performed on both his right and left wrists. That claim was closed by a series of Determination Orders, the last dated July 31, 1979.

The events giving rise to claimant's 1980 alternative aggravation/new injury claims can best be described chronologically:

April 9, 1980: Claimant went to Dr. Neumann, not one of the doctors who had previously treated his carpal tunnel condition, complaining of increasing left wrist pain over recent months. Exhibit 32 is Dr. Neumann's Form 827 report of that examination. It indicates only that the doctor ordered some diagnostic tests. In response to the question, "Released for work?" the doctor checked "yes."

April 14, 1980: Claimant was involved in a motorcycle accident in which he sustained a compound fracture of the ulna and a simple fracture of the radius at the left wrist. Emergency surgery for open reduction and internal fixation was performed the same day. Because of the treatment of these fractures, it was necessary to defer the diagnostic tests Dr. Neumann had ordered on April 9. So far as this record discloses, those tests have never been performed.

July 5, 1980: Claimant was involved in another motorcycle accident while riding his "dirt bike" through the countryside. He again injured this left wrist. There is less detail in the record about the nature of this injury; apparently it involved another fracture of the radius.

Before turning to the main compensability issue, we consider the subsidiary issues of interim compensation and penalties. The Referee ordered Wausau to pay interim compensation from April 9, 1980 to July 25, 1980, the date of Wausau's denial, and a 25% penalty for tardy denial. Regardless of the disposition of the other issues in this case, this portion of the Referee's order cannot be sustained. Dr. Neumann's April 9 Form 827 report was not an aggravation claim in the sense of imposing any duty to pay interim compensation. Rather than verifying time loss, it affirmatively stated claimant was released to work. Even though that statement is beyond debate, any conceivable doubt was resolved by a May 20, 1980 letter from claimant's attorney to Wausau which notes claimant was being treated for his April motorcycle accident and concluded: "We are not yet requesting a reopening."

Indeed, with claimant's ongoing treatment for both of his motorcycle accidents, it is impossible to identify any point at which it could be or was medically verified that he was unable to work due to his carpal tunnel syndrome. Claimant and the Referee rely on Dr. Neumann's June 19, 1980 report: "I first saw him in April, he was in need of further medical care and treatment and I feel that time loss was warranted." While this is certainly sufficient to amount to an aggravation claim in the sense of a claim for further medical services, specifically the diagnostic testing for which claim was also made by the doctor's April Form 827 report, it is not sufficient under the facts of this case to trigger the duty to pay interim compensation.

We have previously expressed skepticism about after-the-fact verification of time loss. Such skepticism deepens when, as here, Dr. Neumann's June after-the-fact "verification" of inability to work is inconsistent with his April release to work. As in Richard L. Schoennoehl, 31 Van Natta 25 (1981), affirmed without opinion, 54 Or App 998 (1981), Dr. Neumann's June opinion is impeached by his prior inconsistent April opinion. But most significantly, Dr. Neumann's June opinion of inability to work due to claimant's left carpal tunnel syndrome simply cannot be reconciled with the facts that claimant was physically capable of strenuous motorcycle riding in April when he had an accident and in July when he had another accident. It makes no sense for claimant to argue, as he does, or the Referee to find, as he did, that claimant was unable to work between April 9, 1980 and July 25, 1980 when it is unquestioned that he was able during this same period to engage in vigorous motorcycle riding.

We turn to the question of the compensability of claimant's alternative new injury/aggravation claims. The parties argue this issue mainly on the level of whether claimant's work activities or motorcycle accidents caused his left carpal tunnel syndrome. We think this puts the cart before the horse. There is no question that claimant's initial 1976 carpal tunnel syndrome claim was accepted and ultimately closed by Determination Order dated July 31, 1979. While claimant is certainly entitled to litigate the extent of disability awarded by that Determination Order, for him to have either a new injury claim or an aggravation claim in the context of this case requires that his carpal tunnel condition has worsened since the July 31, 1979 Determination Order.

There is no medical evidence in this case that even remotely supports the proposition that claimant's carpal tunnel condition has worsened since July 31, 1979. All doctors' reports generated after that date document only that claimant has permanent disability in his left forearm because of scarring in the area of the median nerve. However, there is no question that claimant suffered permanent disability as part of his initial 1976 claim, as recognized by an award for permanent disability in the July 31, 1979 Determination Order. The amount of disability awarded may be incorrect, but this does not establish either a new injury or an aggravation claim. Dr. Neumann, the primary treating physician during 1980, could hardly document a worsening of claimant's condition since the July 31, 1979 Determination Order since he did not even know of the existence of the Determination Order until it was brought to his attention at his post-hearing deposition. In sum, we think the key issue is worsening and find none on this record.

If, instead, the key issue were causation as argued by the parties, and assuming arguendo some worsening of claimant's carpal tunnel condition, the record does not support a finding of work causation. As Dr. Neumann explained at deposition, carpal tunnel syndrome can be caused (and presumably worsened) by serious trauma in the wrist area, chronic microtrauma or just repetitive use of the hands and wrists. See also Robert Sanchez, 32 Van Natta 80 (1981). Claimant's motorcycle hobby subjected him to serious left wrist trauma in his April and July 1980 accidents; subjected him to chronic microtrauma in competitive racing and off-road riding; and required repetitive use of the left hand and wrist (the left hand operates the clutch controls). Dr. Neumann admitted at deposition that these motorcycle activities likely contributed to claimant's left carpal tunnel condition. We are not persuaded that claimant's work activity worsened his condition.

ORDER

The Referee's order dated February 17, 1981 is reversed, and this case is remanded to the Referee to consider the extent of disability issue raised by claimant's request for hearing.

ROBERT R. FOUTCH, Claimant
Daniel Dziuba, Claimant's Attorney
Steven Reinisch, Defense Attorney

WCB 79-06638
January 19, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of that portion of Referee Neal's order which remanded claimant's claims for back, neck, shoulder and left leg conditions to it for acceptance, and ordered an attorney fee of $800. Claimant cross-appeals, contending entitlement to temporary total disability through April 6, 1980.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 24, 1981 is affirmed. Claimant's attorney is awarded $300 as and for a reasonable attorney's fee, payable by the carrier.

WAYNE O. FOX, Claimant
David Hytowitz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07068
January 19, 1982
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.

CHARLES HANSCOM, Claimant
Oscar Nealy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-00403
January 19, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which awarded claimant compensation for 80° unscheduled disability representing an increase of 25% of the maximum allowable by statute. The award was in addition to compensation for 112° unscheduled disability awarded by Determination Order of December 4, 1979.

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

The guidelines for the rating of unscheduled permanent disability, OAR 436-65-600, et seq, are helpful as far as they go, but we observe that in some cases, such as the present one, empirical reasoning must be applied to fill in the gaps that the rules leave. For example, the rating rules do not have the capacity to consider the claimant's inability to stoop, kneel, crouch or crawl. Neither do they provide sufficient guidance for a claimant's subjective complaints of pain. Points for education are determined by the grade level completed, rather than by the skills a claimant actually possesses. For instance, in this case even though claimant had completed eighth grade, he had severe reading and writing disabilities.

Using our insight and experience in combination with OAR 436-65-600, et seq, we find that the Referee's award of 80° making a total of 192° unscheduled disability compensation for claimant's low back condition is correct.

ORDER

The Referee's order dated December 5, 1980 is affirmed. As the claimant's attorney submitted no brief for Board review, we award no attorney's fee to him.

JOHN N. KINTZ, Claimant
D. Keith Swanson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05709
January 19, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Johnson's order which affirmed SAIF Corporation's denial of the claimant's heart condition. Claimant contends his condition is either an aggravation of a prior compensable heart problem or it is a new compensable injury.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 11, 1981 is affirmed.

DAVID MOBLEY, Claimant
Galton, Popick et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-08362
January 19, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

SAIF Corporation requests Board review of Referee Mulder's order which set aside their denial of claimant's claim for a left groin condition and awarded claimant's attorney a fee of $1,100. The issues on review are compensability and whether the $1,100 attorney fee is excessive.

In June, 1980 while employed as a warehouseman, claimant developed discomfort and soreness in the groin area. His work on June 25, 1980 involved moving heavy barrels of liquids with pushing, pulling and lifting movements. Moving some of the barrels involved claimant being pulled onto the barrels in a straddle fashion as each barrel fell onto its side from an upright position. On June 26, 1980 claimant reported groin discomfort to his supervisor and left work to go to the emergency room at Holladay Park Hospital complaining of pain in the left inguinal area. Dr. Kaiser suspected a hernia but diagnosed left epididymitis based on a history of lifting barrels at work and clinical findings of, "* * * * Exquisite point tenderness over left epididymis which is a little swollen."

Dr. Kaiser prescribed Tylenol and warm sitz baths. Claimant did not fill this prescription but did take a few sitz baths. In three or four days the condition had completely cleared. Claimant's time loss from work was limited to the time required to visit the emergency room. No follow up medical treatment was required. It was later established that Dr. Kaiser's diagnosis was probably incorrect. At the hearing, no other diagnosis had been established because by then the claimant had made a complete recovery.

SAIF denied claimant's claim because their medical consultant, Dr. Norton, advised epididymitis is usually of bacterial origin and symptoms may be noted coincidental to work activity. At the hearing SAIF contended that even though the claimant probably did not have epididymitis, the case presented a complicated question of medical causation. The Referee did not agree and found the claim compensable. SAIF appeals and argues again that this case presents a complicated question of medical causation. We disagree and affirm the Referee's finding of compensability.

The claimant developed discomfort/soreness/pain in the groin. He was examined by a physician who diagnosed left epididymitis. SAIF denied the claim based on that diagnosis. It later turned out that Dr. Kaiser's diagnosis was likely incorrect; had it been correct we would agree that a complicated question of medical causation existed. But that is not the case. When Dr. Kaiser examined claimant he noted, "point tenderness over the left epididymis which is a little swollen." (Emphasis added) Claimant recovered in three to four days. It seems logical that something occurred which caused the tenderness and swelling. We find it

more likely than not, based on claimant's testimony, that his work activity on June 25, 1980 and possibly June 26, 1980 caused the condition. We think all of the evidence presents a simple enough picture for us to draw a natural inference of a causal relationship between claimant's groin condition and his work activity. Therefore, we find the claim for left groin soreness/discomfort/pain demonstrated on medical examination by tenderness and swelling in the left epididymis area of the groin to be compensable. We further find the compensable condition(s) was temporary, self-limiting and fully resolved without permanent residuals.

We have not adopted the Referee's order as our own because of the following language on page 2:

> "There was no persuasive medical evidence concluding that the work could not or did not cause the condition." (Emphasis added)

If the Referee meant to imply that the carrier is required to produce evidence to prove a negative or that in an uncomplicated case the burden of proof shifts to the carrier/employer, we disagree with any such implication. The burden of proving the case by a preponderance of the believable evidence is on the claimant. In this case we have found the claimant has met that burden.

SAIF contends the $1,100 attorney fee awarded by the Referee is excessive. We agree. The standard governing awards of attorney fees is efforts expended and results obtained. OAR 438-47-010(2). We do not know how long the hearing lasted, but a transcript of only 21 pages suggests efforts expended were toward the low end of the spectrum. The results obtained were likewise limited; no temporary total disability, no permanent disability, only payment for minimal medical services. In Ada C. Del Rio, 32 Van Natta 138 (1981), we recognized that generally the ordinary range of permissible attorney fees on a denied claim would be $800 to 1,200, with more or less justified based on efforts expended and results obtained. Because of the limited efforts and results here, we conclude the attorney fee awarded for prevailing on SAIF's denial should be reduced to $600.

ORDER

The Referee's order dated June 26, 1981 is modified. That portion which reversed SAIF's denial is affirmed. That portion which awarded claimant's attorney a fee of $1,100 is modified to $600.

KRISTIE PARESI, Claimant
Noreen Saltveit, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 77-06083
January 19, 1982
Order on Petition for Attorney's Fee

The Board issued its Order on Remand herein on December 7, 1981. Claimant's attorney thereafter submitted a petition and affidavit for an award of an attorney's fee. The petition requests the Board to affirm the fee awarded by the Court of Appeals for work performed at that level, to award counsel a fee for services performed in preparing claimant's brief and argument before the Supreme Court, and for services rendered in connection with the Board's consideration on remand.

With one exception, not here relevant, this Board is without authority to award an attorney's fee for services rendered at higher levels of review after Board review. The exception is the delegation of authority or responsibility to the Board from the Court of Appeals announced in Morris v. Denny's, 53 Or App 863 (1981), wherein the Court construed OAR 438-47-045 as a grant of authority to the Board by which the Board awards an attorney's fee for services performed before the Court of Appeals in cases where the issue is extent of disability and the Court increases the worker's award.

This application for an attorney's fee does not fall within the parameters of Morris, supra, or OAR 438-47-045. The Board, therefore, is without authority to consider the propriety of the fee awarded by the Court of Appeals. The Board also lacks authority to consider counsel's entitlement to an attorney's fee for services rendered before the Supreme Court. Counsel should address her petition to that body.

Concerning counsel's application for an attorney's fee for services rendered pursuant to the Board's further consideration of this claim on remand from the Court of Appeals, the Board has recently decided that there exists no statutory authority for an award of an attorney's fee payable by the carrier or employer at this stage of the proceedings. Dianne James, WCB Case No. 77-06474 (Order on Application for Attorney's Fee, January 11, 1982.)

ORDER

The Petition for Attorney Fees is denied.

STEVE PATTERSON, Claimant
SAIF Corp Legal, Defense Attorney

WCB 79-10402
January 19, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

ROBERT RAPPIN, Claimant
Robert Muir, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 80-08699
January 19, 1982
Order on Review

Reviewed by Board members Barnes and McCallister.

Claimant requests Board Review of Referee Knapp's order which granted him an award of 10% loss of the left leg below the knee and 10% unscheduled disability in addition to awards granted by Determination Orders dated June 26, 1978 and September 9, 1980.

The issues raised by claimant on review are extent of scheduled and unscheduled permanent partial disability and whether the case should be remanded to the Referee to further consider the issue of entitlement to temporary total disability. The employer/carrier raises the issue of offset for overpayment of benefits.

First of all, the employer/carrier is authorized to offset any overpayment of benefits against any permanent disability benefits awarded. We make this finding to correct an oversight by the Referee. The amount of the offset is to be adjusted between the parties and failing that, may be the subject of a subsequent hearing.

Secondly, we agree with the Referee's conclusion on the extent of scheduled and unscheduled disability. That portion of the Referee's order is affirmed.

Lastly, claimant's request that we order this case remanded to the Referee to further develop the issue of claimant's entitlement to temporary total disability is denied. We agree with the Referee's disposition on that issue.

ORDER

The Referee's order dated May 29, 1981 is modified. The employer/carrier is authorized to offset any overpayment of benefits against any permanent partial disability award, the amount of the overpayment to be adjusted between the parties. The remainder of the Referee's order is affirmed.

MAXINE E. SHAW, Claimant
Peter Hansen, Claimant's Attorney
Steven Reinisch, Defense Attorney

WCB 79-01310 & 79-10446
January 19, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Pferdner's order which affirmed the denial of claimant's hiatal hernia condition as compensable, and affirmed the Determination Order of October 25, 1978 which awarded temporary total disability only. Claimant contends both the hernia and thrombophlebitis conditions are compensable, and further the thrombophlebitis award should be unscheduled.

The Board affirms and adopts the Referee's order.

ORDER

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

JUDY M. SMITH, Claimant
Rodney Kirkpatrick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05861
January 19, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant has requested review of Referee James' order which (1) upheld SAIF's denial of claimant's claim for a psychiatric or psychological condition, (2) awarded 9.6° scheduled disability for 5% loss of a right arm and 64° for 20% unscheduled upper back and right shoulder disability, and (3) awarded claimant's attorney a reasonable attorney's fee payable out of the additional award of compensation.

The Board affirms and adopts the order of the Referee.

ORDER

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

GEORGE TAMAYO, Claimant
Rolf Olson, Claimant's Attorney
Marshall Cheney, Defense Attorney

WCB 79-09895
January 19, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order which approved Industrial Indemnity's denial of September 28, 1979 of his claim for respiratory problems beginning on or about July 19, 1979. Claimant contends that the carrier is estopped from denying the compensability of the claim if it is determined that his original respiratory disability in July of 1978 is compensable. Claimant additionally contends that his work exposure caused the respiratory condition, or in the alternative, that it aggravated his underlying condition.

The Board affirms and adopts the Referee's order.

ORDER

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

MINNIE THOMAS, Claimant
Bruce A. Bottini, Claimant's Attorney
Frank A. Moscato, Defense Attorney

WCB 80-10097
January 19, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Williams' order which granted claimant an award of permanent total disability. The issues are extent of disability and whether the Referee erroneously refused to admit Exhibit 16, offered by the employer.

On the issue of the extent of claimant's disability, we affirm and adopt those portions of the Referee's order finding claimant to be permanently totally disabled.

A chronological review of this case highlights the propriety of the Referee's refusal to admit into evidence proposed Exhibit 16, which is a brief report by Dr. Thomas dated March 10, 1981:

November 5, 1980: Claimant requests hearing on Determination Order issued October 27, 1980.

December 16, 1980: Exhibits forwarded by employer's counsel including Exhibit 8 (carrier's letter to Dr. Thomas scheduling examination of claimant) and Exhibit 10 (Dr. Thomas' report of that examination).

March 4, 1981: Carrier requests an additional report from Dr. Thomas.

March 10, 1981: Dr. Thomas sends additional report requested; received by EBI on March 13; received by employer's counsel on March 24.

March 30, 1981: Hearing date and first opportunity for the Referee and claimant's counsel to see Dr. Thomas' March 10 report, offered as Exhibit 16. (Employer's counsel had, on March 27, sent copies of Exhibit 16 to the Referee and claimant's counsel, but neither had received that report before the hearing convened.)

OAR 436-83-400(3) provides that,

> "(a)s soon as practical and not less than ten days prior to the hearing, each party shall file with the assigned Referee and provide all other parties with legible copies of all medical reports and all other documentary evidence upon which the party will rely except that evidence offered solely for impeachment need not be so filed and provided."

A summary of this administrative rule is contained on every notice of hearing which this Board issues. It was contained in the notices of hearing issued in this case on November 26, 1980 and March 5, 1981. No effort by any representative of the employer/carrier was made for about six (6) months to secure a supplemental report from Dr. Thomas. Even so, proposed Exhibit 16 was in the possession of the carrier on March 13, 1981, seventeen (17) days prior to hearing. No reason was given either for the delay in soliciting and thus receiving the report or for the delay until one (1) judicial day prior to hearing in forwarding the report to the Referee and claimant's counsel. Delay in furnishing the report to the Hearings Division and opposing counsel can only be due to, so far as we can guess, inefficiency or withholding of the report. Neither is a basis upon which to permit egregious violation of the 10-day rule, a rule which is well-known to counsel representing both claimants and employer/carriers.

The offer by the carrier's counsel at hearing to make Dr. Thomas available post-hearing for deposition and to pay temporary total disability benefits between the hearing and the taking of the deposition in no way cures the violation of the 10-day rule. Rather, the hearing would have been continued for the deposition of Dr. Thomas, plus securing and offering of whatever other documentary or testimonial evidence the claimant desired to produce. No excuse whatsoever was offered at hearing or to this Board for the carrier's gross delays and refusal to comply with an elementary rule.

The Board concludes that the Referee in no way abused his discretion in refusing to admit proposed Exhibit 16. Rather, exclusion of Dr. Thomas' March 10, 1981 report was eminently proper and appropriate under the facts and circumstances of this case. The Board commends the Referee for enforcing a simple, unambiguous rule which is designed to effectuate the entire hearings process.

ORDER

The Referee's order dated April 17, 1981 is affirmed. Claimant's attorney is awarded $800 for services rendered on Board review, payable by the employer.

DAVID F. WOOTEN, Claimant
Robert R. Dickey, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01871
January 19, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

SAIF Corporation requests Board review of Referee Foster's corrected order which awarded claimant 32% for 10% unscheduled low back disability. The sole issue on review is extent of claimant's unscheduled permanent partial disability.

April 14, 1979 the claimant experienced "extreme lower back pain" during the course of his employment as a cook. Dr. Gilsdorf, orthopedic specialist, diagnosed spondylolisthesis and mechanical derangement of lumbosacral spine, aggravation by work activity. Dr. Gilsdorf treated the claimant with conservative measures which resulted in gradual recovery.

July 2, 1979 Dr. Gilsdorf reported, in part,

> "You have received information in the past as to his condition in that he presented with a spondylolisthesis and lumbosacral instability. * * * * These acute symptoms, however, was (sic) the result of an aggravation * * * *. This has resulted in a period of temporary total disability as a result of his acute back pain. He has satisfactorily gone through a treatment program with gradual reduction in his symptoms to what was felt to be his previous baseline regular activity level, however, it has been my instructions and impression, in view of the presence of spondylolisthesis, that this man should avoid those activities that require repetitive heavy lifting or stooping and bending to avoid further acute strain syndrome." (Emphasis added)

In March, 1980 Dr. Gilsdorf reaffirmed his July, 1979 opinion. A Determination Order issued April 29, 1980 which granted temporary total disability only. Claimant appealed. The Referee found the claimant to have a 10% unscheduled disability, and in ruling from the bench, stated on the record,

> "I realize Dr. Gilsdorf * * * * has presented us with an opinion at this time saying he has returned to his baseline condition from his spondylolisthesis that existed prior to the industrial injury, that this lumbar instability is the claimant's main problem, and still he can't return to any work of a repetitive stooping and bending and lifting nature. The fact remains, and I have no reason not to accept the claimant's testimony that he engaged in such activity without any problems prior to this industrial injury and now * * * * he has to do them in a modified manner. For doctors to come up with

these findings, something has happened to the claimant because of his preexisting back condition, then with his back injury he is foreclosed from a segment of work. He may have been foreclosed as a matter of time without this industrial injury, but the fact does remain he is restricted at the present time, both by his own testimony and that of the treating physician.

I do not believe that any larger award can be given based on his preexisting condition, but I do feel that this industrial injury is at least partly responsible for the lumbosacral instability claimant has to live with." (Emphasis added)

We agree with the Referee that there is no reason to doubt the claimant's testimony. We do not agree, in a case such as this, involving complex medical questions, that claimant's testimony (no matter how credible) can form the basis of a permanent disability award absent medical support for that award. We cannot find that medical support in this record.

We find no medical support for the disability award on the basis of lumbosacral instability or any basis. In March, 1980, in addition to other comments, Dr. Gilsdorf reported,

"This man's condition is stationary. He has lumbosacral instability as a result of the spondylolisthesis." (Emphasis added)

and

"It is my opinion in the past that his work activities resulted in an aggravation of symptoms beginning April 14, 1979 which resulted in a period of temporary total disability from which he gradually improved, returning to a baseline stable state." (Emphasis added)

We find claimant has no permanent partial disability as a result of the work exposure.

ORDER

The Referee's order dated July 23, 1981 is reversed. The Determination Order dated April 29, 1980 is reinstated.

CHARLES BERRY, Claimant
Jack Polance, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03132
January 20, 1982
Order Denying Remand

Claimant has moved the Board to remand this claim to the Referee for submission of further evidence, in particular a November 18, 1981 report of Dr. Degge. The reason that claimant deems this procedure to be proper in this case is that Dr. Degge had not examined claimant prior to the hearing; SAIF referred claimant to Dr. Degge more than five months after the hearing; and, therefore, Dr. Degge's report was not obtainable prior to the hearing.

The Board has previously decided that "[t]o merit remand it must be clearly shown that material evidence was not obtainable with due diligence before the hearing." Robert A. Barnett, 31 Van Natta 172, 173 (1981).

Stated differently, "[a] case will not be reopened even if evidence was unavailable at hearing if the evidence could have been obtained by diligent effort." 31 Van Natta at 173.

While it is true that this physician's report was not available at the time of hearing because claimant had never been examined by this physician, we decline to allow a remand every time that a claimant, whose claim is being reviewed by this Board, is referred to a different physician for an examination after the record of the hearing has been closed. If we held otherwise, the hearing process would never end.

"In ongoing medical treatment or vocational training situations--situations that frequently give rise to motions to remand--the parties should decide when they want disputed issues resolved based on the available evidence and not rely on motions to remand based on subsequently obtained evidence as a fallback possibility." Barnett, supra, 31 Van Natta at 174.

ORDER

Claimant's Motion to Remand is denied.

MIKE J. MALONEY, Claimant
Michael Garone, Claimant's Attorney
Mary T. Danford, Defense Attorney

WCB 81-01674
January 20, 1982
Order Denying Motion to Dismiss

The employer has moved to dismiss claimant's request for review on the grounds that claimant failed to mail his request for review to all parties within the 30-day period, pursuant to ORS 656.295(2). See ORS 656.289(3).

The Motion to Dismiss is denied. Barbara Rupp, WCB Case No. 80-01803 (Order Vacating Order of Dismissal, March 4, 1981); Michael J. King, WCB Case No. 80-07413 (Order on Reconsideration of Denial of Motion to Dismiss, December 18, 1981).

IT IS SO ORDERED.

JAMES A. CARTER, Claimant
Richard Carlson, Claimant's Attorney
Gary Galton, Attorney
David Horne, Attorney

WCB 80-04400 & 81-07602
January 21, 1982
Order Approving Disputed
Claim Settlement

The parties' disputed claim settlement, attached hereto and incorporated herein, is approved including approval of the total amount of attorney fees ($5,500) except that the allocation of attorney fees between claimant's former attorney and claimant's present attorney proposed in paragraphs 12(b) and 12(c) of the settlement is not approved.

In complying with the terms of the disputed claim settlement, the carrier is instructed to issue a single check for attorney fees in the amount of $5,500; said single check is to be jointly payable to the law firm of Galton, Popick & Scott and the law firm of Drakulich & Carlson and is to be sent to the law firm of Galton, Popick & Scott. The attorneys involved will then have to resolve their dispute over allocation of the attorney fee either through mutual agreement or in some other forum.

WCB Case Nos. 80-04400 and 81-07602 are dismissed with prejudice pursuant to the provisions of ORS 656.289(4).

IT IS SO ORDERED.

ALBERT E. HUCKABAY, Claimant
Robert N. Ehmann, Claimant's Attorney
Steven R. Reinisch, Defense Attorney

WCB 79-06485
January 21, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of that portion of Referee Danner's order which granted claimant an award of 10% loss of the left arm. Claimant contends he is entitled to a greater award of scheduled disability and also entitled to an award for unscheduled psychological disability. We affirm and adopt.

The Board affirms and adopts the Referee's order.

ORDER

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

ARLIE H. JOHNS, Claimant
Roger G. Weidner, Attorney
Scott Kelley, Attorney

WCB 80-8634
January 21, 1982
Addendum to Disputed Claim Settlement, Approved by Board en banc, February 10, 1982

BY STIPULATION of claimant, ARLIE H. JOHNS, his wife, KATHLEEN JOHNS, and the employer, UTILITY TRAILER & EQUIPMENT CO., by and through INDUSTRIAL INDEMNITY COMPANY, executed the attached Disputed Claim Settlement and submitted it to the Workers' Compensation Board for approval. The Disputed Claim Settlement was submitted on July 23, 1981, and approval of the Disputed Claim Settlement was denied by order of the Workers' Compensation Board dated August 21, 1981, wherein the Workers' Compensation Board held inter alia "we conclude that, regardless of the long shot theoretical possibilities of what might happen upon future board or judicial review of this case, there is not now a bona fide dispute between the parties within the meaning of ORS 656.289(4). The partie's Disputed Claim Settlement will not be approved. IT IS SO ORDERED".

The claimant filed a Notice of Appeal of the Worker's Compensation Board Order denying the approval. The case was argued and submitted to the Court of Appeals on December 9, 1981, before Judges Gillette, Roberts and Young. By order of the Court of Appeals filed December 30, 1981, the following decision was handed down "the decision of the Worker's Compensation Board to the effect that there is no bona fide dispute between the parties under ORS 656.289(4) is reversed, and the case is remanded to the board to perform its review of the parties' agreement pursuant to that statute".

The parties hereto respectfully request that the board now approve the attached Disputed Claim Settlement in all particulars.

TIMOTHY S. LINDSAY, Claimant
Thomas McDermott, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11455
January 21, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Leahy's order which granted claimant compensation equal to 48 degrees for 15% unscheduled back disability. SAIF contends claimant's back disability is not related to his compensable industrial injury.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated February 6, 1981 is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee, payable by SAIF.

OLIVE H. MORRIS, Claimant
Donald Wilson, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 78-06247
January 21, 1982
Order on Remand and Petition for Attorney Fees

On review of the Board's order dated June 27, 1980, the Court of Appeals modified that order and awarded claimant permanent total disability as of October 3, 1979. On claimant's petition for an award of attorney fees, the Court remanded that issue to the Board for an appropriate award of fees pursuant to OAR 438-47-045.

The Board has now been provided sufficient information to form the basis for assessment of an attorney's fee;

NOW, THEREFORE, claimant's attorney is allowed 25% of the additional compensation awarded claimant by the Court of Appeals, not to exceed the sum of $1,600, payable out of claimant's compensation and not in addition thereto. ORS 656.386(2).

IT IS SO ORDERED.

TERRY L. RIDDLE, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-08182
January 21, 1982
Order on Remand

On review of the Board's order dated April 28, 1981, the Court of Appeals reversed and remanded with instructions to enter an award of permanent disability in accordance with the order of the Court.

NOW, THEREFORE, the above-noted Board order is vacated, and claimant is awarded a total of 30° scheduled permanent partial disability for a 20% loss of his left leg.

Claimant's attorney is awarded as and for a reasonable attorney's fee 25% of the additional compensation awarded by the Court of Appeals. Morris v. Denny's, 53 Or App 863 (1981); OAR 438-47-045(1).

VALENTIN BEROV, Claimant
Jack Ofelt, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-00674
January 26, 1982
Order on Remand and Petition for Attorney Fees

On review of the Board's order dated November 5, 1979 the Court of Appeals modified that order and increased claimant's award of unscheduled permanent partial disability on claimant's petition for an award of attorney fees, the Court remanded that issue to the Board for an appropriate award of fees pursuant to OAR 438-47-045.

The Board has now been provided sufficient information to form the basis for assessment of an attorney's fee. The Board bases its award on the effors of counsel and the results obtained. Roy D. Nelson, WCB Case No. 78-05969 (April 6, 1981).

NOW, THEREFORE, claimant's attorney is allowed $1,000 as a reasonable attorney's fee, payable out of the additional compensation awarded claimant by the Court of Appeals and not in addition thereto. ORS 656.386(2).

IT IS SO ORDERED.

GEORGE E. CLARK, The Beneficiaries of
Benton Flaxel, Attorney
Keith Skelton, Defense Attorney

WCB 76-06736
January 26, 1982
Order on Remand

This claim is now before the Board after having been remanded to the Court of Appeals by an order of the Supreme Court reversing the Court of Appeals' opinion and order. Clark v. U. S. Plywood, 288 Or 255 (1980). The Board referred the claim to the Hearings Division for an evidentiary hearing in order to further develop the record on the issue framed by the Supreme Court: "Was the conduct [which resulted in the death of the deceased] expressly or impliedly allowed?" 288 Or at 266.

After taking evidence and hearing testimony of 18 witnesses, the Referee recommended to the Board that this claim be found compensable. On reviewing the record developed at the hearing, together with the record previously developed at the initial hearing, the Board adopts the recommendation of the Referee. For the following reasons, the Board finds this claim compensable.

The sum of the carrier's evidence is that management in the employer's plant was under directions to inform all employees that use of the hot press for heating lunches was forbidden. Management conveyed the directive to the supervisors of each shift, whose duty it was to inform the employees of each shift. Day and swing shifts received the message. Evidence of a communication of the prohibition to the workers on decedent's shift is lacking. The carrier urges us to make a logical inference: Surely if a directive was clearly communicated to two out of three shifts, there exists a compelling inference that the prohibition was in some manner conveyed to the third.

In view of the testimony of the witnesses who were employed on the graveyard shift, however, that no such prohibition was, in fact, communicated to their shift to the best of their knowledge, the majority of the Board declines to draw the inference urged by the carrier.

Although management knew of the express prohibition, the workers on the decedent's shift apparently did not. During decedent's shift, the practice continued with varying frequency. This is plausible because, under the mores of the mill, discipline and supervision are most likely to break down first on graveyard shift. When a lunch was placed on top of the press, it could be seen from the floor merely by looking up. For this reason, one witness believed that the supervisors of graveyard shift were aware of the fact that the workers were continually using the press to heat their lunches.

The Board is persuaded that the question formulated by the Supreme Court must be answered in the affirmative. According to a preponderance of the evidence, the employer impliedly allowed the conduct which resulted in the death of decedent. Accordingly, decedent's death arose out of and in the course of his employment, and his beneficiaries' claim is compensable. ORS 656.005(8)(a).

ORDER

This claim is remanded to the carrier for acceptance and for the payment of compensation as provided by law.

BOARD MEMBER McCALLISTER, DISSENTING.

I disagree with the majority. The claim is not compensable. The occurrence of the conduct, as here, is not proof of the employer's expressed or implied approval of the conduct, nor is it proof of any employer acquiescence. The employer did not in any way approve of the conduct which resulted in the death of the deceased. A strong inference can be drawn from the evidence that "the word" regarding the company policy prohibiting the conduct did, in fact, go out to all employees, including the deceased; I so infer.

JAMES EBER, Claimant
Roger Wallingford, Claimant's Attorney
Daryll Klein, Defense Attorney
Dan Bourgeois, Defense Attorney

WCB 79-04969 & 79-04048
January 26, 1982
Order on Remand

On review of the Board's order of December 1, 1980, the Court of Appeals reversed that order.

Now, therefore, the above-noted Board order is vacated. The claim for claimant's left knee condition and left wrist carpal tunnel syndrome are hereby remanded to Industrial Indemnity for acceptance and payment of benefits as provided by law.

IT IS SO ORDERED.

DONALD A. GODELL, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05378
January 26, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Peterson's order which affirmed the Determination Order of June 6, 1980 which did not grant claimant any permanent partial disability.

The facts as recited by the Referee are adopted as our own.

The medical evidence in this case clearly establishes that claimant has no permanent impairment from the aggravation of his underlying condition from his work exposure. However, the evidence also discloses that claimant is precluded from returning to his regular occupation or to any occupation that is not clean and water-free environmentally. Claimant is now symptom free and remains that way as long as he does not enter an environment which causes atopic eczema and dermatitis.

We find that claimant is permanently sensitized, and when exposed to like substances to which he was exposed at this employment, he will become symptomatic. Therefore, it follows that claimant is handicapped as a result of his work exposure in holding certain types of gainful employment. This in turn results in a loss of wage earning capacity. Claimant is entitled to an award of unscheduled disability.

ORDER

The Referee's order dated January 29, 1981 is modified. Claimant is hereby granted an award of 16° for 5% unscheduled disability.

Claimant's attorney is awarded 25% of the award as and for a reasonable attorney, payable out of the claimant's compensation.

HAROLD O. PETERSEN, Claimant
James Larson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07627
January 26, 1982
Order on Remand and Petition for Attorney Fees

On review of the Board's order dated December 1, 1980, the Court of Appeals reversed that order and awarded claimant permanent total disability. On claimant's petition for an award of attorney fees, the Court remanded that issue to the Board for an appropriate award of fees pursuant to OAR 438-47-045.

Claimant's attorney has provided the Board with an affidavit setting forth the time expended in representing claimant before the Board on review of the Referee's order as well as before the Court of Appeals. Claimant's attorney is not entitled to an attorney's fee for services rendered on Board review. See ORS 656.382(2); OAR 438-47-055; Korter v. EBI Companies, Inc., 46 Or App 43, 53 (1980).

Counsel is entitled to an award of a reasonable attorney's fee payable out of the increased compensation awarded by the Court of Appeals for services performed in the Court of Appeals. ORS 656.386(2). The Board bases its award on the efforts of counsel and results obtained. Roy D. Nelson, WCB Case No. 78-05969 (April 6, 1981).

NOW, THEREFORE, claimant's attorney is allowed $1,400 as a reasonable attorney's fee, payable out of the additional compensation awarded claimant by the Court of Appeals and not in addition thereto.

IT IS SO ORDERED.

ROBERT A. SCOTT, Claimant
David Vandenberg, Claimant's Attorney
Evohl Malagon, Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07284
January 26, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Ail's order which set aside its denial of compensation for claimant's aggravated neck condition. SAIF contends the Referee erred in determining that claimant's neck condition and surgery were the result of a compensable injury.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated February 12, 1981 is affirmed. Claimant's attorney is awarded $200 as and for a reasonable attorney's fee for services rendered on Board review, consisting of a short brief that does not even discuss the central compensability issue but instead raises issues that were not raised at the hearing, payable by the SAIF Corporation.

LOUIS TWIST, Claimant
Peter Hansen, Claimant's Attorney
David Horne, Defense Attorney

WCB 80-07811
January 26, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Pferdner's order which upheld the carrier's denial of claimant's aggravation claim.

Claimant sustained a compensable industrial back injury in September 1977 while employed by Tektronics. His claim was closed by a Determination Order with an award of 10% unscheduled disability. By Stipulated Order of March 30, 1979 he was granted an additional 10% unscheduled disability.

In November 1979 claimant made his first aggravation claim. It was denied by the carrier. That denial was sustained by Referee Neal in an order dated April 21, 1980. The Board affirmed Referee Neal. The Court of Appeals affirmed the Board.

This is claimant's second aggravation claim. It arises from Dr. Misko's treatment starting in March 1980. Dr. Misko performed a laminectomy with decompression and a fusion in July 1980. In Dr. Misko's opinion, there is a direct causal connection between claimant's 1977 injury and his 1980 surgery. Dr. Misko also stated the opinion that, between the time that he first examined claimant in March 1980 and the hearing, claimant's condition did not worsen.

The Referee in this case indicated that claimant must prove that there was a worsening of his condition since the last arrangement of compensation, with which we agree; and that the last arrangement of compensation here was Referee Neal's April 21, 1980 order, with which we disagree. Referee Neal's April 21, 1980 order and subsequent affirmations of it by the Board and Court of Appeals were not arrangements of compensation; they were denials of compensation on claimant's first aggravation claim. The last arrangement of compensation on claimant's 1977 injury was the Stipulated Order of March 1979. The fact that Dr. Misko found no worsening after claimant came under his care one year later sheds little or no light on whether claimant's condition worsened after March 1979.

From Dr. Misko's reports and testimony, we find the necessary causal relationship established between claimant's 1977 injury and his 1980 surgery. This being the case, we think it necessarily follows that claimant has shown a worsening of his condition since March of 1979, at least in the sense of a need for further medical services and, given the nature of the medical services provided, a need for associated time loss.

ORDER

The Referee's order dated April 29, 1981 is reversed. Claimant's aggravation claim is remanded to Wausau for acceptance and the payment of benefits as provided by law.

Claimant's attorney is awarded as and for a reasonable attorney's fee the sum of $1,000 for services at the hearings level and $200 for services at the Board level, all payable by Wausau.

The remainder of the Referee's order is affirmed.

DONALD L. VANDRE, Claimant
Paul Roess, Defense Attorney

WCB 80-11310 & 80-11311
January 26, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Foster's order which affirmed the Determination Order of March 14, 1980 awarding 5% loss of the left thumb, affirmed the Determination Order of October 17, 1980 awarding 20% unscheduled disability to claimant's low back, ordered Weyerhaeuser Company to pay $.17 per mile for travel from his home to his doctor for medical treatment, and awarded claimant's attorney $200 in attorney fees. We affirm this order.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 18, 1981 is affirmed.

GEORGE H. BARGER, Claimant
John W. Eads, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09291
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of Referee Danner's order in the above entitled claim which ordered that claimant be paid an additional award equal to 15% loss of the right foot, or 20.25 degrees, making a cumulative award of 90% loss of a foot, or 121.5 degrees. SAIF contends this increase is not supported by the evidence presented at the hearing and contends there was an overpayment of time loss benefits.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 15, 1981 is affirmed. No attorney fee will be awarded to claimant's attorney as no brief was filed.

JACK W. CAMPBELL, Claimant
Alan Scott, Claimant's Attorney
Richard Davis, Defense Attorney
Steven Reinisch, Defense Attorney

WCB 80-3479, 80-3808 & 81-00533
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of Referee Mulder's order which remanded this claim to SAIF for acceptance as an aggravation claim. SAIF contends this claim requires application of the last injurious exposure rule, thereby their denial should be affirmed and SAIF should be reimbursed for payments and attorney fees paid pursuant to the Referee's order.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 24, 1981 is affirmed. No attorney fee will be awarded to claimant's attorney as he waived the filing of a brief.

AYRE NELL COLBERT, Claimant
Richard Sly, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 79-07258
January 29, 1982
Order on Remand

On review of the Board's Order dated February 13, 1981, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated July 1, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

IT IS SO ORDERED.

DARRELL A. COLTON, Claimant
Dan O'Leary, Claimant's Attorney
Bruce A. Bottini, Defense Attorney

WCB 80-09344
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of that portion of Referee Ail's order which granted claimant an award of permanent total disability effective September 26, 1980. The employer contends claimant is not permanently and totally disabled. We agree.

Claimant, now 63 years of age and retired on Social Security disability, worked for the City of Portland for 18 years as a maintenance mechanic. On April 12, 1979 he injured his right knee when struck by a tire. A diagnosis of torn medial meniscus was made by Dr. Mandiberg who surgically repaired claimant's knee on October 30, 1979. It was noted that claimant also suffered from degenerative arthritis of the right knee.

The Orthopaedic Consultants, in June, 1980, found claimant's condition medically stationary; that he was now precluded from returning to his regular occupation; but that claimant was physically capable of performing sedentary work that did not involve any prolonged sitting or standing. The claim was closed on September 26, 1980 by Determination Order granting claimant an award of 37.5 degrees for 25% loss of the right leg.

Claimant became involved with vocational rehabilitation personnel and through their efforts claimant was placed in employment two and a half hours a day working with furniture. Claimant did well and enjoyed it and the employer was even willing to try a modified at-home work situation. However, claimant decided not to pursue this employment even on an at-home basis because, he claims, he felt physically unable to do so. This decision on his part occurred pending litigation of his appeal from the Determination Order. Claimant, prior to the issuance of the Determination Order sought and obtained Social Security disability.

Claimant's testimony at the hearing was that he had not looked for work prior to claim closure and did not intend to. When asked if he was retired, claimant responded, "yes."

On March 31, 1981 Dr. Utterback, upon examination, found full range of motion, all ligaments were intact but there was slight laxity and moderate quadriceps atrophy. Claimant physically was capable of light to sedentary work with no prolonged walking or standing or lifting over 30 pounds. Earlier that same month Dr. Keist had opined claimant had 50% loss of function of his right leg. Claimant's testimony at hearing regarding his activities at home, included gardening, lawn work, cleaning his gutters which requires climbing on ladders and woodcutting indicates his physical ability to be active.

Claimant has one year of high school education, having quit school to go to work in the woods and sawmills. Claimant attended vocational school in aviation sheet metal work, was an aircraft mechanic, sold life insurance for about three years and sold furniture manufacturing equipment for about eight years.

Permanent total disability can be caused by less than total physical incapacity plus social/vocational factors. The test is whether the evidence persuades the factfinder that as a consequence of a compensable injury a claimant is unable to sell his services in the labor market on a regular basis. In this case, claimant has not persuaded us he satisfies this test.

No medical evidence supports total incapacity to perform employment. Indeed, from the activities claimant testified he is physically able to do at home, it would seem to us that he easily could perform the duties of a salesman, an area in which he has over ten years experience. Admittedly, of the social/vocational factors, the biggest obstacle is probably claimant's age.

The best test of whether claimant's age or any other factors foreclose gainful employment would be reasonable efforts to obtain employment as required by ORS 656.206(3). Which brings us to our fundamental disagreement with the Referee's analysis. The Referee stated claimant tried in vain to increase the hours he worked in the furniture refinishing shop that had been arranged by vocational rehabilitation personnel. This may or may not be relevant. Claimant testified he was unable to work longer hours in the furniture shop due in part to back and shoulder pain, neither of which is connected in any way by the evidence in this case to claimant's knee injury. More significantly, we infer from the record that claimant was not really motivated to try to increase the hours worked; he wanted to retire and he did retire.

Based on his tried-in-vain-to-increase-hours-worked finding, the Referee concluded that claimant had made reasonable efforts to obtain gainful employment. We disagree. As previously noted, claimant had over ten years experience in sales work, work which would seem to be well within the physical limitations imposed by claimant's doctors. There is no direct explanation in the record for claimant's failure to pursue the possibility of sales work. The most likely inference to be drawn is that claimant did not desire to do so.

We turn to the question of the extent of claimant's partial disability. We find the award granted by the Determination Order of 25% loss of use of the right leg was inadequate. Based on all the evidence, primarily the March, 1981 reports of Drs. Utterback and Keist, and applying the guidelines of OAR 436-65-550 and OAR 436-65-555, we find a more appropriate award to be 60% loss of use of claimant's right leg.

ORDER

The Referee's order dated May 27, 1981 is modified. Claimant is granted an award of 90° for 60% loss of the right leg. This award is in lieu of all prior awards.

Claimant's attorney is allowed 25% of the increased compensation granted by this order over that granted by the Determination Order as and for a reasonable attorney's fee. This in in lieu of the attorney fees allowed by the Referee's order.

The remainder of the Referee's order is affirmed.

BARBARA COLWELL, Claimant
John Peterson, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 79-00022
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer and carrier seek Board review of Referee Fink's order which ordered payment of temporary total disability compensation, assessed a 25% penalty for unreasonable delay or refusal to pay temporary total disability, and awarded a carrier-paid attorney's fee to claimant's attorney. The employer and carrier contend the penalty and attorney's fee awards should be reversed.

This case involves the responsibility for a compensable occupational disease claim between two concurrent employers. One employer accepted the claim, while the other employer (the party in this case) denied it. The case travelled up the review ladder and was heard in the Court of Appeals as Colwell v. Trotman, 47 Or App 855 (1980). The Court ruled that both employers were concurrently responsible on the claim. The Court offered the novel solution of apportioning the claim between the two employers rather than assigning the claim entirely to one or the other, as is the usual result. It then remanded the claim to the Board to determine what the appropriate apportionment formula would be. The Board, in turn, remanded the issue to the Hearings Division. The resulting order after hearing on remand is the subject of this review.

On the issue of apportionment of compensation between the two employers, we think the Referee's formula was very sensible and affirm that portion of his order. The carrier complains that the Referee's order apportions only temporary total disability, not the permanent partial disability that was previously paid after issuance of a Determination Order. The carrier is technically correct in that reading of the Referee's order. We deem it at least implicit, however, that the same apportionment formula applies to the permanent partial disability compensation also, and affirm with that understanding.

We reverse the imposition of penalties on the insurer for failure to make payment of compensation pursuant to the decision in Colwell v. Trotman, supra. We find that since neither the Court nor the Board on remand determined the apportionment of compensation, the insurer did not know what amount would be ordered due and payable until Referee Fink issued his Order on Remand. Apportionment of compensation between employers is a novel solution not directly addressed in the statutes or rules. Therefore, the insurer could not know what formula would be devised and applied to them until the Referee's Order on Remand was issued. Their conduct of awaiting that order before paying was not unreasonable.

We affirm the award of an attorney's fee. We interpret the award to compensate claimant's counsel for services related to apportionment and amount of payment by the second employer. This was a continuation of the compensability issues that were left unresolved at the court and Board levels.

No attorney's fee will be allowed claimant's attorney for services on Board review under ORS 656.382(2) because claimant did not successfully defend the penalties issue. Zelda M. Bahler, WCB Case No. 79-06095 (Order on Reconsideration, October 30, 1981).

ORDER

The Referee's order dated June 18, 1981 is affirmed in part and reversed in part.

The apportioned amount of compensation awarded to the claimant and the award of a carrier-paid attorney fee are affirmed.

The penalty awarded is reversed.

HERLAND E. COOK, Claimant
Robert Udziela, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 80-04018
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The employer has requested review of Referee Pferdner's order which rejected the employer's denial of claimant's occupational disease claim and remanded it for acceptance. The only issue presented is compensability of claimant's pulmonary condition.

Whether or not the claimant has established the compensability of his claim for occupational disease requires an initial determination of the existence of that condition, interstitial fibrosis. Once it has been resolved that claimant actually suffers from that condition, the compensability issue becomes more clear.

The diagnosis of interstitial fibrosis was one of the main controversies at the hearing. The Referee chose to give controlling weight to the opinion of Dr. John E. Tuhy, M.D. Accepting the fact that there is some room for disagreement among the various medical reports and expert witnesses' testimony, we agree with the Referee that Dr. Tuhy's opinion is the more persuasive in a case such as this involving a high degree of medical complexity, and where a "battle of the experts" is underway.

There would appear to be little disagreement among the various physicians who examined the claimant that he suffers from chronic obstructive pulmonary disease (hereinafter "COPD") and bronchitis. Dr. Jerome Reich, M.D., in his report of April 24, 1979 attributes claimant's bronchitis to his long history of cigarette smoking. Dr. Tuhy in his extensive report of October 15, 1979 relates that claimant's COPD is "[P]robably due, at least in part, to his history of smoking." There seems to be little question among the medical experts, that claimant suffers from an underlying pulmonary condition that is not related to his employment at ESCO.

Whether or not claimant also suffers from a work-related lung condition is a more difficult question. Dr. Reich in his April 24, 1979 report finds no evidence of asbestosis in the claimant. It should be noted, however, that Dr. Reich gives an incorrect history of the claimant's exposure to asbestos. Dr. Reich relates that claimant's asbestos exposure was very limited and that it was unlikely that he had any significant exposure. This is contrary, however, to the testimony at the hearing which revealed a twenty-year history of asbestos exposure in one form or another. Dr. Reich in his April 3, 1980 report admits that people who develop asbestosis generally do so after exposure to it for a period of twenty or more years. Dr. Tuhy, on the other hand, was familiar with claimant's long history of asbestos exposure, and gives a history in his October 15, 1979 report that is consistent with the testimony at the hearing.

At the November 14, 1980 hearing, the carrier's expert, Robert Richardson, M.D., who examined the claimant once, testified that claimant's work exposure was not a material contributing cause of his lung condition. Upon cross-examination by claimant's attorney, however, Dr. Richardson revealed that he was not aware of claimant's chromium exposure; was unfamiliar with the hazards of claimant's job as a welder; was not familiar with other metal and/or compounds to which claimant was exposed at work; was not familiar with what type of gases are produced in the acetylene welding process or their quantities; did not get an accurate qualitative or quantitative history of claimant's exposure; had made no effort to inquire into claimant's exposure to chemicals at work other than what was provided on a list furnished by Mrs. Cook; admitted that claimant's chronic bronchitis could have been caused by his work exposure; and admitted that he had an inadequate history of claimant's work exposure.

Based on this lack of familiarity on Dr. Richardson's part, we are of the opinion that he was not as qualified in this situation to make as accurate an interpretation of the claimant's condition as would otherwise be the case.

Dr. Tuhy's opinion of the claimant's condition was based on his familiarity with the claimant's medical history, combined with an accurate knowledge of his work exposure. Dr. Tuhy further explained at the hearing why he disagreed with Dr. Reich. He noted that Dr. Reich was using a criteria for evaluation of lung impairment that is not generally accepted on a national level. He also noted that he disagreed with Dr. Reich concerning the exposure levels necessary to cause asbestosis. He notes several cases where very minor asbestos exposure has resulted in asbestosis. Dr. Tuhy also related that there were a number of causes of interstitial fibrosis, including exposure to asbestos, and nitric oxide exposure which is common to welders welding in enclosed spaces. Dr. Tuhy also noted that sandblasting could be contributory (claimant worked as a sandblaster at ESCO for one year).

We are more persuaded by Dr. Tuhy's opinion due to his extensive experience in the field of pulmonary disease, his well-reasoned medical opinions which discuss with scientific objectivity why he rejects the opinions of the other physicians, and because it follows from the totality of the evidence. Hammons v. Perini Corp., 43 Or App 299 (1979). We are therefore convinced that claimant has contracted interstitial fibrosis.

In his report of October 15, 1979 Dr. Tuhy stated;

> "In short, the cause of his basal lung fibrosis is unknown but asbestosis is certainly a possibility."

He also concluded that;

> "It is more probable than not that work exposures at ESCO contributed to his present lung disease. Although his COPD was probably due to smoking, I think, on balance, that the lung fibrosis accelerated the progress of his shortness of breath."

At the hearing Dr. Tuhy testified:

> "Q. Now were there other nonindustrial--well, on the balance, did you conclude that his industrial exposure to which you just made reference was more probable--the more probable exposure which resulted in the fibrosis?
>
> A. Yes. [I] would conclude that it was more probable than not that work exposure at ESCO contributed to his present lung disease, in other words, his chronic obstructive lung disease and reactive airway disease."

Based on Dr. Tuhy's opinion, we find that claimant's work exposure was the "significant predominant cause" of his interstitial fibrosis. Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981). Under Weller v. Union Carbide, 288 Or 27 (1979), where a worker has an underlying condition which is symptomatic, and his work results in a worsening of that condition, that condition is compensable. According to Dr. Tuhy, claimant's interstitial fibrosis, which was a result of claimant's work exposure, accelerated the progression of the underlying symptomatic condition. Dr. Tuhy testified:

> "Q. But did you conclude that there--- there was any relationship at all between the acceleration or progression of his chronic obstructive pulmonary disease and his exposure?

A. Yes. I thought they were added to it. In other words, that the basal interstitial fibrosis further increased his impairment of lung function, and that's why he had gotten into this state at age 52."

We therefore agree with the Referee that the claimant has established the compensability of his claim.

In addition to affirming the Referee's decision on the issue of compensability, we add the following comments.

The Referee, in finding the claim compensable, states:

> "The credentials of all the physicians are impressive, but Dr. Tuhy has had more experience than all of the other physicians combined. Based on Dr. Tuhy's experience and expertise and based on the fact that this is the first case in which Dr. Tuhy has ever testified as to a casual relationship on any pulmonary case before this referee, it is the opinion of the referee the medical evidence overwhelmingly supports claimant's contention." (Emphasis ours)

With respect to the underlined portion of the above quote, we agree with appellant that,

> "There is no legal foundation for relying upon a medical opinion solely because the opinion is offered by a practitioner who usually testifies against causation rather than in favor of it."

We find Dr. Tuhy's opinion persuasive, not for the reason stated by the Referee, but because his opinion is more consistent with the claimant's long history of exposure to environmental contaminants.

ORDER

The Referee's order dated March 9, 1981 is affirmed. Claimant's attorney is awarded $350 as and for a reasonable attorney's fee, payable by the carrier.

CHARLES CRAWFORD, Claimant
Charles Maier, Claimant's Attorney
John Svoboda, Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04194
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The claimant requests Board review of Referee McCullough's order and Order on Reconsideration which approved the SAIF Corporation's May 8, 1980 denial of claimant's left knee aggravation claim.

The claimant sustained a compensable injury on July 11, 1977 when he fell off a log and injured both lower extremities. Eventually, an arthrotomy was performed on claimant's right knee for excision of the medial meniscus. A Determination Order of February 3, 1978 awarded claimant 15% disability for loss of the right leg. A stipulation followed on April 14 providing an additional 12-1/3% scheduled permanent disability with respect to the right knee. On February 7, 1978 Dr. Lundsgaard reported that claimant was experiencing some discomfort along the medial aspect of the left knee. On March 24, 1978 claimant reported to Dr. Lundsgaard a sudden onset of pain in the left knee. Claimant had secured employment as a forklift driver two days previous to this episode. The diagnosis was chondromalacia of the left patella.

On January 8, 1979, an arthrogram was performed on claimant's left knee. The findings were, in effect, a normal left knee.

> "...no abnormality of either the medial or lateral meniscus identified. The articular cartilages appear maintained normally with no cartilage defect or irregularity."

The February 15, 1979 Determination Order awarded temporary total disability from January 8, 1979 through January 22, 1979 inclusive.

On September 13, 1979 Dr. Nagel reported that it was his impression that claimant's left knee difficulties were due to a torn medial meniscus. The January 24, 1980 report of the Orthopaedic Consultants diagnosed chondromalacia of the left patella. On March 1, 1980 claimant requested his original claim be reopened on the basis of aggravation. SAIF denied reopening on May 8, 1980. At the June 4, 1980 hearing, the Referee held that SAIF was prohibited from denying the claimant's aggravation claim since it had voluntarily reopened the claim for the left knee by paying time loss and requesting closure, relying on Frasure v. Agripac, 41 Or App 7 (1979). The Referee additionally found that claimant failed to establish that any worsened condition that claimant may have been suffering from at the time of the hearing was a result of his original July 11, 1977 injury.

We affirm the decision of the Referee but do so based on different reasoning. The Supreme Court has since ruled that unless the carrier's defense is based on lack of notice, the carrier is not estopped to assert the defense of noncompensability. Frasure v. Agripac, 290 Or 99 (1980).

Although the Referee found that SAIF was prohibited from denying the compensability of the injury, he also found that the claimant had failed to establish that any worsening that he may have been suffering was a result of the 1977 injury. Based on the same reasons which the Referee found convincing in denying the claimant's aggravation claim, we find also that claimant has failed to establish, in the first instance, the compensability of his claim for his left knee condition. There is a nearly complete dearth of medical evidence regarding causation of the left knee condition, and this does not appear to be an uncomplicated medical situation. The only medical evidence in the record regarding causation that is favorable to the claimant is in the January 24, 1980 report of the Orthopaedic Consultants, which stated: "In our opinion, re-opening the patient's left knee claim is justified on the basis of aggravation." We agree with the Referee that this statement appears to be a legal conclusion. The report speaks of "re-opening" the left knee claim although claimant never previously filed a left knee claim.

Any positive connotations that may be contained in the Orthopaedic Consultants report are outweighed by other factors. Dr. Lundsgaard, claimant's original treating physician was unable to find any problem with the claimant's left knee, even after an arthrogram. Dr. Nagel, upon deposition, stated that he was unable to precisely define the problem or its etiology. He stated that the claimant's condition could result without any traumatic event ever occurring. When questioned closely on the etiology of claimant's condition, he stated:

> "Q. Is there any way within reasonable medical probability that you can say that whatever problem he has with that knee was caused by his fall in '77 or his fall while he had the cast on, or any other particular event?
>
> "A. Be real difficult to substantiate one over the other."

Thus, neither of claimant's treating physicians are able to relate the condition to the injury of 1977. The best evidence that claimant has been able to produce does nothing more than state that it is possible the 1977 injury was the cause of his current knee condition. Claimant has failed to prove causation by a preponderance.

Claimant additionally contends entitlement to penalties due to the fact that SAIF failed to deny the claim for more than sixty days after it received notification of a claim. We agree with and adopt that portion of the Referee's order finding to the contrary.

ORDER

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

GRACE EVERS, Claimant
Donald R. Wilson, Claimant's Attorney
David Horne, Defense Attorney

WCB 79-02451
January 29, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests Board review of Presiding Referee Daughtry's order dismissing claimant's request for hearing on the basis of lack of prosecution and abandonment. Claimant submitted a Motion for Remand at the same time as her request for review was filed. Since the Board is reviewing an order of dismissal, claimant's motion is superfluous. If the Board agreed with claimant's position regarding the propriety of the order of dismissal, the relief granted on review would be to remand for hearing.

Under the circumstances of this case, the Board finds that dismissal was proper, and the Referee's order is therefore affirmed.

The record reflects that on March 21, 1979 claimant filed a request for hearing on two Determination Orders. The record contains a December 10, 1979 correspondence from claimant's attorney requesting that the claim be held in abeyance until claimant was able to undergo recommended surgery, which was not likely to occur for at least six months. No application to schedule a hearing or further status report was submitted by claimant after the December 10, 1979 correspondence. On July 31, 1981 the Presiding Referee issued an Order to Show Cause why claimant's request for hearing should not be dismissed within 30 days as abandoned. This order was duly mailed to all parties, including claimant's attorney and claimant at her last known address.

No response was received from either claimant or her attorney. On September 10, 1981 an Order of Dismissal was entered dismissing claimant's request for hearing.

On October 9, 1981 a "Request for Board Review and Order of Remand" was filed in behalf of claimant by an attorney other than the attorney who had requested a hearing. The request for review was accompanied by a Motion for Remand with a supporting affidavit of counsel, indicating that it was unknown why claimant's former attorney had not responded to the Order to Show Cause and that claimant was ready to proceed to hearing.

In response to the Board's request for briefs, claimant's attorney submitted a letter indicating that it appeared as though claimant's former attorney had "spent an inordinate amount of time developing the medical evidence rather than setting the claim for hearing, as claimant desired." Subsequently, claimant submitted an affidavit in support of her request for relief from the order of dismissal. The affidavit states that claimant was married in May, 1980, at which time she changed her name; that in February, 1981 she changed her residence from the address contained in the records of the Hearings Division; that her former attorney was apprised of her change in name and address; that she

was not informed by her attorney of the Order to Show Cause; that her former attorney unsuccessfully attempted to communicate with her upon his receipt of the Order to Show Cause, but that he wrote to her at her old address and under her previous name; that she received the Order of Dismissal, although belatedly; and that her former attorney declined to pursue her case when she contacted him regarding the Order of Dismissal.

We accept the allegations in claimant's affidavit as true with one qualification. Both the Presiding Referee's Order to Show Cause and the Presiding Referee's Order of Dismissal were mailed to the claimant at the same address, that being the last address shown in the Hearings Division file. We know claimant received the latter in time to retain a new attorney who requested Board review within 30 days of the dismissal. It thus strains credulity somewhat for claimant to insist she never received the show cause order mailed to the same address.

This Board, including the Hearings Division, has a statutory duty to mail its orders to all of the parties involved in a claim. It is the responsibility of any party to keep this agency informed of any name changes or changes in address that occur, either by direct communication with the agency or communication with the party's representative, such as this worker's attorney. Since claimant allegedly advised her attorney of her change in name and address, it was incumbent upon counsel to convey this information to the agency. When the neglect of a party or a party's representative results in a failure of a vital communication, as in this case, the consequences must be borne by the responsible party.

The Presiding Referee properly issued an Order to Show Cause, in view of the lack of a status report on this claim or an application to schedule a hearing. When no response was forthcoming, entry of an Order of Dismissal was justified.

While we realize that this result creates a hardship for claimant, who may indeed have a meritorious claim, there is no basis for setting aside the Order of Dismissal. This hardship is somewhat ameliorated by the fact that, if the allegations of claimant's affidavit are true, she has a cause of action in another forum by which she may vindicate her rights.

ORDER

The Presiding Referee's Order of Dismissal dated September 10, 1981 is affirmed.

ESTHER FREY, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06584
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Mannix's order which awarded claimant 60 percent unscheduled permanent partial disability for her back injury, that being an increase of 50 percent from the December 17, 1979 Determination Order. SAIF contends that the Referee's award is excessive. Claimant alleges she is permanently and totally disabled.

Claimant, age 58, was employed by Ediger Furniture where on April 17, 1978 she suffered a back injury while lifting wooden church furniture, the employer's principal product. A Determination Order issued December 17, 1989 awarded claimant 10 percent unscheduled permanent partial disability. At the March 3, 1981 hearing, the Referee found that although claimant was not permanently and totally disabled from performing work at a suitable and gainful occupation, that she had serious and adverse social/vocational factors to the extent that an award of 60 percent unscheduled permanent partial disability was justified.

We agree with the Referee that the claimant has social/vocational factors working against her, but we find that those factors are not so serious as to warrant an award of 60 percent unscheduled permanent partial disability. Taking into consideration the Guidelines for the Rating of Unscheduled Permanent Disability, OAR 436-65-600 et. seq., we make the following findings.

Turning first to impairment as required under OAR 436-65-601(1), the most recent spinal ranges of motion for the claimant are given in the October 1, 1980 chart notes as follows, with appropriate percentage of impairment:

Flexion	60°	6%
Extension	10°	1%
Rt. Lateral Flexion	10°	2%
Lt. Lateral Flexion	10°	2%
Rt. Rotation	20°	2%
Lt. Rotation	20°	2%

The combined total is equal to a whole person impairment of 15 percent. Added to this is 5 percent for excision of a deranged disc. This represents a combined impairment of 19.

The second factor to consider is age under OAR 436-65-602. Range of impact for the age factor is calculated from -10 to +10. Since claimant was 58 at the time of her injury, a maximum value of +10 is assigned to this factor.

Education under OAR 436-65-603 is next considered. The record indicates that claimant has an eleventh grade education along with two additional years of "Bible School." Giving the claimant the benefit of the doubt, we find that her education would more properly be considered twelfth grade level rather than thirteenth. Therefore a value of zero is assigned to this factor.

Turning to the work experience factor under OAR 436-65-604, and utilizing the United States Department of Labor's Dictionary of Occupational Titles, it would appear that the job title most appropriate to the claimant, based on information in the record, would be that of finish patcher. The specific vocational preparation time for this occupation is thirty days to six months, which correlates to a value of +3 under subsection (4) of the above mentioned rule.

OAR 436-65-605 requires consideration of adaptability to less strenuous labor. The Dictionary of Occupational Titles indicates claimant's work is considered medium strength. The record indicates that claimant's residual functional capacity is somewhere in the range of light, which carries a value of +5, to sedentary, which carries a value of +15. Again, giving claimant the benefit of the doubt, we split the difference and assign a value of +10.

Mental capacity is the next factor under OAR 436-65-606. The Referee judged claimant to be of average intelligence. Since there is no indication to the contrary in the record, we assign a value of zero to this factor.

Emotional and psychological conditions may contribute to incapacity to perform in an occupational setting. OAR 436-65-607. Dr. Don Poulson, M.D., noted in his October 2, 1979 report that he felt claimant was demonstrating a motivation problem, and that she had convinced herself that she could not go back to her original work. Testimony at the hearing indicated claimant had not attempted to find work of any kind since her injury. Subsection (6) of the above mentioned rule allows minus value of up to -25 for workers unwilling to adjust to their injuries. Since the evidence on this issue is somewhat marginal, we again resolve doubt in favor of the claimant and assign a value of zero to this factor.

Labor market findings under OAR 436-65-608 are next considered. The record indicates that taking into consideration the factors noted above, that claimant could expect to encounter moderate to <u>few</u> potential occupational opportunities in Oregon. This means a range value from +5 to +15. Compromising, and again giving claimant every benefit, we assign a value of +10 to this factor.

OAR 436-65-601(3) next requires that if all assigned values are positive, they must be <u>combined</u> (as opposed to added). The combined total is based on the formula A% + B% (100%-A%)= combined value of A% and B%. The total combined value in this case is equal to 42. We conclude that an award of 45 percent unscheduled permanent partial disability to be more than adequate compensation to the claimant for a relatively non-serious injury, evan considering additional factors such as pain.

Claimant has additionally raised the issue of permanent total disability. We find a complete lack of any medical evidence in the record to even suggest as a possibility that the claimant is permanently and totally disabled. On the contrary, claimant's physical impairment alone is minimal. Claimant has also failed to demonstrate that non-medical factors relating to earning capacity are so serious as to warrant an award of permanent total disability when combined with the medical factors. In any event, claimant has failed to comply with ORS 656.206(3) by failing to seek employment.

ORDER

The Referee's order dated March 5, 1981 is modified. Claimant is awarded 144 degrees for 45 percent of the statutory maximum for unscheduled permanent partial disability. This award is in lieu of, and not in addition to any previous award. The remainder of the Referee's order is affirmed.

JOSEPH E. HAMEL, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-7173
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Mulder's order which set aside its denial and found claimant's occupational disease claim for his psychological condition to be compensable. We reverse.

Claimant was a school teacher for more than 20 years before making this claim. The Referee's findings are embarrassing. They include:

> "During the spring of 1980, at school, [claimant] experienced such as stomach upsets and inability to sleep." (sic)

A teacher's inability to sleep at school is a novel basis for finding a psychological condition to be a compensable occupational disease.

There is virtually no medical evidence that suggests claimants teaching job caused his psychological condition as distinguished from claimant's teaching job merely being yet another forum in which his psychological disease manifested itself. There is overwhelming evidence of nonwork causation: claimant's concern about a variety of health problems (a kidney stone, borderline diabetes, rectal bleeding); sexual problems; marital discord; depression about a friend's suicide; and general concern about aging, that we infer from the record would be best characterized as male menopause.

The Referee cited only Patutucci v. Boise Cascade, 8 Or App 503 (1972). Patutucci is an accidental injury case that has nothing to do with this occupational disease claim. The controlling

standard at the time of the Referee's decision was stated in ORS 656.802(1). That standard has since been elaborated upon in James v. SAIF, 290 Or 343 (1981) and Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981). But even without the elaboration of James and Murrens the Referee's decision was just plain wrong. With the elaboration of James and Murrens, the Referee's decision is even more obviously wrong.

ORDER

The Referee's order dated November 25, 1980 is reversed.

KENNETH HAMMONS, Claimant
James Francesconi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00648
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of Referee Howell's order which ordered that the claim for aggravation of claimant's left knee condition be remanded to SAIF for acceptance and payment of compensation until closure pursuant to ORS 656.268. SAIF contends that claimant did not carry the burden of proving any material contribution from the on-the-job accident six years ago to the present arthritic condition, and that this simply is the natural progression of a preexisting torn meniscus and arthritis.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated July 27, 1981 is affirmed. Claimant's attorney is awarded $500 as and for a reasonable attorney's fee, payable by the carrier.

KENNETH IVIE, Claimant
Michael Strooband, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 80-04388
January 29, 1982
Order on Remand

On review of the Board's Order dated March 20, 1981, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated October 2, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

IT IS SO ORDERED.

JACK JOHNSON, Claimant
Vincent Ierulli, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09455
January 29, 1982
Order on Review (Remanding)

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Braverman's orders dated February 4 and 10, 1981 which ordered SAIF to pay for all medical expenses incidental to diagnostic treatment recommended on December 15, 1980 until closure, ordered payment of temporary total disability from December 18, 1980 until closure, and ordered SAIF to pay claimant's attorney a fee of $750 for overcoming a de facto denial, found claimant not entitled to temporary total disability benefits from September 29, 1980 until December 18, 1980, found claimant's condition to be worse on or about December 15, 1980 and found the question of extent of permanent partial disability to be premature. Claimant cross-requests review of the February 10, 1980 order contending entitlement to temporary total disability benefits beginning on September 29, 1980 rather than December 18, 1980.

The original accident occurred in 1976 when claimant fell off a truck and injured his low back and left hand. A Determination Order of February 17, 1977 awarded claimant 15% unscheduled low back disability. The current claim has its genesis in a May 20, 1980 report of injury where claimant asserts an aggravation of the 1976 injury. That claim was accepted as disabling with time loss payments beginning on May 12, 1980. Dr. Lawrence Noall's report of June 24, 1980 diagnosed lumbosacral instability superimposed on lumbosacral joint space narrowing and predicted recurrent sprain from time to time. Claimant was examined at SAIF's request on August 22, 1980 by Dr. Pasquesi who found, "He has now improved to about the state that he was when he was working before the aggravation and increased symptoms which occurred on May 12, 1980." Dr. Pasquesi recommended claim closure. Dr. Noall concurred with Dr. Pasquesi except for his opinion on overall impairment. A Determination Order of September 23, 1980 awarded temporary total disability benefits from May 12, 1980 through August 22, 1980.

Claimant was seen by Dr. Noall on September 29, 1980. Dr. Noall in an October 2, 1980 letter to Dr. Bentley noted that the claimant was undergoing physical therapy. A Determination Order on reconsideration issued on October 1, 1980 inexplicably modified the temporary total disability award and allowed time-loss benefits through September 29, 1980. On December 15, 1980 claimant was examined by Dr. Snodgrass who speculated on the possibility of a herniated disc and felt that he would be inclined to order an electromyogram and/or myelogram but that the claimant was "panicked" by the idea.

As best we understand this case, it was claimant's theory--adopted by the Referee--that the December 1980 report from Dr. Snodgrass was an aggravation claim.

We disagree. ORS 656.273(1) provides that a claimant is entitled to additional compensation including medical services for worsened conditions resulting from the original injury. We do not construe Dr. Snodgrass' letter of December 15, 1980 as an indication that claimant's condition had in any way worsened. He merely speculated on the "possibility" of a herniated disc. There is no indication that claimant actually had such a condition at the date of the examination.

Neither do we consider the letter to be a claim for further medical services under ORS 656.273(3). Dr. Snodgrass states: "I would be inclined to order an electromyogram but the patient tells me...that he is almost panicked at the thought of needles and operations." This is only a statement of equivocal future intent conditional on the claimant's approval, which at that point in time had not been secured. We, therefore, find that claimant has failed to make or establish a claim for aggravation and is not entitled to any additional temporary total disability benefits as of the date of Dr. Snodgrass' letter since there is no medically verified inability to work. ORS 656.273(6).

The Board also disagrees with the Referee's award of a $750 attorney fee to claimant's attorney. Since we have found that claimant failed to make a claim for aggravation, SAIF had nothing to accept or deny.

We also disagree with the Referee's finding that claimant was not medically stationary as of December 15, 1980. As previously noted, there is no medical report indicating a worsened condition since the closing examination report of Dr. Pasquesi which found the claimant to be stationary on August 22, 1980. Claimant's claim was therefore properly closed.

ORDER

The Referee's orders dated February 4 and 10, 1981 are reversed. This case is remanded to the Referee to rule on the extent of claimant's permanent disability.

BILL E. JONES, Claimant's Attorney
Allen T. Murphy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-00924
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The Referee entered an order on August 28, 1979. Claimant requested review and the SAIF Corporation cross-requested review. On April 15, 1980 the Board entered an Order of Remand. On May 9, 1980 the Board entered an Order on Reconsideration. SAIF's appeal from those orders was dismissed by the Court of Appeals on the ground that those orders were not final. Jones v. SAIF, 49 Or App 543 (1980). Subsequently, on March 23, 1981 Referee Williams entered an "Amendment to Opinion and Order."

If our first paragraph makes it sound like this case is complex, it is only the tip of the iceberg. To say that this case is now a mess would probably be the understatement of 1982, even though the new year is yet young.

This case was first before the Board on requests for review by both parties. Only SAIF has requested review of the Referee's Amended Order. As best we understand it, claimant's current brief seeks only affirmance of the Referee's Amended Order. We thus deem this case now before us only on SAIF's request for review.

It is healthy for both individuals and institutions to admit mistakes. The Board's April 15, 1980 Order of Remand was a mistake. The Board's May 9, 1980 Order on Reconsideration was a serious mistake. It should be noted that both orders were entered at a time when one of the three Board member positions was vacant, which produced some unique problems. Having admitted those prior mistakes, however, the question now is whether Humpty Dumpty can be put back together again.

We find SAIF's brief instructive regarding the desirability of specific wording in remand orders and regarding the general problem of the scope of the Referee's authority following a remand from the Board. The latter point deserves fuller attention in the context of amendments to the Board's procedural rules.

The remaining viable issues are the extent of claimant's disability and whether SAIF is entitled to an offset for temporary total disability benefits paid between August, 1979 and March, 1981, against claimant's permanent disability award. On the first point, we agree with and adopt the Referee's analysis regarding the extent of claimant's disability.

SAIF paid temporary total disability to claimant between August, 1979 and March, 1981 pursuant to the Board's prior Order of Remand and Order on Reconsideration. Those orders are not final, Jones v. SAIF, supra. and thus are subject to further consideration at this time. The only stated reasons for the Board's prior award of additional temporary total disability was "to pre-

serve the status quo" and because claimant "was not vocationally stationary." Neither statement has any presently identifiable legal foundation. Temporary total disability is payable when a claimant is not medically stationary or is participating in an authorized program of vocational rehabilitation. Between August, 1979 and March, 1981 claimant was medically stationary and was not in an authorized rehabilitation program.

The Board has ruled that its Referees have a duty to correct an error in a Determination Order when requested. David S. Hunter, WCB Case No. 80-02213 (September 25, 1981); Lesley L. Robbins, WCB Case No. 79-04284 (June 30, 1981). By parity of reasoning, the Board likewise has a duty to correct an error in its prior nonfinal orders when requested. SAIF here requests that we correct our prior erroneous award of temporary total disability between August, 1979 and March, 1981. We shall do so by allowing the offset SAIF seeks.

ORDER

The Referee's order dated August 28, 1979 as amended by the Referee's order dated March 23, 1981 is modified. SAIF is allowed to offset temporary total disability benefits paid to claimant between August, 1979 and March, 1981 against the permanent disability awarded by the Referee's orders. In all other respects, the Referee's orders are affirmed.

DERRAL D. KELLEY, Claimant
Steven Yates, Claimant's Attorney
Jeffrey Herman, Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-03359
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer, Murphy Logging Co., seeks Board review of Referee Baker's order which affirmed the June 7, 1978 Determination Order which granted claimant compensation for permanent total disability for his injury of September 13, 1975.

Although Murphy Logging's request for hearing and brief on Board review refers in passing to the extent of claimant's disability, the real dispute is between Murphy Logging and the SAIF Corporation. Murphy Logging argues that SAIF should not have accepted claimant's claim for his injury of September 13, 1975.

The Board concludes it has no jurisdiction over a dispute between an insurer and an insured over whether a claim should or should not have been accepted. Presumably, under the terms of the insurance contract, either the insurer or the insured is entitled to make that decision. Any dispute about whether the decision was made correctly or not is a matter of contract or insurance law, not a matter of workers compensation law or a matter "in which a worker's right to receive compensation, or the amount thereof, is directly in issue." ORS 656.704(2).

On the issue of extent of disability, we affirm and adopt the Referee's order.

ORDER

The Referee's order dated February 27, 1981 is affirmed. Claimant's attorney is awarded $500 for services rendered on Board review, payable by Murphy Logging Co.

WILLIAM J. McCUIN, Claimant
D. Kevin Carlson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08815
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant has requested Board review of Referee Leady's order which approved the SAIF Corporation's August 26, 1980 denial of his back injury claim. The Referee found neither the claimant nor his employer credible. The issue on review is compensability.

Claimant, who is 19 year old, testified that he injured his back while retrieving a chemical toilet in the Hillsboro area for his employer. The employer testified that he had no units in that area. The Referee during the course of the hearing indicated that it was his intention to keep the record open for submission of additional evidence on that point. Subsequently an affidavit was produced from a Mr. John Bastasch indicating that he rented a unit from the claimant's employer and that it was removed from his property on July 23, 1980. The Referee refused to receive the affidavit in evidence, but did apparently consider it.

The Board has determined that the affidavit should have been received into evidence. However, we do not find it sufficient to overcome the Referee's finding on credibility. The affidavit does nothing more than indicate that the unit in question was rented from the claimant's employer and removed on July 23, 1980, one of the three possible days which the claimant maintains his injury could have occurred. It does not indicate who retrieved the unit on July 23, nor does it serve to clarify the claimant's vague testimony. We agree with the Referee that even considering the affidavit, speculation is still required in order to find for the claimant. It is up to the claimant to satisfy his burden of proof. We decline to substitute speculation for fact.

ORDER

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

BENETTA A. McKINLEY, Claimant
Robert Muir, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00386 & 80-08575
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation seeks Board review of Referee Seifert's order which set aside its denial of claimant's aggravation claim.

The Board affirms and adopts the Referee's order with one exception.

Claimant sustained what was accepted as a compensable industrial injury in December, 1979. That claim was eventually closed by Determination Order issued in May, 1980. This aggravation claim arises from subsequent surgery performed by Dr. Ellison in July, 1980.

In ruling that SAIF should have accepted this aggravation claim, the Referee ordered claim reopening effective in December, 1979. This may have been a typographical error. All of the pre-May, 1980 rights and duties of the parties arising from the original December, 1979 injury and claim had been liquidated by the May, 1980 Determination Order.

Claimant's claim should thus be reopened on her aggravation application effective July 28, 1980, the date of the first medically verified time loss subsequent to entry of the May, 1980 Determination Order.

ORDER

The Referee's order dated April 27, 1981 is affirmed, except that the claim reopening is corrected to July 28, 1980.

Claimant's attorney is awarded $300 as attorney's fees for services rendered on Board review, payable by SAIF.

DELMAR G. OLAND, Claimant
W.D. Bates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Robert F. Walberg, Defense Attorney

WCB 80-01796 & 80-02840
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee McSwain's order which affirmed the Order of the Workers Compensation Department declaring Rueben Mast a non-complying employer; set aside the denial by the SAIF of responsibility for claimant's left ankle; granted claimant an award of 128 degrees for 40% unscheduled disability and granted an award of 6.75 degrees for 5% loss of the left foot, and attorney fees.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 7, 1981 is affirmed. Claimant's attorney is awarded $550 as and for a reasonable attorney's fee, payable by SAIF.

FRED H. POEHLER, Claimant
Dan O'Leary, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-02665
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee James' order which set aside its denial of claimant's occupational disease claim and remanded it for acceptance and the payment of benefits as required by law.

The claim is for a condition variously described in the medical reports as spinal arthritis, spondylosis and degenerative disc disease. The claim includes cervical laminectomies performed in November, 1978 and lumbar laminectomies performed in Janaury, 1979.

From 1950 to 1972 claimant owned his own garage. He was primarily a supervisor, but did actual mechanic work about 10% to 15% of the time. From 1972 to 1978 claimant worked for this employer as a service manager, again primarily a supervisory position. He did actual mechanic work about 10% to 20% of the time.

The compensability issue depends on which of the two medical opinions is found to be more persuasive. Dr. Hopkins, claimant's treating physician for 30 years, expressed the opinion that claimant's work caused or aggravated his spinal condition because the "triggering event" was claimant "repeatedly working overhead" with his arms and "hyperextending his neck" in his work as a mechanic. Dr. Norton, SAIF's medical consultant, testified that the etiology

of spondylosis is unknown; that the most prevalent cause of claimant's disease is the aging process; that other suspected factors include heredity and metabolism; that the wear-and-tear theory is no longer accepted; and that in a review of medical literature, he could find no mention of "mechanics syndrome." Dr. Norton stated that once claimant's underlying disease reached a certain state where vertebrae surfaces were deteriorated and/or motion impaired, then work activity could produce symptoms, but there was no support in medical literature for the theory that work activity could, or did, cause or aggravate claimant's underlying disease.

We cannot say, as we must in order for claimant to have sustained his burden of proof, that Dr. Hopkins' opinion is the more persuasive.

It could be said that Dr. Hopkins has an advantage in being claimant's treating doctor for 30 years, whereas Dr. Norton never even examined claimant. However, there is no disagreement here about the diagnosis, only disagreement about causation in a complex medical situation. We see no reason to defer to a treating doctor on this kind of question of causation.

In weighing the respective opinions of Drs. Hopkins and Norton, we look to relative expertise, knowledge of claimant's work and the reasons given for their opinions.

At first blush it would seem that Drs. Hopkins and Norton have about equal expertise, both being board certified orthopedic surgeons. However, Dr. Hopkins repeatedly referred to "mechanics syndrome" as if it were a well recognized medical condition. Dr. Norton testified he could find no mention of such a condition in the medical literature. When asked to cite any medical publication that recognized "mechanics syndrome," Dr. Hopkins was unable to do so. On this record, the expertise edge goes to Dr. Norton.

Dr. Norton's knowledge of claimant's work arose from attending the hearing and hearing both claimant and his employer testify. We think it is fair to assume that claimant gave as complete a description of his work at the hearing as he ever gave to Dr. Hopkins. It is harder to deduce the extent of Dr. Hopkins' knowledge of claimant's work. Dr. Hopkins repeatedly referred to claimant "working overhead" with his arms and "hyperextending his neck" while working as a mechanic. Neither statement reflects an accurate understanding of claimant's work since 1950. Since that date, claimant has primarily been a supervisor, doing actual mechanic work about 10% to 20% of the time, about half of which claimant estimated involved working overhead; in other words, overhead work about two to four hours a week. Dr. Hopkins only created additional doubt about his knowledge of claimant's work activities when he testified he was aware claimant was a service manager from 1972 to 1978 and this did not change his opinion.

Moreover, it is unclear what "hyperextension" meant to Dr. Hopkins and whether it had anything to do with claimant's work. Dr. Norton testified that hyperextension means beyond the normal range of motion of the neck, like in a whiplash situation. Nothing in claimant's or Dr. Hopkins' testimony describes work activity beyond the normal range of motion of the neck.

Turning to the reasons given by the doctors for their opinions, we find Dr. Norton's opinion that claimant's condition was a degenerative disease primarily associated with the aging process to be supported by a well-reasoned and detailed explanation. By contrast, other than references to mechanics syndrome, overhead work all of claimant's life and hyperextension of claimant's neck -- all of which we have doubts about for reasons previously stated, Dr. Hopkins' opinion on causation is basically conclusory without supporting analysis. See Moe v. Ceiling Systems, 44 Or App 429 (1980). We note just two especially troublesome points about Dr. Hopkins' opinion. Under Dr. Hopkins' theory that claimant's work activity caused or aggravated his underlying degenerative disease, it would be logical to expect that claimant would have suffered symptoms at work, such as while he was "hyperextended," whatever that means. But claimant testified he did not have any symptoms at work -- he just woke up one morning with a sore neck. Second, disregarding for a moment Dr. Norton's testimony that claimant's work activity could not have caused any of claimant's spinal disease, it does not make any sense to us that overhead work with the arms and hyperextension in the cervical area could have caused or contributed to lumbar spondylosis.

Even if the applicable legal standard required only that work activity be a material contributing cause for an occupational disease claim to be compensable, we could not say on this record that claimant sustained even that minimal burden of proof. In fact, however, the applicable standard requires more. In Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981), we ruled that the not-ordinarily-subjected requirement of ORS 656.802(1) means that the work-connected cause of a disease must be the "significant predominant cause" of the disease in order for it to be compensable. Having failed to establish even material contributing cause, claimant necessarily has not met the higher burden contemplated by Murrens.

ORDER

The Referee's order dated May 15, 1981 is reversed and the denial issued by the SAIF Corporation dated February 1, 1979 is reinstated.

JERRY REUST, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-00038
January 29, 1982
Order of Abatement

The Board has received a motion for reconsideration of its Order on Review dated January 11, 1982.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and the appellant is requested to file a response to the motion for reconsideration within ten days.

IT IS SO ORDERED.

PATRICIA ST. ARNOLD, Claimant
Jerry E. Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10093
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review and the SAIF Corporation cross-requests review. The claimant did not file a brief on this appeal, but contends that SAIF's denial of compensability for her carpal tunnel syndrome is in error. SAIF contends that the attorney fee of $100 is excessive.

We affirm the Referee's conclusion on the issue of compensability. On the issue of an excessive attorney fee, as raised by SAIF, we agree. As pointed out in its brief (and attached argument to the Referee on reconsideration), on the issue of SAIF's refusal to pay compensation, there was very little time expended at the hearing as SAIF admitted it failed to pay. The total benefits to claimant for the compensation for temporary total disability plus the 25% penalty assessed, amounts to $78.75. Because SAIF admitted to failure to pay for six days of time loss, claimant's attorney was not required to devote any time to this issue. Therefore, we conclude that an attorney's fee of $50 is more in keeping with the criteria set forth in Muncy v. SAIF, 19 Or App 783 (1974).

ORDER

The order of the Referee dated June 9, 1981 is modified. Claimant's attorney is granted an appropriate attorney's fee of $50, payable by SAIF. The remainder of the Referee's order is affirmed.

THELMA SINGLETON, Claimant
Rick McCormick, Claimant's Attorney
Margaret Leek Leiberan, Defense Attorney

WCB 80-02000
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of that portion of Referee Danner's order which upheld the carrier's denial of claimant's aggravation claim.

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

Claimant's original back strain claim was closed by Determination Order dated May 26, 1976 without an award of permanent disability. Between that date and claimant's October 1979 aggravation claim, claimant had a series of jobs, most of which were moderately strenuous. Claimant was also involved in several non-work incidents, discussed in the brief of the employer/respondent at pages 7-8 and in claimant's reply brief at pages 2-4, which logically could have contributed to or caused any worsened back condition claimant experienced in late 1979.

Claimant argues that we should accept Dr. Brink's opinion of a causal link between claimant's 1976 minor back strain and her 1979 allegedly worsened back condition notwithstanding the physical stress of her intervening employment and notwithstanding the physical stress of the various non-work incidents mentioned above. Under the totality of these circumstances, we are simply not persuaded by Dr. Brink's opinion.

ORDER

The Referee's order dated February 27, 1981 is affirmed.

GAVIN L. SMITH, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-03191
January 29, 1982
Order on Remand and Petition for Attorney Fees

The Court of Appeals issued its order on April 27, 1981 reversing the Board's Order on Review (entered October 30, 1980) and remanding the claim to the Board for entry of an order;

The Court subsequently issued an order on claimant's petition for attorney fees, remanding to the Board for an award of attorney fees;

The Board has now received the court's Judgment and Mandate issued October 29, 1981 and has been provided with sufficient information from claimant's attorney to form the basis for assessment of an attorney's fee; therefore

Claimant is awarded 70% of the maximum allowable for unscheduled permanent partial disability or 224°;

Claimant's attorney is allowed 25% of the additional compensation granted claimant by the order of the Referee dated May 6, 1980, not to exceed the sum of $2,000, OAR 438-47-025;

Claimant's attorney is allowed 25% of the additional compensation granted claimant by the order of the Court of Appeals--i.e., 25% of 64° of unscheduled permanent partial disability; and claimant's attorney's fee shall be paid out of and not in addition to claimant's award of compensation.

The Board has considered claimant's contention that the Board should award a fee pursuant to OAR 438-47-055, which provides that the carrier is liable for payment of a reasonable attorney's fee when the carrier requests Board review and the Referee's award is affirmed. See ORS 656.382(2). Claimant's argument is that since the Court in effect ordered the Board to reinstate the Referee's order, the Board is now entering an order affirming the Referee, and it follows that claimant's attorney should be awarded a fee pursuant to OAR 438-47-055.

This argument has some appeal by virtue of the fact that the Board's award of a fee in addition to, rather than out of, compensation would benefit claimant by enabling him to retain the entire amount of additional compensation awarded by the Court; however, we are of the opinion that claimant's contention, although appealing, would result in a misapplication of the statutes and administrative rules pertaining to awards of attorney fees. Accordingly, we decline to adopt claimant's novel approach and instead award an attorney's fee out of the compensation. ORS 656.286(2).

In assessing the amount of the fee awarded, we have considered the information provided us in claimant's attorney's affidavit, which recites the amount of time expended in representing claimant before the Board and the Court of Appeals. See Roy D. Nelson, WCB Case No. 78-05469 (April 6, 1981). In view of the fact that claimant did not prevail before the Board, the effort expended on Board review is not included as part of the assessment of the attorney's fee.

ORDER

Claimant is awarded 224°, or 70% of the maximum allowable by law, for unscheduled permanent partial disability.

Claimant's attorney is awarded 25% of the increased compensation awarded by the Court of Appeals (i.e. 64°) as an attorney's fee for services rendered in representing claimant before the court.

TERRY L. STARBUCK, Claimant
Russell DeForest, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Brian Pocock, Attorney

WCB 79-04425
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Wolff's order which: (1) Set aside SAIF's denial of compensability of claimant's alleged new injury claim which was based on the theory of a new injury in about January of 1979 while working at Northwest Quality Cabinets (NQC); (2) affirmed a denial of responsibility issued by Boise Cascade Corporation (BC) on claimant's alleged alternative aggravation claim which was based on a theory of an aggravation of claimant's early 1978 back injury claim made while working at BC and accepted by BC as a non-disabling injury; (3) awarded claimant 40% permanent partial unscheduled disability; and (4) awarded attorney fees. The issues SAIF raises on Board review have little to do with the complexity of this case.

While working at BC, a self-insured employer, on April 13, 1978 claimant made a claim for a back injury at some point during the prior three months without specific incident or trauma. That claim was accepted as non-disabling. Claimant was treated conservatively by Dr. West. Claimant quit working at BC in June 1978 for reasons unrelated to his back injury. A month or two later claimant began working for NQC. Claimant testified that his back was symptomatic throughout 1978 and into 1979, but it was not until February of 1979 that claimant sought medical attention from Dr. Yamodis, some nine months after his last conservative treatment by Dr. West. Dr. Yamodis discovered a herniated disc at L4-5 which lead to surgery on February 16, 1979.

What followed borders on the procedurally unbelievable. Claimant first asserted an aggravation claim against BC, which denied responsibility (not compensability) on the ground that claimant had sustained a new injury while working for NQC. So far, so good. Claimant then asserted a new injury claim against NQC. It was then discovered that NQC was a non-complying employer and thus claimant's new injury claim was ultimately forwarded to SAIF for processing. On July 11, 1979 SAIF denied compensability (not just responsibility). Nevertheless, and inexplicably, on July 23, 1979 the Compliance Division issued an order designating SAIF as paying agent pursuant to ORS 656.307. Matters were then further complicated when the Evaluation Division issued a Determination Order on October 9, 1979 awarding temporary and permanent disability to claimant on his new injury claim then under SAIF's control even though that claim was then and had since July been in a denied status.

Can this puzzle now be unraveled? We think so. We start with a finding that claimant suffered no injury, new or otherwise, while employed by NQC. Claimant unequivocally testified there was no injury, trauma or onset of significantly increased symptoms at that job; rather, claimant's story was one of generally constant and gradually worsening back symptoms throughout 1978 and into 1979 following his accepted back injury claim while working at BC.

Claimant's brief on Board review argues for a finding of a new injury at NQC based on the following reasoning: (1) Drs. West and Yamodis opined that claimant sustained a new injury at NQC; and (2) "although claimant cannot recall an injury sustained while employed by [NQC, these medical opinions] based upon the acquaintanceship with the patient, patient's history and evidence gained on surgery can suffice to establish the occurence of such an event." Regardless of the abstract merit of this proposition, we are not persuaded here. The opinions of Drs. West and Yamodis are not supported by any meaningful statement of claimant's history or other reasons. We will not assume that claimant's history given to his doctors was completely inconsistent with his testimony at hearing. This record cannot and does not support a finding of a new injury at NQC.

There being no compensable claim against NQC, represented by SAIF as a non-complying employer, it follows that the Compliance Division's ORS 656.307 order dated July 23, 1979 must be set aside and further follows that the Evaluation Division's Determination Order dated October 9, 1979 must be set aside.

The next issue is whether claimant has proven an aggravation claim against BC or whether his February 1979 back surgery is not compensable at all. We find the most persuasive medical reports to be Exhibits 12, 14 and 57 all of which conclude that claimant's herniated disc most likely originated at the time of his early 1978 claim while working at BC. The reason given--and we find it cogent--is that claimant repeatedly reported in history to all his doctors, as he testified at hearing, that he had constant and worsening low back symptoms throughout 1978 and into 1979 without any known trauma or sudden increase of symptoms. Claimant has proven his aggravation claim against BC to our satisfaction.

The final issue is whether the Referee erred in rating permanent disability. We conclude that he did. There is no medical report in evidence that even comes close to being a "closing report" from which the extent of permanent disability can be determined. Instead, as is understandable in the context of this case, all reports focus primarily on the aggravation versus new injury, BC versus NQC issue. We find no basis in the record for rating permanent disability at all, much less supporting the permanent disability award made by the Referee.

ORDER

The Referee's order dated August 29, 1980 is reversed and the following is substituted in its stead:

(1) Boise Cascade's denial of responsibility for claimant's aggravation claim, dated May 11, 1979 is set aside and that claim is remanded to Boise Cascade for processing and payment of benefits as provided by law, except that Boise Cascade shall not pay temporary total disability compensation for any period beyond June 18, 1979 unless and until so ordered by duly issued Determination Order in accordance with paragraph 4 of this Order;

(2) The SAIF Corporation's denial on behalf of Northwest Quality Cabinets dated July 11, 1979 is affirmed;

(3) Boise Cascade shall reimburse the SAIF Corporation for all benefits paid pursuant to the Determination Order dated October 9, 1979 and the Referee's order dated August 29, 1980;

(4) The ORS 656.307 order of the Compliance Division dated July 23, 1979 and the Determination Order of the Evaluations Division dated October 9, 1979 are set aside;

(5) Boise Cascade shall, within 60 days of the date of this order, submit claimant's aggravation claim to the Evaluation Division for closure pursuant to ORS 656.268;

(6) Upon issuance of a Determination Order as contemplated by paragraph 5 of this Order, Boise Cascade shall be entitled to a setoff for sums reimbursed to the SAIF Corporation pursuant to paragraph 3 of this Order;

(7) The Referee's award of a $750 claimant's attorney's fee payable by Boise Cascade because of late denial is adopted by the Board solely because it has already been paid.

NICOLAS E. TESORO, Claimant
Hayes P. Lavis, Claimant's Attorney
Mildred Carmack, Defense Attorney

WCB 80-05277
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Leahy's order which granted claimant compensation equal to 192° for 60% unscheduled disability. The employer contends this award is excessive.

Claimant is a 63-year-old man raised and educated in the Phillipine Islands. He has been in the United States for about eight years except for about two years of that time spent back in his home country. He has college degrees in Business Administration and in Civil Engineering. His primary occupations have been in the office management field. He also has experience as a marine surveyor. In October 1979 claimant was working for Bumble Bee Seafood when he was exposed to smoke at a fire in the plant. The fire occurred in some plastic material; the record does not reveal the type of plastic. Over a ten to twenty minute time span, while helping extinguish the fire, he inhaled quantities of smoke.
By April 1980 Dr. Reich was of the opinion claimant had developed bronchiolitis obliterans directly related to smoke inhalation resulting in "severe obstructive airway disease." In June 1980 Dr. Lawyer confirmed Dr. Reich's diagnosis with an overall impression of "very severe airway obstruction with borderline bronchodilator response." Dr. Lawyer reported spirometry tests revealed vital capacity of 1.35 liters, 35% of predicted, FEV-1 of 1.51 liters, 18% of predicted. The claimant complains of dyspnea even when at rest, worse on activity.

The sole issue before us is the extent of claimant's unscheduled permanent partial disability.

There is no question that claimant is severely impaired as a consequence of the inhalation of smoke. We find Dr. Lawyer's medical findings provide the best data upon which an impairment rating can be established under OAR 436-65-675. That rule states:

> "Any documented impairment to a body part or system which is not considered in the foregoing sections will be rated according to the most current edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, 1977 edition, or other authoritative medical reference. In no case, however, will such references be used where they conflict with the Oregon statutes."

We do not go beyond the American Medical Association Guides seeking authoritative medical references; such references may exist, but we know of none and the parties have cited none on the subject of respiratory impairment. We also find the 1977 edition of the AMA Guides is the "lastest" edition.

On page 75 of the Guides is found Table 8--Classes of Respiratory Impairment. We find claimant is a Class 4 based on the tests of ventilatory function and dyspnea. We hold that claimant's respiratory impairment is 60%. We further hold that it is entirely appropriate for a lay person to apply medical findings to the appropriate criteria contained in the Guides. It would be inappropriate for a lay person to make the medical findings, that is, substitute lay interpretation of ventilatory data for that of the physician (in this case, Dr. Lawyer).

Having found the claimant's respiratory impairment to be 60%, we will factor that finding into the guidelines contained in OAR 436-65-600 through 436-65-608 as follows: Age 63 = +10; education (col- lege graduate) = -20; work experience (determined by the job claimant had at the time of the injury) = +3; adaptability (medium to sedentary) = +15; mental capacity (no evidence in record except successful completion of two college degree programs) = 0; emotional and psychological = 0; labor market findings (14% based on claimant's overall SVP of 7 and GED of 6) = +1. Combining the 50% impairment with all other factors produces 56% disability under the rules.

Although claimant has the office management field still open to him, his disability precludes him from a large segment of the labor market and thus has a negative impact on his wage earning capacity. Arguably, claimant is not precluded from a large segment of his labor market since his experience is in "management." Nonetheless, claimant is precluded from all heavy work, virtually all medium work and a large portion of light work. Taking all the evidence into consideration, we conclude the 60% unscheduled permanent partial disability awarded by the Referee was proper.

ORDER

The Referee's order dated July 10, 1981 is affirmed. Claimant's attorney is awarded $300 as and for a reasonable attorney's fee, payable by the carrier.

JERRY A. TRUITT, Claimant
David Hittle, Claimant's Attorney
Mildred Carmack, Defense Attorney

WCB 80-11076
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Daron's order which affirmed the denial of chiropractic services between June 22 and September 26, 1980. Claimant contends these treatments result from his compensable 1972 injury; the employer contends the complaints stem from a non-compensable psychiatric disorder.

The Board affirms and adopts the order of the Referee.

ORDER

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

ROBERT WHITE, Claimant
Evohl F. Malagon, Claimant's Attorney
Ridgway K. Foley, Jr., Defense Attorney

WCB 81-00760
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Neal's order which awarded claimant 20.25 degrees for 15% loss of his right foot. Claimant contends he is entitled to an award of compensation equal to at least 67.5 degrees for 50% loss of function of the right foot.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 24, 1981 is affirmed.

JOHN D. WOODERSON, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-04056
January 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Neal's order which awarded an additional 80 degrees for a total award of 112 degrees for 35 percent unscheduled permanent partial disability. Claimant contends entitlement to temporary total disability from May 5, 1980 through August 13, 1980 and that his award of permanent partial disability is inadequate.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 24, 1981 is affirmed.

GOLDA J. WOODS, Claimant
Merten & Saltveit, Claimant's Attorneys
Frank A. Moscato, Defense Attorney

WCB 81-01194
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Leahy's order which upheld the employer's denial of compensation. Claimant contends the Referee's Opinion and Order ignores claimant's evidence that there was a sufficiently close temporal connection between the lifting of a 33 pound patient "log book" and the onset of pain and ignores the medical evidence that claimant's earlier back strain was an entirely different problem than her current herniated and bulging disc.

The Board affirms and adopts the Referee's order.

ORDER

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

JOHN ZOLOTAS, Claimant
Nicholas D. Zafiratos, Claimant's Attorney
Katherine O'Neil, Defense Attorney

WCB 81-00017
January 29, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Foster's order which affirmed Crown Zellerbach's denial of carpal tunnel syndrome. Claimant contends there is sufficient medical testimony to causally relate the claimant's carpal tunnel syndrome to his employment.

The Board affirms and adopts the Referee's order.

ORDER

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

HAZEL A. HINES, Claimant
Charles Seagraves, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-05355
February 3, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF seeks Board review of Referee Baker's order which found that the disability award should most appropriately be assigned to the September 16, 1977 claim and granted claimant an award of 112° for 35% unscheduled disability.

We adopt the Referee's recitation of the facts as our own.

We agree with the Referee that the disability award is properly part of the September, 1977 claim. However, we agree with SAIF that the award granted is excessive.

Claimant had pre-existing back problems. The diagnosis from the 1977 injury was acute lumbar sprain. Claimant was treated with only traction, with no surgical intervention. Claimant was to perform only light work because of the 1977 injury, but has in fact returned to bus driving, albeit a mini bus.

We conclude that claimant's loss of wage earning capacity resulting from the September, 1977 injury, to be 20% unscheduled disability. This award is based on an application of all the factors relevant to disability determination under OAR 436-65-680, et. seq., and comparing this case to other similar cases.

ORDER

The order of the Referee, dated January 14, 1980 is modified. Claimant is hereby granted an award of 64° for 20% unscheduled disability. This award is in lieu of all prior awards. The remainder of the Referee's order is affirmed.

GERALDINE REYNOLDS, Claimant
Industrial Indemnity, Defense Attorney

Own Motion 81-0312M
December 7, 1981
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an alleged worsened condition related to her industrial injury of July 3, 1975. Claimant's aggravation rights have expired.

Claimant, in her request, indicated that she had been hospitalized by Dr. Berselli in September 1981. To date no report has been received from Dr. Berselli.

We conclude claimant is entitled to have her medical services paid for by the carrier pursuant to ORS 656.245 for conditions related to her July 1975 injury. However, claimant is not entitled to have her claim reopened as she has voluntarily retired from the labor market and is therefore no entitled to compensation for temporary total disability.

IT IS SO ORDERED.

GERALDINE REYNOLDS, Claimant
Industrial Indemnity, Defense Attorney

Own Motion 81-0312M
January 12, 1982
Amended Own Motion Order

The Board issued its Own Motion Order in the above entitled matter on December 7, 1981 and ordered the payment of medical services to be paid by the carrier pursuant to ORS 656.245. We declined to reopen the claim for the payment of compensation for temporary total disability because the lack of information concerning claimant's employability and concluded she had voluntarily retired from the labor market.

Claimant has requested that we reconsider. Based upon a reconsideration we find that the medical evidence indicates that claimant's continuing problems arising out of her industrial injury was in part the reason for her non-employment and find she is entitled to compensation for temporary total disability.

Claimant is entitled to compensation for temporary total disability commencing September 9, 1981 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

GERALDINE REYNOLDS, Claimant
Industrial Indemnity, Defense Attorney

Own Motion 81-0312M
February 3, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Amended Own Motion Order dated January 12, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

GERALDINE REYNOLDS, Claimant
Industrial Indemnity, Defense Attorney

Own Motion 81-0312M
February 3, 1982
Order to Show Cause

By Amended Own Motion Order dated January 12, 1982 the Board ordered claimant's claim reopened commencing September 9, 1981. A copy of that Amended Own Motion Order was duly mailed to Industrial Indemnity Company, the carrier responsible for claimant's compensable injury of July 3, 1975.

Claimant advises the Board that Industrial Indemnity has not yet made any payments of compensation as required by the Board's January 12, 1982 Amended Own Motion Order.

NOW, THEREFORE, IT IS ORDERED that Industrial Indemnity Company show cause, if any exists, by written response filed with the Board within ten days why the Board should not apply to the Circuit Court for a citation of contempt because of the apparent refusal by Industrial Indemnity Company to comply with the Board's January 12, 1982 Amended Own Motion Order and/or why the Board should not now assess penalties pursuant to ORS 656.262(8).

MOUIN J. SALLOUM, Claimant
SAIF Corp Legal, Defense Attorney
Industrial Indemnity, Defense Attorney
Marshall Cheney, Claimant's Attorney

WCB 80-08445 & 80-09601
February 3, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Gemmell's order which affirmed the SAIF's denial of August 29, 1980, approved the Determination Orders of February 22, 1980 and April 11, 1980 and remanded claimant's claim for an injury of August 7, 1974 to Industrial Indemnity with compensation for temporary total disability commencing April 9, 1981 and until closure is authorized.

The Board affirms and adopts the Referee's order. By a letter dated December 29, 1981 the respondent requested that we address the issue of claimant's failure to serve the parties by his request for review. We have held by prior Board order that if the party requesting review does not serve copies of the request on the opposite parties, that the Board's acknowledgement letter supplies actual notice of the request for review. See Order on Reconsideration of Denial of Motion to Dismiss, Michael J. King, WCB Case No. 80-07413 (December 18, 1981).

ORDER

The Referee's order dated August 27, 1981 is affirmed.

RICHARD L. GALLAGHER, Claimant
Robert Muir, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Scott Terrall, Attorney

WCB 80-04447 & 80-01980
February 4, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Mannix's order which concluded the episode of August 14, 1979 constituted an aggravation of claimant's July 1976 compensable injury and as such was SAIF's responsibility rather than a new injury for which American Hardware Mutual Insurance (American) would be responsible. The only issue raised in SAIF's brief is its contention that the Referee erred in not permitting a post-hearing deposition of one of claimant's treating doctors.

We agree with the Referee's refusal to leave the record open for deposing Dr. Llewellyn. SAIF denied claimant's aggravation claim on February 19, 1980 after investigation that included a taped interview with claimant. On March 31, 1980 Dr. Llewellyn issued a narrative report which essentially espoused the view that claimant had sustained an aggravation. For approximately the next year, so far as this record reflects, SAIF did nothing in terms of discovery or case preparation as regards Dr. Llewellyn.

Then about early April 1981 the attorneys representing SAIF and American agreed they would depose Dr. Llewellyn in his Corvallis office on April 16, 1981. Subsequently, however, at the request of American's attorney, both defense attorneys agreed to depose Dr. Llewellyn immediately after the hearing on April 28.

Notwithstanding this prior agreement, American's attorney objected at the hearing to leaving the record open for the doctor's deposition. After previous cooperation in scheduling and rescheduling the deposition, this flip-flop by American's attorney demonstrates at best lack of professional consideration and at worst blatant gamesmanship. Although we do not countenance such actions, we conclude that SAIF's one-year delay in discovery and case preparation support the Referee's refusal to keep the record open for Dr. Llewellyn's deposition.

SAIF is correct in noting that the Board encourages use of depositions to secure expert medical and vocational evidence. OAR 436-83-400(5). But SAIF ignores OAR 436-83-315, which provides:

> "Each party shall be prepared to produce at hearing all evidence to establish its case. Parties adverse to a request for hearing shall not be permitted to delay resolution of the issues except when continuance is necessary to achieve substantial justice."

This administrative rule is based on ORS 656.283(6), which allows Referees to conduct hearings in any manner which achieves substantial justice.

In this case, the Referee properly ruled that keeping the record open for the deposition of a physician whose reports date back to 1976 and whose reports uniformly supported a finding of aggravation against SAIF would not help to achieve substantial justice. The Referee did not abuse his discretion in so ruling. We reiterate our disapproval of the tactics of American's attorney. Yet SAIF's lack of case preparation for a year or more was even more egregious than American's repudiation of its agreement to participate in a post-hearing deposition.

ORDER

The Referee's order dated April 30, 1981 is affirmed. Claimant's attorney is awarded $400 as attorney fees for services rendered on this Board review, payable by the SAIF Corporation.

BOARD MEMBER McCALLISTER, CONCURRING:

I concur with the majority disposition of the case but would have done so by affirming the Referee without comment.

DONALD HOLCOMB, Claimant
Martin McKeown, Claimant's Attorney
R. Ray Heysell, Defense Attorney

WCB 80-01090
February 4, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Peterson's order which granted claimant an award of permanent total disability retroactive to December 18, 1979. The employer contends that claimant is not permanently and totally disabled and also that his visual disability was not caused or made worse by his industrial injury.

We affirm and adopt the conclusion of the Referee with an additional comment. The employer, in its brief, states:

> "Taking his age, his average learning abilities and the medical reports and physical restrictions that he has, coupled with some very strong transferable skills, make it clear that claimant could become employed."

The Supreme Court in Gettman v. SAIF, 289 Or 609 (1980) reversed the Board and Court of Appeals based on a statement about a claimant's "potential for retraining." The Court concluded that the present tense language of ORS 656.206(1)(a) precludes cancellation of a permanent total disability award based upon a speculative future change in employment status. We conclude in this case, as did the Court in Gettman, supra, that the determination of whether claimant is permanently and totally disabled must be based on conditions existing at the time of the determination.

ORDER

The Referee's order dated May 29, 1981 is affirmed. Claimant's attorney is awarded $650 as and for a reasonable attorney's fee, payable by the employer.

GARY HUNTER, Claimant
MICHAEL LEROY, Claimant
Daniel Dziuba, Claimants' Attorney
Darrell Bewley, Defense Attorney

WCB 79-04980, 79-10169 & 79-10606
February 4, 1982
Order on Remand

On review of the Board's Order dated December 30, 1980. the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated June 30, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

IT IS SO ORDERED.

CLAUDE LYON, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03328
February 4, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Johnson's order which granted claimant 60% unscheduled disability for the psychological consequences of his 1974 left arm injury.

SAIF first challenges the order issued by Referee Peterson in WCB Case No. 77-06675. In that case the Referee set aside SAIF's partial denial and found claimant's psychological condition, first treated in 1978, was a compensable aggravation of claimant's 1974 left arm injury. In an apparent attempt to avoid a rather obvious and serious res judicata problem, SAIF argues without explanation or elaboration that Referee Peterson's order in WCB Case No. 77-06675 was an interim, nonappealable order. We find to the contrary. That order was appealable. That order was not appealed. It is now res judicata.

It is possible that Referee Peterson's order in the prior case may have been incorrect. But the res judicata doctrine protects the integrity and finality of both correct and incorrect prior decisions.

We turn to the question of the extent of claimant's unscheduled disability because of his psychological condition. The most recent Determination Order, dated April 23, 1980 awarded 25% unscheduled disability. In this case, Referee Johnson increased that award to 60% unscheduled disability.

All doctors generally agree that claimant had at least latent psychological problems before his 1974 left arm injury. There was no suggestion that these psychological problems were worsened by the 1974 injury until, four years later, claimant first went to Dr. Luther on referral from his attorney. Dr. Luther has provided active psychological treatment since 1978 with no apparent improvement in claimant's condition.

Claimant has not been employed since his 1974 arm injury nor has he sought any employment. He has been uncooperative in the past with vocational rehabilitation efforts. He was a brief, reluctant participant at the Pain Clinic either unable or unwilling to wean himself from Valium. Claimant is presently enrolled in an authorized program of vocational rehabilitation, studying to be a motorcycle mechanic until that program ends in June 1982.

Claimant is 32 years old with average intelligence and a GED. He is precluded from returning to his pre-injury employment as a carpenter due to his left arm injury alone. The compensation granted for claimant's left arm disability is not here in question. Therefore, the sole issue is the permanent residual psychological disability and its effect upon claimant's loss of wage earning capacity.

It is difficult if not impossible to assess the effect of claimant's psychological condition on his wage earning capacity because he is now engaged in a retraining program, the purpose of which is to enhance his wage earning capacity. Considering this fact together with claimant's relative youth and average intelligence/education, we are not persuaded that claimant has yet proven a loss of wage earning capacity due to his psychological condition that is greater than awarded by the Determination Order of April 23, 1980.

ORDER

The Referee's order dated November 28, 1980 is modified. The Referee's award of 60% unscheduled disability is reversed and the 25% award of the Determination Order dated April 23, 1980 is reinstated and affirmed. The remainder of the Referee's order is affirmed.

BOARD MEMBER LEWIS, DISSENTING:

I respectfully dissent from the majority opinion and would affirm and adopt the Referee's order. I would also award $500 as a reasonable attorney's fee, payable by SAIF Corporation.

ALBERT W. OWEN, Claimant
Gerald Wygant, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06481
February 4, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Mulder's order that set aside SAIF's denial of claimant's aggravation claim. Claimant has filed no brief in defense of the Referee's order.

Claimant was first compensably injured in April of 1976 when he twisted his low back. He was discharged from his doctor's care "completely asymptomatic" and a Determination Order awarded only about one week of temporary total disability.

From May of 1976 to April of 1980, claimant sought no treatment for the 1976 injury. During that period of time he was gainfully employed at various moderately vigorous jobs.

The present aggravation claim arose in April of 1980. Claimant was digging a hole in the yard at his home when his back "went out." Claimant returned to the care of Dr. Torres who had treated him at the time of his 1976 injury.

Whether claimant has proven a causal nexus between his 1976 industrial injury and the April 1980 incident depends upon whether Dr. Torres' opinion is found to be persuasive. The mere passage of four years after apparent complete recovery from the prior injury makes the question of causation complex. On deposition, Dr. Torres provides no comprehensible explanation of his opinion that the April 1980 "exacerbation" is causally related to the 1976 minor low back strain. We are not persuaded by Dr. Torres' opinion.

ORDER

The Referee's order dated May 1, 1981 is reversed.

BOARD MEMBER LEWIS, DISSENTING:

I respectfully dissent from the majority opinion based on the opinion of claimant's treating doctor that claimant had an exacerbation of his 1976 injury and that it was not a new injury. This opinion is also based on the Referee's finding that the claimant was credible and with evidence before him that claimant had proven a compensable aggravation.

I would, therefore, affirm and adopt the Referee's opinion and order.

LUTHER BAILEY, Claimant
Thomas Howser, Claimant's Attorney
R. Ray Heysell, Defense Attorney

WCB 79-03803
February 5, 1982
Order on Remand

On review of the Board's Order dated August 11, 1980. the Court of Appeals reversed the Board's Order.

Now, therefore, the above-noted Board Order is vacated, and this claim is remanded to the carrier for acceptance and payment of benefits in accordance with law.

IT IS SO ORDERED.

TERRY L. GREEN, Claimant
Robert W. Muir, Claimant's Attorney
Jerry McCallister, Defense Attorney

WCB 79-07224
February 5, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Seifert's order which upheld the denial of the SAIF Corporation for claimant's leg injury sustained when he was struck by a motor vehicle while crossing a street on what claimant calls a "coffee break."

We affirm and adopt the Referee's order with the following additional comments. Claimant was working as a dock hand unloading shrimp boats the day of his injury. Claimant's friend, Terry Martin, came to where claimant was working to get claimant to go with him to the District Attorney's office on a personal mission. Claimant testified: "And he [Martin] said he'd talked to my employer and he [the supervisor] said I couldn't leave until we'd finished [unloading] the boat." Claimant testified that he nevertheless left the employer's premises for his "coffee break" before the boat was completely unloaded, leaving his partner to complete the job alone. Considering this factor together with the other's identified in Jordan v. Western Electric, 1 Or App 441 (1970), we agree with and adopt the Referee's analysis.

ORDER

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

LEWIS TWIST, Claimant
Peter Hansen, Claimant's Attorney
David Horne, Defense Attorney

WCB 80-07811
February 8, 1982
Order of Abatement

The Board has received a motion for reconsideration of its Order on Review dated January 26, 1982.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and appellant is requested to file a response to the motion for reconsideration within ten days.

IT IS SO ORDERED.

VESIA LOVING, Claimant
Ronald W. Atwood, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08433
February 9, 1982
Order of Abatement

The Board has received a motion for reconsideration of its Order on Review dated January 21, 1982.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and respondent is requested to file a response to the motion for reconsideration within ten days.

IT IS SO ORDERED.

ANTHONY J. MIMS, Claimant
David Edstrom, Claimant's Attorney
Mildred Carmack, Defense Attorney

WCB 80-09417
February 9, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Pferdner's order which upheld the employer's denial of claimant's low back claim.

A threshhold question involves the record before the Board. The Referee's order states:

> "Both Dr. Clark and his associate, Dr. Chester B. Hanley, testified at the first hearing. At the second hearing, during closing argument, claimant indicated he was not relying on any of the medical testimony adduced at the hearing, so none of the testimony of those physicians has been considered in achieving this opinion."

However, both parties' briefs cite parts of the testimony of Drs. Clark and Hanley. Upon noting this apparent discrepancy between the Referee's order and the parties' briefs, the Board requested supplemental briefs on the question of whether this medical testimony should be considered by the Board on review.

Claimant's attorney responded that he has no memory of disclaiming reliance on the testimony of Drs. Clark and Hanley during arguments to the Referee; also, it is apparently the position of claimant's attorney that, even if he made such a disclaimer, the testimony is nevertheless part of the record and should be considered on review. The employer's attorney agrees that the doctor's testimony is properly part of the record but argues we should not consider it because of the alleged disclaimer claimant's attorney made during closing argument before the Referee.

The problem is that there is no transcript of the closing argument and thus nothing in the record to show whether any disclaimer was made. The Board has instructed the Referees in this kind of situation to go back on the record and note for the record admissions, stipulations, withdrawal of issues, etc., made during counsels' closing arguments. That was not done here. We have considered the testimony of Drs. Clark and Hanley on Board review.

On the merits, we agree with the Referee that claimant has not proven by a preponderance of the evidence that he injured his back at work during unwitnessed lifting incidents on either September 9, or 10, 1980. Claimant first reported to his doctors on September 10, giving a history of back pain for the prior two or three days. Claimant had played in a semi-professional football game on September 6. In numerous respects claimant's testimony was significantly impeached. Claimant's chiropractors contribute little; based on virtually the same examination results, they first diagnosed "collapsed colon" and later diagnosed a back injury. Like the Referee, we are not persuaded claimant has sustained his burden of proof.

The Referee's order dated March 4, 1981 is affirmed.

MICHAEL R. PETKOVICH, Claimant
George M. Jenks, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02623
February 9, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Pferdner's order which upheld the SAIF Corporation's denial of claimant's claim for aggravation of his back condition.

There is a preliminary issue. The Referee ordered SAIF "to ascertain whether or not claimant was working between April 17, 1980 and June 19, 1980" and if not, to pay temporary total disability benefits for that period. However, no issue had been raised or evidence presented about claimant's entitlement to additional temporary total disability benefits. Referees (and this Board too) should concentrate on making the best possible decisions on the issues raised by the parties without the distraction of volunteering decisions on issues not raised. The Referee's gratuitous order to ascertain whether claimant was working, etc., will be reversed.

Regarding the issue that was framed by the parties, i.e., claimant's aggravation claim, we agree with the Referee's conclusion. The last arrangement of compensation was in February, 1980. Comparison of the medical reports generated before that date with those generated after that date shows no real change in claimant's condition. There is no evidence of a worsened condition nor a need for further medical treatment, other than a possible need for back surgery which claimant declines to undergo. The evidence suggests the possibility that the February, 1980 stipulation awarded claimant insufficient permanent partial disability, but an aggravation claim is not a permissible means of collaterally attacking the last arrangement of compensation. The evidence suggests the probability that claimant needs vocational rehabilitation assistance, but an aggravation claim is not a permissible means of seeking such.

ORDER

The Referee's order dated June 26, 1981 is affirmed in part and reversed in part. That portion upholding SAIF's denial dated March 19, 1981 is affirmed. The remainder of the Referee's order is reversed.

ORLANDO RUSSELL, Claimant
Larry Bruun, Claimant's Attorney
Ronald Atwood, Defense Attorney

WCB 80-10049
February 9, 1982
Order on Reconsideration

The Board issued its Order on Review in the above entitled matter on December 31, 1981. By cover letter dated January 11, 1982 the employer moved for reconsideration. The Board on January 14, 1982 abated its Order on Review to enable us to give due consideration to the motion.

We now modify our prior order. We find that the increased award granted for claimant's foot injury was improper and affirm the Determination Order's scheduled award. We decline the employer's request that we set forth our analysis used to arrive at the award granted for unscheduled disability. Our order states that we applied the guidelines set forth in OAR 436-65-600, et seq, and identifies the principal factors relied upon.

Our Order on Review dated December 31, 1981 is hereby modified accordingly.

ORDER

Our increased foot award is reversed and the scheduled award by Determination Order is affirmed. The remainder of our order is affirmed in its entirety.

CARL UNDERCOFFER, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
Mary T. Danford, Defense Attorney

WCB 80-11357
February 9, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant requests Board review of Referee James' order which affirmed the carrier's denial of a back injury claim.

The Referee found:

> "Resolution of this claim depends on credibility. Both of the employer's witnesses were quite credible. Claimant was not. His wife's testimony was not so credible that it overcomes the testimony of the employer's witnesses." (Emphasis added)

We decline to substitute our judgment for that of the Referee.

The Board affirms and adopts the Referee's order.

ORDER

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

DANIEL BALL, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05133
February 12, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The claimant seeks Board review and SAIF Corporation cross-requests review of Referee Knapp's order which granted claimant an award of 32° for 10% unscheduled disability. The claimant contends the award granted by the Referee is inadequate. SAIF contends: (1) claimant did not prove entitlement to the award granted by the Referee; (2) the Referee did not rule on SAIF's request for authority to offset an overpayment of temporary total disability against the permanent partial disability award; and (3) the Referee erred when he granted claimant's motion that SAIF be ordered to pay certain of claimant's attorney's costs.

We accept the Referee's recitation of the facts as our own.

We find the evidence supports the Referee's determination of permanent disability. The award granted by the Referee is consistent with the evidence and the guidelines for determining permanent disability found in OAR 436-65-600, et seq. Neither claimant, in contending the Referee's award was too low, nor SAIF, in contending the Referee's award was too high, cite, discuss or even mention the relevant rules at OAR 436, Part 65.

SAIF's contention regarding the overpayment-offset issue is correct to the extent the Referee did not rule on that issue. That error is cured by reference here to OAR 436-54-320:

> "Insurers and self-insured employers may recover payments of benefits paid to a worker on an accepted claim from benefits which are or may become payable on that claim."

SAIF's request to offset is granted pursuant to the rule.

The Referee granted claimant's attorney's post-hearing motion seeking insurer payment of certain costs. Those costs are:

(1)	Medical report from Dr. Chen	$35.00
(2)	Eleven collect telephone calls from claimant	12.87
(3)	Photocopying and postage	2.60

In John A. Mayer, 7 Van Natta 278 (1971), the Board said:

> "There is no basis in either law or Board regulation to impose the hearing costs incurred by one party upon the other party."

We adhere to that decision here and add that in Clara M. Peoples, 31 Van Natta 134 (1981), and Richard Stinton, 29 Van Natta 469 (1980), we ruled that the cost of a medical report generated solely for litigation purposes is the claimant's responsibility. By parity of reasoning, the costs of telephone calls, copy expense and postage expense are likewise claimant's responsibility. Indeed, claimant's fee agreement with the attorney who represented him at hearing so indicated: "Client to pay all costs."

ORDER

The Referee's order dated May 27, 1981 is affirmed. The claimant's motion of June 16, 1981 allowed by the Referee is disallowed. SAIF's request to offset an overpayment of temporary total disability against the permanent partial award is granted pursuant to OAR 436-54-320.

LARRY W. BRUCE, Claimant
David Hytowitz, Claimant's Attorney
Stephen R. Frank, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09781 & 80-11106
February 12, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Hartford Insurance Group, the carrier for Lancer Mobile Homes, requests Board review of Referee Leahy's order which affirmed SAIF Corporation's denial of claimant's claim for an injury of July 31, 1980. The Referee also recommended to the Board that it remand claimant's aggravation claim to Hartford for acceptance and payment of compensation. Hartford contends claimant's current condition is the result of a new injury sustained on July 31, 1980 and that SAIF is the responsible carrier.

The only issue in this case is aggravation versus new injury. There is no question of compensability.

We find that the "last injurious exposure" rule is controlling in this case. Based on that rule we reverse the order of the Referee. The rule states:

> "The 'last injurious exposure' rule in successive-injury cases 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.
>
> "If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. . .
>
> "On the other hand, if the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in

> the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. . ." (Emphasis added)

Drs. Post and Misko consistently used the term "aggravation" when discussing claimant's current condition. However, the terminology used by a doctor is not necessarily to be translated into a legal conclusion. Dr. Post indicated:

> "My basic feeling remains that the pre-existing condition predisposed Mr. Bruce to increased back problems with relatively minimal injuring forces. . . . On the other hand, his history is clear that a specific event took place at work which led to recurrence and increase in low back discomfort necessitating further medical treatment. I would conclude, therefore, that the mechanism of injury on July 31st or August 1st 1980, even though minimal, contributed to a worsening of his condition." (Emphasis added)

Dr. Misko stated:

> "While Mr. Bruce had considerable underlying pre-existing lumbar spine disease prior to his incident of injury early in August 1980, it is apparent that his injury at that time did increase his symptomatology and probably worsened his underlying condition. I agree with Doctor Post that although this contribution was minimal, it certainly contributed to the worsening of his condition." (Emphasis added)

Claimant's testimony is consistent with the conclusion reached by the doctors. Claimant indicated that he had no substantial problems with his back in the several months preceding his July, 1980 injury. He also indicated that the pain which resulted from the incident was different from that prior to the injury.

We conclude from the evidence before us that claimant has shown he sustained a new injury on July 31, 1980. We are persuaded that the reports of claimant's doctors sufficiently satisfy the criteria set forth in the "last injurious exposure" rule for new injury cases. The Referee's order should be reversed.

ORDER

The order of the Referee dated July 17, 1981 is reversed. SAIF's denial of September 25, 1980 is reversed. Claimant's attorney is awarded a reasonable attorney's fee equal to $1,000 for his services before the Referee and the Board, payable by SAIF.

PATRICK J. CANEPA, Claimant
Joel Lieberman, Claimant's Attorney
Roger Warren, Defense Attorney

WCB 81-06342
February 12, 1982
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.

GEORGE E. CLARK, Beneficiaries of
Keith D. Skelton, Attorney
Benton Flaxel, Attorney

WCB 76-06736
February 12, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated January 26, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

GEORGE E. CLARK, Beneficiaries of
Benton Flaxel, Attorney
Keith Skelton, Attorney

WCB 76-06736
February 12, 1982
Order on Application for Attorney's Fee

The Board issued its Order on Remand herein on January 26, 1982. Claimant's attorney thereafter requested an amendment to that order providing for an award of an attorney's fee for services rendered in behalf of claimant before the Board on remand from the Court of Appeals which included an evidentiary hearing before a Referee.

Claimant's application is denied. Dianne L. James, WCB Case No. 77-06474, Order on Application for Attorney's Fee (January 11, 1982); Kristie Paresi, WCB Case No. 77-06083, Order on Petition for Attorney's Fee (January 19, 1982).

IT IS SO ORDERED.

BEULAH C. CLEMENS, Claimant
Brian Welch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00898
February 12, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of that portion of Referee James' order which affirmed the SAIF Corporation's partial denial of claimant's request for a specific brand of nerve stimulator. Claimant wanted a "Stimtech." SAIF had provided and was only willing to provide a "Neuropulsator."

The Referee's conclusion on the transcutaneous nerve stimulator issue was:

> "Claimant's desire for a Stimtech stimulator is understandable but the Referee is persuaded by Dr. Norton's analysis of the situation and concludes that the desired change in stimulators is primarily founded on convenience to the claimant rather than actual need. Accordingly the denial will be affirmed."

We disagree and reverse.

We conclude on this record that SAIF should provide claimant with the "Stimtech" transcutaneous nerve stimulator. All the medical opinions, except Dr. Norton's, on the "stimulator" issue either recommend or urge SAIF to provide claimant with the "Stimtech" nerve stimulator. Dr. Norton, SAIF's consultant, made a contrary recommendation, stating:

> "On the basis of the information I have been able to review regarding the clinical condition for which this device was described, and the application of it that has been made clinically, I do not believe that purchasing a different model is warranted for the purpose of providing a miniaturized device and a continuous power source. By the statement of the physical therapy department, the purchased device was effective and compatible with their instructions as to the duration of use. Technically, the device cannot be considered an obsolete piece of equipment."

Dr. Norton technically may be correct, but on this record we think his concern over the "hardware" may have resulted in something less than a common sense evaluation of the issue.

Drs. Loosli, Ragsdale and Tesar recommended SAIF provide the "Stimtech" type stimulator. Their reasoning was that it worked for the claimant. The claimant testified the "Stimtech" worked for her whereas the "Neuropulsator" SAIF provided did not. On balance, we are persuaded that the weight of evidence supports claimant's position.

The Referee's order dated July 28, 1981 is modified in accordance with the above findings. Claimant's attorney is awarded $600 for services rendered at the hearing and Board level in prevailing on SAIF's partial denial, payable by SAIF.

MICHAEL DOBBS, Claimant
Raymond Smitke, Claimant's Attorney
Gary Hull, Defense Attorney

WCB 80-06514
February 12, 1982
Order on Review

Reviewed by the Board en banc.

Timjoist, Inc., by and through its insurer, Industrial Indemnity, requests Board review of Referee Neal's order which approved the SAIF Corporation's denial of September 19, 1980 and rejected Industrial Indemnity's July 15, 1980 denial and ordered the claim accepted. The issue on review is whether the claim is compensable and if so, which of the two carriers is responsible. Industrial Indemnity contends that the claimant's current difficulties are the result of an aggravation of a previous injury sustained while he was employed by Viking Industries which is insured by SAIF. SAIF asserts that claimant has failed to prove compensability against either employer/carrier and its denial should be affirmed.

The January, 1981 report of Dr. Raaf accurately summarizes the claimant's medical history. Claimant's back difficulties can be traced to an automobile accident which occurred in 1967. The diagnosis at that time was possible lumbosacral spasm. The next instance of back difficulty was noted by Dr. Kahn, to the effect that claimant was admitted to the Kaiser Hospital in December, 1973 due to back strain. A myelogram performed in January, 1974 was negative. The claimant was again examined by Dr. Kahn in October, 1974, who diagnosed low back strain. There is no indication in the record of further back difficulties until December, 1976 when claimant was treated for "chronic recurrent back strain." Claimant was seen at Permanente Clinic in September, 1978 for low back pain. Claimant complained at that time that it felt like a "nerve is pinched" in the right leg. The diagnosis was chronic lumbosacral strain.

In August, 1979 claimant began working for Viking Industries as a glazer and punch operator. In September, 1979 he suffered a compensable back injury while lifting patio door panels. Dr. Calhoun diagnosed lumbosacral strain. A Permanente Clinic note in September, 1979 states that claimant suffered "fairly severe sacral pain" and notes that numbness in the left leg is transient. The impression was possible herniated disc or possibly some cauda equina involvement. Another Permanente Clinic note in September, 1979 advises claimant is suffering moderate to severe lumbosacral pain radiating down the entire left leg to the foot, and "suspect early disc." Another note of September, 1979 indicates radiating pain into claimant's left leg and complaints that the leg felt "dead." Apparently by October, 1979, claimant felt better and was released for work that month.

During October, 1979 he returned to work with a new employer, Timjoist, as a gluer and offbearer. In May, 1980 claimant complained that his back was bothering him. He was examined at Meridian Park Hospital by Dr. Berselli. Dr. Berselli noted that the low back pain was secondary to a lifting episode at work but noted no radicular symptoms. The diagnosis was acute low back strain. Claimant was readmitted to the hospital in June, 1980 following an exacerbation of low back and left leg pain. A myelogram revealed a "large disc herniation at level L4-5." A lumbar laminectomy and diskectomy was performed in July, 1980 by Dr. Berselli.

The Referee stated in her order that she preferred to rely on witnesses and medical testimony more than the claimant's testimony because he had been inaccurate at the hearing and had not been honest with either employer concerning his prior back problems. The Referee gave controlling weight to the report of the Orthopaedic Consultants of December 11, 1980 which stated:

> "The degree of impairment that he has now which can be attributed to his accident of May 8, 1980 is mildly moderate. We do not think that the trouble he had with his back prior to that date in any way was a factor in necessitating the treatment he has received since May of 1980 and that treatment, of course, included a laminectomy which has been described." (Emphasis added)

The Referee noted, however, that the Orthopaedic Consultants probably had an incomplete history of claimant's back difficulties. The Referee held that, based on Dr. Raaf's and Dr. Berselli's opinions, even a minor incident could bring on a herniated disc, that claimant's twisting motion at work "could have" contributed slightly to the disabling condition and that, therefore, Timjoist was responsible.

After thoroughly considering all the relevant evidence, the Board finds that responsibility for claimant's surgery and any resulting time loss should have been assigned to SAIF.

Dr. Berselli stated in his October, 1980 report that:

> "The cause of the herniated disc was due, I think, to his industrial injury which occurred on the 18th of May, 1980.

Dr. Berselli was deposed and on deposition, as the Referee noted, Dr. Berselli was not aware of the claimant's previous back problems at the time that he reached the above quoted conclusion. When confronted on the issue of causation following a reevaluation of claimant's past medical history, Dr. Berselli retracted his previous conclusion and refused to be pinned down on that issue, but seemed to imply that the herniation occurred earlier following radicular symptoms when he testified:

> "A. I really can't give an opinion, this patient has had a long history of back pain and intermittent leg pain. Exactly what episode caused the disc to protrude, I can't say. By history it would seem that he had leg pain prior to his lifting episode of May, 1980, so other than that, I can't really say which episode, specifically, caused it. As I indicated, it is a degenerative problem which evolves over a long period of time, generally speaking." (Emphasis added)

Dr. Raaf reviewed all the medical reports concerning claimant's back difficulties and issued a very thorough report in January, 1981. Dr. Raaf specifically disagreed with the unexplained conclusion of the Orthopaedic Consultants regarding causation. Dr. Raaf was of the opinion that claimant's protruded disc was "coming on over a long period of time;" and that the original disc injury could have occurred with the 1967 automobile accident. We assume that Dr. Raaf is not suggesting that the actual herniation took place in 1967 in view of the fact that the 1974 myelogram was negative. The remainder of the text is informative on the subject of herniated discs in general but not on the issue of causation of this specific one. Dr. Raaf, later in January, 1981 reported:

> "I think it is probable that sooner or later it would have been necessary for the patient to have an operation for a protruded disc whether he was gainfully employed on the job or working around the house doing daily chores."

Again, however, Dr. Raaf is noncommittal on the principal issue of causation other than that claimant was suffering from a general degenerative process.

The only other medical report dealing with causation is that of the Orthopaedic Consultants. As we previously noted, however, this report appears to be based on an incomplete medical history. In addition, we have previously stated that mere conclusory statements regarding causation are generally unpersuasive. Robert L. Green, 32 Van Natta 54 (1981). We, therefore, attach little weight to this report.

We find that the Referee's conclusion that claimant's activity while employed at Timjoist "could have" contributed to the causation if his disabling condition is not adequately supported in the record. There is a dearth of evidence in the record indicating that any type of incident occurred at Timjoist. The claimant and his supervisor at Timjoist were at odds during the hearing concerning the alleged incident, and, as noted, the Referee found the claimant to be less than credible. The best that can be said of the matter is that claimant's back was bothering him at work on May 21, 1980.

We are persuaded that the medical evidence supports a finding of an aggravation of claimant's injury of September 12, 1979. We find the evidence concerning radicular pain to be the most persuasive on the question of when the disc herniation likely occurred. Dr. Berselli was questioned at his deposition on the significance of the role of radiating leg pain and ruptured discs:

> "Q. Okay, and if it were indicated that subsequent to the injury at Viking Door that there was a numbness or radiation of leg pain, would it indicate to you that disc condition or rupture existed at that time?

"A. It would certainly be that you would think very strongly that there was a herniation."

Dr. Berselli's statement is strengthened by the fact the examiner at Permanente Clinic diagnosed a suspected disc problem and noted substantial radicular pain upon examination in 1979. Dr. Berselli also noted at the deposition that it was not unusual for a person to suffer a herniated disc and then have a period of remission. Combining this evidence, which strongly indicates the disc rupture occurred following the 1979 injury, with Dr. Raaf's opinion that ". . . sooner or later enough disc material would have extruded regardless of his activity. . ." and viewing this evidence in the light of Calder v. Hughes & Ladd, 23 Or App 66 (1975), we find that whatever minor incident, if any, occurred at work for Timjoist in May of 1980, did not contribute even minimally to claimant's disability. We find claimant has presented the requisite proof of a causal relationship between his disability and the Viking injury.

The Referee relied on the "could have" contributed rationale found in Inkley v. Forest Fiber Products, 288 Or 337 (1980). We have applied the minimal contribution rationale found in Calder.

There may be some abstract reason to discuss the distinction and we may in some future similar case do so, but here it is sufficient to state that under application of either rationale Viking/SAIF is responsible for this claim.

ORDER

The Referee's order dated March 9, 1981 is reversed. The July 15, 1980 denial of Industrial Indemnity is approved, and the September 19, 1980 denial of the SAIF Corporation is set aside. The claim is remanded to SAIF for the payment of compensation in accordance with law.

SAIF Corporation shall reimburse Industrial Indemnity any compensation paid to claimant or in his behalf, pursuant to the Referee's order.

Claimant's attorney is awarded $350 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

JIMMY FAULK, Claimant
Peter E. Baer, Claimant's Attorney
R. Kenney Roberts, Defense Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 81-0217M
February 12, 1982
Own Motion Order on Reconsideration

Both the SAIF Corporation and claimant have requested reconsideration of the Board's Own Motion Order dated January 8, 1982 which ordered reopening of claimant's January 10, 1971 injury claim.

Claimant's motion can be dealt with briefly. We ordered claim reopening effective upon claimant's August 17, 1981 hospitalization. Claimant asks that we order claim reopening retroactive to September 18, 1980. Having reconsidered the matter, we decline to do so. Claimant also asks that we order attorney fees at this time. That request is premature. Hazel Stanton Lovell, 31 Van Natta 69 (1981).

SAIF's motion contends that responsibility for claimant's 1981 hospitalization should have been assigned to Employee Benefits Insurance Company (EBI). On reconsideration, we agree.

On January 10, 1971 claimant slipped and fell during the course of his employment with Master Chemical Corporation (MCC), insured by SAIF, and sustained an injury to his back and neck. A Determination Order of June 22, 1972 awarded 5% unscheduled permanent partial disability. On March 28, 1973, while employed by Independent Motor Transport (IMT), insured by EBI, claimant fell on his hip. A hearing was requested pursuant to ORS 656.307 to determine carrier responsibility on the basis of aggravation or new injury. EBI subsequently accepted responsibility for the 1973 injury. A November 12, 1974 Determination Order awarded claimant 10% unscheduled permanent partial disability for low and upper back.

Following EBI's acceptance of the 1973 injury, a series of protracted proceedings followed involving claimant's request for hearing from the Determination Orders for the 1973 injury, and EBI's attempt to join MCC and SAIF in a hearing on the issue of extent of claimant's injury. During these proceedings, claimant's award from the 1973 injury was increased to 50% unscheduled permanent partial disability. Eventually the case made its way to the Court of Appeals. The court ruled that the claimant's then present "disability" was the result of a new injury, and therefore the responsibility of EBI. Industrial Motor Transport v. Faulk, 54 Or App 77 (1981).

Claimant underwent surgery on August 17, 1981. On July 20, 1981 claimant requested the Board to exercise its own motion jurisdiction and order reopening of the January 1971 claim in order to allow for the necessary surgical and related expenses due to claimant's 1981 hospitalization. Medical reports dated April 15, 1981 and October 28, 1981 by Dr. John Blosser indicated that claimant's previously undiagnosed condition was the result of the original 1971 injury.

On January 8, 1982 the Board issued its Own Motion Order reopening the 1971 claim, and thereby assigning responsibility for claimant's hospitalization to SAIF. Reconsideration was requested by SAIF on February 4, 1982.

Following reconsideration of the matter, the Board has determined that it erred in ordering reopening of the 1971 claim. In Crosby v. General Distributors, 33 Or App 543 (1978), the claimant suffered an injury in 1971 for which he was awarded 20% unscheduled permanent partial disability. In 1973 claimant sustained a second injury, covered by a different insurer, for which he received an additional 30% unscheduled permanent partial disability. Claimant thereafter filed an aggravation claim based on the 1971 injury. The court, in denying the claim, ruled that the "last injurious exposure rule" applied, stating:

> "Where a subsequent injury contributes independently to a claimant's disability, the first injury is effectively superseded and the latter insurer is solely liable for the entire disability." (Emphasis added.) 33 Or App at 545.

In the current case, the Court of Appeals has determined that claimant suffered a new injury in 1973 and for which claimant received a permanent disability award. It is, therefore, clear that rightly or wrongly, the 1973 injury was found to have contributed to claimant's disability, and that finding is now res judicata. We, therefore, find, based on Crosby, that at least in a situation where some permanent disability is found in relation to the new injury, that the insurer on the risk at the time of that injury is liable for any subsequent worsening or need for medical care where the same bodily part is involved. We leave to another day the issue of whether or not the same rule would apply in a situation where a claimant suffers no additional permanent disability as a result of the new injury.

ORDER

The Board's Own Motion Order dated January 8, 1982 is vacated. Claimant's request for reopening of his 1971 injury (SAIF Claim No. C205050) is denied. Claimant's request for reopening of his 1973 injury (EBI Claim No. C7302421) is allowed, effective August 17, 1981, and that claim is remanded to EBI for processing any payment of benefits until closure pursuant to ORS 656.278.

SHERMAN HAMMOND, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-06042
February 12, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Seifert's order which found that claimant was still permanently and totally disabled as of June 12, 1980. A Determination Order, issued on that date on re-evaluation of claimant's status, terminated claimant's permanent total disability award and awarded compensation equal to 96 degrees for 30 percent unscheduled low back and excretory system disability; 75 degrees for 50 percent loss of right leg; and 75 degrees for 50 percent loss of left leg.

SAIF has raised two issues on review. It first contends that the rule of Bentley v. SAIF, 38 Or App 473 (1979), which places the burden of showing change of permanent total disability status on the employer/carrier, should only apply when initially requesting re-evaluation, and that once the order terminating permanent total disability status issues, the burden then shifts to the claimant at the hearing. The Board has previously considered and ruled on this issue adversely to SAIF's position in Angel B. Albarez, 33 Van Natta's 598 (1981).

SAIF additionally contends that if the burden of showing change in permanent total disability status belongs to it, that this burden has been met. In Bentley, the court stated:

> "In an unscheduled disability case, the degree of disability is measured by the loss of earning power, which is a combination of physical and mental disability and employability in the current job market. [Om. cit.] It follows, in order to reduce the disability award, there must be a material change since the last award in one of the physical or mental factors that relate to claimant's earning capacity." (Emphasis added)

The issue before the Board is therefore whether there has been a material change since claimant's last award, in one of the physical or mental factors that relate to earning capacity.

Earning capacity has been defined as the ability to obtain and hold gainful employment in the broad field of general industrial occupations. Ford v. SAIF, 7 Or App 549 (1972). The provisions in ORS 656.205(5) for re-examination of permanent total disability awards indicate that permanent total disability is based on existing occupational abilities, and that adjustment is appropriate if the claimant is no longer permanently incapacitated from regularly performing work at a gainful and suitable occupation. Gettman v. SAIF, 289 Or 609 (1980).

The Board concurs with the Referee, that there has been no material change in the claimant's condition such as to affect his earning capacity. With regard to claimant's physical condition, the report of the Orthopaedic Consultants dated February 11, 1978 stated:

> "His condition is essentially unchanged from what it was a year ago; he is still permanently and totally disabled."

Claimant was examined by Dr. Henry Storino at the Callahan Center on April 10, 1980. The examination revealed:

> "...rather severe motor and sensory residuals from the cauda equina injury sustained in 1974. The patient has bilateral "floppy feet," with rather marked atrophy of the musculature below the knees, and in addition quite a bit of atrophy of the gluteal musculature."

Dr. Storino additionally found hypesthesia and hypalgesia of those dermatomes from L4 through S1, numbness of feet and legs, found that claimant frequently lost his balance due to impaired position sense in both feet and residual urological symptoms. Dr. Storino also found that the claimant was straight-forward and well motivated.

Dr. Leland Cross of the Good Samaritan Rehabilitation Center examined claimant on July 14, 1980. Dr. Cross noted that back and leg pain regularly interfered with claimant's sleep, and the type and amount of work have a significant bearing on the level of pain. Dr. Cross further related that plastic AFO shells and high top shoes were necessary in order to prevent claimant from falling down due to poor leg and sensation control below the knees and notes additional urological problems which contribute to limitations in the labor market.

The sum of the medical evidence indicates to us that claimant's physical condition has changed little from the date of the order allowing claimant compensation for permanent total disability.

With regard to the non-medical factors that relate to earning capacity, we find that there has been no material change established by SAIF. On vocational testing, claimant did well but it was his expressed desire to continue with his long term pre-injury goal of becoming a potter. Intellectually, the claimant was found capable of performing in 54 of the 62 occupational ability pattern areas and capable of learning many different vocational tasks.

During the course of the hearing, SAIF produced a vocational rehabilitation counselor, Rodney Isom, to testify regarding the claimant's potential employability. The witness related that there were some very limited employment opportunities for the claimant in southern Oregon. Upon cross-examination, however, it became apparent that the witness was not sufficiently familiar with the claimant or his physical impediments to make an appropriate determination. There was also testimony for SAIF by Bill Moberly, a job developer for Pacific Rehabilitation Associates. The witness testified that there was one firm that "might" have an interest in

talking with the claimant regarding a job in pottery sales, and another firm that manufactured small glass items that was a potential employer. The witness also indicated that it may be possible for the claimant to work in the electronics industry. The same limitations which applied to Mr. Isom's testimony apply to Mr. Moberly's equally well.

As previously noted, the burden is on SAIF to establish a material change. The evidence indicates that there has been no change in claimant's condition from a medical standpoint. We also concur with the Referee's conclusion that there has been no material change established by SAIF with regard to the other factors which relate to earning capacity. SAIF has clearly established that claimant has the mental ability to perform a number of vocational tasks. The critical point of focus, however, comes when combining mental aptitude with the effect of the claimant's physical impairments in order to determine employability. It is here that there has been a failure of proof on the part of SAIF. SAIF has only established that there may be one or two jobs which the claimant could be capable of performing. This does not establish a material change in claimant's earning capacity.

The Board would also comment on one additional point. It appears throughout the record that claimant's only expressed vocational desire is to be a potter. In Jimmy A. Smith, 29 Van Natta 182 (1980), the claimant was attempting to establish his status as permanently and totally disabled. The claimant refused to consider any occupational courses other than the ministry. The Board found that claimant voluntarily limited his choice of employment to the ministry, and that the evidence indicated claimant would be able to secure other types of employment if he had attempted to do so. The Board therefore refused to find the claimant permanently totally disabled.

In the current case, we have found that the evidence is insufficient to result in a change in claimant's status. This is not to say, however, that the evidence in the future will be insufficient. A finding of permanent total disability is not res judicata. If the evidence on the next re-evaluation indicates that claimant would be able to engage in other occupational endeavors, and that he voluntarily limited himself to limited self-employment as a potter, there would then be a strong basis for terminating claimant's permanent total disability award.

ORDER

The Referee's order dated January 9, 1981 is affirmed. Claimant's attorney is awarded $375 as and for a reasonable attorney's fee, payable by SAIF.

ISABEL D. MARTINEZ, Claimant
Robert Udziela, Claimant's Attorney
David Horne, Defense Attorney

WCB 79-03053 & 80-06054
February 12, 1982
Order of Dismissal

WCB Case No. 79-03053 is now before the Board on remand from the Court of Appeals. WCB Case No. 80-06054 is now pending before the Hearings Division on claimant's request for hearing.

Based on the parties' disputed claim settlement approved by the Board this date, both cases are dismissed with prejudice pursuant to ORS 656.289(4).

IT IS SO ORDERED.

JOHN C. MAY, Claimant
David Hytowitz, Claimant's Attorney
Edwin A. Harnden, Defense Attorney

WCB 80-10376
February 12, 1982
Order on Review

Reviewed by the Board en banc.

The employer seeks Board review of Referee St. Martin's order which granted claimant compensation for temporary total disability from September 5, 1980 through September 23, 1980, assessed a penalty of 15% of that amount and ordered an employer-paid attorney's fee.

The issue is the meaning of the following portion of ORS 656.268(2):

> ". . . . employer must continue to make temporary total disability payments until termination of such payments is authorized following examination of the medical reports submitted to the Evaluation Division under this section."

Claimant contends that authorization contemplated by this statute can only be in the form of a duly issued, written Determination Order.

The employer contends a phone call made to the Evaluation Division on about September 16, 1980 resulted in being told that when a Determination Order was issued it would terminate entitlement to temporary total disability compensation effective September 5, 1980; therefore, the employer argues, it had authorization within the meaning of ORS 656.268(2) to terminate temporary total disability compensation.

The majority concludes the employer's position is both wrong and unreasonable. By clear statutory implication and previously unquestioned long-standing custom, "authorized . . . under this section" means a written Determination Order. This provides for the certainty of a written public record rather than case-by-case problems of proof about what was said during a telephone conversation. A written Determination Order provides a date certain to start the one year period in which to request a hearing, ORS 656.319(2), and to start the five year aggravation period, ORS 656.273(4). As far as the majority of the Board is concerned, the Evaluation Division has no business providing telephonic previews of coming attractions.

From our conclusion that the employer's position is both wrong and unreasonable, it follows that the Referee's analysis was correct. We affirm and adopt the Referee's order.

ORDER

The Referee's order dated September 24, 1981 is affirmed. Claimant's attorney is awarded $400 for services rendered on Board review, payable by the employer.

MEMBER McCALLISTER DISSENTING IN PART:

I agree with the majority that the Evaluation Division should not preview Determination Order findings over the telephone, unless they communicate the clear message that information provided by telephone has no legal effect and that any action regarding a worker's entitlement to compensation must await receipt of the written Determination Order. I further agree that the employer's reliance on the "telephone Determination Order" was wrong. I disagree with the majority opinion that the employer's actions were unreasonable. I would affirm that portion of the Referee's order which awarded claimant additional temporary total disability but would reverse on the penalty issue.

RONALD QUEEN, Claimant
Rick W. Roll, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Katherine O'Neil, Defense Attorney

WCB 79-09182 & 80-03422
February 12, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Crown Zellerbach, a self-insured employer, requests Board review of Referee Gemmell's order which reversed its denial and found that the incident of September 21, 1979, constituted a new injury. SAIF Corporation cross-requests Board review protesting the Referee's Interim Order which held that claimant's aggravation rights had not expired in his medical only (non-disabling) claim since it was not submitted to the Evaluation Division for closure and thus for which no Determination Order ever issued. The Referee also denied claimant's request for penalties and attorney's fees due to SAIF's alleged unreasonable denial and/or interference and blocking of issuance of an Order Designating Paying Agency pursuant to ORS 656.307.

We conclude that the Referee properly placed responsibility on Crown Zellerbach on a new injury basis. We conclude that the Referee correctly declined to award penalties and attorney's fees against SAIF under the facts, circumstances and legal contentions in this case. We affirm and adopt those portions of the Referee's order.

We also agree with the Referee's Interim Order upholding Hearings Division and Board jurisdiction over claimant's request for hearing on SAIF's denial of his aggravation claim and we borrow liberally from that Interim Order in the balance of this order.

Claimant sustained a compensable injury to his right wrist on July 31, 1971 while employed by Crown Zellerbach which was then insured by SAIF. Claimant's workers compensation claim was accepted by SAIF, medical treatment was provided, but no time loss was paid. No Determination Order ever issued closing the claim because SAIF did not submit it to the Evaluation Division. In 1979, SAIF denied claimant's aggravation claim of his injury of 1971 and contended claimant did not timely file the claim within the five-year period provided by statute.

The law in effect at the time of claimant's injury in 1971 placed responsibility upon SAIF for requesting claim determination. ORS 656.268. A worker's aggravation rights were set forth in former ORS 656.271, which read in pertinent part:

> "(2) A request for a hearing on increased compensation for aggravation must be filed with the Board within five years after the first determination made under subsection (3) of ORS 656.268..."

In 1973, the aggravation statute was renumbered ORS 656.273 and amended to provide:

> "(3) (a) Except as provided in paragraphs (b) and (c) of this subsection, the claim for aggravation must be filed within five years after the first determination made under subsection (3) of ORS 656.268.
>
> (b) If no determination was made, the claim for aggravation must be filed within five years after the date of injury.
>
> (c) If a nondisabling injury did not become disabling within at least one year from the termination of medical services, the claim for aggravation must be filed within five years from the date of injury rather than the date of any determination issued on the claim." ORS 656.273.

The statutory language remains the same except that subsection (3)(b) quoted above has been renumbered (4)(b) and now reads:

> "If the injury was nondisabling and no determination was made, the claim for aggravation must be filed within five years after the date of injury." ORS 656.273(4)(b).

SAIF contends that the statute should be applied retroactively and that claimant's claim is barred because it was not filed within five years of the date of injury as required by present ORS 656.273 (4)(b). We disagree.

The claim herein was accepted by SAIF and was never closed by determination. This Board in the case of Elizabeth Simmons, 11 Van Natta 282 (1974), explained the procedure used in such cases and addressed the issue raised herein:

> "The Agency soon learned that the great majority of the approximately 100,000 injury claims each year involved only nominal medical care. Realizing that formally closing these claims would result in enormous administrative costs, and because the statute permits the employer to specifically request a determination in any case, the Board concluded an informal 'administrative' closure could sufficiently fulfill and carry out the legislative intent while saving the unnecessary costs. The administrative practice of making 'medical only' closure was therefore developed. In the process, an estimated one million dollars of unproductive administrative

expense, a cost ultimately borne by employers, was saved. It was the Board's position, however, that since no formal written determination order was issued or mailed, the medical only closure did not, under ORS 656.268(4), start the running of the aggravation period."

The Board subsequently and consistently has held that administrative "medical only" closures do not qualify as the first determination made under ORS 656.268. We have held in such cases not only that a worker's aggravation rights have not expired but that said rights will not begin to run until such a determination is issued. Marlo Rediske, 14 Van Natta 74 (1975); Jack Yoes, 14 Van Natta 19 (1975).

Further, the Board recently has reaffirmed its position on this issue in the case of Robert Farance, 30 Van Natta 51. Mr. Farance was injured in 1970, received medical treatment but had no compensable time loss. Claim closure not having been requested by the carrier, no determination order issued. In 1976, the carrier denied his claim for aggravation. The Board affirmed the Referee's order which held that claimant's aggravation rights had not expired.

In conclusion, the aggravation law in effect at the time of claimant's injury in 1971 did not provide for an aggravation period commencing from the date of injury. Former ORS 656.271 provided only for an aggravation period commencing from the time of the initial determination by the Evaluation Division. Our prior decisions have consistently held that "medical only" closures do not qualify as the initial determination under ORS 656.268, and that, for workers whose aggravation rights are determined by the law in effect prior to the 1973 amendments, aggravation rights do not begin to run until such time as a determination under ORS 656.268 has issued. In the case at bar, SAIF did not submit the claim for closure to the Evaluation Division and no determination issued. Therefore, the Referee correctly ruled that claimant's aggravation rights had not expired and that the Hearings Division (and this Board) had jurisdiction to decide the matter on its merits.

ORDER

The Referee's order dated April 9, 1981 is affirmed. Claimant's attorney is awarded $600 for services rendered on Board review, payable by Crown Zellerbach.

ALLAN D. SMITH, Claimant
Douglas D. Hagen, Claimant's Attorney
Daniel L. Meyers, Defense Attorney

WCB 80-08592
February 12, 1982
Order Approving Disputed Claim Settlement

On December 17, 1980 Referee Braverman entered an order affirming the employer's denial of claimant's claim for degenerative arthritis in both of his knees. On August 4, 1981 the Board affirmed Referee Braverman's order. Claimant's appeal is now pending in the Court of Appeals.

Claimant and the employer's representative have executed a disputed claim settlement. The parties moved the Court of Appeals for approval of the disputed claim settlement or, alternatively, to remand to the Board to enter an order either approving or disapproving the settlement.

On February 4, 1982 the Court of Appeals entered an order remanding the issue of approval of the disputed claim settlement to the Board while retaining jurisdiction over the pending appeal (CA No. A 22084) while the Board considered approval of the parties' disputed claim settlement.

Having considered the parties' disputed claim settlement, attached hereto as Exhibit A, the same is hereby approved.

IT IS SO ORDERED.

JACK SUYDAM, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08595
February 12, 1982
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.

GABE BARRERA, Claimant
Mike Ratliff, Claimant's Attorney
George Goodman, Defense Attorney

WCB 81-01660
February 22, 1982
Order of Dismissal

The Board has this day granted claimant's Motion to Dismiss the proceedings which form the basis of the employer's request for Board review (erroneously identified with WCB Case No. 80-03611) filed herein August 12, 1981. Accordingly, the employer's request for Board review is now moot.

ORDER

The employer's request for review is dismissed as moot.

GABE BARRERA, Claimant
Mike Ratliff, Claimant's Attorney
George Goodman, Defense Attorney

WCB 80-03611
February 22, 1982
Order of Dismissal

By motion filed January 19, 1982 claimant has requested dismissal of the present proceedings. See attached Exhibit A.

This is an example of the confusion engendered by this agency and the lawyers practicing before it, attributable in part to the failure to pay heed to case numbers assigned to individual cases and a lack of understanding as to when a separate case number is or should be assigned to a request for hearing. Although our own internal procedures are yet to be perfected, practitioners are expected to avoid creating confusion where none exists.

There is presently pending a request for Board review filed by the carrier, identified by the carrier as WCB Case No. 80-03611. That case, WCB Case No. 80-03611, was closed after issuance of an order by Referee Mulder on January 16, 1981, disposing of an issue of premature claim closure. There was no appeal from that order. These proceedings, therefore, have erroneously been identified with that case number.

The proper case number for the employer's request for review and for the Referee's order which the Board has been requested to review is, as noted above, WCB Case No. 81-01660.

Having now set the record straight in regard to the proper case number for this claim, we turn our attention to the claimant's request for dismissal.

Claimant's motion for dismissal is a request to dismiss that portion of his claim which is also the subject of the employer's request for review. Since the claim is now before the Board on the employer's request for review, the Board will dispose of claimant's motion rather than refer it to the Hearings Division.

Based upon claimant's motion and the attachment thereto, these proceedings are dismissed, and WCB Case No. 81-01660 is hereby closed.

IT IS SO ORDERED.

EXHIBIT "A"

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

In the Matter of the Compensation of		Claim No. C-7823413
GABE BARRERA,	Claimant,	INSTRUCTIONS TO ATTORNEY
EBI COS.,	Insurer,	
LOVENESS CO.,	Employer.	

WHEREAS, the firm of Parks & Ratliff, hereafter referred to as FIRST PARTY, has been retained to represent the interest of GABE BARRERA and BONNIE BARRERA, hereinafter referred to as SECOND PARTIES, in a Workers' Compensation case filed in the State of Oregon, Case #C-7823413; and,

WHEREAS, SECOND PARTIES are of the opinion that it is in their best interest that the proceeding be dismissed due to the stress that is being inflicted upon the SECOND PARTIES by the pending action; and,

WHEREAS, SECOND PARTIES acknowledge that the FIRST PARTY has explained to them there are substantial rights being adjudicated in this case and that a dismissal at this point would terminate those rights, which could preclude SECOND PARTIES from making any recovery whatsoever from the compensation carrier for permnant disability, which is subject to this suit; and,

WHEREAS, SECOND PARTIES acknowledge that they have a right to seek a second legal opinion if they should so desire, and have had ample opportunity to do so;

PARKS & RATLIFF
ATTORNEYS AT LAW
228 NORTH SEVENTH
KLAMATH FALLS, OREGON 97601
(503) 882-6331

NOW, THEREFORE, SECOND PARTIES hereby instruct FIRST PARTY to dismiss the Workers' Compensation Claim at this time, and to take no further proceedings on their behalf; and SECOND PARTIES hereby agree that said dismissal is made from their own free will and without any coercion whatsoever, and that they shall not in the future seek in any respect to hold FIRST PARTY liable for the dismissal of the compensation claim and any loss that may accrue to SECOND PARTIES as the result thereof.

DATED this 30 day of November, 1981.

SECOND PARTIES

GABE BARRERA

BONNIE BARRERA

GEORGE E. CLARK, Beneficiaries of
Benton Flaxel, Attorney
Keith Skelton, Defense Attorney

WCB 76-06736
February 22, 1982
Order Denying Reconsideration:
Application for Attorney's Fee

The Board issued an order on application for an attorney's fee on February 12, 1982 denying claimant's attorney's request for an allowance of an attorney's fee for services rendered before the Board on remand from the Court of Appeals. Claimant's attorney thereafter requested reconsideration of that order.

Claimant's request for reconsideration is denied.

IT IS SO ORDERED.

ROBERT CLOSE, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 81-0080M
February 22, 1982
Order Vacating Own Motion Order

The Board issued Own Motion Orders in the above case on April 6, 1981 and May 13, 1981.

It has come to the Board's attention that the time those orders were issued claimant had a pending request for hearing which is identified as WCB Case No. 81-00952. It has also come to the Board's attention that the contention might be made in WCB Case No. 81-00952 that the Board's Own Motion Orders of April and May of last year in some way determine some or all of the issues raised in WCB Case No. 81-00952.

There was not previously and is not now any intent to determine any issues pending on a request for hearing by way of an own motion order. Therefore, the Board's Own Motion Orders of April 6, 1981 and May 13, 1981 are vacated. Upon the conclusion of WCB Case No. 81-00952, any party who believes the Board should consider granting own motion relief is invited to submit such a request to the Board at that time.

IT IS SO ORDERED.

JON D. DAY, Claimant
John DeWenter, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Katherine O'Neil, Defense Attorney

WCB 80-11371 & 81-01192
February 22, 1982
Order on Application for Additional Attorney's Fee

The Board issued its Order on Review herein on January 29, 1982 affirming and adopting the Referee's order. Claimant's attorney was allowed a carrier-paid attorney's fee in the amount of $250.00.

Claimant's attorney thereafter requested an additional sum as an attorney's fee, submitting an affidavit of time spent and services performed on review.

The salient issue or review, as framed by appellant's brief, was responsibility for claimant's right elbow condition. Claimant raised an issue concerning entitlement to a penalty and attorney's fee but did not prevail on this issue. The primary issue was which one of two carriers is responsible for payment of benefits to claimant. There was no issue of compensability. Claimant's attorney, therefore, was not placed in the position of having to defend claimant's award as in the ordinary situation. Although counsel actively participated in Board review, we question whether his participation was all that meaningful. See OAR 438-47-090(1).

By that as it may, however, claimant's brief is a good work product, and counsel should be compensated to a reasonable degree for services performed. Accordingly, we increase the allowance of the attorney's fee, although not to the extent requested.

ORDER

Claimant's attorney is allowed $200.00 as a reasonable attorney's fee, payable by SAIF. This fee is in addition to that allowed by the Board's order of January 29, 1982, for a total attorney's fee on review in the amount of $450.00.

GAROLD HURLEY, Claimant
Peter McSwain, Claimant's Attorney
Paul Bocci, Defense Attorney

Own Motion 81-0134M
February 22, 1982
Order Vacating Own Motion Order and Determination

The Board entered an Own Motion Order on May 29, 1981 reopening claimant's claim in the above-entitled matter. Subsequently, by Own Motion Determination of December 14, 1981 the claim was closed.

It has since come to the Board's attention that both the Own Motion Order and the Own Motion Determination erroneously referred to an unrelated claim number. The claim that was reopened and reclosed should be identified by only the number shown above.

It has also since come to the Board's attention that at least related and probably overlapping issues were, at the time of the Own Motion Order and Own Motion Determination, and are now pending before in the Hearing Division in WCB Case No. 79-06826. None of the parties advised the Board of this pending WCB case in connection with the request for own motion relief.

In view of the pendancy of WCB Case No. 79-06826, there is a serious question of whether the Board had jurisdiction to grant own motion relief. Even if such jurisdiction existed, we now deem it inappropriate to grant own motion relief when there is a pending, related and unresolved request for hearing. Therefore, the Board's Orders dated May 29, 1981 and December 14, 1981 are hereby vacated.

The Referee in WCB Case No. 79-06826 shall hear all issues to be adjudicated at the hearing presently set for March 5, 1982. In addition, if the Referee awards claimant any increase in compensation, the Referee shall consider whether a setoff for sums paid under the terms of the Board's Orders dated May 29, 1981 and December 14, 1981 is warranted under the circumstances of this case.

IT IS SO ORDERED.

MERLE JOHNSON, Claimant
Peter McSwain, Claimant's Attorney
Brian Pocock, Defense Attorney
Breathower & Gilman, Defense Attorneys

WCB 81-02188 & 80-09738
February 22, 1982
Order Dismissing Request for Review

Charter Ocean Products and its insurer have requested review of Referee Knapp's order of November 9, 1981. The request for review was filed with the Board February 10, 1982, more than 30 days after the date of the Referee's order. It is not timely.

ORDER

The employer/carrier's request for review is dismissed as untimely.

MIKE TOSKOVICH, Claimant
J. Michael Starr, Claimant's Attorney
Ridgway K. Foley, Jr., Defense Attorney

WCB 80-05727
February 22, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer requests Board review of Referee Wolff's order which (1) affirmed a Determination Order issued May 20, 1980 which granted claimant 16.72% binaural hearing loss and (2) awarded claimant penalties and attorney fees for the employer's "unreasonable failure of * * * to provide hearing aid selection assistance and the failure to provide funds to secure a hearing aid for claimant and on account of failure of * * * to pay the bills for Mr. Lamont and Dr. Hagan, * * *."

I

We find there is no basis in this record for assessment of penalties and attorney fees. The record does not support the Referee's conclusion that the employer's processing of this claim was in any way unreasonable. First, we find no evidence that the employer either delayed or refused to pay any medical bills submitted to it. Secondly, we find no evidence that the employer was in any way responsible for delay in providing a hearing aid; certainly there was no refusal. Lastly, we conclude the employer had no legal obligation to provide hearing aid selection assistance to this or any claimant. Nothing in law, or common sense would prevent the employer from providing the assistance if asked; but in this case the assistance was not requested.

The primary disagreement regarding extent of scheduled permanent partial disability is over which of three audiometric test results should be used to calculate claimant's hearing disability. The tests were administered by Dr. Ediger, a specialist in audiology, and the results were as follows:

Date of Test	Hearing Loss
December 18, 1979	21.06
January 2, 1980	6.55
January 29, 1980	16.07

Without explanation, the Evaluation Division adopted the January 29, 1980 test results and issued the contested May 20, 1980 Determination Order which granted claimant an award of 16.72 binaural loss of hearing.

The employer argues on appeal that the January 2, 1980 test results should have been used to determine disability. The claimant argues that December 18, 1979 test results should have been used.

Dr. Ediger, the only expert witness to provide evidence regarding the tests, testified that he was unable to explain the wide fluctuation in the test results. He testified all the test results were "reliable" but believed the January 2, 1980 test results to be the most reliable. The Evaluation Division did not have the benefit of Dr. Ediger's testimony regarding the "best" audiometric test results and relied on his March, 1980 report.

We do not know why the Evaluation Division chose to use the January 29, 1980 test results. We might speculate it was selected because it was the last in a series; or because of Dr. Ediger's March, 1980 report, "The January 29 evaluation showed good intra-test reliability"; or perhaps the middle ground was taken by rejecting the low and the high of the three.

OAR 436-65-565(3) states in part:

> "The best audiometric report currently available will be used for rating compensable hearing loss." (Emphasis added)

We believe "best" in the context of this rule means the report which shows the best hearing acuity (least impairment). Dr. Ediger's opinion is consistent with our interpretation of OAR 436-65-565(3). Thus, we find the Evaluation Division would have used the January 2, 1980 audiometric test results in its computation of claimant's scheduled permanent partial disability for loss of hearing if they had known of Dr. Ediger's subsequent testimony. We believe the Evaluation Division, had it had all the evidence now before the Board, would have taken the January 2, 1980 audiometric test results as the "best." Since they did not, we will.

The Referee's order dated June 22, 1981 is reversed. The claimant is awarded 12.5° for 6.55% binaural hearing loss in lieu of that awarded by the Referee and in lieu of that awarded by the Determination Order issued May 20, 1980.

RICHARD L. GALLAGHER, Claimant
Richard T. Kropp, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 80-04447 & 80-01980
February 23, 1982
Order of Abatement

The Board has received a motion for reconsideration of its Order on Review dated February 4, 1982.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and respondent is requested to file a response to the motion for reconsideration within ten days.

IT IS SO ORDERED.

ALVY OSBORNE, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 82-0023M
February 23, 1982
Own Motion Order

Both the SAIF Corporation and claimant have requested that the Board grant own motion relief. The Board referred both requests to a Referee for an evidentiary hearing and recommendation. The Board, having received the Referee's recommendation and reviewed the record, denies both requests for own motion relief.

Claimant was originally injured in March of 1968 when he received a severe electric shock while working as a lineman for the City of Canby. A series of orders (the nature of which is not completely clear from this record) over the following several years resulted in claimant being awarded 30% loss of the left forearm, 10% loss of the right thumb and 100% loss of the right eye. In September 1973 claimant made an aggravation claim, contending impairment of his upper back/neck/shoulders, impairment of his left eye and hearing loss as a result of the 1968 injury. A Referee's order dated September 30, 1974 set aside a denial of claimant's aggravation claim, finding all of these conditions causally linked to the 1968 injury. On SAIF's appeal from that Referee order, the Board's order on review dated May 6, 1975 affirmed the finding that claimant's left eye condition was causally linked to the 1968 injury and reversed the findings that the upper back/neck/shoulder condition and hearing loss were causally linked to the 1968 injury.

SAIF's present request for own motion relief asks that the Board find claimant's left eye condition not compensable. (The issues are the same regarding claimant's right eye and left eye but SAIF does not refer to claimant's right eye because, we presume, claimant has long since been paid for 100% loss of his right eye and SAIF's only continuing exposure is claimant's left eye.) Claimant's present request is that his upper back/neck/shoulder condition and hearing loss be found causally linked to his 1968 injury. In other words, both parties here seek to relitigate issues that were previously before a Referee in 1974 and before the board in 1975.

Pre-1981 law did permit own motion relitigation of such previously litigated issues. Fields v. Workman's Compensation Board, 276 Or 805 (1976). Oregon Laws 1981, ch 535, sec 32 amends ORS 656.278 by adding a new subsection (5):

> "(5) The provisions of this section do not authorize the board, on its own motion, to modify, change or terminate former findings or orders:
>
> "(a) That a claimant incurred no injury or incurred a noncompensable injury..."

We need not here determine whether "incurred a noncompensable injury" includes a prior determination about the compensable consequences of an injury. Nor need we consider why a prior finding of noncompensability was made invulnerable to own motion modification while a prior finding of compensability was not granted the same protection. Actually, we need not even decide whether the former version of ORS 656.278 or the present version of ORS 656.278 applies in this case because assuming the former (more open ended) version applies, we believe that the reasons underlying the doctrine of res judicata support very sparing use of authority to reverse former findings of compensability or noncompensability only for compelling reasons and based on clear and convincing evidence.

There is not clear and convincing evidence for any modification in this case. Claimant has presented no new medical evidence to support his request for an own motion finding that his upper back, etc., condition and hearing loss are compensable consequences of his 1968 injury.

SAIF's request regarding claimant's left eye has some substance. The prior findings of compensability of claimant's left eye condition were based on the theory that his eye condition was caused by electric shock or burn. SAIF argues: (1) Medical science has advanced in the 14 years since claimant's injury; (2) some doctors now believe claimant has an eye disease called geographic helicoid peripappilary choroidopathy (GHPC) which is quite rare and about which little is known; and (3) based on the presently limited understanding of medical science, there is no known case of electric shock or burn causing or aggravating GHPC.

Had this line of defense been raised when the compensability of claimant's eye condition was first in issue, it may have been enough to raise sufficient doubt so that it could not have been said that claimant carried his burden of proving compensability. However, compensability has previously been found and it is now SAIF's burden to prove the contrary. Cf. Bentley v. SAIF, 38 Or App 473 (1979). Moreover, as previously noted, in the procedural posture of this case we expect proof of the contrary to be by clear and convincing evidence.

We are not persuaded that SAIF's reliance on an exotic disease of generally unknown etiology carries its burden of proof that claimant's left eye condition is unrelated to his 1968 injury.

ORDER

SAIF Corporation's request for own motion relief is denied. Claimant's request for own motion relief is denied.

Claimant's attorney is awarded $2,500 as a reasonable attorney fee pursuant to OAR 438-47-070(1) for successfully defending SAIF's request for own motion relief, payable by SAIF.

CARL UNDERCOFFER, Claimant
Donald R. Wilson, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 80-11357
February 23, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated February 9, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

JOHN R. PETERSON, Claimant
James Francesconi, Claimant's Attorney
David Horne, Defense Attorney

WCB 79-09942
February 24, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The employer seeks Board review of Referee Wolff's order which granted claimant compensation for temporary total disability between December 28, 1979 and March 6, 1980 and additional compensation equal to 160° for 50% unscheduled permanent partial disability. The employer asks that the Referee's order be reversed in its totality.

On September 20, 1977 claimant sustained an industrial injury while cutting trees when he was struck in the face and head by a falling tree branch. As a result of the injury the claimant sustained a laceration of the forehead with a depressed fracture of the outer table of the front sinus, lacerated lip, frontal bone fracture and damage to claimant's teeth and jaw.

The employer takes issue with the Referee's somewhat unusual method of reaching a decision with respect to temporary total disability. We do not find that this method resulted in an erroneous conclusion. The medical reports in the record support the additional temporary total disability granted.

Claimant has previously received awards of temporary total disability inclusively from September 20, 1977 through April 3, 1978 (September 14, 1978 Determination Order) and October 10, 1979 through December 28, 1979 (February 1, 1980 Determination Order). He received 24° for 7.5% unscheduled permanent partial disability as a result of a stipulation between the parties approved on June 13, 1979. The stipulation covered complaints the claimant suffered as a result of his compensable injury including lightheadedness, intermittent tinnitus and intermittent right frontal headaches. Since the stipulation, claimant's condition aggravated in the form of right-sided hemiparesis associated with severe headaches, and claimant was awarded an additional 16° for 5% unscheduled permanent disability by the February 1, 1980 Determination Order.

We agree with the Referee that claimant should be granted more permanent disability compensation based on his aggravation claim but disagree with the amount and method the Referee used.

In regards to the unscheduled disabilities, claimant now complains of occipital (back of the head) as well as frontal (forehead) headaches. His treating doctor, Dr. Lafrance, notes the headaches are progressively severe. Also, Dr. Lafrance notes mild right controfacial paresis.

Taking into consideration the worsening of claimant's physical condition since the last arrangement of compensation on July 13, 1979, claimant's age, education, training, skills and work experience, we find claimant has suffered an additional 48° for 15% unscheduled permanent disability since the date of the stipulation.

The right-sided hemiparesis in claimant's right arm and leg is manifested in right-sided weakenss and reduced fine manipulation in claimant's right hand. Disability to these body areas should be expressed as scheduled awards in this case. Dr. Lafrance opined that claimant's right-sided paralysis is a result of vascular spasms associated with migrain headaches. He relates the paralysis to the original injury and has had extensive testing performed to rule out other causes.

The record shows the right-sided hemiparesis to be mild with the right arm more affected than the right leg. We find claimant has suffered 20° for 13.5% loss of use and function of his right leg and has suffered 40° for 20.8% loss of use and function of his right arm.

ORDER

The Referee's order dated July 2, 1980 is modified:

We affirm the award of temporary total disability for the period between December 28, 1979 and March 6, 1980;

We reverse the award of 160° for 50% unscheduled permanent partial disability and reaffirm the unscheduled awards of 24° for 7.5% approved in the June 13, 1979 Stipulation and Order of Dismissal and 16° for 5% granted in the February 1, 1980 Determination Order. We additionally grant 32° for 10% unscheduled disability for claimant's aggravated head injuries, making a total of 48° for 15% disability compensation granted for claimant's aggravation claim;

Claimant is awarded 20° for 13.5% of the maximum allowed by statute for the loss of use and function of his right leg;

Claimant is awarded 40° for 20.8% of the maximum allowed by statute for the loss of use and function of his right arm;

JUANITA SKOPHAMMER, Claimant
Gary Galton, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 81-0234M
February 24, 1982
Amended Own Motion Order

The Board issued its Own Motion Order in the above entitled matter on September 18, 1981 wherein we found claimant entitled to compensation under the provisions of ORS 656.245 but not entitled to a claim reopening.

By a letter of January 19, 1982 claimant's attorney requested reconsideration indicating that claimant's inability to join the labor market is based, at least in part, on the residuals and treatment arising from her industrial injury. A careful review of the medical evidence does tend to support claimant's contention that she did have ongoing symptoms and pain syndrome that probably precluded employment to some degree.

Therefore, on reconsideration, we amend our Own Motion Order and find claimant is entitled to compensation for temporary total disability from July 19, 1981 until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

MARY BLANCHE, Claimant
Orlin Anson, Claimant's Attorney
Michael Bostwick, Defense Attorney

WCB 79-05195 & 79-05196
February 26, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Foster's order which set aside its denial of compensability for claimant's psychological condition.

This claim originated with an April 1, 1979 form 801 in which the claimant alleges she suffered from "mental abuse." Following a denial of the claim and a hearing on the matter, the Referee initially issued an order upholding SAIF's denial. Thereafter, a protracted series of proceedings followed. The Board in January, 1980, acknowledged an undated request for review from the claimant. In February, 1980 the claimant requested a remand to the Referee on the grounds of newly discovered evidence. This evidence consisted of a letter from the claimant's treating physician, Dr. Hofeldt, which was solicited subsequent to the hearing. In March, 1980 the Board denied the motion on the ground that the letter was not newly discovered evidence. Following denial of the motion, the case proceeded to review, and in May, 1980 the Board issued its Order affirming the decision of the Referee.

The claimant then appealed to the Court of Appeals, and in September, 1980 petitioned the Court for remand to the Board to consider the proffered evidence. The Court allowed the motion. The claimant thereafter filed a motion with the Board requesting remand to the Hearings Referee, which was denied. Claimant then petitioned the Court of Appeals for such an order in January, 1981. Remand to the Referee was ordered by the Court, the Referee issued his Order on Remand on June 26, 1981. That order is subject to this appeal.

The May 26, 1978 report of Dr. Hofeldt summarizes the claimant's medical history. Claimant's symptoms began some twenty years ago following surgery and a serious accident. Unfortunate domestic incidents followed, and she became a recluse, unable to leave her house due to severe depression. She received treatment until approximately 1975. Claimant gradually improved and became involved in a work study program at Chemawa Indian School, but by May, 1978, slipped back into a depressive state. Dr. Hofeldt's diagnosis was "anxious-depressive with a psychophysiological reaction." Hysteria was also a consideration. Follow up psychiatric treatment and medication were prescribed.

In June, 1978, claimant began working for the Department of Vocational Rehabilitation, typing disability determinations. As the Referee noted in his initial order, there is evidence that claimant's supervisor may have harassed her. There is however, evidence to the contrary. Claimant contends that this, and other work-related stress resulted in her breakdown. As previously noted, the Referee initially found that although claimant may have been exposed to an emotional situation, the medical evidence did not establish the necessary causation.

Following the remand for consideration of Dr. Hofeldt's letter of February 5, 1980 and of his deposition the Referee reversed his previous opinion and determined that the claim was compensable. The Referee found that the letter and deposition indicated that claimant's breakdown was caused primarily by the situation at work. We disagree.

Dr. Hofeldt indicates in his letter that he read the Referee's original three page order, which gives a necessarily brief summary of two days and 284 pages of testimony from the original hearing concerning the claimant's work environment. He then proposes a two paragraph opinion based on that brief summary. The doctor offers no explanation of why he apparently had no prior knowledge of claimant's work situation. He relates:

> "In summary threfore, I am of the opinion at this time....that Mary E. Blanche was exposed to a highly stressful situation which contributed to her present depressive and anxiety disturbance."

In SAIF V. Gygi, 55 Or App 570 (1982), the court stated that if conditions at work, when compared to non-work exposure, are the major contributing cause of the disability, then compensation is warranted. The Board found that the evidence at the time of the first hearing failed to establish compensability of the claimant's condition. We adhere to that opinion despite the additionally submitted evidence.

Dr. Hofeldt in his May 21, 1979 report relates that SAIF had requested information regarding the claimant's "industrial accident." Dr. Hofeldt's opinion at that time was that the claimant had a long-term problem of latent schizophrenia with affective and anxiety dysfunction. He states in that report that Dr. Carney, claimant's treating medical doctor, stated in his June 4, 1979 report that claimant's job did not cause her current problems "...which are of a longstanding nature." A psychologist, Dr. Lowery, indicates in his July 9, 1979 report that he also is of the opinion that claimant's problems are of a long standing nature.

The only medical evidence in the record indicating that claimant's job contributed to her present symptoms is the February 5, 1980 letter of Dr. Hofeldt. Upon deposition, however, Dr. Hofeldt indicated that the opinion of that letter had to be considered in light of some substantial deficiencies, specifically, his lack of a sufficient history:

> "Q So I guess at least you have that much information. You do not have a lengthly statement of a summarization of the witnesses' testimony.
>
> A Yes. And I personally feel that in a situation and in a case like this that one would render a wise opinion only after the data were given to you and you could sort it out for yourself. I have a number of questions that were not raised in the Opinion and Order.

It says in here that a number of co-workers testified that in fact she was harassed. An I would like to know the degree of that, exactly what type of harassment that was. There's some brief description of that, but not of any significance."

The doctor also testified:

"A. I think its the same kind of problem as if you were asked to solve a murder case and you were a detective and you were blind-folded. I need good, reliable data. And thats what I need to make any kind of an opinion...And I would be glad at some point in time, again, to rehear or reconsider the degree in which the job related stresses played a part."

It would appear that Dr. Hofeldt in effect discredits his own opinion on the basis of insufficient factual data. The best that he could do was to state that if the Referee's order was an accurate summary, "...then I would have to say that Mary Blanche was exposed to stresses that did contribute to her dysfunctioning which are job-related." We are not persuaded by even this equivocal opinion of a doctor who was supposedly treating claimant for a psychological condition and yet who seems to take the position that he learned more about his patient's medical history from reading a Referee's order than he ever learned directly from his patient.

Since there is no medical evidence linking claimant's job to her breakdown other than Dr. Hofeldt's February 5, 1980 letter which is inconsistent with his prior position and which he disavows to a large extent in his deposition, we find that the claimant has failed to establish the compensability of her claim for occupational disease. Even if we were to accept Dr. Hofeldt's final opinion that the job did contribute to her symptoms, this bare statement is not sufficient to rise to the level of major cause under Gygi.

ORDER

The Referee's order dated June 26, 1981 is reversed. SAIF's denial of June 7, 1979 is affirmed.

ROBERT G. BRANNON, Beneficiaries of
Lawrence Wobbrock, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 77-8011
February 26, 1982
Order on Review

Reviewed by Board Members Barnes, McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Leahy's order which, as far as we are able to discern, ordered SAIF to (1) pay $11,360.21 in outstanding medical bills, (2) pay any unpaid temporary total disability and/or any permanent total disability benefits from February of 1977 to the date of the worker's death, computed at a rate based on the status of the worker as married with one child, (3) pay death benefits for the child of the worker who was born after the date of the original injury, (4) ordered SAIF to pay a 10% penalty on all compensation ordered, and (5) awarded claimant's attorney a fee of $975, payable by SAIF.

In 1965, the deceased worker sustained a variety of compensable injuries including a fractured femur. During surgery, which was necessitated by the injury, claimant suffered a pulmonary infarction as a result of embolism. The Determination Order of July 17, 1969 awarded claimant 20% unscheduled disability and 75% for loss of his leg. This was appealed, and the claim was settled with a modest increase in compensation. Additional permanent partial disability was awarded in 1970 following a hearing in which it was determined that a second myocardial infarction suffered in 1969 was related to the infarction which occurred during the 1965 surgery.

The deceased worker underwent various surgical procedures for his injured leg in 1973 and 1974. In 1975 one leg was surgically straightened, and the other was shortened. The deceased worker was ultimately, in 1975, granted an award for permanent total disability.

At the time of the 1965 injury, the deceased worker and his wife were separated. A divorce was finalized in August 1965. He married his second wife in September 1965. Their daughter was born on July 15, 1970.

SAIF paid compensation to the deceased worker from 1975 until February 1977. These payments included amounts based on his status as married with one child. SAIF informed him in February 1977 that he was not eligible for benefits for his wife and daughter, and amounts were then deducted to correct for "overpayments".

Beginning in May 1977 the deceased worker experienced further difficulties which eventually required amputation of his left toe. In 1978 he suffered two myocardial infarctions. On October 18, 1979 he died. SAIF refused to pay the medical bills for treatment of these conditions.

SAIF first contends that the deceased worker's widow should not receive a component portion of the temporary total disability and permanent total disability paid to the deceased worker during his life since she was not his wife on the date of the 1965 injury. SAIF also contends that temporary total disability and permanent total disability benefits paid to the deceased worker during his life and death benefits should not include any amounts for the daughter as she was not a life in being at the time of the injury. Finally, SAIF asserts that it is not responsible for the $11,360.21 in medical bills on the grounds that claimant failed to prove that the treatments were necessitated by the original injury. Both parties agree that the Workers' Compensation Law of 1965 is controlling to the disposition of the issues in this case.

SAIF contends that Cassady v. SIAC, 116 Or 656 (1926), stands for the proposition that an injured worker cannot enhance his compensation benefits by acquisition of a spouse after the original injury. Therefore, SAIF argues, the compensation paid to the deceased worker during his life may not include benefits for a spouse, married after the date of injury. In Cassady the claimant was attempting to compel SIAC to pay compensation for permanent total disability based on his status as married with two children. At the time of the compensable injury, claimant was unmarried with no children. The Court found that claimant was not entitled to receive additional compensation for his after acquired wife and children. The Court based its decision on Oregon Laws Section 6626 (1920) as it read at the time of claimant's injury. That law provided:

> "Rate of Compensation. When permanent total disability results from the injury, the workman shall receive monthly during the period of such disability:
>
> "1) If unmarried at the time of the injury, the sum of thirty dollars ($30)." (Emphasis added.)

Since the claimant was unmarried at the time of the injury, the statute made it obvious, and the court in Cassady found, that he was not entitled to the added compensation for his wife and children.

We find that the Cassady case is not directly applicable. Unlike Cassady, the worker in this case was married at the time of the injury even though to a different spouse. Therefore, since Cassady involved application of a section of law dealing with workers who were unmarried on the date of the injury we do not find it to be controlling.

The worker's beneficiaries have cited Rosell v. SIAC, 164 Or 173 (1940), for the proposition that the deceased worker's wife should be included in the calculations of temporary total disability and permanent total disability benefits. As noted above, the issue in the current case is calculating temporary total disability and permanent total disability benefits prior to the worker's death, not as in Rosell, entitlement to death benefits. SAIF, in this case, has admitted liability for death benefits under ORS 656.208 (1965). Rosell is, therefore, not directly applicable.

Since there is no controlling case law, we turn to an analysis of the applicable statutes. ORS 656.206 (1965) provided for payment of permanent total disability benefits to a claimant in amounts that related to his status as unmarried, married, married with children, etc. The current version of ORS 656.206 provides for payments based on a wage percentage plus an additional amount for each "beneficiary", rather than creating specific categories as the 1965 statute did.

Since the 1965 version of 656.206 did provide for breakdown based on claimant's status, it is necessary to decide which category applied to the deceased worker in this case.

ORS 656.206(1965) provided:

> "Permanent total disability. (1) 'Permanent total disability' means the loss, including preexisting disability, of both feet or hands, or one foot and one hand, total loss of eyesight or such paralysis or other condition permanently incapacitating the workman from regularly performing any work at a gainful and suitable occupation.
>
> "(2) When permanent total disability results from the injury, the workman shall receive monthly during the period of that disability:
>
> "(a) If unmarried at the time of the injury, $125.
>
> "(b) If the workman has a wife or invalid husband, but no child under the age of 18 years, $155. If the husband is not an invalid, the monthly payment shall be reduced by $30."

Since the deceased worker was married, ORS 656.206(2)(b) would appear applicable. Since he was entitled to benefits when injured, to be calculated on his status as married, he did not lose this entitlement to have his benefits calculated in this manner by his subsequent divorce and remarriage. The statute fails to provide for such a situation, and we are unwilling to add to the statute.

With regard to the issue of calculation of temporary total disability benefits, we find the above reasoning equally applicable. ORS 656.210 (1965) is phrased in a manner nearly identical to ORS 656.206 (1965). Therefore, it is proper to calculate temporary total disability benefits based on claimant's status as married on the date of the injury.

With regard to the issue of payment of temporary total disability and permanent total disability benefits calculated on the basis of claimant's status as married with one child, SAIF contends that Meaney v. SIAC, 115 Or 484 (1925), is dispositive of the issue. We agree with SAIF on this point.

The statutes which the Court construed in Meaney provided that the claimant was not entitled to have his compensation benefits readjusted to account for three children born after the date of the original injury. The Court based its reasoning on the fact that 1925 Oregon Laws, Section 6619, defined "child" in terms that related to child at the time of the injury. The definition of "child" contained in that law remained basically unchanged at the date of the 1965 injury that gave rise to this case. ORS 656.002(4) (1965). Therefore, we find that claimant is not entitled to have compensation benefits for permanent total disability calculated to include his after-born child.

The next issue is entitlement of the after-born child to death benefits. The Meaney case dealt with the issue of increased permanent total disability benefits to a claimant due to children born after the date of the original injury. In the absence of any legislative or judicial indication otherwise, we are reluctant to expand on the holding in Meaney. Death benefits payable under ORS 656.208 (1965) are payable without regard to the needs of the named recipients. It is also to be noted that such benefits are payable independently and are not derivative of the injured worker's rights. Mikolich v. SIAC, 212 Or 36 (1957). One of the major reasons given by the Court in Meaney for not allowing permanent total disability benefits to be increased due to after-born children was the fact that the carrier was required to set up a reserve fund for payment of benefits in a case of permanent total disability. It was said that the insurer could not accurately fix such a fund unless the number of children were known. Meaney, 115 Or at 488. This reasoning does not necessarily apply in the case of death of a worker. The carrier is not obligated to create a reserve until the death actually occurs. ORS 656.456 (1) (1965). Therefore, Meaney should not be controlling in a case of death of a worker.

We conclude that the standards set forth in Meaney should only apply to a situation where a worker on permanent total disability or temporary total disability acquires after-born children. In a case of entitlement to death benefits, we conclude that the reasoning in Rosell which allowed death benefits to a spouse which the claimant married after the injury is equally applicable to allow payment of death benefits for a child born after the injury. We find no logical reason to allow death benefits to a child born before or on the date of injury, and to disallow such benefits to a child born after the date of injury, especially when such benefits were allowed for a subsequently-acquired spouse in Rosell.

SAIF raises as a final issue its liability for $11,360.21 in medical bills. SAIF has failed, however, to cite which specific bills it objects to, but simply contends it is not liable for any of the disputed bills. We agree with claimant that Exhibit 118 authored by Dr. Kiest and Exhibits 117 and 119 authored by Dr. Kliks provide unrefuted evidence that all on-going and additional vascular and cardiac problems and treatment were related to the original 1965 compensable injury.

Although the issue of penalties was not specifically raised by either party to the review, we feel it is necessary to clarify the Referee's order on this matter. We find a 10% penalty assessed against SAIF for its refusal to pay medical bills to be warranted. We find, however, that SAIF's interpretation of the responsibility under the law for payment of all other benefits not so unreasonable as to warrant a penalty.

ORDER

The order of the Referee dated January 19, 1980 is modified. SAIF is ordered to pay the $11,360.21 in outstanding medical bills plus a 10% penalty on such bills. SAIF is also ordered to pay any amounts of unpaid temporary total disability and/or permanent total disability benefits based on the deceased worker's status as married on the date of the injury, and is ordered to pay death benefits for the deceased worker's child. That portion of the Referee's order which ordered SAIF to pay any unpaid temporary total disability and permanent total disability benefits based on the deceased worker's status as married with one child is reversed.

GORDON E. DAHLGREN, Claimant
James Church, Claimant's Attorney
Charles Holloway III, Defense Attorney

WCB 80-00589
February 26, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of that portion of Referee Mongrain's opinion which concluded he is not entitled to claim reopening nor penalties and attorney fees for the carrier's alleged unreasonable failure to timely accept or deny his aggravation claim.

The Referee concluded "that the weight of the evidence does not support a conclusion that the claimant has experienced an aggravation and, therefore, he is not entitled to reopening of his claim." We agree and affirm.

The aggravation claim is controlled by ORS 656.273(7) which states in part: "If the evidence as a whole shows a worsening of the claimant's condition, the claim shall be allowed." (Emphasis added.) On our de novo review, we conclude in this case that the evidence as a whole does not show a worsening of claimant's condition subsequent to the last arrangement of compensation.

As to the issue of claimant's entitlement to penalties and attorney fees for unreasonable delay in denial of the aggravation claim, the Referee concluded:

> "...even though the carrier probably should have entered a specific denial of reopening, I see no basis for an award of penalties or fees."

Because the carrier provided continuing medical services pursuant to ORS 656.245 at all times pertinent to this case and for the further reason we have found the claimant not entitled to claim reopening, we agree with the Referee. No penalties or attorney fees are awarded, ableit the "carrier probably should have entered a specific denial."

ORDER

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

MICHAEL W. DAUGHERTY, Claimant
James Church, Claimant's Attorney
Mildred Carmack, Defense Attorney

WCB 80-10215
February 26, 1982
Order on Review

Reviewed by Board Members Lewis and McCallister.

Claimant requests Board review of that portion of Referee Pferdner's order which granted him an award of 5% (16°)unscheduled permanent partial disability. The claimant contends the record supports a greater award.

We affirm the Referee's order. The Board, in affirming, has not considered the medical reports submitted by claimant with his request for review. See Brown v. SAIF 51 OR App 389 (1981).

The Board affirms and adopts the order of the Referee.

ORDER

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

MARVIN DeVOE, Claimant
Douglas Hess, Claimant's Attorney
Don Swink, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06033 & 80-10625
February 26, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Wholesale Fountain Supply and its insurer, Mission Insurance Company, seek Board review of Referee Ail's order which set aside their denial of responsibility for aggravation of claimant's back condition. Wholesale and Mission contend that claimant suffered a new injury while employed by Rub-A-Dub, a combination car wash and gas station insured by the SAIF Corporation. SAIF argues the Referee's aggravation finding should be affirmed and if affirmed that SAIF is entitled to reimbursement for temporary total disability and medical benefits provided in connection with claimant's new injury claim against Rub-A-Dub. Claimant argues that the Referee correctly found an aggravation and also that, regardless of which insurer is found responsible, he is entitled to penalties and attorney fees for unreasonable denial.

Claimant sustained a low back injury while working for Wholesale Fountain Supply in January of 1979. After being unemployed for a period, claimant began working for Rub-A-Dub and while employed there in May of 1980 he experienced pain in his lower back and down his left leg, the same areas affected by the 1979 injury, while carrying two buckets, each weighing about 25-30 pounds.

On July 14, 1980 Mission denied claimant's aggravation on the ground that claimant had sustained a new injury for which SAIF was responsible. SAIF, on behalf of Rub-A-Dub, initially accepted claimant's new injury claim and paid for time loss and medical services. Indeed, SAIF processed claimant's new injury claim to closing by Determination Order dated November 19, 1980 which

awarded time loss only. But on the same date, November 19, SAIF also revoked its prior claim acceptance and denied responsibility on the ground that claimant's May, 1980 incident and following treatment was an aggravation of his January, 1979 injury and thus the responsibility of Mission.

On the issues of which insurer is responsible and whether claimant is entitled to penalties and attorney fees, we affirm and adopt those portions of the Referee's order holding Mission to be responsible on an aggravation theory and ruling claimant is not entitled to penalties and attorney fees because the entire situation was (and is) sufficiently unclear for either insurer's conduct to be deemed unreasonable.

On SAIF's request for reimbursement for temporary total disability and medical benefits from Mission, we modify the Referee's order. The Referee stated he is not aware of any authority to order adjustments or reimbursement between two insurance companies in insurer responsibility cases. Such authority clearly exists. Orders issued by the Workers Compensation Department pursuant to ORS 656.307 typically provide that the Referee is to make necessary adjustments upon determination of which insurer is responsible for a claim. There is no .307 order issued in this case, but this case is nevertheless the functional equivalent of a .307 case. In such situations, we conclude that the Referees and this Board always have authority to order necessary adjustments and reimbursement upon determination of the responsible insurer.

ORDER

The Referee's order dated April 21, 1981 is modified. Mission Insurance Company is ordered to reimburse the SAIF Corporation for workers compensation benefits paid to or on behalf of claimant between May 24, 1980 and November 19, 1980. The balance of the Referee's order is affirmed. Claimant's attorney is awarded $50 for services rendered on this Board review, payable by Mission Insurance Company.

VICTORIA EDWARDS, Claimant
Michael Strooband, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10862
February 26, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

SAIF Corporation seeks Board review of Referee Wolff's order which found claimant's sinus condition was compensable as an occupational disease.

After de novo review, the Board affirms the order of the Referee. The burden of proof is on claimant to show that her work exposure was the major contributing cause of her disability. Claimant has succeeded in her burden. SAIF v. Gygi, 55 Or App 570 (1982). See also Kay L. Murrens, 33 Van Natta 586 (1981) and Beaudry v. Winchester Plywood Co., 255 Or 503 (1970).

ORDER

The Referee's order dated August 24, 1981 is affirmed. Claimant's attorney is awarded $100 as and for a reasonable attorney's fee, payable by SAIF Corporation.

MARY GIBSON, Claimant
Gary Allen, Claimant's Attorney
Daniel Meyers, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01219 & 81-01220
February 26, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The EBI Company seeks Board review of Referee St. Martin's order which found it responsible for claimant's back condition on the theory of a new injury (WCB Case No. 81-01220). EBI contends that claimant's back condition is not a new injury but rather an aggravation of a compensable injury claimant sustained in April of 1979 while SAIF was on the risk (WCB Case No. 81-01219). We agree with EBI's position and therefore reverse.

Ordinarily the new injury versus aggravation distinction turns largely on medical opinion evidence. There is very little opinion evidence in this record. The principal reports are from Drs. Wright and Borman. Neither offers any objective information relevant to probable etiology. To the limited extent that either offers any opinion on causation, that opinion is based solely on claimant's history.

Claimant testified:

> "Q So, during that six month period was your back then getting a little worse each month that you went along?
>
> A. Yeah.

Q. So, you testified earlier that your back appeared to be worsening some two to three months before December of '80. Is it accurate to describe it as some six months earlier?

A. No. It was worse the last three months. Because it was starting to get -- it wasn't anything I couldn't live with.

Q. Six months earlier?

A. Six months.

Q. But, it was getting worse during that period?

A. I could feel it was getting worse, yes.

Q. Had it got to the point it was really bothering you then some two to three months before December?

A. Yes.

Q. Throughout this period of April of '79 through December of '80, has the pain been in the same location?

A. Yes.

Q. Okay. Has it changed in any respect other than the fact that it has gotten progressively worse?

A. Just the more numbness and the back pain's worse."

We conclude that claimant's testimony is the most relevant and helpful evidence in this case. Claimant's testimony that her symptoms were at all times the same except for a gradual worsening leads us to conclude that claimant's condition is an aggravation of the April, 1979 compensable injury. SAIF was the insurer in April of 1979 and therefore is now responsible for claimant's aggravated condition.

ORDER

The Referee's order dated January 13, 1981 is reversed. EBI's denial of claimant's claim for new injury is reinstated and affirmed. SAIF's denial of claimant's aggravation claim is set aside and the claim is remanded to SAIF for processing in accordance with law. In addition, SAIF is to reimburse EBI for claims expendatures incurred in reliance on the Referee's order. No attorney fee will be awarded to claimant's attorney as he waived the filing of a brief.

DELBERT GREENING, Claimant
Dan O'Leary, Claimant's Attorney
Paul Bocci, Defense Attorney

WCB 80-04633
February 26, 1982
Order on Review

Reviewed the Board en banc.

The employer seeks Board review of Referee Ail's order that set aside its denial of claimant's aggravation claim and ordered payment of interim compensation, penalties and attorney fees.

Claimant first injured his low back in May of 1977. The initial diagnosis was lumbosacral strain. After claimant completed an 18 month vocational rehabilitation program, his claim was closed by Determination Order dated February 8, 1980 which awarded 48° for 15% unscheduled disability. The present aggravation claim arose within a couple months of the February 8, 1980 Determination Order.

March 6, 1980: Dr. Satyanarayan reports that claimant has ongoing subjective complaints and has been scheduled for an electromyogram. The doctor concludes: "At the present time I do not believe that he will be able to return to work until after further workup and examination is completed after the electromyogram."

April 23, 1980: Dr. Satyanarayan repeats the essence of his March report, adding there is now the possibility of a myelogram being done. The doctor concludes: "I am writing this to request you to kindly reopen Mr. Greening's claim for further diagnostic procedures."

May 21, 1980: Claimant submits a request for hearing protesting, "Carrier has failed to pay compensation within 14 days."

May 22, 1980: The employer's Personnel Manager sends a letter to claimant stating, "We will continue to pay medical bills for further diagnostic procedures related to this injury but will not initiate time loss payments." This May letter did not state any reasons for the partial denial and did not include any notice of appeal rights.

July 28, 1980: The employer issues a formal partial denial with stated reasons and notice of appeal rights.

August 7, 1980: Claimant files amended request for hearing raising the additional issue of the validity of the July 28, 1980 partial denial.

The Referee ordered interim compensation was payable from April 23, 1980 to July 27, 1980. The Referee selected the starting date based on the following reasoning: "I do not find the March 6 report of Dr. Satyanarayan indicated claimant's condition has worsened but his April 23 report did indicate an earlier worsening and inability to work as a result thereof." The Referee did not explain the basis of the July 27, 1980 ending date, although it could be inferred from one comment ("The employer failed to issue a proper denial until July 28...") that the Referee concluded that the May 22, 1980 letter was without legal effect.

We disagree with the Referee. We conclude that interim compensation was due and payable from March 6, 1980 to May 22, 1980. Contrary to the Referee, we find Dr. Satyanarayan's March 6 letter to state claimant's condition had worsened (at least in the sense of reporting claimant's subjective complaints), to state that further medical care is necessary (at least in the sense of diagnostic procedures) and to authorize time loss.

Contrary to the Referee, we find the employer's May 22 letter to be an effective denial. Copies of that letter were sent to both claimant and his attorney. We cannot believe there could have been any doubt in either's mind about the employer's position. The employer's May 22 letter did not contain the required statement of factual and legal reasons for the denial, but we do not attach much significance to that omission because denied cases are litigated every day with neither the parties, the Referee or the Board focusing only on the reasons stated in the denial letter.

Omission of notice of appeal rights from the employer's May 22 denial letter conceivably could have rendered it ineffective as a denial. However, we find that theoretical possibility not relevant to this case. Instead, this is a situation substantially like that we confronted in Terry Dorsey, 31 Van Natta 144, 145 (1981):

> "The Board does not agree that SAIF's failure to include notice of appeal rights in its January 24 letter renders that document meaningless. The notice of appeal rights is, of course, to inform a worker of those rights so the worker can decide whether to exercise them. But in this case the claimant had requested a hearing on January 22, 1980--two days before SAIF's denial. Claimant was rather obviously, therefore, not prejudiced by SAIF's failure to include notice of appeal rights that had already been exercised."

Here claimant also exercised appeal rights by filing his May 21 request for hearing even before receipt of the employer's May 22 denial letter. As in Dorsey, claimant was not prejudiced by not being notified of a right he had already exercised. The May 22 denial was effective as a denial and terminated the duty to pay interim compensation.

The next issue is whether there was a tardy payment of interim compensation or a tardy denial. The Referee found a tardy denial. We disagree. Dr. Satyanarayan's March 6 report, which we have found sufficient to be an aggravation claim, was not sent to the employer or its workers compensation carrier, but instead was sent to an employee of the Workers Compensation Department. The only evidence in the record about when Dr. Satyanarayan's March 6 report was received by the employer is some rather vague testimony about receipt in mid-April. While there was then a duty to pay

for previously authorized time loss, the employer's 60 days in which to accept or deny could hardly start to run before it had any notice or knowledge of the aggravation claim--which in this case apparently means in mid-April 1980. The May 22, 1980 denial was timely.

As best we understand the record, no interim compensation was paid before hearing for the period between March 6 and May 22, 1980 or for any other period. In other words, payment of interim compensation was far from timely. We will return to the issue of penalties and attorney fees after considering the other issues.

The principal issue, of course, is whether claimant's aggravation claim is compensable. As previously noted, the claim was based on claimant's on-going subjective complaints and the medical desire for further diagnostic testing. To be distinguished from the claim is the need for further supporting evidence. "If the evidence as a whole shows a worsening of the claimant's condition the claim shall be allowed." ORS 656.273(7). The evidence as a whole in this case does not show

any worsening of claimant's condition for the simple reason that all diagnostic procedures produced negative results. On September 18, 1980 Dr. Satyanarayan reported that myelogram results were normal and claimant's neurological examination was normal. Drs. McNeill and Long and the Orthopaedic Consultants all recommended against surgery for what Dr. McNeill called claimant's "very, very minimal spondylolisthesis." Considering all the evidence, we are not persuaded that claimant has proven his condition worsened since he was declared medically stationary in July of 1978 after recovery from his rather minor back strain of May of 1977.

As an alternative to his aggravation claim, claimant sought a hearing on the extent of disability awarded by a Determination Order dated February 6, 1980 which awarded 48° for 15% unscheduled permanent partial disability. The Referee did not reach the extent-of-disability issue because of his ruling on the aggravation claim. On Board review claimant asks that if we find the aggravation claim not compensable, as we have found, we remand to the Referee to rule on the extent-of-disability issue. We see no reason for a remand. The record was fully developed on the extent issue and we feel it is adequate for us to rule on that issue on de novo review.

The Orthopaedic Consultants rated claimant's impairment from his industrial injury as minimal. The preponderance of the medical evidence indicates claimant is precluded from any segment of the labor market requiring heavy lifting. Claimant was retrained as a draftsman in the rehabilitation program in which he participated for a year and a half but strongly testified he cannot perform drafting work without low back symptoms. Although we have no particular reason to doubt claimant's sincerity, it is impossible to reconcile this testimony with any of the medical evidence. Claimant is 45 years old. He did not complete high school but received his GED in the military. His past work experiences include restaurant work, sawmill, auto mechanical, dairy farm, a weaver, and a general mechanic. Some but not all of these jobs require heavy lifting from which claimant is now precluded. See OAR 436-65-605(2)(a): "Heavy work (frequently up to 50 lbs., occasionally over 50 lbs.)."

Considering all the evidence and applying the criteria of OAR 436-65-600, et seq, we concude claimant would be properly compensated for his loss of wage earning capacity by an award of 80° for 25% unscheduled permanent partial disability. Claimant's attorney is entitled to 25% of the increased compensation granted by this order over that granted by the Determination Order.

We return to the question of penalties and carrier-paid attorney fees because of the refusal to pay interim compensation. The employer offers no explanation or defense of its refusal to pay interim compensation. Under the standards of Zelda M. Bahler, 31 Van Natta 139, 33 Van Natta 478 (1981), we conclude that both the maximum penalty and a carrier-paid attorney fee are appropriate.

ORDER

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

Claimant is entitled to temporary total disability compensation from March 6, 1980 to May 22, 1980, less amounts previously paid. The employer is entitled to a setoff for temporary total disability compensation previously paid under the terms of the Referee's order.

The denials of claimant's aggravation claim dated May 22, 1980 and July 28, 1980 are affirmed.

Claimant is granted 80° for 25% unscheduled permanent partial low back disability in lieu of all prior awards. Claimant's attorney is allowed 25% of the increased compensation granted by this order over that granted by the Determination Order dated February 6, 1980 as and for a reasonable attorney fee.

The employer shall pay claimant a penalty for its unreasonable refusal to pay interim compensation equal to 25% of the temporary total disability compensation due and payable from March 6 to May 22, 1980. The employer shall pay claimant's attorney $500 as attorney fees for its unreasonable refusal to pay interim compensation.

MINER LEE HARRIS, Claimant
Evohl Malagon, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 79-09167
February 26, 1982
Order on Remand

On review of the Board's Order dated April 15, 1981 the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated October 15, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

IT IS SO ORDERED.

ROBERT HEDLUND, Claimant
Ronald Hoover, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10221
February 26, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Neal's order which approved the carrier's suspension of permanent partial disability award payments during a time he was receiving temporary total disability payments while actively participating in an authorized vocational rehabilitation program.

SAIF Corporation, the insurer, had suspended the payments on permanent partial disability awarded by a Referee's order when claimant had subsequently entered the authorized vocational retraining program. The suspension was pursuant to OAR 436-61-050(4) which was subsequently amended and renumbered as OAR 436-61-410(3) through (5) in June of 1980. The earlier version only referred to suspension of payments due under a Determination Order. The more recent version refers to suspension of payments due under a Determination Order, a Referee's order, an Order on Review or a court mandate.

The Referee found that OAR 436-61-410 is procedural and thus retroactive. We agree. Moreover, the Board has previously ruled that as a matter of statutory analysis, without benefit of any administrative rule, payment of a Referee's award of permanent partial disability may be suspended while a claimant is receiving temporary total disability on account of being in an authorized program. Charles C. Tackett, 31 Van Natta 61 (1981). The Referee concluded that SAIF's suspension of permanent partial disability payments was proper. We agree, both for the reason stated by the Referee and for the additional reason stated in Tackett.

ORDER

The Referee's order dated May 19, 1981 is affirmed.

WARREN W. KELLER, Claimant
Rick McCormick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08294
February 26, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Howell's order which granted claimant an award of 40.5° for 30% loss of the left foot, an award of 128° for 40% unscheduled back and neck disability and affirmed the SAIF Corporation's denial of continuing responsibility for claimant's hypertension condition. Claimant seeks greater awards for scheduled and unscheduled disability and argues his hypertension condition should be found compensable.

We affirm and adopt those portions of the Referee's order dealing with the extent of claimant's unscheduled disability and upholding SAIF's denial of continuing responsibility for claimant's hypertension condition.

As to claimant's scheduled left leg disability, we believe the award should be for the leg rather than for the left foot as the Referee did. OAR 436-65-558 and 436-65-532(4) require impairment to be rated in terms of the most proximate radical when two or more radicals are impaired. In this case, there was lower leg impairment (rated as a foot) and permanent shortening of claimant's left leg (rated as leg impairment). The foot impairment rating is converted to a leg rating under OAR 436-65-549. The two leg impairment ratings are then combined to produce a single leg impairment rating.

While not all the information necessary for a complete application of the standards in the rules is contained in this record, it appears that claimant would be properly compensated by an award of 52.5° for 35% loss of use of his left leg.

ORDER

The Referee's order dated June 8, 1981 is modified. Claimant is awarded 52.5° for 35% loss of use of his left leg in lieu of all prior awards. Claimant's attorney is allowed 25% of the increase granted by this order over that granted by the Referee's order as and for a reasonable attorney's fee. The balance of the Referee's order is affirmed.

DWAYNE KESTER, Claimant
Mark Morrell, Claimant's Attorney
Mildred Carmack, Defense Attorney

WCB 80-07576
February 26, 1982
Order on Review

Reviewed by Board Members Lewis and McCallister.

The claimant has requested Board review of Referee Mongrain's order which awarded him 65% unscheduled permanent partial disability for injuries arising out of the industrial accident of August 2, 1977. That being an increase of 25% over the Determination Order of August 11, 1980. The sole issue for review is the extent of permanent partial disability. The claimant contends that he is permanently and totally disabled.

The claimant suffered a serious injury when his log truck left the road and overturned on August 2, 1977. As a result of this accident, claimant suffered a hearing loss found equal to 40.38%, several skull fractures and multiple contusions and a burn. The injuries apparently resulted in the claimant suffering balance difficulties, slowed speech, slowed cognition and some left side dysfunction (hemiparesis).

Claimant was 48 years old at the time of the hearing, and had obtained a GED while in the Air Force. His intelligence has been rated to be in the dull-normal range. His work history indicates that he has worked on ranches and performed aircraft maintenance and repair while in the Air Force, mainly involving sheet metal work. Upon leaving the Air Force, he worked in a mill for several years doing various jobs including trailing off a resaw and planer, and crane driving. Claimant was thereafter mainly involved in truck driving work for various employers up to the time of his accident in 1977.

As the Referee noted, the numerous medical reports indicate that while claimant suffered a serious injury, he nevertheless does retain a moderate degree of physical capacity. Claimant's treating physician, Dr. Thomas E. Klump, in his June 19, 1980 report notes that the claimant is only 48 years old and expressed his desire and opinion that claimant would be capable of performing some type of work. Dr. R. W. Toon of the Callahan Center

expressed his opinion that, "From a physical capacity standpoint, it is estimated that he should be able to handle at least light to medium work as defined by the Dictionary of Occupational Titles." In 1979, after becoming involved in a vocational program, claimant was found to be able to tolerate an eight hour work day from a standing or sitting position quite well. The vocational report of February 26, 1979 also indicates optimism that claimant would be able to handle light work following vocational planning.

As the Referee noted, it appears that the medical and vocational reports do not indicate that the claimant is permanently and totally disabled. The record does reflect, however, the general consensus that the numerous vocational evaluations that the claimant has been involved in since 1978 have concentrated on involving him in jobs that he is unable to adequately perform.

This has been due in a large part to claimant's continued expressed desire to return to his former occupation of truck driving, against the advice of nearly all the medical and vocational experts. The report of the Southern Oregon Medical Consultants of October 17, 1980 indicates that the claimant would be better counseled to function within his limitations and to avoid work that would be dangerous to himself and others. A protected work situation was suggested. The tenor of the medical and vocational reports is that claimant would be able to engage in alternative occupational endeavors were an appropriate attempt to do so made.

Permanent total disability may be based on a combination of medical and non-medical conditions, including age, education, adaptability to non-manual labor and mental capacity as well as labor market conditions, Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Examining all of these factors from a realistic standpoint, we conclude that although the claimant has suffered a substantial loss of earning capacity, that he is not so foreclosed from the labor market that he would not be able to secure gainful and suitable employment were he to make an attempt to find such employment in a vocation more suited to his current limitations, although this is also due in part to the inappropriate vocational guidance provided him.

The claimant has demonstrated his physical ability to perform at various job functions, and, at the time of hearing, was working all day at a sheltered workshop "tailing" a saw. Although claimant's intelligence was rated in the dull-normal range, the Referee noted that he retained a reasonable level of mental ability. The Referee also noted that he presented a reasonable appearance at the hearing without the demeanor of a person who is permanently and totally disabled. We will normally defer to the judgment of the Referee in such matters.

Although the Referee did not find the claimant to be permanently and totally disabled, he did increase the award of the Determination Order to 65% unscheduled disability in view of the overall slowdown of mental processes which would likely affect his ability to find and hold gainful and suitable employment. We agree with the Referee but find that an award of 75% unscheduled permanent partial disability would more adequately compensate the claimant in view of the fact that the communication difficulties which he suffered as a result of his injury would additionally serve to preclude him from a large number of the secondary occupations which he may be physically and mentally able to perform.

ORDER

The Referee's order dated June 2, 1981 is modified. Claimant is awarded 75% unscheduled permanent partial disability to the head. This award is in lieu of and in addition to any previous award of disability to claimant's head.

Claimant's attorney is awarded as a reasonable attorney's fee 25% of the increased compensation made payable by this order not to exceed the sum of $3,000.

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

MICHAEL J. KING, Claimant
Peter Hansen, Claimant's Attorney
Daniel Meyers, Defense Attorney

WBC 80-07413
February 26, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The claimant seeks Board review of Referee James' order which affirmed the carrier's denial of his claim for an injury sustained on July 9, 1980.

The facts of this case have been adequately set forth by the Referee in his order and we will not repeat them in detail here. Suffice it to say that claimant was injured while doing some work on an acquaintance's car in his employer's paint and body shop, using the employer's tools, and with the employer's permission. The issue before us in compensability.

We find this case to be closely on point with Edwin T. Bosworth, 33 Van Natta 487 (1981). In that case the worker was injured while working on a purely personal project on the employer's premises using the employer's tools. We found that the employer permitted this personal work as a bonus for the claimant having managed the employer's business in the employer's absence. We concluded that the injury-producing personal project was thus "functionally, a negotiated element of [claimant's] employment" and the injury was compensable.

In the instant case, the employer allowed his employees to totally rebuild one car per year, using his shop and equipment. Although it was assumed that that "one car" would belong to the employee, it was not necessarily so. In essence it was part of the employer's fringe benefit plan, if you will, to promote good morale. Claimant's injury-producing activity was thus both for the employer's benefit and also was contemplated by the employer, either at the time of hiring or later.

Of prime importance to this case was the employer's acquiescence in claimant's activity. Prior to locking up the shop for the day, the employer talked to claimant about the fact he did not want claimant working on the car. (Claimant was a painter and did not do other types of work for the employer, such as body work or repairs.) Claimant, being somewhat intoxicated, argued with his employer. The employer, fearing "unpleasant consequences," told claimant to hurry up and finish the job and leave the shop as soon as possible. We find this to be unquestionably an act of acquiescence on the part of the claimant's employer.

Claimant has proven entitlement to compensation for his injury sustained on July 9, 1980.

ORDER

The Referee's order dated July 17, 1981 is reversed. Claimant's claim for the July 9, 1980 injury is remanded to the carrier for acceptance and payment of compensation to which claimant is entitled.

Claimant's former attorney is awarded $750 as a reasonable attorney's fee for services rendered at the hearing, payable by the carrier.

JOHN D. KREUTZER, Claimant
Robert Van Natta, Claimant's Attorney
Scott Kelley, Defense Attorney

WCB 80-04208
February 26, 1982
Order on Review (Remanding)

Reviewed by Board Members McCallister and Barnes.

The employer/insurer seeks Board review of Referee Ail's order which found claimant to be permanently totally disabled. The issue is extent of disability. We find the record has been incompletely developed and therefore remand for further proceedings.

Claimant injured his back in May of 1975 and again in October or November of 1975. In November 1975 a laminectomy was performed with removal of a herniated nucleus pulposus on the right at L4-5. Over the following several years, until a Determination Order was finally issued on April 23, 1980, claimant received a variety of additional medical care, pursued various vocational rehabilitation efforts and twice attempted to return to work.

The employer/carrier focuses on the fact that claimant did in fact return to work in arguing that claimant is not permanently totally disabled. Claimant first worked as a machinist from about October of 1977 to about February of 1978. Claimant later returned to work as a supervisor for the employer for whom he had been working in 1975 when injured. This position lasted from about January of 1979 to about April of 1979. The employer/insurer argues that claimant's history of at least some working since his 1975 injuries is inconsistent with an award of permanent total disability. Claimant argues that the fact that he tried working but was unable to do so is even more support for an award of permanent total disability.

We basically agree with claimant. Although the reasons for claimant leaving the positions as a machinist and supervisor are suprisingly poorly developed in the record, the more likely inference--and the inference we draw--is that pain associated with claimant's back condition was a significant reason for leaving both positions. The employer/insurer makes much of claimant's testimony that "drinking" was part of his reasons for leaving the supervisory position. However, when interpreted in context with claimant's testimony that he was drinking alcohol as a

self-administered form of pain medication, we think this only supports rather than refutes our inference that claimant's physical impairment was a large part of the reason for claimant's inability work at even relatively sedentary jobs.

The other area of controversy, as this case has been argued by the parties, is over the relative persuasiveness of the opinions of Dr. Tesar (that claimant is permanently totally disabled) and the Orthopaedic Consultants (that claimant is not permanently totally disabled). Claimant argues Dr. Tesar's opinion is more persuasive because Dr. Tesar is his "treating doctor." However, if Exhibit 40 records all of the contacts between claimant and Dr. Tesar, the doctor did not come into the picture until April of 1978, some three years after claimant's initial injury, and the "treatment" he has rendered for claimant's back condition has been quite limited. The employer/insurer argues that Dr. Tesar's opinion is merely a bald conclusion, unsupported by analysis or stated reasons while the two contrary reports from the Orthopaedic Consultants are fully supported analysis and stated reasons.

If this is all there were to the case, we would agree that the question is close, but would find that Dr. Tesar's opinion combined with claimant's testimony combined with the most telling fact that claimant attempted to work in vain would all lead to the conclusion that claimant is permanent total disability. However, the analysis presented by the Orthopaedic Consultants for a contrary finding identifies the critical void in the present record.

Claimant was injured in 1975. Dr. Tesar's opinion and claimant's testimony were presented five to six years later in 1980-81. The problem, not really addressed by any medical evidence in this record, is: To what extent is claimant's present impairment causally connected to his 1975 injuries and surgery?

The problem is highlighted by claimant's medical care during 1978. An August 1978 x-ray was interpreted to suggest degenerative disc disease in the lower lumbar spine and upper sacral spine. A September 1978 myelogram found degenerative change in most of the lumbar spine and the upper sacral spine; "marked thickening of the ligamentum flavum from L-4 through S-1"; a possible herniated disc at L-5, S-1; and "the possibility of a benign tumor." Dr. Smith's October 1978 reports conclude it is impossible to tell from the myelogram whether claimant's problems are scar formation related back to his 1975 surgery for some new problem such as a ruptured disc at L-5, S-1. And even Dr. Tesar's July 14, 1978 chart note records and impression of "radiating pain secondary to degenerative disc disease of the lumbosacral spine."

It is certainly possible that claimant's 1975 injuries/surgery materially contributed to the degeneratation of his lower spine. It is possible, albeit less so, that claimant's 1975 injuries/surgery materially contributed to a subsequent ruptured disc at a lower level. It may be possible that claimant's 1975 injuries/surgery could materially contribute to the formation of a tumor; but we would not be willing to make any such finding absent expert medical evidence. In sum, there are many possibilities but no evidence on the question of whether and to what extent claimant's physical impairments of today are causally related to his injuries and surgery of 1975. Accordingly, we remand to the Referee for further proceedings in accordance with this order.

ORDER

The Referee's order dated March 6, 1981 is vacated. This case is remanded to the Presiding Referee for further proceedings as follows: The Board will retain jurisdiction over this case. The Presiding Referee or another Referee he designates will receive additional medical reports and conduct a further hearing, if necessary. The Referee will, within 60 days of the date of this order, forward to the Board such additional evidence as has been submitted by the parties and a recommendation on the issue of which of claimant's present physical impairments are causally related to his 1975 industrial injuries.

ROBERT M. LAUDAHL, Claimant
John Peterson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01815
February 26, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order which affirmed the carrier's denial of aggravation and denial of any continuing medical services after January 30, 1979. Claimant contends that his degenerative disc disease was aggravated or caused by the 1976 injury and therefore the carrier is responsible.

We concur with the Referee's conclusion in the denial of any continuing medical services after January 30, 1979. Claimant contends that his degenerative disc disease was aggravated or caused by the 1976 injury and therefore the carrier is responsible.

We concur with the Referee's conclusion that the denial of aggravation must be affirmed as the preponderance of evidence indicates no worsening of claimant's condition arising out of the 1976 industrial injury. We further agree that claimant's present symptomatology and need for treatment is due to his underlying degenerative disc disease process and not the carrier's responsibility for continuing medical care for these symptoms. However we note that the wording in the denial states that the carrier was contending no responsibility for any medical care and treatment subsequent to the January 30, 1979 medically stationary date. No issue was raised at the hearing of unpaid medical billings so we assume all medicals were paid but the denial is dated February 9, 1981 indicating almost two years of medical benefits being denied by the carrier retrospectively. Therefore, we do not approve, in this particular case, retrospective denial of medical expenses and order any unpaid medical bills be paid up to the date of the denial.

IT IS SO ORDERED.

KEVIN J. McALLISTER, Claimant
Donald R. Wilson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Ridgway Foley, Defense Attorney

WCB 80-08117 & 80-08118
February 26, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests Board review of Referee Leahy's order upholding two denials issued by SAIF Corporation, both of which arose out of a single incident alleged to have occurred July 1, 1980. We affirm in part and reverse in part.

Claimant was initially injured on January 5, 1979 while in the employ of Hoffman Construction Co. (Hoffman), insured by SAIF. He sustained a compensable cervical-thoracic strain while lifting iron pipe. The claim for this injury, which is not the subject of this review, was accepted, and a Determination Order issued awarding claimant time loss and no permanent disability. Claimant requested a hearing on the extent of temporary and permanent disability.

A hearing was scheduled pursuant to claimant's request. Approximately two weeks before the hearing, a second incident occurred on July 1, 1980 while claimant was in the employ of a different employer, Wheeler Construction Company (Wheeler), also insured by SAIF. Claimant was engaged in pick and shovel work and pushing wheelbarrows full of sand on that day. The following day claimant's physician diagnosed his condition as a thoracic strain resulting from the previous day's work activity. On July 7, 1980 claimant filed a claim for an injury with Wheeler Construction Company.

On July 15, 1980 a hearing was held to determine the extent of claimant's disability arising out of the January 5, 1979 injury. An order was issued July 23, 1980 awarding claimant 32° for 10% unscheduled permanent partial disability for injury to his "upper back."

On August 26, 1980 SAIF, in behalf of Wheeler, denied claimant's claim for an injury of July 1980 on the basis of medical information indicating that the condition preexisted his employment with Wheeler, and that his work activity on that day did not adversely affect his condition. On or about September 8, 1980 claimant requested a hearing on SAIF's August 26, 1980 denial and, in the alternative, claimed an aggravation of claimant's condition resulting from his compensable injury of January 5, 1979.

On September 16, 1980 SAIF, in behalf of Hoffman, denied claimant's claim for aggravation on the grounds that the incident of July 1, 1980 constituted a new injury and not an aggravation of the injury sustained while in the employ of Hoffman. Claimant thereafter filed a supplemental request for hearing.

The two claims were heard before Referee Leahy on March 24, 1981. After considering all the evidence, the Referee concluded that by failing to litigate the issue of aggravation versus new injury (arising out of the July 1, 1980 incident) at the hearing held on July 15, 1980, claimant had waived that issue because it was a matter which could have been determined at the time of that hearing in the exercise of due diligence. The Referee went on to find that even if claimant had not waived the issue, he had failed to sustain his burden of proof on the merits of both claims.

The issues raised by claimant on review are: (1) The propriety of the Referee's ruling that claimant waived the aggravation versus new injury issue by failing to litigate that issue at the July 15, 1980 hearing; and (2) whether claimant sustained a compensable aggravation or new injury on July 1, 1980. We hold that claimant did not waive, indeed could not have waived, the aggravation versus new injury issue at the initial hearing, and that claimant sustained a compensable worsening of his original injury.

I.

Claimant did not waive the issue of compensability of the July 1, 1980 incident at the July 15, 1980 hearing for the reason that compensability was not at issue on July 15, 1980.

The claim against Wheeler was filed July 7, 1980. Wheeler and SAIF had 60 days from that date to accept or deny the claim. ORS 656.262(5). When SAIF issued its denial on August 26, 1980, compensability was then at issue but not before. Claimant's attorney thereafter filed an aggravation application with Hoffman, simultaneously requesting a hearing on Wheeler's denial. When SAIF denied the aggravation claim against Hoffman on September 16, 1980, the aggravation claim was then at issue and not before.

Litigation of the aggravation versus new injury issue at the July 15, 1980 hearing would have been improper because it would have been premature. Within 60 days of notice of knowledge of each claim, either employer had the option of accepting the claim for benefits. Litigating either claim on July 15, 1980 would have presumed denial without affording either employer the opportunity to accept and pay compensation, thereby avoiding any need for litigation.

> "The statutory scheme does not reasonably permit a hearing on compensability of the claim prior to a timely acceptance or denial or prior to the expiration of the time in which the carrier may investigate and consider the claim without risking penalties. Until one of those events occurs, it is not known whether a hearing will be necessary or, if so, what issue or issues will be presented at the hearing." Sypers v. K-W Logging, Inc., 51 Or App 769, 770 (1981).

II.

SAIF, on behalf of both employers, took the position that no compensable event occurred on July 1, 1980. We disagree.

After claimant's initial injury in 1979, he was advised to avoid heavy labor as it would likely cause a recurrence of symptoms. On July 2, 1980, the day after the event in issue, claimant was examined by Dr. Irvine, his treating physician. Dr. Irvine diagnosed thoracic strain, and on July 7, 1980 he reported:

> "Examination revealed well-localized tenderness at approximately the 7th thoracic spinous process. Bilateral paravertebral muscle and interscapular spasm was present...It was my impression that he had an interscapular strain due to heavy work the preceding day, possibly an aggravation of his old injury of January 5, 1979."

Claimant was referred by SAIF for an examination with the Orthopaedic Consultants on July 23, 1980 who found no orthopedic or neurologic disorder and moderate interference from "functional disturbance." Their conclusion was that "[t]he mechanism of the described strains do no [sic] equate with the physical findings. There is no apparent aggravation of his previous injury by this alleged industrial injury."

Claimant was examined by Dr. Irvine the day after the alleged incident of July 1, 1980. The Orthopaedic Consultants did not examine claimant until three weeks after the occurrence. It has been this Board's experience in reviewing claims of this nature that problems such as this claimant's generally tend to be relatively short-lived in their acute phases and tend to resolve rather rapidly given the proper treatment. We are therefore more persuaded by Dr. Irvine's conclusion, based upon an examination of claimant the day after this incident, that claimant did experience a strain due to his work activity on July 1, 1980.

III.

Claimant argues at some length that the incident of July 1, 1980 represents a new injury. In support of this contention, he points to the situs of the most recent pain which he contends is six to twelve inches below the situs of the pain arising from the cervical strain for which he was originally compensated. The physicians who examined and treated claimant for his initial injury variously diagnosed his condition as "paracervical strain"; "acute cervical strain with irritation of the greater occipital nerve on the right"; "acute tear of the spenius capitis muscle and acute traumatic neuritis of the right greater occipital nerve"; "cervical muscle strain and interscapular back pain with thoracic back strain"; and "cervical strain." Claimant's second injury was diagnosed as a "thoracic strain" by Dr. Irvine. We find it impossible to identify the body parts involved from these various descriptions with the pinpoint accuracy that claimant's argument presupposes.

After claimant's original 1979 injury for which he was granted an award of permanent partial disability, he continued to experience pain in the area of his upper back. We are persuaded the claimant's work activity on July 1, 1980 caused a worsening of the condition resulting from claimant's original compensable injury. This claim is of that type in which a person suffers a back strain, "...followed by a period of work with continuing symptoms indicating that the original condition persists and culminating in a second period of disability precipitated by some lift or exertion." 4 Larson, Workmen's Compensation Law 17-71 to 17-74, §95.12 (1981); see, e.g., Ronny L. Dozier, 32 Van Natta 68 (1981).

Since we have determined that claimant sustained a compensable aggravation of his 1979 injury and not a new injury, this claim must be remanded to Hoffman in whose employ claimant sustained his original injury.

In its brief filed in behalf of Wheeler, SAIF raises an issue concerning the Referee's exclusion of witnesses at the hearing. Included among the witnesses excluded was one of the potentially responsible employers, Mr. Wheeler. It is argued that since the employer is a party, it was error for the Referee to exclude the employer. If it was error for the Referee to exclude Mr. Wheeler, considering the result reached on the responsibility issue, any error was harmless.

ORDER

The Referee's order dated April 10, 1981 is affirmed in part and reversed in part. SAIF Corporation's denial of claimant's new injury claim issued August 26, 1980 in behalf of Wheeler Construction Company is upheld.

SAIF's denial of claimant's aggravation claim issued September 16, 1980 in behalf of Hoffman Construction Company is set aside. This claim is remanded to SAIF for acceptance and payment of benefits according to law.

SAIF (Hoffman) shall pay to claimant's attorney $1,200 as and for a reasonable attorney's fee for services rendered before the Referee and the Board. Said sum is payable in addition to and not out of claimant's compensation.

LORRIE A. MINTON, Claimant
Michael Strooband, Claimant
SAIF Corp Legal, Defense Attorney

WCB 80-11134
February 26, 1982
Order on Review (Remanding)

Reviewed by Board Members McCallister and Barnes.

The SAIF Corporation seeks Board review of Referee Peterson's order which set aside its denial of compensation for claimant's wrist condition.

We agree with the Referee that claimant's wrist condition, if compensable at all, is compensable as an occupational disease. Given then that this is an occupational disease claim, we find two major flaws in the Referee's analysis. First, the Referee stated:

> "...compensability does not require a specific diagnosis. The question is whether the disease, whatever it is, is work-related."

Hypertechnically, this thought may be correct. As a practical matter, however, it is incorrect. Determination of the work-relatedness of a disease requires identifying possible causes and weighing the relative contribution of possible causes. Practically, it is usually impossible to identify possible etiology and weigh relative contribution unless we know what disease we are talking about. Medical science can tell us that it is impossible for certain causes to produce certain effects; but for such information to be helpful, it is necessary to know what effect is under consideration.

The second flaw in the Referee's analysis is his finding that this occupational disease claim is compensable because at-work factors were a material contributing cause. The Court of Appeals has since established that the test for the compensability of an occupational disease claim is whether work related factors were the major contributing cause. SAIF v. Gygi, 55 Or App 570 (1982).

It is unlikely, especially given the ambiguities about what claimant's disease is, that claimant can sustain this higher burden of proof. Nevertheless, claimant should have the opportunity.

ORDER

The Referee's order dated April 30, 1981 is vacated and this case is remanded to the Referee for further proceedings in accordance with this order.

EDWARD NICKS, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05296
February 26, 1982
Order on Review

Reviewed by Board Members Lewis and McCallister.

SAIF Corporation has requested review of Referee Mulder's order of August 20, 1981 which set aside SAIF's denial of a claim which was designated as one for an aggravation of a 1978 compensable injury. In his response brief, claimant requests that the Board modify that portion of the Referee's order finding that SAIF's processing of this claim was not unreasonable. Claimant seeks an assessment of a penalty and attorney's fee pursuant to ORS 656.262(8) and 656.382(1). We modify the Referee's order.

This claim is solely one for chiropractic treatments. Claimant asserts entitlement pursuant to ORS 656.245(1):

> "For every compensable injury the (DRE) or (SAIF) shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of recovery requires * * * *"

The Board agrees with the Referee's conclusion that the claimed chiropractic treatments are causally related to claimant's 1978 compensable injury.

On the issues of penalties and attorney fees [ORS 656.262(8) and 656.382(1)], the Board disagrees with and therefore modifies the Referee's order to require payment of a penalty to claimant and an attorney's fee to claimant's attorney.

A claim for medical or chiropractic services pursuant to ORS 656.245 is a claim for compensation.

> "'Compensation' includes all benefits, including medical services, provided for a compensable injury to a subject worker or the worker's beneficiaries by a [DRE] or [SAIF] pursuant to this chapter." ORS 656.005(9).
>
> "'Claim' means a written request for compensation from a subject worker or someone on the worker's behalf, or any compensable injury of which a subject employer has notice or knowledge." ORS 656.005(7).

An employer or carrier is required to promptly pay compensation to the person entitled thereto, upon receiving notice or knowledge of a claim, except where the right to receive such compensation is denied. ORS 656.262(2).

Written notice of acceptance or denial of a claim for compensation must be furnished to claimant within 60 days of notice or knowledge of the claim. ORS 656.262(5), OAR 436-83-120. Unreasonably delaying acceptance or denial of a claim subjects the employer or its carrier to penalties and possibly attorney fees. ORS 656.262(8); Zelda M. Bahler, 33 Van Natta 478 (1981).

In the case of medical services provided in connection with a compensable claim, payment is timely when it is made within 45 days of receipt of a statement. OAR 436-54-310(6). Of course, a carrier is entitled to deny compensability of claimed medical services by issuing a formal denial, or to dispute the amount of a bill or need for services rendered. ORS 656.262(2) and (5); OAR 436-54-310(6); see also ORS 656.313(3).

In this case, claimant's chiropractor forwarded a form 827 (Physician's Report of Injury or Disease) to SAIF, which was received January 7, 1980. The form 827 designated the date of injury as being in 1978, contained the name of the employer that was responsible for claimant's injury, claimant's name and Social Security number. This constitutes a claim for compensation within the meaning of ORS 656.005(7) and (9).

Another form 827 was provided to SAIF, received on February 19, 1980 containing the same information.

SAIF denied "a claim for aggravation" by denial letter of April 24, 1980. This constitutes a delay of 48 days beyond the 60-day period mandated for issuing denials. ORS 656.262(5). The Board regards this delay as being in clear violation of this worker's right-to-know interest, justifying imposition of the maximum penalty. Zelda M. Bahler, 33 Van Natta 478, 480 (1981). Furthermore, we believe this to be an appropriate case for an assessment of an attorney's fee pursuant to ORS 656.382(1). See Bahler, supra, at 481.

ORDER

The Referee's order dated August 20, 1981 is modified. SAIF's denial of claimant's claim for chiropractic treatment is set aside, and the claim is remanded to SAIF for payment of the chiropractor's bill.

SAIF shall pay to claimant as and for a penalty, a sum equal to 25% of the amount claimed for chiropractic services and to claimant's attorney an attorney's fee in the amount of $100.

The remainder of the Referee's order is affirmed.

Claimant's attorney is allowed $350 as and for a reasonable attorney's fee for services rendered on this review, payable by SAIF.

DANIEL P. O'NEIL, Claimant
Donald Richardson, Claimant's Attorney
Frank Vizzini, Defense Attorney

WCB 80-11593
February 26, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant has requested Board review of Referee Pferdner's order which affirmed the employer's December 16, 1980 denial. The only issue on review is compensability.

Claimant was 27 years old on the date of the injury and employed by Tube Forgings of America in Portland. The employer does provide its employees with a parking lot, but on the day of the injury, the claimant rode to work with a co-employee, Brady Lester. Lester parked his pickup truck, not in the employee lot, but on the west side of a street, parallel to the employer's plant and in between the plant and the employee's lot. The terrain was "unimproved," and claimant would have had to cross the street in any case had Lester utilized the employee parking lot. Upon jumping out of the pickup, about two and a half feet to the ground, claimant injured his ankle.

The Referee found that had the injury occurred on the parking lot, it would have been compensable. Since, however, claimant never arrived on the employer's premises before the injury and since the employer exercised no form of control over the area, the claimant could not be said to have arrived at work.

We agree with the analysis and conclusion of the Referee. In addition, the recent Court of Appeals decision in Adamson v. The Dalles Cherry Growers, Inc., 54 Or App 52 (1981) presents a fact situation nearly identical in every aspect to the current case. This case does not present a situation which would fall under any of the exceptions to the "going and coming rule." Based on Adamson, we affirm the decision of the Referee.

ORDER

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

ALENE E. POTTER, Claimant
Charles Maier, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00249
February 26, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation seeks Board review of Referee Knapp's order which found the claimant to be entitled to an award of 35% scheduled permanent partial disability for partial loss of use of her right leg due to an industrial knee injury. The sole issue on review is the extent of claimant's disability.

The Board accepts the Referee's findings of fact and adopts them as its own. We disagree, however, with his determination that the claimant is entitled to an award of 35% scheduled permanent partial disability.

In May 1980 Dr. Tiley performed an arthrotomy on the claimant's right knee. No pathology was found, but there was some chondromalacia of the patella and some persistent synovitis. Dr. Anderson, in his extensive report of November 25, 1980, found the total loss of function as a result of the injury to be minimal. Dr. Anderson noted that the claimant exhibited a marked limp when entering the examining room but that it disappeared thereafter and she was able to move around the room quite easily, walked with equal weight bearing and no list. The Determination Order of December 23, 1980 awarded claimant 5% scheduled permanent partial disability for loss of the right leg (knee).

Dr. Whitmire's March 23, 1981 report found an 11% permanent impairment of the whole person based on range of motion and motor and sensory impairment. Claimant was examined by Dr. Poulson on May 13, 1981. Dr. Poulson, whose report is the most recent in the record, found that the claimant had a full range of motion in the right knee and was able to move around well with no limp. No change of sensation was found. Dr. Poulson stated that the claimant had no impairment based on motion and no loss of cartilage, but that she had disability due to pain which he noted was slight.

The Referee, although doubting the claimant's testimony concerning her back and hip claim, accepted her allegations of pain and limitations associated with her right knee. The Referee found that claimant suffered a loss of stamina, strength and motion although Dr. Poulson's report indicates no such losses, and Dr. Anderson's report indicates muscle strength to be unimpaired and left and right knee flexion and extension to be equal. The Referee found that due to the knee injury, claimant could not participate in her previous recreational activities or perform her household chores normally. Dr. Anderson, however, stated he saw no reason for the claimant to limit her activities.

We find, based on the medical evidence, that the Referee's award of 35% scheduled permanent partial disability is excessive. The record does indicate that claimant suffers a certain degree of pain that is disabling to some extent. Based on that, we find that an award of 15% scheduled permanent partial disability to be adequate compensation for the claimant's minor knee injury of March 11, 1980.

ORDER

The Referee's order dated August 20, 1981 is modified. Claimant is awarded 22.5° for partial loss of use of her right leg, equal to 15% of the maximum 150° allowed. This award is in lieu and not in addition to any previous award granted for the claimant's right knee injury of March 11, 1980. The remainder of the Referee's order is affirmed in all respects.

BESSIE A. RAY, Claimant
Hayes Patrick Lavis, Claimant's Attorney
Jerry McCallister, Defense Attorney

WCB 80-10090
February 26, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee James' order which affirmed the Determination Order whereby she was granted no compensation for permanent partial disability. Claimant contends that she is entitled to an award.

The order of the Referee should be affirmed. Claimant has shown only that she suffers from back pain after exertion. She has failed to show this pain is disabling; there is no evidence of permanent impairment at this time.

ORDER

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

PATRICK D. RIDDLE, Claimant
A.J. Morris, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08585
February 26, 1982
Order on Review (Remanding)

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Baker's order which granted claimant 50% scheduled permanent partial disability for a February 28, 1979 compensable left leg injury. The Determination Order had granted 35% scheduled permanent partial disability.

On the record Referee Baker stated:

> "Well, as I have previously held, these Workers Compensation Department Rules were not effective until April 1, 1981. And to the extent that the rules would affect the rights and obligations and, specifically, awards to injured workers, those rules do not apply on any injuries that occurred before April 1, 1980."
>
> "I don't expect to deal with this further in my opinion and order. I'll announce that at this time."

In Dennis Gardner, 31 Van Natta 191 (1981), the Board held that the rules in question of the Workers Compensation Department, OAR 436, Part 65, governing the rating of disability generally did apply retroactively to injuries incurred before the April 1, 1981 effective date of those rules, subject to the right of all parties to show that the rules are inconsistent with prior law and thus invalid in individual cases. It is possible, albeit unlikely, that the Board's June 30, 1981 order in Gardner was unknown to Referee Baker at the time he entered his July 29, 1981 order in this case.

ORDER

The Referee's order dated July 29, 1981 is vacated and this case is remanded to the Referee to enter a supplemental order applying the relevant rating criteria in OAR 436, Part 65.

MARLENE STRAUSER, Claimant
Peter McSwain, Claimant's Attorney
George Goodman, Defense Attorney

WCB 81-00819
February 26, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Seifert's order which upheld the employer's denial of claimant's aggravation claim and ruled claimant was not entitled to continuing palliative medical care.

We agree that the evidence fails to sustain claimant's contention that her back condition due to her compensable injury of July 8, 1979 had worsened since November 13, 1980 which was the date of the last arrangement of compensation.

We disagree that claimant was not entitled to continued palliative treatment under ORS 686.245(1) for her original compensable injury. The Referee cited Tooley v. SAIC, 239 Or App 466 (1965) as authority for the proposition that the Workers Compensation Act does not authorize palliative medical treatment of a worker after the worker's condition has become stationary. However, substantial revision of the Act since the Tooley decision and subsequent case law have established that ORS 656.245(1) provides for life-long palliative medical treatment necessarily and reasonably incurred in the treatment of every compensable injury. Wait v. Montgomery Ward, Inc. 10 Or App 333 (1972); Bowser v. Evans Products Co., 270 Or 841 (1974); Wetzel v. Goodwin Brothers, 50 Or App 101 (1981).

By letter of February 13, 1981, the insurer informed the claimant that it would not authorize any more treatment under ORS 656.245 because claimant had exceeded her limit of treating with five doctors as permitted in ORS 656.245(2). However, it is not clear from the record that claimant exceeded the number of treating doctors she is allowed by statute.

Under ORS 656.245(2), it is unclear whether it is the worker's burden to seek prior approval from the director before treating with a sixth doctor, or whether it is the insurer's burden to seek disapproval of the sixth selection. The Workers Compensation Department has recently adopted new rules on the subject at OAR 436-69-401, et seq. The rules place the burden on the claimant to gain approval of the sixth selection. The rules also place a burden on the insurer to inform the worker that a sixth selection requires approval.

Before the new rules were adopted and this order was promulgated, it was not clear who had the burden of seeking approval or disapproval for a sixth treating doctor. No penalty will be assessed against the insurer.

Since we have determined that the record does not show that the claimant has exceeded the number of treating doctors allowed by statute, the claims for medical treatment related to the claimant's injury shall be paid by the insurer pursuant to ORS 656.245.

ORDER

The Referee's order dated May 7, 1981 is modified. That portion upholding the insurer's denial dated February 12, 1981 of claimant's aggravation claim is affirmed. That portion denying continuing medical care under ORS 656.245(1) is reversed unless and until the director disapproves claimant's selection of physicians under ORS 656.245(2).

Claimant's attorney is awarded a fee for prevailing on a partial denial, payable in addition to compensation for services at the hearing and on Board review in the amount of $1000.

WILLIAM P. STULTZ, Claimant
David Hall, Claimant's Attorney
Steven Reinisch, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03388
February 26, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee St. Martin's order which affirmed the denial of aggravation for his failure to file a request for hearing within 60 days of the date of the denial.

The first issue which must be discussed is whether claimant showed good cause for filing his request for hearing after 60 days of the date of Fred S. James Company's denial. Upon receipt of the December 27, 1979 denial, claimant testified he was incapacitated as a result of severe headaches resulting from his recent hospitalization. He stated it was necessary for him to lie down in a darkened room for most of the day. When the denial arrived at claimant's home, his wife advised him of its contents. Claimant's mother then called Fred S. James Company to discuss the denial letter. Although there is no convincing evidence as to what was said in this conversation, claimant filed a new injury claim on January 3, 1980, shortly after the call to Fred S. James Company and presumably as a result of this call. The "new injury" carrier, SAIF Corporation, began temporary total disability payments shortly thereafter for a period of approximately two months. Claimant testified that soon after the benefits stopped, he consulted an attorney for the first time. Claimant's attorney filed a request for hearing on the Fred S. James denial on April 14, 1980. SAIF issued their denial on April 23, 1980.

Claimant's major argument on this issue is that his period of incapacitation rendered him incapable of taking action on the denial. The Referee found, and we agree, that this "excuse" in claimant's situation does not rise to the level of "good cause." However, we do find that claimant's claim is directly comparable to Curtis A. Lowden, WCB Case No. 79-10215 (March 30, 1981). We find claimant was caught in a cross-fire between two carriers which gave him a sense of security about his claim. We do not find any collusion between the carriers, but we do not think that is a requirement to find "good cause." Admittedly, SAIF Corporation initially "deferred" action on claimant's claim, but we do not find a worker should be expected to read that and conclude there is a possibility his claim will be denied. All claimant knew was that he was receiving temporary total disability benefits from SAIF and there was no reason to take action. Within a reasonable amount of time after the benefits ceased, claimant requested a hearing. We conclude claimant has shown good cause why his request for hearing was filed after 60 days from the date of the denial.

Having found for claimant on the issue of timeliness, we now reach the issue of aggravation. Claimant sustained a compensable injury to his back on June 6, 1978. The injury was sustained when claimant was pulling toward himself an object weighing approximately 200 pounds. The injury was diagnosed as "muscular strain of the transverse abdominal musculature where it attaches to the left iliac crest." The evidence in the record indicates that claimant's condition became medically stationary around September, 1978. In any event, claimant apparently received no medical services from September, 1978 until August, 1979 and his claim arising from the June 6, 1978 injury was closed April 27, 1979, with no award for permanent partial disability.

The second injury was sustained on August 30, 1979 while claimant was operating a metal press requiring repeated pushing down with his leg and foot and prolonged standing. The diagnosis tendered by the various physicians who examined claimant following the second incident differed slightly in the wording of their respective diagnoses, but consistently referred to the injury as involving the fourth and fifth lumbar vertebrae.

The situs of the two injuries are in close proximity, but medically discreet. In addition, the nature of the work activities in which claimant was engaged when he sustained the two injuries suggests that different parts of the body were involved.

It is understandable that the claimant would think that he had merely aggravated an old injury because both injuries manifested themselves as low back pain. Nevertheless, the medical evidence is clear that different muscles and bones were involved in the two injuries. Under the "last injuries exposure" rule, a second incident contributes independently to the causation of the disabling condition (here back pain), even if the condition would have been much less severe and even if the first injury contributed the major part to the final condition.

After a thorough consideration of this case, we conclude claimant has failed to prove entitlement to compensation for an aggravation claim. We are persuaded that the work activity on August 30, 1979 contributed independently to claimant's current disability. Due to the Disputed Claim Settlement issued June 23, 1981, claimant's new injury is not before us. The denial of aggravation, dated December 27, 1979 should be affirmed.

ORDER

The Referee's order dated June 11, 1981 is modified. The denial dated December 27, 1979 is affirmed for the reason that claimant has failed to prove his claim for aggravation.

VERDA M. WALL, Claimant
Robert Thomas, Claimant's Attorney
Katherine O'Neil, Defense Attorney

WCB 80-09392
February 26, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The self-insured employer seeks Board review of Referee Mongrain's order which awarded claimant 50% permanent partial unscheduled disability. The sole issue is extent of disability.

While working as a tree planter, claimant was injured in October of 1979 when she was struck and knocked down by a truck or tractor. Other than abrasions, etc., the initial diagnoses all suggested a fairly minor low back soft tissue injury. Claimant was released to work less than two weeks after the injury. Other than a few days, however, claimant has not returned to work since her October, 1979 injury.

Claimant's continuing complaints ultimately lead her doctors to suspect possible ruptured disc or nerve root irritation. But this possible diagnosis remains speculative because claimant has declined to undergo a myelogram.

The first problem with rating extent of disability is thus the open question on the nature and extent of claimant's physical impairment. So far as the medical evidence discloses, claimant's impairment could be virtually nil (i.e., an initial sprain or strain, now resolved) to significant (i.e., the suggestion of neurological involvement). The testimony of claimant and her witnesses portrays significant impairment. However, as did the Referee, we find this testimony less than totally convincing. Moreover, if claimant's physical problems were as severe as she portrayed them at the hearing, it is impossible to understand why claimant rejects the suggestion by her doctors of a myelogram and possible surgery to relieve her complaints. The "hardest" bit of medical data is that claimant is now restricted from lifting more than 50 pounds. But this restriction forecloses claimant from only a microscopic slice of the broad range of industrial occupations. While the matter is not free from doubt, we conclude that claimant's physical impairment is very much toward the mild end of the spectrum.

Claimant was 58 years old at the time of hearing. She has a high school diploma. Much of the work claimant has done has been manual, but she does have about 8 to 10 years experience in relatively sedintary positions as an electronic technician, supervisor and cashier. We find that claimant's motivation to seek work is at best suspect.

Applying the criteria in OAR 436-65-600, et seq, as best as possible to the evidence in this record, we conclude that claimant has lost 25% of her earning capacity.

ORDER

The Referee's order dated May 22, 1981 is modified. Claimant is awarded 80° for 25% unscheduled permanent partial disability for her low back injury; this is in lieu of all previous awards. The balance of the Referee's order is affirmed.

BROCK WEIDMAN, Claimant
Allen & Vick, Claimant's Attorneys
Merten & Saltveit, Defense Attorneys

WCB 81-04440
February 26, 1982
Order on Review

Reviewed by the Board en banc.

Claimant seeks Board review of Referee James' order which upheld the self-insured employer's denial of benefits.

Claimant sustained a minor injury on October 3, 1980. Apparently -- although this is not really stated in the record -- his claim was accepted and closed as a non-disabling injury with no medical services and no compensable time loss. Almost six months later, claimant went to a chiropractor complaining of lumbar pain radiating into his legs. The chiropractor opined that claimant's March/April 1981 symptoms were related to the October 1980 industrial incident. Dr. Pasquesi opined to the contrary by report and testimony at the hearing.

Apparently -- although this is not really stated in the record -- after initiation of chiropractic care claimant sought to have his October 1980 injury reclassified from non-disabling to disabling. The self-insured employer denied that claimant's March/April medical care and authorized time loss were causally related to the October 1980 industrial incident.

The passage of so much time between the October 1980 incident and the March/April 1981 medical care suggests the need for something more than a bald conclusion causally linking the two. We find nothing more than a bald conclusion from claimant's chiropractor. The lack of any explanation for the theory of causal connection coupled with Dr. Pasquesi's contrary opinion leads us to the conclusion that claimant has not sustained his burden of persuasion.

ORDER

The Referee's order dated July 20, 1981 is affirmed.

Board Member Lewis dissents as follows:

I respectfully dissent and would reverse the Referee's Opinion and Order for the following reasons.

Prior to the industrial incident of October 3, 1980, claimant had not experienced any back problems. The medical reports indicate that claimant had spondylolisthesis of the fourth lumbar vertebra (Grade #1) that pre-existed the October 1980 incident. However, despite a work history involving heavy manual labor, the condition was stable and asymptomatic prior to the industrial incident.

Claimant was injured while running a wheelbarrow full of sand up a dirt ramp. The wheelbarrow struck and lodged in a crossbar imbedded in the ramp floor. Claimant flipped sideways and landed on his back. Because the employer was shorthanded at that time, claimant's foreman made claimant continue working notwithstanding the pain and discomfort the claimant was feeling following the accident. When another employee became available, the foreman then allowed claimant to leave work early. Claimant missed another day of employment due to the injury before being laid off.

The claimant and his wife testified at the hearing that instead of healing, claimant's condition progressively worsened and claimant had to gradually limit his activities. The Referee found the claimant and his wife to be credible.

In March 1980, when claimant sought medical attention, Dr. Held (claimant's treating chiropractor) diagnosed a severe lumbar sprain with muscle spasm and radiculitis of the right sciatic plexus. Dr. Bell, a consulting neurologist, also diagnosed a "soft tissue injury to the back".

The absence of any back problems prior to the 1980 industrial incident coupled with the nature of the accident, the sequence of events immediately and in the days following the incident, and the progressive worsening of claimant's condition provides a cogent and reasonable basis for claimant's contention that he sustained an industrial injury in 1980 which did not become sufficiently symptomatic as to require medical services until March of 1981.

The report of Dr. Pasquesi, the carrier's physician, to the contrary is unpersuasive because he was unaware of critical facts relevant to his opinion concerning causation of the condition. The facts of which he was unaware include claimant missing work following the incident and the progressive worsening of claimant's condition. For this reason alone, Dr. Pasquesi's report should be disregarded. Foley v. SAIF, 29 Or App 151, 562 P2d 593 (1977). In addition, Dr. Pasquesi speculates as to some "undocumented" intervening event which "must have caused" claimant's condition as it existed in 1981, and propounds inconsistent theories concerning causation of the condition (natural progression of claimant's pre-existing spondylolysthesis and the occurance of an intervening "undocumented" event).

By contrast, the report of Dr. Held, who treated claimant over a three-month period prior to preparation of his report, provided an accurate case history and an unequivocal relation of the March 1981 symptoms to the October 1980 incident. Cf. Hamlin v. Roseburg Lumber Company, 30 Or App 615, 567 P2d 612 (1977). Dr. Held stated that:

"Mr. Weidman had a pre-existing spondylolysthesis of L4 (Grade #1) which was essentially stable at the time of his injury. A sprain type injury superimposed up on [sic] a lumbar spine with a spondylolysthesis will result in a greater disability than would occur in a normal spine.

"The need for care this patient has received to date is due to the above captioned injury and not in my opinion a natural progression of the pre-existing spondylolysthesis. I have absolutely nothing in my file, or has the patient indicated any incident which would have aggravated this condition other than the industrial injury of October 3, 1980. I have no idea as to what Dr. Pasquesi is basing his assumption that 'some event' probably occured to make his symptoms worse. . . ."

Assuming, arguendo, that the October 1980 incident merely aggravated the claimant's pre-existing spondylolysthesis, or that there was an "undocumented" intervening off-the-job injury, the claimant is still entitled to compensation if the industrial accident was at least a material contributing cause to claimant's condition when it required medical care. Lorena Iles, 30 Van Natta 666 (1981) and Kinney v. SIAC, 245 Or 543, 423 P2d 186 (1967), and Grable v. Weyerhaeuser, 291 Or 387 (1981). The strength of Dr. Held's opinion convinces me that the industrial incident of October 1980 was at least a material contributing cause (if not the sole cause) of claimant's condition in March 1981.

I would order that the employer accept the claim and payment of benefits according to law. I would further allow $1650 as a reasonable attorney's fee in representing the claimant before the Referee and the Board to be paid by the employer.

GORDON E. WOLF, Claimant
Larry Bruun, Claimant's Attorney
Keith Skelton, Defense Attorney
Mildred Carmack, Defense Attorney

WCB 80-02051
February 26, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer, Champion International (self-insured) requests Board review of Referee Nichol's order which set aside its denial of claimant's occupational disease claim for a low back condition. Liberty Mutual, the employer's former workers compensation insurance carrier, requests review of the Referee's order finding the claim compensable and that portion of the order which awarded claimant a 15% penalty of the amount of interim compensation due claimant from July 15, 1980 until the issuance of a denial on December 4, 1980 plus an award of $250 attorney fee.

As a preliminary matter, Champion International has moved that the Board either consider Dr. Degge's July 15, 1981 report or remand to the Referee for consideration of it. Both Liberty Mutual and the claimant have filed objections to Champion International's motion. We deny the motion. Champion has not shown why Dr. Degge's report (or the same information from some other source) could not have been obtained before and produced at the hearing within the requirements of Robert A. Barnett, 31 Van Natta 172 (1981).

Turning to the merits, claimant started work with U. S. Plywood, now Champion International, in May 1971. Liberty Mutual provided the workers compensation coverage until October 31, 1979. On November 1, 1979 Champion became self-insured. Claimant worked for Champion throughout this period and until February 1980 as a dryer-grader pulling veneer off the dry chain.

The claimant has a long history of "back trouble" including specific incidents on and off the job. He had been told as early as 1947 that he had arthritis. In June 1971, he filed a claim for "muscle strain developed during normal course of job duties." Dr. Denker diagnosed the condition as lumbo sacral strain. Liberty Mutual accepted the claim. After a short period of time loss, the claimant returned to his regular job, and in October 1971 a Determination Order was issued awarding only time loss.

The claimant continued to experience symptoms and occasional disability because of the low back condition. The "condition" has been diagnosed by various physicians as chronic lumbosacral strain or acute and chronic lumbosacral strain with some, but not all, the examining physicians attributing the chronicity of the condition to an underlying degenerative arthritis. In February 1980, claimant filed a claim for the low back condition stating "pulling dry veneer off the dry chain--twisting causes my back severe pain and affects lower back and legs making it difficult to walk and move." Dr. Nelson, who has been the primary treating physician throughout, diagnosed "lumbar strain (has underlying degenerative arthritis of the spine.)" Champion denied the claim February 28, 1980 on the grounds that the condition from which claimant suffers did not arise out of and in the course of employment. Claimant requested a hearing. Liberty was joined on Champion's request and Champion also tendered the claim to Liberty. Liberty refused Champion's tender but did not deny the claim.

At hearing both carriers asserted that claimant's low back condition was not compensable because the conditions of employment had not worsened claimant's underlying condition or in the alternative they each point the finger of responsibility at the other. In addition Liberty asserted they had no obligation to pay interim compensation because no claim was made on it which obligated payment or formal denial.

The first issue, raised by both carriers, is compensability. Since the evidence clearly establishes the onset of claimant's long standing and chronic low back condition predated his employment at Champion, he must prove that the work activity caused a worsening of the underlying disease to the extent that it produced disability or required medical services. Weller v. Union Carbide, 288 Or 27 (1979). Dr. Nelson's opinion is "...his job has contributed to his back difficulty, and that it has caused some gradual permanent worsening in the underlying condition." (Emphasis added.) We agree with the Referee that the Weller test has been satisfied.

We turn now to the issue of responsibility. The Referee found Champion, self-insurer, responsible. The test under the last injury exposure rule, see Mathis v. SAIF, 10 Or App 139 (1972), fixes responsibility on the last employer/carrier in whose employ or under whose coverage the claimant had an injurious exposure. Again, Dr. Nelson's opinion is persuasive--he said claimant's work activity after October 1979 was injurious. Even more so under the "could have caused" extension of the last injurious exposure rule established in Inkley v. Forest Fiber, 288 Or 337 (1980), responsibility rests with Champion (self-insurer). We have found the claim compensable, implicit in that finding is that the claimant's work activity over the years caused a worsening of his underlying condition. It then logically follows that the same work conditions after November 1979 "could have caused" a worsening. It is not necessary to measure or define the quantity of contribution.

The next issue is whether Liberty's handling of the claim constituted unreasonable resistance or refusal to the payment of compensation. Under the facts of this case we disagree with the Referee and reverse in part, It can be argued that Liberty, at the time it received Champion's letter tendering the claim to it, should have commenced the payment of compensation. Under the complicated fact situation which then (July 1980) existed, we agree their action could have been different, but that does not constitute unreasonable conduct. Liberty had no clear obligation to pay compensation or to issue a denial then. It is arguable whether under the facts of this case Liberty had any obligation to issue a denial. We find Liberty's failure to pay interim compensation was not unreasonable.

ORDER

The Referee's order dated April 15, 1981 is modified. That portion of the order which assessed a 15% penalty against Liberty Mutual is reversed as is the $250 attorney fee. The remainder of the Referee's order is affirmed.

DONALD WOODMAN, Claimant
Michael Strooband, Claimant's Attorney
Frank Moscato, Defense Attorney

WCB 78-5283
February 26, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Seifert's Order on Remand which affirmed the June 5, 1978 Determination Order which allowed 100% for loss of the left arm, 14% for loss of hearing in the right ear and 2.5% for loss of hearing in the left ear. The sole issue on review is whether or not claimant is entitled to an award of unscheduled permanent partial disability for his neuroma and spinal problems.

The facts of this case have been fully related in the various Referee, Board, and Court opinions and orders. We will therefore only briefly restate the course of events.

Claimant suffered a crushing injury to his left arm in 1974 which necessitated an amputation of that arm a few inches below his shoulder. The Determination Order allowed 100% unscheduled disability for loss of that arm. Claimant thereafter requested a hearing, seeking an additional award for unscheduled disability to the left shoulder and back. The Referee affirmed the Determination Order. On review, the Board modified the order, allowing claimant 15% unscheduled upper back disability. Upon appeal, the Court of Appeals reversed the Board's award. Woodman v. Georgia Pacific, 42 Or App 899 (1979). The matter then proceeded to the Supreme Court, which reversed the Court of Appeals and remanded the matter. Woodman v. Georgia Pacific, 289 Or 551 (1980). The case eventually returned to the Hearings Division for the taking of additional evidence. Following consideration of the additional evidence, the Referee once again affirmed the June 5, 1978 Determination Order and refused to allow the claimant any unscheduled disability. The Referee stated that consequential losses in an unscheduled area are included in a scheduled award when the medical expectation that it will accompany the scheduled loss is so great that failure to occur would be an exceptional case, but would not extend to secondary consequences of the scheduled loss that are merely common or probable, and such losses are therefore not compensable.

We disagree with the Referee's interpretation of the law. In Woodman, the Supreme Court enunciated a three-prong test for determining under what circumstances permanent partial disability resulting from an injury causing a scheduled loss under ORS 656.214 (2) may also be compensable as an unscheduled disability. That test is: (1) the claimant must suffer an independent disability to an unscheduled part of the body; (2) the resulting unscheduled disability is included in the scheduled formula if the medical expectation that it will accompany the scheduled loss is so great that failure to occur would be an exceptional case; this legislative assumption does not extend to secondary consequences beyond the scheduled loss which are merely common or probable; and (3) these criteria must be applied to the general population of working men and women as a whole in order to determine whether unscheduled disability was included as a necessary consequence of a scheduled loss.

The Referee's error was committed under the second prong of this test when he stated that secondary consequences which are merely common or probable do not give rise to an unscheduled disability award. Clearly such consequences are compensable. Only secondary consequences that are so intrinsic to the original injury that failure to follow would be anomalous and surprising are not compensable.

Applying this test, we make the following findings. Dr. Post in his November 15, 1980 letter relates " . . . in a patient with a high upper extremity amputation, some problems with spinal imbalance and shoulder girdle atrophy are inevitable." He also states, however, " . . . on the other hand, painful neuromata are by no means routine with amputation surgery although their likelihood is certainly greater in traumatic amputations where crush injury is involved. The type of neuroma problem which Mr. Woodman has experienced is in that sense exceptional although not rare." Dr. Post in his December 24, 1980 letter reiterated that spinal imbalance is an "inevitable consequence" of the amputation, but that painful neuromata is not expected in every case. Dr. Post's report of January 21, 1981 states that " ... painful upper back problems following above elbow amputation are not inevitable and are somewhat unusual." (Emphasis added.)

The Board finds that the evidence indicates that the claimant's atrophy and spinal imbalance are not compensable under the Woodman test. It was previously conceded however that the muscle atrophy was not compensable. It is equally clear however, that the painful neuromata and painful upper back pain are compensable. Claimant has suffered an independent disability to an unscheduled part of his body. The upper back pain and neuromata problems are not such that they are intrinsic to the original injury, applying these standards to the general population of working men and women as a whole.

The record establishes that the claimant is a highly motivated individual who has been successful, to an impressive extent, in overcoming a severe handicap. As a result of the claimant's arm amputation, however, he has suffered unscheduled upper back and neuromata problems to such a degree that he has generally been unable to utilize his prosthesis in an effective manner. Although the claimant has been compensated for the loss of his left arm, the additional problems that he has suffered have precluded him from obtaining gainful and suitable employment in a large sector of the labor market. We therefore find claimant entitled to an award of 30% unscheduled permanent partial disability.

ORDER

The Referee's order dated June 23, 1981 is reversed.

Claimant is hereby granted an award of 96° for 30% unscheduled permanent partial disability for his upper back pain and neuroma condition. 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, and payable out of said compensation, to a maximum of $3,000.

TERRI REEDY, Claimant
A.J. Morris, Claimant's Attorney
SAIF Legal, Defense Attorney
Terence Hammons, Attorney

WCB 81-08327
March 1, 1982
Order Denying Remand; Allowing Extension of Time

The employer has moved the Board for an order remanding this claim to the Referee for the submission of additional evidence, or, in the alternative, for an extension of time within which to file its brief.

The employer's motion for remand is hereby denied. Robert A. Barnett, 31 VanNatta 172(1981).

The employer's alternative motion for an extension of time is allowed. Employer shall file its appellant's brief within 30 days of the date of this order. The schedule for the filing of respondents' briefs and a reply brief, if any, is extended accordingly.

IT IS SO ORDERED.

TERRY L. STARBUCK, Claimant
Russell DeForest, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Brian Pocock, Defense Attorney

WCB 79-04425
March 1, 1982
Order on Reconsideration

Claimant's attorney requests reconsideration of the Board's order on review dated January 29, 1982 because it failed to provide for attorney fees for prevailing on a denied claim.

The principal issue at hearing was whether claimant's condition was the responsibility of the Boise Cascade Corporation, self-insured, on an aggravation theory or instead whether claimant sustained a new injury while employed by Northwest Quality Cabinets insured by SAIF Corporation. Both Boise Cascade and SAIF denied responsibility, each contending the other was responsible.

The Referee found a new injury, ordered SAIF to accept the claim and awarded claimant's attorney a fee for prevailing on SAIF's denial. The Board reversed, finding an aggravation of a prior accepted claim that arose while claimant was in the employ of Boise Cascade. However, through an oversight we failed to provide for any attorney fee for services rendered at the hearing level for prevailing on Boise Cascade's denial.

Claimant's attorney is entitled to such a fee. ORS 656.381(1). The amount of the fee is based on efforts expended and results obtained. OAR 438-47-010(2). The record reflects an extensive number of hours spent by claimant's attorney on his representation, perhaps even an excessive number of hours, but this kind of carrier responsibility contest often requires extensive representation at the outset of a claim to try and get an injured worker compensation from somebody. We deem an attorney fee of $1,500 to be appropriate.

ORDER

The Board's Order on Review dated January 29, 1982 is amended on reconsideration by the addition of the following:

Claimant's attorney is awarded as and for a reasonable attorney fee for services rendered at the hearing level $1,500, payable by Boise Cascade Corporation.

In all other respects the Board's Order on Review dated January 29, 1982 is readopted and republished.

GERALDO MOSQUEDO, Claimant
Noreen Saltveit, Claimant's Attorney
Emil Berg, Defense Attorney

WCB 79-08138
March 4, 1982
Order on Remand

On review of the Board's Order dated May 4, 1981, the Court of Appeals reversed the Board's Order.

Now, therefore, the above-noted Board Order is vacated, and this claim is remanded to the carrier for acceptance and payment of benefits in accordance with law.

IT IS SO ORDERED.

RAY WHITMAN, Claimant
Allen T. Murphy, Claimant's Attorney
Daryll Klein, Defense Attorney

WCB 80-03300
March 4, 1982
Order on Remand

On review of the Board's Order dated May 6, 1981, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated October 13, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

Claimant's attorney is allowed 25% of the increased compensation awarded by the Court of Appeals, not to exceed $1,250.00, as and for a reasonable attorney's fee for services rendered before the court, payable out of claimant's award of compensation and not in addition thereto.

IT IS SO ORDERED.

WILLIAM J. FRAME, Claimant
Robert Udziela, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 80-07617
March 5, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Pferdner's order which awarded 96° for 30% unscheduled low back disability and found claimant eligible for a work skills improvement program. We modify the award of disability and reverse the finding of eligibility for a work skills improvement program.

This case arises from a compensable injury sustained by the claimant in 1978 while employed by Crown Zellerbach. The Board adopts the Referee's statement of facts.

> "Claimant was 39 years old and employed as a green chain marker in defendent's sawmill when he injured his low back . . . In September, 1978 claimant was released to return to light duty and the claim was closed on December 22, 1978 without any award of permanent disability.
>
> "In February, 1979 claimant reinjured his low back. A myelogram revealed a prolapsed disc at the L4-5 level which was surgically repaired. In November, 1979 claimant was released to return to work without restriction, but the repetitive lifting, twisting, pulling and prolonged standing precipitated a recurrence of symptoms. His physician then suggested a change in occupation. In March, 1980 claimant was released to return to modified work which did not require repetitive heavy lifting or bending. Psychological treatment was recommended and this was furnished. In June, 1980 claimant was examined at Orthopaedic Consultants which
>
> was of the opinion claimant's condition was medically stationary and that he would need vocational assistance. The Second Determination Order of July 11, 1980 awarded claimant 65° for 20% unscheduled low back disability.

"In June, 1980 vocational rehabilitation evaluation was started and in July, 1980 claimant was referred for employment re-entry assistance. Ingram & Associates was the assigned vendor. It determined claimant has transferrable skills and experience and endeavored to assist claimant in finding employment. Field Services Division was of the opinion claimant was not eligible for an authorized training program and in December, 1980, although claimant had not yet found employment, Ingram & Associates closed his file.

"Claimant is now 42 years old and has a high school education. He has also been trained as a truck driver. His employment experience includes four years in the Navy as a gunner's mate, eight years with Boeing in its jig shop, five and a half years as a utility man in a road department and a couple of years with defendent. The transferable skills referred to by Field Services Division relate to his use of precision measuring devices while employed at Boeing. Claimant's overall cognitive performance is probably average although some of the findings were in a below average range."

Claimant contends that under the administrative rules governing vocational assistance, he is entitled to an authorized training program. In the alternative, claimant contends that he is permanently and totally disabled or is entitled to an increased award of permanent partial disability. On cross-request for review, the employer contends that claimant is not entitled to any additional vocational assistance, and is entitled to a lesser award of permanent partial disability than that which the Referee awarded. Therefore, the issues are as follows:

1. Whether claimant is a vocationally handicapped worker and eligible for a job skills improvement or an authorized training program.

2. Whether claimant is entitled to a greater or lesser award of permanent disability, up to an award of permanent total disability.

The Board concludes that claimant is not eligible for either a work skills improvement program or an authorized training program.

With respect to eligibility for a work skills improvement program, counsel for both the claimant and the employer point out that under the Workers Compensation Department's current rules, eligibility for job skills improvement programs is limited to workers who are not medically stationary. OAR 436-61-100(6)(b) and 436-61-110(2). The evidence in this case indicates that claimant became medically stationary no later than June of 1980. More importantly, in 1978, when claimant was injured, the administrative rules governing vocational rehabilitation programs did not provide for "job skills improvement programs." Thus claimant is not entitled to such benefits.

With respect to claimant's eligibility for an authorized training program, for the sake of clarity it is necessary to dispose of two preliminary issues: retroactivity and the scope of review of vocational rehabilitation program placement decisions.

Claimant was compensably injured in August, 1978. His condition did not stabilize and he was not determined eligible for any vocational assistance until June of 1980. A review of the administrative rules governing vocational assistance indicates significant changes in the rules between these dates. Under the 1978 rules, an injured worker determined to be in need of vocational assistance was classified as either vocationally "handicapped" or vocationally "displaced." Vocationally handicapped workers were eligible for employment re-entry assistance and authorized training programs; vocationally displaced workers were eligible only for employment re-entry assistance. Under current rules, the categories of vocationally handicapped and displaced have been eliminated. However, the definition of a vocationally handicapped worker has been restated as the eligibility criteria for an authorized training program. Thus, although the result might be the same under either set of rules, we will use the definitions and eligibility criteria found in the 1978 rules.

The employer contends that the Referee and the Board should review authorized training program eligibility decisions made by the Field Services Division of the Workers Compensation Department using the "abuse of discretion" standard of review. The claimant contends that the scope of review is de novo.

The Board previously considered this issue and decided that the scope of review is de novo. Arlee F. Fisher, WCB Case No. 80-00232 (January 6, 1981), (affirming and adopting the Order of the Referee); see also Tom Moore, 30 Van Natta 499 (1981). Because the Board's rationale for its decision has not been set forth in a published order of the Board, the rationale will be discussed here. We borrow from the Referee's order in Arlee F. Fisher:

> "Prior to 1980 OAR 426-61-060 governed administrative review of vocational rehabilitation decisions. This rule provided for a limited scope of review, requiring affirmance of the agency decision unless it was found that the decision violated a statutory rule, exceeded the statutory authority of the agency, was made upon unlawful procedure, or was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. However, by amendment to ORS 656.283 in 1979, the legislature limited the application of this limited scope of review to decisions regarding participation in authorized vocational rehabilitation programs. Questions concerning a claimant's eligibility for such programs are subject to the same procedures as any other question concerning a worker's compensation claim. Such review is de novo."

Arlee F. Fisher, Referee's order dated June 6, 1980, WCB Case No. 80-00232, at page 3.

The legislation referred to by the Referee in the passage quoted above is OR Laws 1979, ch 839, §7, which amended ORS 656.283 (1) as follows:

> "Subject to ORS 656.319, any party or the [board] director may at any time request a hearing on any question concerning a claim. However, decisions of the director regarding participation in, but not eligibility for, an authorized vocational rehabilitation program may be modified only if the decision of the director:
>
> (a) Violates a statute or rule;
> (b) Exceeds the statutory authority of the agency;
> (c) Was made upon unlawful procedure; or
> (d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion."

This statute begs the question of what is the scope of review for eligibility cases.

The employer in its brief argues that the existing scope of review for eligibility cases is the "abuse of discretion" standard. The employer cites a line of Court of Appeal cases involving vocational rehabilitation program eligibility/participating decisions. In Leaton v. SAIF, 27 Or App 669 (1977), and Brady v. General Accident Assurance Co., 29 Or App 357 (1977), the issue before the Court was whether the claimant was vocationally handicapped and

therefore eligible for an authorized training program. In both cases, without mentioning the scope of review issue, the Court held that the claimant was not vocationally handicapped. In Adams v. SAIF, 43 Or App 899 (1979), the claimant had previously been determined vocationally handicapped, and the issue before the Court was whether he was entitled to participate further in an authorized training program. Again, without discussion of the scope of review, the Court decided that the claimant was not entitled to additional authorized training program benefits. In all three cases, Leaton, Brady and Adams, the Court's discussion and evaluation of the evidence suggested de novo review.

In Saunders v. SAIF, 40 Or App 169 (1979), the issue was whether the claimant was vocationally handicapped and therefore eligible for an authorized training program. Here the Court did mention the scope of review issue, but specifically declined to rule on it, holding that under either scope of review the claimant did not demonstrate that he was vocationally handicapped. There is only one case decided by the Court of Appeals where the Court applied the "abuse of discretion" standard. In Schriendl v. SAIF, 48 Or App 127 (1980), decided after the effective date of the 1979 legislature, the Court held that the Field Services Division did not abuse its discretion in denying further participation in an authorized training program by an admittedly vocationally handicapped worker.

Thus, there is no Oregon appellate case holding that the scope of review of vocational rehabilitation authorized training program eligibility decisions is anything other than de novo.

Upon our own de novo review and applying the 1978 administrative rules governing vocational rehabilitation benefits, the Board concludes that the claimant is not vocationally handicapped and therefore is not eligible for an authorized training program.

The administrative rule in effect at the time of claimant's injury provided as follows:

> "Vocationally handicapped worker means a worker who is unable to return to his regular employment because of permanent residuals of an occupational injury or disease, and who has no other skills, aptitudes or abilities which would enable him to return to gainful employment."

OAR 436-61-004(4), as amended effective February 1, 1978.

The evidence is clear that claimant is unable to return to his regular employment (green chain marker in a sawmill) because of the permanent residuals of the occupational injury he sustained in 1978 (the inability to do repetitive heavy lifting or bending arising from a low back injury).

As noted by the Referee, however, the primary skills claimant has acquired through previous employment that are transferable arise from his employment some 12 years ago with Boeing Aircraft. Those skills include the ability to read blueprints and use of precision measuring devices. Notwithstanding the length of time since claimant last used these transferable skills, the vocational rehabilitation vendor to which claimant was assigned by the Field Services Division for employment re-entry assistance found that claimant could obtain employment at such positions as light duty drill press operator, inspector trainee and light production work. All these positions are entry-level positions paying $3.50 to $4.50 per hour, as compared to the $9.00 to $10.00 per hour that claimant could have expected to be earning had he remained working at the sawmill.

Claimant rests his contention that he is vocationally handicapped on the premise that he is not gainfully employable; and that he is not gainfully employable because the only work he can obtain pays minimum wage (roughly one-third of his pre-injury earnings). Claimant cites as authority Tom Moore, 30 Van Natta 499 (1981). In Moore, the Board concluded that $3.79 per hour was not gainful employment where the worker's pre-injury earnings were in the $7.00 to $9.00 per hour range. However, the Board's ruling in that case must be understood in light of the unique facts of that case -- the claimant, on his own, pending a decision by Field Services Division, had commenced school and, suffering economic hardship, found work. The Board in that case felt it was unfair to penalize the claimant and deny him an authorized training program merely because the claimant by his own efforts, without the assistance of Field Services, had begun school and obtained employment.

The equities in the case at bar are not as favorable to the claimant. The vocational rehabilitation vendor assigned had to convince claimant that he had some transferable skills in order to motivate claimant to seek employment at all. Once motivated, claimant did make a consecientious effort to find work. However, claimant refused at least two different offers of employment for reasons unrelated to the inability to perform work. More importantly, claimant did not demonstrate that an authorized training program would prepare him for employment that would pay substantially more than the minimum wage jobs he rejected. In fact, the only evidence in the record suggests that if claimant were retrained pursuant to an authorized training program he would still be forced, at least initially, to accept entry-level wages. Under these circumstances, the Board cannot say that $3.50 per hour is not gainful employment.

We conclude that claimant has not established he is a vocationally handicapped worker under the 1978 version of OAR 436-61-004(4) because the evidence does not show he "has no other skills, aptitudes or abilities which would enable him to return to gainful employment."

It would be incongruous for the Board to find claimant not vocationally handicapped on the ground of employability, and at the same time to find claimant permanently and totally disabled. However, upon review of the medical and other evidence in the record and considering claimant's physical impairment, age, education, work experience and other factors, and using OAR 436-65-600, et seq, as a guideline we find that the claimant is entitled to an award of 128° for 40% permanent partial disability.

ORDER

The Referee's order dated May 15, 1981 is reversed in part and modified in part. The finding that claimant is entitled for a job skills improvement program is reversed. The award of permanent partial disability is modified. Claimant is awarded 128° for 40% unscheduled permanent partial disability for the injury to his low back. This award is in lieu of all prior awards for the injury to claimant's low back. Claimant's attorney is allowed 25% of the increased compensation awarded herein as and for a reasonable attorney's fee.

LARRY W. BRUCE, Claimant
David Hytowitz, Claimant's Attorney
Stephen Frank, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09781 & 80-11106
March 8, 1982
Supplemental Order on Review

The Board issued an order in this case finding SAIF Corporation responsible for claimant's current condition. This order was a reversal of the Referee's order which found Hartford Insurance Group responsible for claimant's aggravation claim. Hartford now requests the Board to clarify its order by directing SAIF to reimburse it for all monies paid after July 31, 1980. We have recently stated that, "[I]n such situations...Referees and this Board always have authority to order necessary adjustments and reimbursement upon determination of the responsible insurer." Marvin DeVoe, WCB Case Nos. 80-06033 and 80-10625 (February 26, 1982).

ORDER

SAIF Corporation is hereby directed to reimburse Hartford for benefits paid to or on behalf of claimant after July 31, 1980.

RON KLEIST, Claimant
Douglas Green, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 81-04207
March 8, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The employer/carrier requests Board review of Referee James' order vacating the Determination Order issued April 23, 1981 as premature. The sole issue presented for review is whether the claimant proved by a preponderance of the evidence that his medical condition was not stationary on and after April 23, 1981.

Claimant injured his back in June, 1980. Dr. O'Leary diagnosed muscle strain entire spine. He later modified the diagnosis to low back muscle strain and mid-dorsal strain. Dr. Duckler, orthopedist, became the treating physician throughout the remainder of 1980. In December, 1980 the diagnosis remained lumbar sacral strain with dorsal strain. Treatment was entirely conservative.

In January, 1981 Dr. Beeson, a chiropractor, examined claimant. He diagnosed sprain of the thoracic, cervical and lumbar regions of the back with some torn ligaments at the level of the fifth and seventh cervical vertabrae. Dr. Beeson commenced treatment with chiropractic adjustment and traction.

In January claimant was examined by Dr. Marble, orthopedic specialist, who reported:

> "On the basis of my clinical examination I can make no diagnosis, whatsoever, of an objective disease. I would feel that his scoliosis is functionally insignificant and of, most likely, a congenital origin. We will try to obtain the films from Dr. Beeson's office.
>
> "I feel that this gentleman has sustained a lumbar strain which is now resolved. His complaints are totally subjective. I see no indication for further treatment. I would think he can return to any type of work that he wishes and would suggest that his claim be closed without disability since I can see no objective evidence of same."

In addition, in the same report, Dr. Marble advised "when and if" Dr. Beeson's x-rays appear he would file an amended report, if indicated. No amended report is in the record.

In February, 1981 Dr. Duckler ordered a special x-ray study (CAT scan). Claimant failed to appear for the scheduled test.

In March, 1981 Dr. Duckler concurred with Dr. Marble's January, 1981 opinion quoted above, stating since claimant had failed to meet his appointment for the CAT scan he agreed with Dr. Marble's findings. Dr. Beeson, on the contrary, in March, disagreed with Dr. Marble.

On April 23, 1981 the Evaluation Division issued the disputed Determination Order which we quote in its entirety:

> "The Department finds that there is no conflicting medical opinion as to whether your condition is medically stationary. It is the determination of the Department that the weight of evidence indicates that your condition has become medically stationary; that further 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 condition, even though a determination of your claim is now appropriate; and that you are entitled to no award of permanent partial disability.
>
> "The Department finds and therefore ORDERS you entitled to compensation for temporary total disability inclusive from September 29, 1980 through March 10, 1981."

Dr. Beeson testified at the hearing that the claimant's condition was one of mechanical balance of the spinal structures and that his treatment was curative in the sense that it would correct the malalignment and imbalance of the spinal structure. In essence he testified that since the treatment provided was corrective in nature it was curative, not palliative. He believed the claimant's condition had not become medically stationary at any time after the injury and up to the date of the hearing.

We conclude claimant's claim was properly closed by Determination Order. Admittedly, there is conflicting evidence. However, we are not persuaded by Dr. Beeson in the face of two orthopedic doctors' opinions. Indeed, accepting Dr. Beeson's diagnosis of "mechanical displacement" of claimant's spine would necessarily imply that two more qualified doctors, including the doctor who treated claimant for several months following his injury, failed to properly diagnose the situation. The preponderance of the evidence indicates claimant's condition is medically stationary and that Dr. Beeson's treatment is only palliative in nature. Claimant is entitled to continue these treatments under the provisons of ORS 656.245; however, there is no evidence to indicate claim reopening is necessary.

The evidence in the record on claimant's extent of permanent partial disability is not abundant. We conclude, based on the record, that the Determination Order was correct and should be affirmed.

ORDER

The Referee's order dated July 21, 1981 is reversed. The April 23, 1981 Determination Order is affirmed.

ILENE STEVENSON, Claimant
Richard Condon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00867
March 8, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

SAIF Corporation seeks Board review of Referee Knapp's order which set aside its denial of claimant's occupational disease claim ordering them to accept her thrombophlebitis condition as compensable.

The sole issue on review is compensability of claimant's thrombophlebitis.

The claimant, 60 years old at the time of the hearing, had been employed since October, 1978 in a "desk job" as a clerical person for the Oregon State Department of Commerce, first in the Insurance Division and then in the Real Estate Division. Her work in both divisions required her to be at her desk most of the work shift, up to about seven hours a day. While in the Insurance Division she moved around a bit more than she did while in the Real Estate Division, but essentially she sat at her desk most of the working shift. The exceptions were during lunch and coffee breaks when she would walk to the area where the activity was to occur and then generally sit down while on break. As we see it, the essence of her work activity was not materially different from any other similarly situated desk worker.

The record is not clear regarding how many hours claimant would sit during non-work activities, but we infer that when she was not sleeping she was frequently sitting to perform many of the non-work related activities common to similarly situated people. We do know that she did sit most of the time about seven hours a day (less before she transferred to the Real Estate Division) out of 24, five days a week out of seven (except when not working for whatever reason).

The latter part of November 1978 claimant developed discomfort in her feet, mostly the left foot, characterized as "cold" and "swelling." In December 1980 she saw Dr. Allen who diagnosed thrombophlebitis, left leg. Later in December, 1980 Dr. Craig expanded the diagnosis to include atherosclerotic cardiovascular disease with incipient angina pectoris. In June 1981 Dr. Craig reported:

> "In my opinion the longer periods of sedentary activity at work put her at much greater risk for developing a thrombophlebitis than her commuting."

(The "commuting" is reference to the fact claimant rode the bus from Dallas to Salem and back the days she worked.) Dr. Allen in June 1981 reported:

> "In my opinion it is medically probable that the thrombophlebitis suffered by Mrs. Stevenson was either caused or materially contributed to by her work activities..."

Also, in June 1981 Dr. Bruton, who had previously seen and treated claimant for the phlebitis condition, reported:

> "As to the etiology of her disease, I would have to state that stasis of blood in her veins where she already had some problems with varicose veins was responsible. I would say there is strong medical probability that prolonged sitting at her desk without moving her leg or without elevating it was related to the onset of phlebitis." (Emphasis added.)

SAIF denied compensability and claimant appealed. The Referee found the thrombophlebitis compensable. He stated: "I conclude that claimant indeed suffered a compensable occupational disease while in the employ of the Department of Commerce." The Referee found the medical evidence uncontradicted and that her off-the-job activities were not substantially the same as her on-the-job work conditions. We do not completely agree with the Referee that the medical evidence is uncontroverted because of Dr. Bruton's somewhat equivocal opinion.

This is an occupational disease claim. ORS 656.802(1)(a) defines occupational disease as:

> "Any disease or infection which arises out of and in the scope of the employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein."

In Kay L. Murrens, 33 Van Natta 586 (1981), we interpreted this statute to require a "significant preponderance" of at-work causation in order for an occupational disease claim to be compensable. In SAIF v. Gygi, 55 Or App 570 (1982), the Court of Appeals subsequently established a "major contributing cause" test.

We find claimant's thrombophlebitis condition is not compensable under either test. According to all the medical evidence the most likely etiology of that condition was stasis of blood related to prolonged sitting. Aside from claimant's long commute by bus, we think it safe to assume that her activities while not working included periods of prolonged sitting. The most that Dr. Allen can say is that sitting at work was likely a material contributing cause. As we understand Gygi, however, material contributing cause is something less than major contributing case. And we find nothing in the evidence or in logic or in common sense that would make sitting at the office a "major" cause while sitting on the bus or at home is a "minor" cause.

ORDER

The Referee's order dated July 20, 1981 is reversed.

ELIZABETH N. WELCOME, Claimant
Jerry Gastineau, Claimant' Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03201
March 8, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Nichols' order which reopened claimant's claim as of December 3, 1979 and found claimant was entitled to medical treatment of her choice along with mileage incurred as a result of all related treatment. A penalty was assessed for SAIF's failure to pay claimant's travel expenses.

Claimant sustained compensable injuries on November 16, 1977 when she was physically assaulted by a co-worker. After a period of treatment by several physicians, her claim was closed by a Determination Order dated November 5, 1979 whereby she was granted time loss benefits only. On December 3, 1979 claimant first saw Dr. Ricks, a chiropractor, complaining of lower back pain radiating into both legs. She also complained of headaches and weakness in her arms and hands. Dr. Ricks felt claimant should respond to chiropractic therapy. SAIF sought advice from Drs. Emori and Tennyson regarding this treatment. Neither doctor felt the chiropractic treatment was necessary or indicated for the claimant. Based on these reports, SAIF denied all chiropractic treatment after February 14, 1980. This partial denial was mailed April 1, 1980. On April 7, 1980 the parties entered into a stipulation disposing of issues involving permanent partial disability and space shoes prescribed by Dr. Weinman. The stipulation specifically stated that SAIF would reconsider claimant's mileage reimbursement request, and reserved claimant's right to contest the April 1, 1980 partial denial.

SAIF contends that the Referee's reopening of the claim as of December 3, 1979 was in error. We agree. The Referee set forth the issues involved at the hearing as follows:

> "The issues are improper denial of .245 treatment, the failure to pay mileage, and penalties and attorney's fees associated therewith. ***"

We are uncertain whether the Referee reopened the claim on the basis of medical treatment alone, or, whether it was also to include time loss benefits. If time loss benefits were contemplated, the claimant must proceed on the basis of premature closure, or aggravation under ORS 656.273. There is no contention that the claim was prematurely closed. ORS 656.273(1) provides that an aggravation claim is for worsened conditions "[a]fter the last award or arrangement of compensation . . . ." The last award or arrangement of compensation in this case was the April stipulation. If the Referee contemplated that the claim be reopened as of December 3, 1979 for time loss benefits, she was without authority to do so since any such issue of worsening up to the date of the stipulation was stipulated away.

If the Referee's reopening of the claim only contemplated chiropractic treatment, that also was erroneous. SAIF's partial denial of April 1, 1980 denied only chiropractic treatments after February 14, 1980. There is no contention that SAIF denied any such treatments prior to that date. Since there was no denial for treatments in the interim period between the issuance of the Determination Order and February 14, 1980, it was improper for the Referee to order reopening as of December 3, 1979. That was not an issue at the hearing. The proper procedure would have been to set aside SAIF's partial denial and order it to pay for claimant's chiropractic treatments related to her injury, subsequent to February 14, 1980.

With respect to the issues of propriety of treatment under ORS 656.245, mileage, penalties and attorney fees, we affirm the conclusions reached by the Referee.

ORDER

The Referee's order dated March 13, 1981 is modified. That portion of the order which reopened claimant's claim as of December 3, 1979 is reversed. Claimant's claim is reopened for chiropractic treatments related to her November 16, 1977 injury as of February 14, 1980, in accordance with ORS 656.245. Claimant's attorney is awarded $450 as and for a reasonable attorney's fee, payable by SAIF.

JAMES DeWOLFE, Claimant
SAIF Corp Legal, Defense Attorney

WCB 80-05575
March 10, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The claimant has requested Board review of Referee Gemmell's order which approved the June 5, 1980 denial of the SAIF Corporation for an injury allegedly sustained by the claimant on October 9, 1979. The issue on review is compensability.

The claimant contends that he suffered an injury to his low back on October 9, 1979 when he was helping extricate a "ditch witch" from a trench. The first indication given by the claimant that he suffered an injury appears in the March 20, 1980 report of Dr. Danielson. Claimant first completed a Form 801 on March 25, 1980.

The Referee found that the claimant's failure to report the injury earlier or to relate the incident to any of the several doctors he visited following the alleged injury until March 20, 1980 was unlikely for a man who has suffered an injury. The Referee further found that the reasons given by the claimant for his failure to do so were not convincing. Additionally, the Referee found that the medical evidence did not specifically relate the claimant's numerous physical complaints to an injury on October 9, 1980.

The Board affirms and adopts the order of the Referee.

ORDER

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

JESS GIGER, Claimant
David Vandenberg, Claimant's Attorney
Steven Reinisch, Defense Attorney

WCB 78-09716
March 10, 1982
Order on Remand

The Court of Appeals, by an Opinion and Order issued August 3, 1981 reversed that part of the Board's Order on Review (entered December 8, 1980) which failed to consider the reasonableness of the carrier-paid attorney's fee awarded by the Referee, and remanded the claim to the Board for consideration of this issue pursuant to ORS 656.295;

The Board has now received the Judgment and Mandate of the Court, issued September 23, 1981;

Having now considered the issue of the reasonableness of the carrier-paid attorney's fee ordered by the Referee, the Board concludes that the award is somewhat excessive in view of the nature of the legal and factual issues involved, and the time and effort expended by counsel in representing claimant at the Hearings level. The maximum fee allowable by OAR 438-47-020 is $3,000. The Board is of the opinion that claimant's attorney rendered a high quality of service to his client, but that the nature of the case and the efforts expended by counsel do not justify the fee awarded by the Referee.

ORDER

The Referee's award of a carrier-paid attorney's fee is modified. Claimant's attorney is awarded $1,650 as a reasonable attorney's fee for services rendered at the Hearings level. This award is in lieu of the amount awarded by the Referee's order of June 11, 1980.

LAURA JONES, Claimant
Richard Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04455
March 10, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Baker's order which set aside its denial of continuing responsibility for claimant's psychological treatment.

Claimant injured her back in 1968. In an earlier proceeding, in 1977, a Referee found that "a lot of" claimant's "psychological condition pre-exceeded [?] her industrial injury . . . but certainly has been aggravated by that industrial injury." The Referee ordered SAIF to provide claimant with psychological treatment pursuant to ORS 656.245. The issue in this proceeding is whether SAIF must continue to provide such treatment.

At times the Referee in this case seems to invoke a res judicata line of reasoning: "The 1977 . . . order allowing care and treatment . . . is not now open to attack." We do not believe the res judicata doctrine is relevant. ORS 656.245 requires medical treatment "for such period as the nature of the injury or the process of recovery requires." In other words, an earlier order to provide medical services can be followed by a later decision that medical services are no longer the responsibility of a workers compensation insurer despite the doctrine of res judicata. This is especially true where, as here, medical services were ordered provided because of an aggravation of a pre-existing condition; SAIF was thus responsible for treatment only until the psychological condition returned to its pre-injury level.

There are three medical opinions in the record. Claimant's treating psychiatrist, Dr. Newman, believes claimant's ongoing treatment is related to her 1968 injury. Drs. Colbach and Holland believe that claimant's treatment now is no longer in any way related to her 1968 injury but rather is now due to family problems and lifestyle.

On questions of the need for medical care, we defer to the treating doctor absent compelling reasons to the contrary. Lucile Schaffer, 33 Van Natta 511 (1981). The question here, however, is not one of need for medical services; we have no doubt that claimant needs continuing psychological treatment. Rather, the question is one of causation -- why does claimant need continuing treatment -- a question that depends upon analysis of the reasons given in support of the expert medical opinions, without any particular "edge" necessarily going to the treating doctor.

All three doctors generally agree that the depression for which claimant was first treated after her industrial injury has long since resolved. All three doctors generally agree that family and lifestyle problems have become part of the basis for claimant's present need for psychiatric care. Drs. Colbach and Holland find there is no causal relationship between the 1968 injury and claimant's present psychological problems. Dr. Newman theorizes a chain of causation whereby claimant's being at home and not working has contributed to the family problems which require psychological treatment. We find Dr. Newman's theory to be tortured and, considering the entire record, not persuasive.

ORDER

The Referee's order dated July 29, 1981 is reversed. The denial issued by the SAIF Corporation for further responsibility for claimant's psychiatric treatment dated May 7, 1980 is affirmed.

DONALD P. NEAL, Claimant
Tom Hanlon, Claimant's Attorney
Jerry K. McCallister, Defense Attorney

WCB 79-11036
March 10, 1982
Order on Review

Reviewed by the Board en banc.

Claimant seeks Board review of Referee Mulder's order that upheld the SAIF Corporation's partial denial of medical benefits for the treatment of claimant's aspirin overdose.

Claimant sustained a fractured ankle in March of 1978 which eventually lead to compensable surgery performed on May 1, 1980. Claimant suffered a nearly-fatal overdose of aspirin on June 4, 1980; SAIF has denied responsibility for medical treatment that followed the overdose. Despite our initial reaction that it was highly unlikely there could be any connection between the May 1 surgery and the June 4 overdose, upon consideration of the unusual circumstances of this case we find there is a clear chain of causation between the former and the latter.

Between May 3, 1980 and May 31, 1980 claimant's doctors issued him a total of ten perscriptions for a total of 340 tablets of four different drugs that affect the central nervous system.

DATE	MEDICATION	#/TABS
5/3/80	Dalmane 30 Mg.	10
5/3/80	Tylenol w/Codine #3	50
5/8/80	Percodan Tabs Endo	40
5/13/80	Percodan Tabs Endo	40
5/16/80	Percodan Tabs Endo	40
5/22/80	Valium Tabs 10 Mg.	30
5/25/80	Tylenol w/Codine #3	20
5/27/80	Valium Tabs 10 Mg.	30
5/29/80	Tylenol w/Codine #3	40
5/31/80	Tylenol w/Codine #3	40

According to the Physicians Desk Reference, of which we take official notice, Dalmane is hypnotic/sedative drug, or in lay terms, sleeping pill. Percodan is a semisynthic narcotic similar to morcpnine. Valium is a central nervous system depressant. The codine in Tylenol #3 is a narcotic which can impair mental abilities.

Also according to the Physicians Desk Reference, these four mood and mind altering drugs were prescribed for claimant in greater than the recommended dosage.

The discrepancy was greatest with the Percodan perscriptions which read "1 or 2 tablets every 3 - 4 hours as needed for pain." The Physicians Desk Reference states: "The usual adult does is one tablet every 6 hours as needed for pain." It was thus possible for claimant, complying with the terms of his perscription, to take four times as much Percodan as the Physicians Desk Reference recommended dosage. While there certainly can be theraputic reasons to deviate from the recommended dosage in any given situation, no such theraputic reasons are stated in this record.

Claimant's behavior during the month of May, 1980 was described in the testimony of his wife, brother and stepdaughter. Without detailing all of the testimony, considering the testimony as a whole, the picture that emerges to us is of a man whose mental abilities were seriously impaired by massive amounts of various sedative, depressant and narcotic drugs. By the end of May claimant had just enough reserve left that he was successfully prevailed upon by his wife to stop taking perscription drugs and instead to take aspirin for any remaining pain for his May ankle surgery. What apparently followed is that claimant took fourty 500 milligram aspirin tablets within about a 48 hour period leading to his emergency hospital admission with a sylicylate overdose and associated complications.

While we do not deem it critical to this case, we find claimant's switch from perscription drugs to aspirin was reasonable both because he had been previously told by doctors to use aspirin for headaches associated with his prior loss of an eye and because we live in a society that is literally bombarded with commercial messages that encourage the use of aspirin for pain control.

In upholding SAIF's partial denial of claimant's medical treatment for sylicylate overdose and associated complications, the Referee found that claimant "choose to take" the aspirin. We disagree. We find that by the time of his early June aspirin overdose, claimant's mental faculities were impaired by his ingestion during May of ten perscriptions for 340 tablets of four different sedative, depressant and narcotic drugs to the point that it cannot meaningfully be said that claimant could or did "choose" to do anything. Moreover, we believe that if a person actually "choose" to take 40 maximum strength aspirin tablets over two days, the only possible inference that could be drawn is one of attempted suscide; but we agree with the Referee's finding that claimant did not intend to harm himself.

The consequences of negligent treatment of a compensable injury are themselves compensable. See Wimer v. Miller, 235 Or 25 (1963). While we hestiate to make a finding of negligent treatment because claimant's doctor is not a party to this proceeding, we find the conclusion inescapable without explanation -- and there is none in this record -- that the medications claimant was perscribed during May, 1980 were excessive in number, excessive in amount and without theraputic basis.

In sum, we find the following chain of causation: Claimant's compensable surgery lead, for some reason, to an excessive dispensing of perscription drugs which caused claimant's seriously impaired cognative abilities which lead to his aspirin overdose. The following treatment is, therefore, compensable.

There are admittedly weak links in the chain of causation. Claimant was not forced to take his second through tenth perscriptions; he necessarily had to and did seek refills of his perscriptions. One would hope that at some point claimant would realize that no amount of ankle pain from his May 1 surgery justified being permanently sedated by the amounts of perscription drugs he was taking. But we think the primary responsibility for that judgement lay with claimant's doctor, not with claimant.

Also, claimant was instructed by his doctor not to put any weight on his ankle following his operation. The evidence is clear that claimant did not comply with this instruction, which may have increased his need for pain medication. For example, about May 18 claimant was out in the woods helping his brother in some kind of wood cutting operation. However, about May 18 was just toward the end of claimant's grossly excessive, albeit pursuant to doctor's orders, ingestion of Percodan. We are not prepared to say that even at that point claimant was entirely responsible or accountable for his own actions.

We agree with the Referee's finding that this situation is sufficiently unigue, if not bizzar, that SAIF had legitimate doubt about its responsibility and therefore penalities and attorney fees for unreasonable denial are not warranted.

ORDER

The Referee's order dated July 15, 1981 is reversed. SAIF's partial denial dated September 3, 1980 is set aside and this claim is remanded to SAIF for processing and the payment of benefits.

Claimant's attorney is awarded $2500 as and for a reasonable attorney fee for prevailing on SAIF's partial denial, payable by SAIF.

JERRY J. REUST, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-00038
March 10, 1982
Order on Reconsideration

The Board issued its Order on Review on January 11, 1982 reducing claimant's permanent disability award from 65% to 35%. Claimant's attorney has requested reconsideration of our order.

Claimant takes issue with the Board's dependence on Dr. Bolin's July 7, 1980 report because he was not claimant's treating physician. Claimant asks that we instead base our conclusion on Dr. Llewellyn's statement that claimant's ". . . functional activities of low back, should be 50% to 75% of normal." We note that this statement was made in November, 1979 and is not the most up-to-date medical evidence.

Our use of Dr. Bolin's report was due to the lack of other documented objective findings upon which to rate claimant's impairment. Had we relied solely on that report we would have given claimant a 5% impairment rating rather than 15%. We find the 15% impairment rating to be entirely consistent with the findings indicated by claimant's other physicians. In reconsidering this case, we note that Dr. Llewellyn also outlined claimant's objective findings in his November 5, 1980 report. He indicated all claimant's ranges of lumbar and lumbosacral motion were 50% of normal. This does not translate into 50% of the whole man, but rather somewhere around 11%. We again do not find this inconsistent with the 15% impairment rating used to help us reach a determination of claimant's unscheduled disability.

After reconsideration we conclude our January 11, 1982 Order on Review should be readopted and republished.

IT IS SO ORDERED.

ARTHUR HUFF, Claimant
Duane Murray, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-07035
March 11, 1982
Order on Reconsideration

The Board issued its Order on Review on February 24, 1982 wherein we affirmed and adopted the order of the Referee which remanded claimant's claim to SAIF for payment of compensation for medical services and temporary total disability compensation beginning April 15, 1980 and continuing until claimant become medically stationary and closure is proper pursuant to ORS 656.268.

On March 5, 1982 SAIF Corporation submitted a Motion for Reconsideration contending that the Referee specifically found claimant was not credible and that the Referee erred by finding that the opinions of treating doctors were to be relied upon when they in turn relied upon claimant's history to them.

After giving due consideration and a re-review of the evidence, we conclude that our Order on Review was proper and the Motion for Reconsideration is denied.

IT IS SO ORDERED.

EDWARD NICKS, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05296
March 11, 1982
Supplemental Order

On February 26, 1982 the Board entered an Order on Review which, in part, allowed claimant's attorney a carrier-paid attorney's fee of $350 (ORS 656.382(2)), a penalty of 25% of amounts claimed for chiropractic services and an attorney's fee of $100 (ORS 656.382(1)).

Said amounts are to be paid by SAIF in addition to and not in lieu of the attorney's fee allowed by the Referee's order of August 20, 1981.

IT IS SO ORDERED.

PATRICIA L. LEWIS, Claimant
Robert S. Gardner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10226
March 15, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Mannix's order which set aside its denial and remanded claimant's claim for acceptance and payment of compensation as required by law. SAIF relies upon Weller v. Union Carbine, 288 or 27 (1979), in arguing that the Referee's order should be reversed.

We basically agree with the Referee's analysis and affirm his conclusion. But we do not find the Weller test was satisfied; instead, we find that Weller is inapplicable because claimant's back condition was not symptomatic before her industrial exposure in August of 1980. Lorena Iles, 30 Van Natta 666 (1981).

The significance of a condition being previously symptomatic is that there is usually prior treatment, meaning that there is a baseline from which to measure whether the claimant's underlying condition has worsened within the meaning of Weller. If Weller also applied when the underlying condition was previously asymptomatic, there would almost never be any baseline information about the prior extent of the underlying condition and thus the claimant would almost never be able to prove any worsening of that condition. For this reason we have previously ruled in Iles that Weller is inapplicable to previously asymtomatic conditions. We adhere to that conclusion and find it here dispositive.

ORDER

The Referee's order dated June 2, 1981 is affirmed. Claimant's attorney is awarded $475 for services rendered on this Board review, payable by the SAIF Corporation.

JOYCE F. ADAIR, Claimant
Jerome F. Bischoff, Claimant's Attorney
R. Ray Heysell, Defense Attorney

WCB 81-01035
March 17, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The employer/carrier seeks Board review of Referee Baker's order which set aside its denial of aggravation and remanded claimant's claim to it for acceptance.

Claimant was employed by Roseburg Lumber Company as a skoog operator and on June 24, 1977 she injured her low back. The diagnosis from Dr. Hovenden, a chiropractor, was lumbar strain. She subsequently moved a bed at home and aggravated her low back condition. This aggravation was denied by the employer/carrier. Claimant appealed and, after a hearing, a Referee found this incident represented an aggravation of claimant's industrial injury.

Thereafter claimant was examined by Dr. Woolpert in September, 1977 and he found claimant had good range of motion of her lumbar spine and diagnosed possible mild discogenic disease.

After claimant's industrial injury and subsequent aggravation she returned to work in December, 1977 and continued working.

Dr. Woolpert examined claimant on October 16, 1978 and indicated he hadn't seen her since April. Claimant told him she had back pain once every week or two which lasted two to three days. Upon examination he found no limitation, full range of motion and neurlogical testing was normal. He felt her condition was medically stationary with minimal disability.

The claim was initially closed on December 15, 1978 with compensation for temporary total disability only. Claimant appealed, and after a hearing, a Referee granted claimant 10% unscheduled permanent partial disability.

There are no further medical reports in the record until claimant reported to the emergency room at Douglas Community Hospital on December 28, 1980. The diagnosis was acute lubosacral strain with the possibility of a disc type syndrome. The claimant testified that on that date, at home, she bent over to take two rugs out of her dryer and couldn't straighten her back.

On January 12, 1981 the employer/carrier issued its denial of claimant's aggravation on the ground that claimant had sustained a new injury at home.

The only medical evidence in the record that is relevant to the claimant's current condition is the May 27, 1981 letter signed by Dr. Black, and his short deposition of July 20, 1981. The letter consists of a statement apparently prepared by claimant's attorney and signed by Dr. Black which states that the claimant's need for treatment and time off work as of January 5, 1981 are related to a worsening of her industrially caused condition.

Dr. Black indicated in the deposition that the incident at home resulted in a worsening of the claimant's pre-existing condition that claimant had since 1977 following her industrial injury.

In Grable v. Weyerhaeuser, 291 Or 387 (1981), the Court stated that if the claimant estblishes that the compensable injury is a "material contributing cause" of his worsened condition, he has thereby established that the worsened condition is not the result of an "independent, intervening cause." 291 Or 387 at 400-401. In this case, it is the claimant that has the burden of establishing the contribution of her industrial injury to the alleged worsening.

Based on the "credible lay testimony" and "expert medical opinion," the Referee found that the claimant's work injury of 1977 had continued to be a material contributing factor to the claimant's condition and remanded the claim for acceptance.

We do not find that back claims are simple matters which can be resolved without adequate medical evidence. We find that the claimant's evidence is inadequate to establish that the industrial injury of 1977 was a material contributing cause of her 1980 condition. As noted, the evidence consists of the doctor's signature on a statement apparently prepared by claimant's attorney, and a "yes" in answer to a question posed upon deposition. Nowhere does the doctor give any explanation of the relation between the 1977 and 1980 incidents. Merely conclusory statements are generally insufficient to establish medical causation. Robert L. Green, 31 Van Natta 54 (1981), John M. Powell 33 Van Natta 714 (1981). In this case it is not even a conclusory statement by a doctor, but by the claimant's attorney. We find this meager evidence insufficient to establish a causal connection between the 1977 injury and the 1980 "worsening".

ORDER

The Referee's order dated September 24, 1981 is reversed. The employer/carrier's denial dated January 12, 1981 is affirmed.

EDWARD M. ANHELUK, Claimant
Dwayne Murray, Claimant's Attorney
Robert Joseph, Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08613
March 17, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Braverman's order which assessed a carrier-paid attorney fee and imposed a penalty.

Claimant made a claim for injury to his right knee in August of 1980. SAIF denied the claim within a couple of weeks. In April 1981 SAIF reversed its position and accepted the claim. Claimant's pending request for hearing, which had been filed after SAIF's initial denial, then proceeded to hearing solely on the questions of penalties and attorney fees.

The Referee's decision carries on at length about his belief that the employer and carrier were unreasonable. Probably distracted by this analysis by the Referee, SAIF's brief on Board review seems to assume the Referee ordered attorney fees paid pursuant to ORS 656.282(8) and 656.382(1).

We do not so understand the Referee's order. Attorney fees may be awarded for certain specific forms of unreasonable claims processing under ORS 656.262(8) and 656.382(1), read in conjunction. See Zelda Bahler, 33 Van Natta 478 (1981). On the other hand, under ORS 656.386(1) attorney fees must be awarded when the claimant prevails on a denied claim. In our view, this is not an ORS 656.262(8)/656.382(1) situation (attorney fees awarded because of any specific form of unreasonable claims processing); rather, this is an ORS 656.386(1) situation (attorney fees awarded because claimant prevailed on a denied claim).

Technically, claimant did not prevail on the denied claim at the hearing because a month before the hearing SAIF reversed its position and accepted the claim. We have no doubt about the authority of an insurer to reverse itself and issue notice of claim acceptance after a request for hearing. When an insurer does so, however, it is a safe bet that the request for hearing and other efforts of the claimant's attorney were instrumental in obtaining the ultimate result of claim acceptance. We thus conclude that in this kind of situation claimant's attorney is entitled to an insurer-paid fee pursuant to ORS 656.386(1).

The amount of the fee should reflect the fact that the efforts of claimant's attorney involved something less than taking the case to hearing. In Clara M. Peoples, 31 Van Natta 134 (1981), we recognized a normal range of $800 to $1,200 for attorney fees for prevailing at hearing on a denied claim. In this case the Referee awarded an attorney fee of $1,200. In other words, for a case that an attorney resolved successfully for the worker without a hearing the Referee awarded an attorney fee that would, in a typical situation, be at the high end of the usual range for cases that are taken to hearing. We conclude that claimant's attorney would be adequately compensated for services rendered by a fee of $800.

The other issue is penalties. Although we have concluded that unreasonableness is not relevant to the attorney fee issue, unreasonableness is critical to an assessment of penalties. As we understand the record, the information in SAIF's possession when it issued its initial denial is all contained in Exhibits 1 and 2. Exhibit 1 is a doctor's report that records claimant's history, "My right knee slipped out when I tried to get up," and the doctor's paraphrase of claimant's history, "He states that for the past several weeks he has had pain along the medial aspect of the right knee when standing from a squatted position." Exhibit 2 is claimant's 801 form. He describes the alleged accident as follows: "Knee slipped out of place in kneeling position during lunch time." We conclude that this information is insufficient to be able to say that SAIF's denial of claimant's claim was unreasonable.

ORDER

The Referee's order dated May 15, 1981 is modified. Claimant's attorney is awarded $800 for services rendered in getting claimant's claim accepted, payable by SAIF. This is in lieu of the attorney fee awarded by the Referee. The Referee's assessment of a penalty is reversed.

CHAIRMAN BARNES CONCURRING:

While the dissent of Board Member Lewis raises several philosophical points upon which reasonable persons could--and here do--differ, that dissent starts with the statement that:

> "The Referee's total award of attorney fees included an ORS 656.386(1) attorney's fee and an ORS 656.382(1) attorney's fee for SAIF's unreasonable conduct." (Emphasis added.)

With all due respect, there is no basis in the record for the emphasized portion of this statement.

Aside from this threshhold error, I feel it is necessary to comment on one other possible implication in the dissent. It refers to "the testimony concerning settlement negotiations" and seems to say, as the Referee more explicitely said, that SAIF was unreasonable not to accept claimant's settlement offer. I regard any effort to police the settlement process through the imposition of carrier-paid penalties and attorney fees to be a serious mistake for two reasons: (1) although no objection was made in this case to the testimony in question, I see no reason to deviate from the general rule that evidence of settlement negotiations is inadmissible; and (2) the monitoring of the settlement process contemplated by the Referee and apparently by the dissent is unfairly one-sided--penalties and fees could only be imposed when a carrier unreasonably failed to accept a claimant's offer, but there would

be no sanction when a claimant unreasonably refused to accept a carrier's offer. While the Referee and the dissent may sincerely want to find a basis to impose a penalty in this case, I strongly suggest that adoption of a precedent that mandates "reasonableness" in settlement negotiations would prove to be like jumping into the middle of a deep pool of quicksand.

BOARD MEMBER LEWIS DISSENTING:

I respectfully dissent from the majority opinion and would affirm the Referee's order.

The Referee's total award of attorney's fees included an ORS 656.386(1) attorney's fee and an ORS 656.382(1) attorney's fee for SAIF's unreasonable conduct. The basis of the Referee's assessment of a penalty and additional attorney's fee was a finding that the employer was dealing in bad faith and was "unreasonable in every aspect of the case."

Although I do not agree with the Referee that the employer's conduct necessarily exhibited bad faith, I am of the opinion that the conduct in this case was sufficiently unreasonable to justify imposition of a penalty and attorney's fee. It is my opinion that the total attorney's fee allowed by the Referee was not excessive, considering the evidence of efforts expended and the results obtained by claimant's attorneys. Although I am in agreement with the majority's statement regarding the authority of a carrier to rescind a denial after a request for hearing has been filed, I cannot agree with the majority's conclusion that SAIF's conduct in this case was reasonable.

SAIF denied this claim less than two weeks after claimant signed his report of injury. On the very same day that SAIF issued its denial, claimant's treating physician signed a Form 827 (First Medical Report), indicating that claimant's condition was work-related. This physician's report was in all likelihood received by SAIF within a week of its denial. SAIF apparently did not communicate with claimant's physician until shortly before April 1981, at which time claimant's physician clearly stated his opinion that claimant's condition was work-related, as previously indicated on the Form 827. SAIF rescinded its September 1980 denial on April 3, 1981, seven months having passed in the interim.

Before the hearing in May 1981, claimant's attorney and SAIF attempted to negotiate a settlement of the remaining issues: Penalties for unreasonable conduct and an attorney's fee.

In view of the fact that a period of seven months passed before SAIF rescinded its denial, I deem claimant's attorney's demands, as reflected in the testimony concerning settlement negotiations, not to have been unreasonable. Furthermore, I regard the delay in rescinding this denial to have been unreasonable in view of the fact that the medical opinion which ultimately resulted in the retraction was before SAIF almost immediately

after issuance of the denial. The physician's statement of work-connectedness contained in the Form 827 was sufficient to put SAIF on notice and should have resulted in an inquiry at an earlier date. Instead, no serious effort was made to confirm this medical opinion until slightly more than one month prior to hearing.

I regard the majority's opinion as a sanction of a denial which was issued in a haphazard fashion, inasmuch as no inquiry was made beforehand. Furthermore SAIF had available to it a medical opinion of the work-relatedness of the injury soon after the claim was denied.

Allowing a carrier to simply withdraw a hasty denial at a late date, after a worker has sought the assistance of counsel who has invested time and effort, encourages perfunctory denials with an eye toward rescission if no evidence in support of the denial can be mustered. It is my opinion that a penalty and an attorney's fee pursuant to ORS 656.262 (9) and 656.382 (1) should be assessed in cases such as this.

I respectfully dissent and would affirm the Referee's order.

I would award claimant's attorney an attorney's fee of $300 for services rendered on Board review, payable by SAIF.

ALICE S. BREWER, Claimant
Eric R. Friedman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00687
March 17, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF seeks Board review of Referee St. Martin's order which remanded claimant's claim for bilateral carpal tunnel syndrome to it for acceptance and the payment of benefits as required by law. Claimant cross requests review contending entitlement to penalties and attorney's fee.

Claimant developed tingling and numbness in her wrist sometime in 1976 while employed as a typist . Subsequently, she went to work for this employer in an occupation requiring repetitive cutting, shaping, stitching and putting holes in thick leather.

Claimant filed an 801 form for conditions involving both wrists and hands. The diagnosis was right carpal tunnel syndrome. Nerve conduction studies showed compression of the right median nerve but the left wrist testing was normal. On March 20, 1980 claimant underwent right carpal tunnel release surgery.

On April 28, 1980 claimant was released to return to her regular work. Claimant returned to work on April 21 but after two hours left work. There are then no medical reports in evidence until July, 1980.

On July 10, 1980 claimant fell off her horse landing on the left side of her body. Claimant contused her left chest, left leg and strained her left foot. She also suffered abrasions of both hands.

By August, 1980 claimant sought medical care for tingling and numbness of both hands. On December 22, 1980 SAIF denied any further responsibility for claimant's conditions. Dr. Norton, SAIF's medical consultant opined that claimant's wrists conditions were no longer related to her employment activities.

Dr. Waller who performed surgery in February, 1981, indicated that electrodiagnostic studies prior to the March, 1980 surgery demonstrated impairment of neural function of the median nerves in both wrists. He felt it reasonable to assume that the bilateral median nerve dysfunction continued to be related to claimant's job activities. From the record we infer Dr. Waller was unaware of the incident in July, 1980 when claimant fell off of the horse.

After the fall from the horse claimant was on crutches for a time. Later she had strep throat which required a period of bed rest. Dr. Dennis, neurologist, mentions ulnar neuropathy as a possible diagnosis and would relate it to prolonged bed rest. On depositon Dr. Dennis testified his history was that after the fall from a horse claimant was on crutches for three weeks. He felt

that the use of crutches could aggravate carpal tunnel syndrome. He also stated that both the shoveling activity necessary in caring for her horse as well as riding the horse could either cause or aggravate the symptoms. Dr. Dennis testified he found it difficult to reconcile the fact claimant's condition worsened with the fact she was not working. He concluded her condition was not related to her former occupation.

In concluding that SAIF remained responsible for claimant's bilateral wrist conditions the Referee stated:

> "I am of the opinion that the evidence slightly preponderates that claimant's case should have been reopened as of October 26, 1980 for both the right and left carpal tunnel problems".

He found Dr. Waller's analysis persuasive and remanded the claim to SAIF for acceptance. We disagree. We are not pursuaded by Dr. Waller's opinion because he had no history of claimant's fall off the horse nor information relating to the injuries caused by that fall. In addition, there is no evidence that Dr. Waller was aware of the nature of claimant's other off the job activities. Considering that Dr. Waller based his opinion on an incomplete history we find it is not sufficient basis to overcome the opinions of Dr. Dennis and Dr. Norton. Dr. Dennis and Dr. Norton are more persuasive.

The Referee found no penalties and attorney's fee due. We agree.

ORDER

The Referee's order dated August 19, 1981 is modified.

That portion of the Referee's order which remanded claimant's bilateral carpal tunnel syndrome to SAIF for acceptance is reversed. SAIF's denial is affirmed. The balance of the Referee's order is affirmed.

JOHN CAMERON, Claimant
Douglas Green, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11124
March 17, 1982
Order on Review

Reviewed by the Board members en banc.

The carrier seeks Board review of Referee McCullough's order which awarded 30% unscheduled permanent partial disability and allowed an attorney fee in the amount of 25% of increased compensation. The issue is whether claimant's injuries should be considered scheduled or unscheduled.

Quoting from the Referee's order, the facts of the case are as follows:

> "Claimant, age 35, suffered multiple injuries as a result of his employment as a millman with Kalt Manufacturing Company on October 13, 1978. A piece of pipe flew off a press and struck him on the right side of his face, knocking him to the ground. He suffered a mild cerebral contusion and fractures of several of the bones on the right side of his face. More seriously, he suffered fractures of the left iliac and pubic bones and the acetabulum. This occurred as a result of the left femur (the upper leg bone) having been driven through the acetabulum into the pelvic area, producing a 'central dislocation.' Claimant was hospitalized for over two months for repair of the injuries and for follow-up conservative treatment."

The Referee noted that:

> "The question in this case is not only the extent of claimant's permanent disability, but whether it should be unscheduled, scheduled, or both. The significance of this question lies in the fact that the present law provides that 'scheduled' permanent disability is to be evaluated solely on the basis of loss of use or function, whereas 'unscheduled' permament disability is evaluated based upon loss of earning capacity. Loss of earning capacity includes consideration of residual impairment (loss of use or function) combined with such factors as age, education, training, and work experience."

By way of clarification, while we speak of an injury to the acetabulum, physiologically, the acetabulum is not a separate structure but is a large, rounded cavity made up of portions of the fused pubis, ischium and ilium bones. The acetabulum articu-

lates with the upper ball-shaped "trochanter major" portion of the femur. Together, the acetabulum and the trochanter major make up what is commonly referred to as the "hip joint." The pubis, ischium and ilium make up the "os coxae" which is part of the larger pelvic structure.

Notwithstanding the physiology of these parts, the carrier contends that claimant's injuries should be considered a scheduled injury of the leg. Carrier cites OAR 436-65-550(2) and 436-65-630(2), which purport to rate injuries to the "hip joint" and "pelvis" as scheduled injuries of the leg. These administrative rules were adopted by the Workers Compensation Department pursuant to the grant of authority under ORS 656.726(3)(f) to "provide general guidelines for the evaluation of permanent disabilities in accordance with existing law."

In the opinion of the Board, injuries such as those sustained by claimant in this case to the acetabulum and other portions of the os coxae are injuries to unscheduled portions of the body. To the extent that the Department's administrative rules provide otherwise, they are invalid because they conflict with existing law. OSEA v. Worker's Compensation Department, 51 Or App 55 (1981). The Board has previously determined that injuries to the acetabulum or os coxae are unscheduled injuries. Gunnar Davidson, 20 Van Natta 234 (1977); Mildred Way, 15 Van Natta 31(1975); cf. Robert Lauber, 21 Van Natta 234 (1977); Chester Clark, 31 Van Natta 10 (1981); Don Emrich, 27 Van Natta 416 (1979); Harold Middleton, 23 Van Natta 335 (1978). It is instructive to note that one of the Department's evaluation guideline rules struck down in OSEA v. Worker's Compensation Department was the rule which purported to consider a shoulder joint injury as a scheduled injury of the arm where the Court of Appeals had ruled otherwise in Audas v. Galaxie, 2 Or App 520 (1970).

With respect to the extent of claimant's disability, the Referee's order provides:

> "Although some of claimant's residuals from his injuries are in the scheduled leg area (the thigh and calf atrophy and the degenerative changes involving the femoral head), it is impossible in this case to make any reasonable separation of the scheduled aspects of his residual disability from the unscheduled aspects. Since his injuries were to unscheduled areas and a significant portion of his residual problems involve unscheduled areas, and since all of his residual problems are attributable to the unscheduled injuries, I think the only sensible approach in this case is to evaluate his overall residual permanent disability based upon the loss of earning capacity standard."
>
> * * * *

"Having considered all of the evidence, I conclude that claimant has suffered a loss of earning capacity as a result of his injury that entitled him to an award of 30% unscheduled permanent partial disability."

Neither the carrier nor the claimant takes issue with the quoted portion of the Referee's order. Therefore, we decline to review the extent of disability and affirm the Referee's order.

ORDER

The Referee's order dated July 6, 1981 is affirmed.

RAY D. DEZELLEM, Claimant
Jon Woodside, Claimant's Attorney
R. Michael Healey, Defense Attorney

WCB 80-10560
March 17, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer seeks review of Referee Pferdner's order which awarded claimant 96° for 30% unscheduled disability (low back injury), ordered Field Services Division to evaluate claimant's vocational potential and provide rehabilitation consistent with the evaluation, and allowed an attorney fee of 25% of the increased award up to $2,000.

In January, 1980 claimant, then 23 years of age and employed as a material handler in the laminating department of United Foam Company, sustained a low back strain superimposed upon pre-existing spondylolisthesis. Claimant was released to "light duty," limited to lifting objects weighing less than 10 pounds, and returned to work three days after the injury. On February 13, claimant received a disciplinary warning for "tardiness and absenteeism." On February 29, claimant compensably re-injured his lower back. On March 14, claimant submitted to Field Services a written "self-referral" for vocational assistance. Field Services told claimant about a Job Fair, but made no other evaluation of claimant and provided no other services. On June 10, claimant was released again by his physician, with instructions initially not to lift objects in excess of 10 pounds.

From June 18, 1980 through July 7, 1980 claimant received four disciplinary warnings, for "tardiness," "lifting over 10 pounds," "leaving work area," "urinating in the parking lot" and "wearing open toe shoes in violation of safety rules." Claimant was given a three day suspension for receiving four disciplinary warnings in two months, and upon his return to work on July 11, 1980 he was terminated for "unsatisfactory performance", and "not capable of performing duties."

Sometime in the two weeks following his termination, claimant telephoned Field Services Division seeking vocational assistance. Claimant's counselor at Field Services told claimant he was not

eligible for vocational assistance because he had been terminated for reasons other than his compensable injury.

In November, 1980 a Determination Order issued awarding temporary total disability for February 29, 1980 through June 10, 1980 and awarding 5% unscheduled permanent partial disability arising from the low back injury. Claimant requested a hearing on the length of temporary disability and extent of permanent disability. At the hearing claimant raised the additional issue of entitlement to a vocational rehabilitation program.

In his brief, claimant's counsel represents that claimant is or soon will be enrolled in a vocational training program under the auspices of the Field Services Division.

The Referee made a "finding" that claimant was vocationally handicapped, and ordered that claimant receive temporary total disability payments to commence when the claimant becomes "engaged in the vocational rehabilitation process."

The employer contends that claimant was adequately compensated by the Determination Order's award of 5% unscheduled disability, that claimant is not entitled to vocational assistance, and that if he is eligible, he is not entitled to time loss merely for "engaging in the vocational rehabilitation process." Claimant maintains that the Referee correctly decided these issues. In addition, claimant contends that the vocational assistance issue is now moot. In the course of arguing and deciding the vocational assistance issue, the parties and the Referee apparently assumed that the vocational assistance rules adopted May 5, 1980 governed this issue, whereas in fact claimant was injured in January and February, 1980 when the vocational assistance rules adopted February, 1978 were in effect.

Therefore, the primary issues are (1) extent of disability, (2) entitlement to vocational assistance and (3) entitlement to time loss while engaged in the vocational rehabilitation process. The two subsidiary issues relating to vocational assistance are whether the vocational assistance issue is moot and which administrative rules here govern eligibility for vocational assistance.

I

The claimant was injured and reinjured in January and February of 1980. The administrative rules governing vocational rehabilitation benefits were amended in February, 1978, in May, 1980 and again in December, 1981. The parties argued the case and a Field Services Division employee testified based apparently upon the provisions of the May, 1980 version of the administrative rules.

ORS 656.202(2) provides that:

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

Vocational assistance is a benefit provided by the Workers Compensation Department pursuant to ORS 656.728. It follows that claimant's entitlement to vocational rehabilitation assistance is governed by the Department's administrative rules for vocational rehabilitation benefits in effect in January and February, 1980 when claimant was compensably injured, which would be the rules adopted in February, 1978.

II

ORS 656.295(4) limits Board review to the testimony and exhibits developed at the hearing before the Referee, and oral and written argument of the parties. A representation of fact contained only in a party's brief submitted to the Board and not developed in the hearing record cannot be considered by the Board. In the absence of appropriate evidence, we do not reach the mootness issue.

III

The following factors tend to indicate a lesser degree of disability than that awarded by the Referee: the claimant's age (now 25 years); his education (graduation equivalency diploma); the demonstrated ability to learn a new skill (claimant completed a welding course) and the absence of evidence indicating impairment in mental capacity or emotional or psychological stability. The primary factors tending to support the extent of disability found by the Referee are the extent of impairment to claimant's low back combined with claimant's lack of any substantial work experience at other than heavy manual labor, and the lack of other transferable skills. Viewing the evidence as a whole, and considering OAR 436-65-600, et seq, we believe that claimant is entitled to an award of 48° for 15% unscheduled disability.

IV

The employer contends that claimant is ineligible for vocational assistance, first, because claimant failed to make written application for such assistance. The employer cites OAR 436-61-100(3):

> "An injured worker who has been referred to the Division after a determination order has been issued must complete a written application for vocational assistance."

The rule employer cites is found in the vocational assistance rules adopted in May, 1980, but is not found in the rules in effect at the time of claimant's compensable injury.

At the hearing, claimant's Field Services counselor testified that claimant was not eligible for vocational assistance because of OAR 436-61-010, which provides in part:

> "(13) Workers have no entitlement to services under these rules if:"
>
> * * * *

"(c) They have been reinstated or re-employed, but leave for reasons not directly caused by their compensable injury."

Again, this rule can be found in the administrative rules adopted in May, 1980, but is not found in the rules in effect at the time claimant was injured. Nevertheless, it is a reasonable inference from the 1978 eligibility requirements (see the definitions of a "vocationally handicapped worker" and a "vocationally displaced worker" in the 1978 rules) that a worker discharged for misconduct on the job would not be eligible for vocational assistance.

Our review of the evidence leads to the conclusion that the real reason for claimant's termination from employment with United Foam was the limits imposed on claimant's ability to lift objects in excess of 10 pounds rather than violations of company rules. Claimant worked for employer for six months prior to being injured and, prior to that, he had worked for the employer for a nine month period. During that time, there was no evidence that claimant received any disciplinary warnings. It was only after claimant sustained his first compensable injury that he was cited for tardiness and absenteeism. During the time away from work following the February incident, claimant applied for vocational assistance. The record contains an offer of re-employment from employer concerning claimant dated after claimant's application for vocational assistance. That offer lists two jobs, both of which required claimant to lift objects in excess of 20 pounds. In fact, after claimant was released and returned to work in June, 1980 claimant's job did require him to occasionally lift objects in excess of 10 pounds. Claimant was issued a disciplinary warning for lifting such an object, but claimant testified that his supervisor had asked him to do so.

The termination notice listed as the reasons for termination "unsatisfactory performance" and "not capable of performing duties." In the absence of any further explanation from the employer, we interpret these reasons at least in large part to refer to claimant's physical inability to do all the tasks required by his job.

Based on his comments at the hearing, the Referee apparently believed that the employer was trying to get rid of claimant in order to avoid its obligation to claimant as a compensably injured worker. We reach the same conclusion.

The Referee in his order incorrectly stated that one issue was whether claimant was vocationally handicapped and entitled to a formal vocational training program. Claimant was denied any vocational assistance because of the circumstances surrounding his termination from employment; Field Services did not deny assistance because they found claimant not to be vocationally handicapped. The employer argues that the Referee precipitously decided the issue whether claimant is vocationally handicapped and entitled to an authorized training program. To the extent that the Referee's order purports to make a finding that claimant is vocationally handicapped, we agree. The matter should be remanded to Field Services for an evaluation of claimant and a determination whether and to what extent the claimant is eligible for vocational assistance.

V

The Referee ordered that temporary total disability payments to claimant should commence "when claimant becomes enrolled and actively engaged in the vocational rehabilitation process." All versions of the vocational assistance rules are clear that a medically stationary worker is not entitled to time loss payments unless and until the worker is enrolled and actively engaged in an authorized training program. A worker participating in other types of vocational assistance may not be entitled to such payments. The Referee's order on this point is ambiguous, and to the extent that he intended to order time loss payments only after enrollment in an authorized training program, the order was unnecessary because claimant is entitled to such payment as a matter of law.

ORDER

The Referee's order dated July 29, 1981 is reversed. Claimant is awarded 96° for 15% unscheduled permanent partial disability arising from his low back injury. This is in lieu of all prior awards. Claimant's attorney is allowed 25% of the increased award granted by this order over that granted by the Determination Order for services at the hearings level. This matter is remanded to the Field Services Division of the Workers Compensation Department to determine whether and to what extent claimant is entitled to vocational assistance.

BILLIE GARDNER, Claimant
Carlotta Sorensen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11276
March 17, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of Referee Foster's order which remanded claimant's claim for aggravation until closure pursuant to ORS 656.268 and ordered it to pay claimant 25% as a penalty on all medical bills due and owing from March 15, 1980 until their denial in October, 1980. The Referee also indicated there was no obligation on the part of SAIF to pay compensation for temporary total disability.

The SAIF contends that the Referee erred in treating this case as an aggravation as opposed to a claim for ORS 656.245 benefits. We agree and modify that order. The Referee found that claimant had not proven entitlement to temporary total disability, yet ordered SAIF to accept the "aggravation claim" under ORS 656.273. We agree the claimant has failed to prove by a preponderance of evidence entitlement to temporary total disability, but has proved entitlement to continuing medical services pursuant to ORS 656.245.

We conclude that the denial for continuing medical responsibility issued by SAIF in October, 1980 should be reversed and that claimant has proven her entitlement to continued medical services. However, we find that these services are palliative and not curative and there is no need for claim reopening.

ORDER

The Referee's order dated September 4, 1981 is modified. The denial of continuing responsibility for ORS 656.245 benefits is reversed and claimant's medical care and treatment is the responsibility of SAIF. The remainder of the Referee's order dealing with penalties and attorney fees is affirmed. Claimant's attorney is awarded $250 as and for a reasonable attorney's fee, payable by SAIF.

AVIS L. HANKS, Claimant
Robert Udziela, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-02460
March 17, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The SAIF Corporation seeks Board review of Referee Baker's order which reversed its denial of aggravation and remanded claimant's claim to it for acceptance and compensation for temporary total disability from March 7, 1980 through April 17, 1980. The sole issue is compensability.

Claimant was employed as a nurses aide when she sustained two lifting injuries, the first occurring in April, 1977 and the second in May, 1977. Claimant first injured her back in 1975 and was hospitalized on several occasions prior to 1977 for continuing back pain. Dr. Charles Lindsay diagnosed the claimant's condition following the 1977 injuries as "Acute, recurrent lumbosacral strain with mechanical low back pain problem, probable acute herniated intervertebral disc syndrome." Chronic degenerative disc disease with narrowing of the L4-5 disc space was found. A bilateral partial laminectomy L4 with removal of midline L4-5 disc and decompression of the L5 nerve roots bilaterally was performed on June 13, 1977 by Dr. Gerhard Grieser.

The claim was closed by a March 3, 1978 Determination Order which awarded claimant 10% unscheduled permanent partial disability. A stipulated order of January 10, 1979 reopened the claim for vocational rehabilitation and compensation for temporary total disability commencing July 15, 1978. The December 28, 1977 report of Dr. Grieser recommending claim closure is the last medical report in the record until 1980, when claimant's attorney submitted a letter requesting that the claim be reopened on the basis of aggravation.

Dr. Lindsay, in his April 10, 1980 report, relates that the claimant suffered an exacerbation of severe acute and chronic recurrent mechanical low back pain. He notes that the claimant was working in the yard on February 23, 1980, bent over to pull a piece of wire out of the ground, pulled hard, and felt like something "slipped or went wrong" in her back. Claimant experienced recurrent back pain problems since the incident. The diagnosis was "Acute and chronic recurrent herniated intervertebral disc syndrome with chronic mechanical low back pain syndrome." On July 1, 1980 claimant underwent a laminectomy, L4-5, complete on the right with L4 to the sacrum fusion, lateral mass.

This case involves the question of whether there is a causal connection between claimant's industrial injury sustained in 1977 and resulting surgery necessitated by that injury, and a subsequent operation to repair a low back when there has been an incident occurring off the job which could be described as an intervening incident. Its resolution therefore depends on the claimant establishing that the 1977 injury was a material contributing cause of the claimant's worsened condition. Grable v. Weyerhaeuser, 291 Or 387 (1981).

The medical evidence in this case is somewhat equivocal. In his May 15, 1980 letter, Dr. Bert states:

> "Her current problems are related to a complex group of occurrences. I feel that a previous laminectomy and a problem with her L4-5 disc space are directly causing a great deal of her current problems. I think the pulling something out of the ground history she gave was an inciting event that aggravated pre-existing conditions. I feel her current problems go back to at least 1975 and her injury of 1977 was only an aggravation to the basic problem of 1975." (Emphasis added.)

Dr. Bert has termed the wire-pulling incident both a new injury and an aggravation. It is difficult to determine whether he is giving a medical or legal opinion.

In his November 17, 1980 letter, Dr. Bert states that the wire-pulling incident was an "aggravating factor precipitating the necessity for surgery in July."

Dr. Bert was deposed on December 3, 1980. The following exchange took place:

> "Q. Yes. With regard to the causal relationship between her original surgery by Dr. Greiser and her present most recent surgery by yourself, can you give us your opinion, based on a reasonable medical probability, as to the causal relationship between those two?
>
> A. I feel that there is a direct relationship between her initial back problem and subsequent surgery by Dr. Greiser and her present problem. I feel that she had nerve root scars in her back from the surgery and as well as mechanical instability, as well as a Laminectomy which necessitated the present surgery which she had this summer, namely a lumbar fusion.
>
> Q. Do you feel that the lifting incident and history that she described to you as occurring at home this summer contributed to the onset of her symptoms of this most recent time when you did the surgery?
>
> A. Yes, I feel it was a contributing factor. But to put it in perspective, I feel when the back is unstable, any incident, and it can be a minor one, it can contribute to the problem.

Q. So, are you saying this is a situation where there are multiple concurrent causes operating simultaneously?

A. I believe that the primary cause of the problem still is injury and surgery to her back. But I do think there are multiple exacerbating events that occurred in her case, yes."

The various reports and opinions of Dr. Bert could most likely be best summarized by saying that he feels that the claimant's current problems are a result of the combination of the 1975 injury, the 1977 injury and resulting surgery, and to some extent, the 1980 wire-pulling incident. His October 7, 1980 letter terms the wire incident as only an aggravating event rather than the cause of the surgery. He is more clear in his deposition where he relates that the primary cause of the problem is the injury and resulting surgery to her back. This seems to be adequate to meet the test established by the Supreme Court in Grable and applied by the Court of Appeals on remand, Grable v.Weyerhaeuser, 55 Or App 627 (1982), but only by the narrowest of margins.

ORDER

The Referee's order dated July 2, 1981 is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee, payable by SAIF.

JOHN J. KELLY, Claimant
Gary K. Jensen, Claimant's Attorney
Richard Lang, Defense Attorney

WCB 80-01608
March 17, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Wolf's order which affirmed the denial of compensation of claimant's myocardial infarction.

We affirm and adopt with an additional comment. Claimant raises the issue on appeal of the admissibility of Dr. Bullard's reports, Exhibits 12 and 15. Dr. Bullard is a clinical psychologist; his field of expertise is psychological problems. On the issue of medical causation of a myocardial infarction allegedly arising from stress, Dr. Bullard's tendered opinion is beyond the scope of his expertise. The Referee correctly declined to admit or rely on Dr. Bullard's reports.

ORDER

The Referee's order dated September 17, 1981 is affirmed.

CLINTON LAMB, Claimant
INTER-CABLE UTILITIES, INC., Employer
Keith Boyd, Attorney
R. Michael Healey, Attorney
Michael Chellis, Attorney
Don Wilson, Attorney

WCB 80-02549
WCB 80-08298
Order on Review
March 17, 1982

Reviewed by Board members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Danner's order which (1) found Inter-Cable Utilities to be a complying employer on the date of the claimant's injury herein; (2) found SAIF to be the responsible carrier; (3) remanded the claim to SAIF as a compensable claim; (4) ordered SAIF to repay Employee Benefits Insurance Company(EBI) the sums expended by EBI pursuant to an Order Designating Paying Agent; (5) affirmed EBI's denial of responsibility and (6) allowed claimant's attorney $500 for the attorney's services at the hearing, the attorney fee to be paid by SAIF in addition to compensation benefits.

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

On January 25, 1980 claimant sustained a compensable injury while in the employ of Inter-Cable Utilities (ICU) whose putative carrier was SAIF. ICU was a subcontractor of Consumers Power, Inc., whose carrier was EBI. SAIF contends that it effectively terminated coverage of ICU prior to the date of claimant's injury, and argues that the Referee erred in applying the doctrine of equitable estoppel to reach a different result.

Prior to December 30, 1979, SAIF was clearly ICU's carrier. On November 30, 1979 SAIF mailed by regular mail an "advance notice of termination" the purpose of which was to inform ICU that unless ICU paid a $15 renewal fee by December 30, 1979 worker's compensation insurance coverage would terminate as of that date. ICU received that letter, but due to internal disorganization, it was not opened and read until sometime in February. In the meantime, on January 9, 1980, SAIF, by certified mail, sent another notice to ICU demanding a cash deposit of $5,500 within 30 days or "... your worker's compensation insurance coverage will be canceled by default effective midnight February 8, 1980."

After claimant sustained his injury on January 25, ICU discovered that, in fact, SAIF claimed that coverage had terminated on December 30, 1979 as per the first letter mailed to ICU. ICU immediately ceased all work until it was able to make the $5,500 premium payment to SAIF on or about February 13, 1980.

Consumers Power, Inc. and its carrier are parties to the proceeding because of their potential liability under ORS 656.029 which provides that, under certain circumstances, a prime contractor may be responsible for injuries sustained by employees of subcontractors.

The Referee, in deciding against SAIF, reasoned that the doctrine of equitable estoppel was applicable, and that ICU justifiably relied to its detriment on SAIF's January 9 letter which represented that ICU was covered until February 9, 1980.

SAIF argues that it is a State agency and that equitable estoppel cannot be asserted against a State agency, at least to the extent that the agency is exercising a "governmental" (as opposed to a "proprietary") function. SAIF cites Rhode v. State Industrial Accident Commission (SIAC), 108 Or 426 (1923) in which the Court reasoned that the worker's compensation law was enacted under the police power of the State, and that therefore SIAC was acting in a governmental capacity. The Court further said that equitable estoppel could not be asserted against the State acting in a governmental capacity because of the public policy of preventing loss to the State through the negligence of its public officers. The SAIF Corporation argues that it stands in the shoes of SIAC, and it cannot be estopped by the acts of its employees.

SAIF may have at one point stood in the shoes of SIAC. However, the numerous amendments to Oregon's workers compensation laws since 1965 and especially those adopted as Oregon Laws 1979, ch 829 had as a common denominator the notion that SAIF would cease to be a pure State agency and instead become a public corporation. See especially sections 2 and 5. We conclude that at least in its capacity as an insurer for the employer in this case, the SAIF Corporation was not acting as a State agency. We therefore find SAIF's reliance on the Rhode case to be inapposite.

Turning to the question whether the elements of estoppel are present here, we are satisfied that at the time of the injury on January 25, 1980, ICU reasonably believed that SAIF was providing worker's compensation coverage. SAIF insists that the real reason ICU did not pay timely the sums then due was the financial inability to do so, rather than the representations made in the January 9 letter. That contention overlooks the other option available to ICU, the one that they exercised when ICU ultimately did find out that they lacked coverage: it ceased working, thereby obviating the risk of injury.

ORDER

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

GREGORY L. McCONNELL, Claimant
Bill Bailey, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03735
March 17, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Neal's order which granted claimant an award of 16° for 5% unscheduled low back disability. Claimant contends that the award is inadequate.

The facts as recited by the Referee are adopted as our own, but we modify her conclusion. Based on the report of Dr. Storino, and utilizing the guidelines set forth in Workers Compensation Department Administrative Rules 436-65-600, et seq, we find that claimant is entitled to an award of 32° for 10% unscheduled permanent partial disability to compensate him for his loss of wage earning capacity.

ORDER

The Referee's order dated July 8, 1981 is modified. Claimant is hereby granted an award of 32° for 10% unscheduled low back disability. This award is in lieu of all prior awards. Claimant's attorney is granted, as and for a reasonable attorney's fee, 25% of the award granted by this order not to exceed the sum of $3,000.

MARY E. MEADOWS, Claimant
Elden Rosenthal, Claimant's Attorney
William Thomlinson, Defense Attorney
George Goodman, Defense Attorney

WCB 81-02192 & 81-02193
March 17, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Mulder's order which granted claimant an award of 22.5° for 15% loss of the right forearm. The Determination Order of May 8, 1981 granted claimant no award of permanent partial disability and it is the employer's contention that the Determination Order should be affirmed.

Claimant was employed as a nurses aide commencing on March 4, 1980 and two days later suffered a compensable industrial injury when she grabbed a rail and heard a snap in her right wrist. On April 26, 1980 Dr. Duckler diagnosed tenosynovitis of the right wrist but felt there would be no permanent disability. Claimant was released to return to her regular work on May 19, 1980. On July 15, 1980 Dr. Duckler reported claimant had continued having pain in her wrist but there was no permanent injury. Subsequently he reported there was "no loss of function."

On July 30, 1980 claimant fell and injured her right shoulder and wrist and suffered a headache. Claimant filed a new claim with a new employer. Claimant testified that her wrist condition after the July 30, 1980 injury remained the same as it was before the injury.

The Referee found claimant's testimony candid and credible and concluded that she had suffered permanent loss of function and granted her 15% loss of the right forearm. We reverse.

The Board in Olive B. Lyons, 33 Van Natta 188 (1981), found that the Referee granted claimant a scheduled award based on her credible testimony regarding her limitations. The Board concluded that credible testimony of the claimant was insufficient grounds for granting an award when the medical evidence documented there was no permanent impairment and no loss of function. We find the case at bar on point with the above citation.

All of the medical evidence from Dr. Duckler indicates no loss of function and no permanent impairment arising out of the industrial injury. The only finding stated by the doctor was claimant's continuing complaints of pain. However, there is no proof that this pain is, in and of itself, disabling. Therefore, we conclude that claimant has failed to prove by a preponderance of the evidence any entitlement to an award for loss of function of her right forearm.

ORDER

The Referee's order dated July 22, 1981 is reversed. The Determination Order of May 8. 1981 is reinstated and affirmed.

RICHARD D. REITZ, Claimant
Evohl Malagon, Claimant's Attorney
Gary Allen, Attorney

WCB 81-02533
March 17, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The employer, Scotty's Auction, seeks Board review of Referee Foster's order which declared employer to be a noncomplying employer and claimant to be a subject employee on the date of the injury. The Referee further found that claimant sustained a compensable injury while working for the employer and remanded the matter to the SAIF Corporation for payment of compensation, and allowed claimant's counsel an attorney fee of $1,000 to be assessed against employer as a claim cost.

The SAIF Corporation and the Department of Justice elected not to be present at the hearing. The employer was represented by independent counsel.

Except for one part of the Referee's order noted below, we affirm and adopt the Referee's order with the following comments.

Employer contends that no employer-employee relationship existed on the day of the injury, that claimant failed to file timely notice of his claim with the employer, and that claimant failed to file a timely request for a hearing following SAIF's written denial.

On January 20, 1981 claimant's hand was struck by the crank handle of the lid to a large trash dump box at the employer's work site. On January 18, 1981 claimant had approached the managers of Scotty's Auction seeking to trade certain items for a television. In the course of the bargaining, claimant asked about the possibility of employment at Scotty's. From then on, the evidence is conflicting as to whether claimant was employed at all and if so whether he commenced work sometime after the day of injury. Resolution of these issues required an assessment of the credibility of a number of witnesses. Suffice to say that the Referee resolved the conflict in favor of the claimant and on this record we see no reason to reach a different result. Buckner v. Kennedy's Riding Academy, 18 Or App 516 (1981).

Claimant informed employer of the injury sustained on January 20, 1981 within minutes thereafter. At the employer's behest, the fire department was called and claimant was transported to the hospital. However, claimant did not submit a form 801 until March 23, 1981. Therefore, employer contends that claimant failed to comply with ORS 656.265(1) and (2), which require a written notice to the employer within 30 days of an accident resulting in injury or death. However, subsection (3) of that same statute provides that a claim is not barred if the emloyer had actual knowledge of the injury. Here, it is uncontroverted and we find that the employer had actual and immediate knowledge of claimant's injury.

Claimant requested a hearing on March 23, 1981 on the issue, among others, of a "de facto denial" of benefits. SAIF's written denial was not issued until April 23, 1981. Therefore, employer contends that claimant failed to request a hearing on the issue of the denied claim in a timely fashion as required by ORS 656.319. Apparently all parties have overlooked that claimant's counsel submitted an amended request for hearing on May 5, 1981 indicating "appeal from denial" as an issue. We conclude that claimant timely requested a hearing on the issue of compensability.

But for the amended request for hearing submitted after issuance of the written denial, claimant's claim may well have been barred. Syphers v. K-W Logging Co., 51 Or App 769 (1981). To the extent that the second paragraph of that portion of the Referee's order entitled "Opinion" suggests otherwise, we do not adopt it.

ORDER

The Referee's order dated July 9, 1981 is affirmed. Claimant's attorney is allowed the sum of $300 for his services before the Board, payable by SAIF Corporation, subject to claim cost against the employer.

GERALDINE REYNOLDS, Claimant

WCB 81-0312M
March 17, 1982
Own Motion Order on Reconsideration

Upon the carrier's request for reconsideration of our prior Own Motion Order and upon carrier's response to the Board's order to show cause, we have carefully reconsidered this entire record.

The Board adheres to its amended Own Motion Order of January 12, 1982.

We construe the Referee's order dated June 1, 1981 in WCB Case No. 80-07944 to have affirmed the carriers denial of claimant's request for the lumbar sympathectomy surgery. We do not interpret the Referee's order to deny any and all surgery, as the carrier contends. We agree that the carrier was justifiably "surprised" by Dr. Berselli's performace of low back surgery other than the contested lumbar sympathectomy. It would appear that, by proceeding without prior authorization, Dr. Berselli violated the OAR 436-69-501. We do not agree that the Berselli surgery was not something which might reasonably have been anticipated in this case because as early as July, 1980 Dr. Johnson noted:

> "The patient seems to be thinking seriously of fusion and certainly if she had relief with body casting, this might well be a valid consideration!"

The surgery Dr. Berselli performed September 10, 1981 was "laminectomy L4-5 & L5-S1; lysis of adhesions L5-S1; L4-S1 spinal fusion."

Dr. Berselli's March 2, 1981 report indicates the surgery, albeit unauthorized, has had good results. He states:

> "Post operatively the patient has done very well indeed. She essentially has no back pain and no leg pain. I think the surgery has been a success and frankly has improved the condition of this patient's life immeasurably."

We understand the carrier has some cause for frustration because the spinal fusion surgery was done so close after lump sum payment of the increased disability granted by the Referee in WCB Case No. 80-07944. Although we agree some frustration could occur and probably has, we do not agree that the claimant has been unjustly enriched.

In sum, we adhere to our previous Own Motion Order as amended January 12, 1982 and add only that the carrier may have a valid reason to pursue with the Director of the Workers' Compensation Department the matter of Dr. Bersselli's possible violation of OAR 436-69-501.

This is the fifth order we have issued on this request for own motion relief since December, 1981. Certain issues have been considered, reconsidered and reconsidered again. It is now time for the carrier to comply with the Board's orders.

IT IS SO ORDERED.

THOMAS H. STEWART, Claimant
Samuel Imperati, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-05207
March 17, 1982
Order on Reconsideration

On February 24, 1982 the Board issued its Order on Review in the case of Thomas H. Stewart, WCB Case No. 80-05207, affirming and adopting the order of the Referee. By letter of March 5, 1982 the claimant, by and through his attorney, requested the Board to reconsider its determination. The contention is that the Board, by affirming and adopting the Referee's order, failed to consider several issues that the claimant raised on cross-appeal.

After considering this contention, the Board has determined that each issue the claimant has contended that the Board did not address, were fully addressed by the Referee in his order. By affirming and adopting that order, the Board has already expressed its intent to accept the reasoning and conclusions of the Referee with regard to those issues.

ORDER

The claimant's request for reconsideration of the Board's Order on Review dated February 24, 1982 is denied.

SUSAN SULLENGER, Claimant
Allen T. Murphy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00410
March 17, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The carrier seeks Board review of Referee Gemmell's order which awarded claimant 20% unscheduled disability (respiratory disease) and allowed an attorney fee of 25% of the increased compensation. The only issue is the extent of claimant's permanent partial disability, if any.

We adopt the Referee's statement of the facts and by reference incorporate them herein; however, we conclude that claimant is entitled to a lesser award of permanent disability.

We find claimant's respiratory impairment to be in the "minimal" range. Applying OAR 436-65-600, et seq, considering claimant's age, education, work experience and other factors, and viewing the record as a whole, we conclude that claimant is entitled to an award of 32° for 10% permanent unscheduled disability.

The carrier contends that the Referee placed undue reliance on the fact that claimant changed occupations on her physician's advice citing Hunt v. Whittier Wood Products, 52 Or App 493 (1981), where, as here, the claimant changed occupations because of medical advice as a result of the claimant's reaction to fumes and dust in the work environment. The need for a worker to change occupations in order to avoid exposure to noxious elements in the work environment is significant only in that it is some evidence that the worker's impairment has an effect on the worker's employability, and hence, earning capacity.

Of greater significance, in Hunt, the Court in reviewing the evidence noted that:

> "None of the doctors who treated or examined claimant expressed an opinion that she suffered permanent disability from the exacerbation of her ear and respiratory ailments while working at Whittier." 52 Or App at 496

By contrast, here, two years after the onset of the disease, claimant's treating physician and the examining physician found symptoms of claimant's respiratory disease. Both physicians indicated in language referring to the future that her impairment might resolve itself, but that for the time being some impairment remained. Also, in Hunt, the Court may have been impressed with the claimant's lack of credibility and the fact that it was an exacerbation case. Here, claimant's credibility is not at issue, and the disease was due almost exclusively to claimant's employment.

From our review of the record, we are satisfied that claimant is entitled to an award of permanent disability, but not to the extent awarded by the Referee.

ORDER

The Referee's order dated May 27, 1981 is modified. Claimant is awarded 32° for 10% unscheduled permanent partial disability in lieu of the Referee's award. Claimant's attorney is allowed 25% of the award granted by this order as a reasonable attorney's fee for services rendered at the hearing before the Referee.

LEONARD WONSYLD, Claimant
Michael Tedesco, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07736 & 80-09771
March 17, 1982
Order on Review

Reviewed by Board Members Lewis and McCallister.

This case is before the Board on the issues of aggravation of claimant's back condition and compensability of claimant's carpal tunnel syndrome. The SAIF Corporation appeals Referee Mulder's finding that claimant has proven his aggravation claim. Claimant appeals the Referee's finding that his bilateral carpal tunnel syndrome is not compensable.

Claimant sustained a compensable back injury on September 4, 1974. The last arrangement of compensation was a September 24, 1976 Opinion and Order which granted him an increased award for a total of 90% unscheduled back disability. Claimant has not worked fulltime since 1975.

On May 22, 1980, Dr. Wymore, a general practitioner, asked that claimant's back claim be reopened. Claimant then saw Dr. Raaf, a neurosurgeon, who advised SAIF that the objective findings in claimant's back did not indicate a worsening. The only finding was an increase in arthritic lipping. Claimant has an underlying degenerative disc condition which was visible on x-rays at the time of his 1974 injury. Dr. Wymore testified that claimant's condition related to his 1974 industrial injury was, in fact, worsened. He did not, however, have available the x-rays from 1974 and 1975 and could only speculate on the degree of increase in the arthritic lipping. He stated his conclusion that claimant was actually worse based on " . . . clinical and not based on the x-ray evidence." He went on to state that the clinical picture had to do with claimant's complaints of symptoms and his " . . . decreased mobility and an increase in pain". He admitted the arthritic lipping was probably not caused by the industrial injury. In comparing the medical evidence before us we note several factors: (1) Dr. Wymore and Dr. Raaf both saw claimant soon after the injury and again in 1980; (2) Dr. Raaf has more expertise in the area of back conditions; and (3) Dr. Raaf had more objective evidence upon which to base his conclusion.

We are persuaded by the medical opinion of Dr. Raaf on the issue of aggravation. Claimant and his wife testified as to his subjective complaints. The most that was apparent was an increase in claimant's pain. His limitations are no more than would be expected for a worker with a 90% disability award. The denial of claimant's aggravation claim should be affirmed.

With respect to claimant's bilateral carpal tunnel syndrome we again are persuaded by the report of Dr. Raaf and also the thorough discussion given by Dr. Norton. That denial should remain affirmed.

ORDER

The Referee's order dated May 1, 1981 is reversed in part and modified in part. That portion of the order finding claimant's aggravation claim compensable is reversed; that portion of the order which upholds SAIF's denial of the bilateral carpal tunnel syndrome is affirmed.

WILLIAM A. BEISER, Claimant
Gerald R. Hayes, Claimant's Attorney

WCB 81-03846
March 18, 1982
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.

WARREN W. KELLER, Claimant
Rick McCormick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08294
March 18, 1982
Order on Reconsideration

The Board issued its Order on Review in the above entitled matter on February 26, 1982 wherein we modified the Referee's order by granting him an award of 35% loss of use of his left leg in lieu of the Referee's granting of an award to the left foot.

By cover letter dated March 5, 1982 SAIF submitted a Motion for Reconsideration contending that conversion of the Referee's foot award, which took into consideration a 3/4 inch shortening of the left leg, equates to 27% loss of a leg and, therefore, there is no basis for the 35% award granted by the Board.

We fully realize that the Referee took into account the 3/4 inch shortening of claimant's leg in his rating of a lower leg (foot) award. The issue before us was extent of disability and taking into consideration the guidelines set forth in OAR 436-65-559, the medical evidence, including the Orthopaedic Consultants rating of functional loss to be 20 to 40%, and claimant's testimony, we found claimant entitled to an award of 35% loss of the left leg.

SAIF's request for reconsideration is denied and our order on review is readopted and republished.

IT IS SO ORDERED.

JON M. SPANGLER, Claimant
Allan H. Coons, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01856 & 81-01992
March 18, 1982
Order Denying Request for Attorney's Fee

The Board issued an Order on Review herein on February 26, 1982. Claimant's attorney thereafter made application for an attorney's fee pursuant to ORS 656.382(2). Counsel's request for an attorney's fee is denied.

The Referee's order upheld SAIF's denial of claimant's right arm condition in WCB Case No. 80-01856; and granted an award of temporary total disability and unscheduled permanent partial disability for bilateral tinnitus in WCB Case No. 81-01992. These claims had been consolidated for hearing. The Referee's order was issued August 18, 1981.

On August 25, 1981 the Board received claimant's request for review of the Referee's order, which was a general request for review with no designation of the issue or issues to be considered on review. On August 31, 1981 the Board received SAIF's request for review which requested review of the Referee's order in its entirety. The Board treated SAIF's request for review as a cross-request for Board review.

Claimant's appellant's brief was received by the Board on November 17, 1981. The issue designated for review was: "[c]ompensability of the right arm-elbow condition which arose from claimant's employment duties at Agripac: SAIF denial of 1/16/80." No mention was made in claimant's brief of any issue concerning the Referee's award of temporary total disability and unscheduled permanent partial disability for bilateral tinnitus in WCB Case No. 81-01992. In fact, claimant's brief is identified with WCB Case No. 80-01856 only.

SAIF's brief was filed with the Board on December 7, 1981, was designated "Respondent's Brief" and identified with WCB Case No. 80-01856 only. The issue stated in SAIF's respondent's brief was the compensability of claimant's right arm condition. No reference was made, nor was any argument addressed to, that portion of the Referee's order concerning the award of compensation for bilateral tinnitus in WCB Case No. 81-01992. No reply brief was filed by claimant.

It is a common practice for parties requesting Board review to simply file a general request for review without designating the issues to be resolved on review. Designation of issues is generally accomplished in the parties' briefs. The only issue before the Board, based upon the parties' briefs was the compensability of claimant's right arm condition, denied by SAIF.

It may well be that when SAIF filed its request for review, it intended to raise the issue of the Referee's award of temporary and permanent disability for bilateral tinnitus in WCB Case No. 81-01992. This issue was apparently abandoned by SAIF, however, as evidenced by the fact that the only issue addressed in SAIF's brief concerns the propriety of the denial.

ORS 656.382(2) provides that:

> "If a request for hearing, request for review or court appeal is initiated by an employer or insurer, and the referee, board or court finds that the compensation awarded to the claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney's fee in an amount set by the referee, board or the court for legal representation by an attorney... ."

The attorney's fee contemplated by the quoted statute requires some effort expended by counsel in defending an award of compensation. See OAR 438-47-010. Claimant's attorney was not required to defend the Referee's award of compensation for bilateral tinnitus, nor did claimant's attorney expend any efforts in so doing. The only efforts expended by counsel on Board review relate to the issue of SAIF's denial of claimant's right arm condition in WCB Case No. 80-01856. This issue was brought before the Board on claimant's request for review. Accordingly, claimant's attorney is not entitled to an attorney's fee for services rendered on Board review.

ORDER

Claimant's attorney's request for an allowance of an attorney's fee for services rendered on Board review is denied.

MARY A. GOTCHALL, Claimant
L, Leslie Bush, Claimant's Attorney
John Snarskis, Attorney
David Horne, Attorney
Leslie McKenzie, Attorney

WCB 80-09494, 80-09957, 80-10393, 80-10494, & 81-00011
March 22, 1982
Order on Review

Reviewed by Board Members Lewis and McCallister.

The claimant seeks Board review of Referee Leahy's order which affirmed Industrial Indemnity's denials of October 1, 1980 and December 22, 1980; affirmed Wausau's denials of November 11, 1980 and November 13, 1980 and ordered Wausau to pay claimant three days of time loss together with a penalty of 10% thereon; affirmed Aetna's denial of November 3, 1980 and affirmed the Determination Order of October 28, 1980.

Claimant, age 57, held the same repetitious job for this employer, Mail-Well, for 11 years. Industrial Indemnity was the worker's compensation carrier until January, 1977. Aetna became the carrier January, 1977 until January, 1979. Wausau became the carrier from January, 1979 onward.

The first injury occurred on October 19, 1973 when claimant injured her low back but missed no time from work. X-rays at that time showed mild degenerative changes. Subsequently, in late 1973 and 1974 claimant had complaints involving the cervical, dorsal and thoracic areas. Dr. Sabo diagnosed myositis of the cervical and lumbar areas secondary to trauma.

The second injury occurred on January 15, 1976 and involved claimant's right shoulder, neck and arm and was diagnosed as a strain. On July 9, 1976 Dr. Sabo reported that claimant's symptoms were chronic and aggravated by her work. Claimant continued in her occupation with ongoing problems.

In October, 1978 Dr. McKillop diagnosed degenerative disc disease of the cervical spine, bicipital tendonitis and bursitis of the right shoulder, lateral epicondylitis of the right elbow, all of which were aggravated by claimant's work. Dr. McKillop rated claimant's neck impairment as minimal and shoulder impairment minimal to mild.

In a report of September 11, 1980 Dr. McKillop again reported that claimant's work was continuing to aggravate her symptoms. He felt her condition was the same as it had been two years before. He considered claimant's condition to be an occupational disease.

Claimant filed three occupational disease claims in October, 1980 for low back, shoulder to wrist and neck problems, all allegedly caused by her work activities. She also filed a claim for an injury to her low back, which occurred October 28, 1980. All claims were denied by Wausau.

The January 15, 1976 injury claim was closed by a Determination Order of October 20, 1980 by which claimant received 32° for 10% unscheduled neck disability and 9.6° for 5% loss of the right arm.

Dr. Berkeley indicated on November 21, 1980 that on October 28, 1980 claimant bent over to pick up a carton and felt a sharp back pain. On that date she ceased her employment. Diagnosis was diffuse degenerative condition of the entire spine, and he felt it was highly probable that the work activities contributed significantly to worsen claimant's condition and the underlying disease, resulting in increased neck and low back pain. Dr. Berkeley found claimant was disabled.

On July 24, 1981 Dr. Strasser indicated that it was probable that claimant's work activity over the past 15 years had worsened her underlying condition.

Dr. Rosenbaum testified at the hearing. Dr. Rosenbaum's testimony and opinions were limited to the neurological aspects of claimant's condition. He found no permanent disability neurologically and from that standpoint did not know the etiology of claimant's complaints. Dr. Rosenbaum testified he did not know there were orthopedic specialists involved in this case.

The Referee considered the opinion of Dr. Rosenbaum to be the most persuasive, and he based his conclusion thereon. We find the doctor's testimony and opinion quite limited and disagree with the Referee's conclusion. The other physicians involved in this case are more persuasive, namely Dr. McKillop, Dr. Berkeley and Dr. Strasser, whose opinion had the concurrence of Dr. Ritmanis, claimant's family physician for many years.

We conclude that the preponderance of medical evidence is that claimant's work activities have caused a worsening of her underlying disease, which became symptomatic and required medical services. We find claimant's occupational disease claim is compensable and the responsibility of Wausau.

ORDER

The Referee's order dated August 31, 1981 is modified. Claimant's occupational disease claim is hereby remanded to Wausau for acceptance and payment of compensation commencing the date she became disabled, October 28, 1980 until closure is authorized pursuant to ORS 656.268.

The remainder of the Referee's order is affirmed. Claimant's attorney is hereby granted as and for a reasonable attorney's fee for his services before the Referee and this Board $1,800.

LINDA E. SIMONS, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-11041
March 22, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation seeks Board review of Referee Foster's order which set aside its denial of claimant's aggravation claim. We agree with the Referee's conclusion but do not agree with the Referee's analysis.

After her initial November, 1978 injury, claimant was treated by Dr. Donald D. Smith, an orthopedic surgeon in Pendleton. The principal evidence in support of claimant's aggravation claim comes from Dr. Donald T. Smith, a neurosurgeon in Eugene, who first examined claimant in May of 1980. Failing to note that there were two Drs. Donald Smith involved, the Referee's order stated the report of Dr. Donald T. Smith was persuasive because he had treated claimant since her original injury. When SAIF's motion for reconsideration pointed out the confusion of names, the Referee then found that Dr. Donald T. Smith had become claimant's treating physician.

The Referee's confusion between Dr. Donald D. Smith and Dr. Donald T. Smith is understandable, given the record in this case. In her testimony, claimant referred only to "Dr. Smith", drawing no distinction between the two physicians. Similarly, neither attorney made such a distinction. However, the Referee's statement on reconsideration that Dr. Donald T. Smith had become claimant's treating physician is not supported by the record. So far as this record reveals, Dr. Donald T. Smith has examined claimant once and only once on referral from claimant's attorney and has not provided any treatment to claimant.

We find claimant established her aggravation claim for the following reasons. Following the initial November, 1978 injury claimant was treated for low back complaints. There is no history of upper back involvement at that time. The May, 1980 report of Dr. Donald T. Smith and the October 27, 1980 report of Dr. Golden document upper back/neck/arm pain and involvement. While there is no medical evidence that links the upper back problems to claimant's original November, 1978 injury, SAIF has argued only that claimant has not proven any worsening of her condition since the September 14, 1979 Determination Order. On the point argued by SAIF we agree with the Referee; the Determination Order granted a permanent partial award for low back disability, claimant now has some form of upper back disability, and therefore her condition has worsened.

ORDER

The Referee's order dated March 16, 1981 is affirmed. No attorney's fee will be awarded to claimant's attorney as no brief was filed.

A.L. FLORENCE, Claimant
Darrell Bewley, Defense Attorney

WCB 79-00860 & 79-00966
March 23, 1982
Order on Remand

On review of the Board's Order dated February 10, 1981 the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated January 3, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

IT IS SO ORDERED.

DONALD P. NEAL, Claimant
Tom Hanlon, Claimant's Attorney
Jerry K. McCallister, Defense Attorney

WCB 79-11036
March 23, 1982
Corrected Order on Review

Reviewed by the Board en banc.

Claimant seeks Board review of Referee Mulder's order that upheld the SAIF Corporation's partial denial of medical benefits for the treatment of claimant's aspirin overdose.

Claimant sustained a fractured ankle in March of 1978 which eventually led to compensable surgery performed on May 1, 1980. Claimant suffered a nearly-fatal overdose of aspirin on June 4, 1980; SAIF has denied responsibility for medical treatment that followed the overdose. Despite our initial reaction that it was highly unlikely there could be any connection between the May 1 surgery and the June 4 overdose, upon consideration of the unusual circumstances of this case we find there is a clear chain of causation between the former and the latter.

Between May 3, 1980 and May 31, 1980 claimant's doctors issued him a total of ten prescriptions for a total of 340 tablets of four different drugs that affect the central nervous system.

DATE	MEDICATION	#/TABS
5/3/80	Dalmane 30 Mg.	10
5/3/80	Tylenol w/Codine #3	50
5/8/80	Percodan Tabs Endo	40
5/13/80	Percodan Tabs Endo	40
5/16/80	Percodan Tabs Endo	40
5/22/80	Valium Tabs 10 Mg.	30
5/25/80	Tylenol w/Codine #3	20
5/27/80	Valium Tabs 10 Mg.	30
5/29/80	Tylenol w/Codine #3	40
5/31/80	Tylenol w/Codine #3	40

According to the Physicians Desk Reference, of which we take official notice, Dalmane is a hypnotic/sedative drug, or in lay terms, sleeping pill. Percodan is a semisynthetic narcotic similar to morphine. Valium is a central nervous system depressant. The codine in Tylenol #3 is a narcotic which can impair mental abilities.

Also according to the Physicians Desk Reference, these four mood and mind altering drugs were prescribed for claimant in greater than the recommended dosage.

The discrepancy was greatest with the Percodan prescriptions which read "1 or 2 tablets every 3 - 4 hours as needed for pain." The Physicians Desk Reference states: "The usual adult dose is one tablet every 6 hours as needed for pain." It was thus possible for claimant, complying with the terms of his prescription, to take four times as much Percodan as the Physicians Desk Reference recommended dosage. While there certainly can be therapeutic reasons to deviate from the recommended dosage in any given situation, no such therapeutic reasons are stated in this record.

Claimant's behavior during the month of May, 1980 was described in the testimony of his wife, brother and stepdaughter. Without detailing all of the testimony, considering the testimony as a whole, the picture that emerges to us is of a man whose mental abilities were seriously impaired by massive amounts of various sedative, depressant and narcotic drugs. By the end of May claimant had just enough reserve left that he was successfully prevailed upon by his wife to stop taking prescription drugs and instead to take aspirin for any remaining pain for his May ankle surgery. What apparently followed is that claimant took forty 500 milligram aspirin tablets within about a 48 hour period leading to his emergency hospital admission with a salicylate overdose and associated complications.

While we do not deem it critical to this case, we find claimant's switch from prescription drugs to aspirin was reasonable both because he had been previously told by doctors to use aspirin for headaches associated with his prior loss of an eye and because we live in a society that is literally bombarded with commercial messages that encourage the use of aspirin for pain control.

In upholding SAIF's partial denial of claimant's medical treatment for salicylate overdose and associated complications, the Referee found that claimant "chose to take" the aspirin. We disagree. We find that by the time of his early June aspirin overdose, claimant's mental faculties were impaired by his ingestion during May of ten prescriptions for 340 tablets of four different sedative, depressant and narcotic drugs to the point that it cannot meaningfully be said that claimant could or did "chose" to do anything. Moreover, we believe that if a person actually "chose" to take 40 maximum strength aspirin tablets over two days, the only possible inference that could be drawn is one of attempted suicide; but we agree with the Referee's finding that claimant did not intend to harm himself.

The consequences of negligent treatment of a compensable injury are themselves compensable. See Wimer v. Miller, 235 Or 25 (1963). While we hesitate to make a finding of negligent treatment because claimant's doctor is not a party to this proceeding, we find the conclusion inescapable without explanation -- and there is none in this record -- that the medications claimant was prescribed during May, 1980 were excessive in number, excessive in amount and without therapeutic basis.

In sum, we find the following chain of causation: Claimant's compensable surgery led, for some reason, to an excessive dispensing of prescription drugs which caused claimant's seriously impaired cognitive abilities which led to his aspirin overdose. The following treatment is, therefore, compensable.

There are admittedly weak links in the chain of causation. Claimant was not forced to take his second through tenth prescriptions; he necessarily had to and did seek refills of his prescriptions. One would hope that at some point claimant would realize that no amount of ankle pain from his May 1 surgery justified being permanently sedated by the amounts of prescription drugs he was taking. But we think the primary responsibility for that judgment lay with claimant's doctor, not with claimant.

Also, claimant was instructed by his doctor not to put any weight on his ankle following his operation. The evidence is clear that claimant did not comply with this instruction, which may have increased his need for pain medication. For example, about May 18 claimant was out in the woods helping his brother in some kind of wood cutting operation. However, about May 18 was just toward the end of claimant's grossly excessive, albeit pursuant to doctor's orders, ingestion of Percodan. We are not prepared to say that even at that point claimant was entirely responsible or accountable for his own actions.

We agree with the Referee's finding that this situation is sufficiently unique, if not bizarre, that SAIF had legitimate doubt about its responsibility and therefore penalities and attorney fees for unreasonable denial are not warranted.

ORDER

The Referee's order dated July 15, 1981 is reversed. SAIF's partial denial dated September 3, 1980 is set aside and this claim is remanded to SAIF for processing and the payment of benefits.

Claimant's attorney is awarded $2500 as and for a reasonable attorney fee for prevailing on SAIF's partial denial, payable by SAIF.

LANCE P. REYNOLDS, Claimant
Mildred Carmack, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 79-03058
March 23, 1982
Order on Remand

On review of the Board's Order dated February 23, 1981, the Court of Appeals reversed the Board's Order.

Now, therefore, the above noted Board Order is vacated and the matter is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

JOHN DAVIDSON, Claimant
Robert Udziela, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10913
March 25, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee St. Martin's order which denied claimant's request for reimbursement for tuition, etc., expenses he had paid himself to complete a vocational rehabilitation program at Portland State University after the Field Services Division ceased paying tuition after claimant had completed one third of the program.

Claimant's brief on Board review discusses at length the question of the proper scope of review in this type of case. We recently analyzed that question in William J. Frame, WCB Case No. 80-07617 (March 5, 1982), 34 Van Natta 183 (1982). We concluded that under the 1979 amendments to ORS 656.283, review of eligibility to participate in an authorized program of vocational rehabilitation is de novo, while review of participation in such a program is limited to the abuse of discretion, etc., standards spelled out in ORS 656.283(1)(a) through (d).

This case offers the opportunity to expand on Frame because there is some question here whether the dispute concerns eligibility or participation. Claimant was admitted to an authorized program of vocational rehabilitation, but Field Services Division payment for that program was terminated before claimant completed it. We deem eligibility issues to be limited to the question of whether an injured worker will be admitted to an authorized program at all. We deem participation issues to include the scope, extent or duration of an authorized program. Under those interpretations, this would appear to be a participation case, i.e., involving the duration of claimant's rehabilitation program, not an eligibility case, i.e., involving the question of whether claimant would be admitted to a rehabilitation program at all.

Matters are not, however, that simple. Field Services Division's decision to terminate support for claimant's Portland State program (i.e., a participation matter) was apparently based in part on the belief that the program should not have been authorized in the first place (i.e., an eligibility matter). We say "apparently based" because there is further confusion in the record about whether the 1978 or 1980 rules governing eligibility for vocational assistance apply here. See generally Ray D. Dezellem, WCB Case No. 80-10560, 34 Van Natta 213 (March 17, 1982).

We conclude the 1978 rules apply here. Assuming the issue to be eligibility under those rules, subject to our de novo review, we agree with the Referee. Assuming the issue to be participation, subject only to review for abuse of discretion, there is no basis for any conclusion other than that reached by the Referee.

ORDER

The Referee's order dated May 26, 1981 is affirmed.

JOHN G. NAGY, Claimant
Larry A. Brown, Claimant's Attorney
Richard W. Butler, Attorney

WCB 80-04807
March 25, 1982
Order Denying Attorney's Fee

The Board issued its Order on Review herein on February 26, 1982. Claimant's attorney thereafter moved the Board for an order allowing an attorney's fee pursuant to ORS 656.382(2). Counsel's request for an attorney's fee is denied.

This case involves an issue of employer responsibility: whether this claim is one for an aggravation for a prior back injury or whether it is a claim for a new injury. The Referee found that the claim was one for a new injury. The new injury employer requested Board review, contending that the weight of the evidence indicated an aggravation and not a new injury. Claimant's brief on review was a two paragraph document requesting reversal of the Referee's order. Claimant's position was that he was suffering from an aggravation of his prior compensable injury.

The Board will award an attorney's fee to a claimant's attorney when the sole issue is responsibility only when the attorney actively and meaningfully participates in behalf and in defense of a claimant's rights. Otherwise the dispute is one between two compensation carriers. Jon D. Day, WCB Case Nos. 80-11371, 81-01192, 34 Van Natta 123 (February 22, 1982).

Claimant's attorney's involvement on review was minimal. More importantly, however, claimant was arguing for a result directly contrary to the result reached by the Board in its Order on Review.

While it is true that counsel represented claimant on review, the legal representation rendered in behalf of the claimant was not in the nature contemplated by ORS 656.382(2).

Accordingly, the Board declines to allow claimant's attorney an attorney's fee on this review.

ORDER

Counsel's request for allowance of an attorney's fee on Board review is denied.

BOBBY JOE ROSS, Claimant
Allan Coons, Claimant's Attorney
Brian Pocock, Attorney
Roger Warren, Attorney

WCB 79-04420 & 79-05569
March 25, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Employer's Insurance of Wausau (Wausau) has requested Board review of Referee Foster's order which affirmed the June 14, 1979 denial of Industrial Indemnity, and set aside Wausau's May 11, 1979 denial and referred the matter back for payment of compensation until closure occurs pursuant to ORS 656.268.

Claimant was originally injured on September 14, 1974 while working at Roseburg Lumber Company, which was insured at that time by Wausau. The incident occurred when a load of veneer fell on the claimant, causing him to sustain numerous injuries including multiple fractures of the ribs, pelvic fractures and injury to his back. Eventually claimant returned to work in 1978, and received an award of 30% unscheduled permanent partial disability by Determination Order dated January 9, 1979. A stipulated agreement subsequently increased this award to 40% unscheduled permanent partial disability.

Dr. Randal Ochs, by letter of February 13, 1979, informed Wausau that claimant was off work due to a psychological problem associated with his previous injury. Wausau denied this claim on the basis that the condition was not caused or aggravated by the September 11, 1974 injury. Industrial Indemnity denied on the basis that the condition was the responsibility of Wausau. The Referee found that claimant's anxiety neurosis was directly related to the industrial injury, even though it was in part also due to claimant's feelings of insecurity caused by his work relationship with his foreman. The responsibility for claimant's psychological condition was therefore found to be Wausau's.

The only issue that Wausau raises on review is the issue of responsibility. Wausau contends that claimant's employment during 1978 and 1979, when the employer became insured by Industrial Indemnity, was the reason for the development of his present psychopathology. If that is the case, then Industrial Indemnity would be responsible for this claim. Neither Wausau nor Industrial Indemnity has raised an issue concerning the basic compensability of this claim. Compensability is therefore taken to be conceded by both carriers, the only issue being responsibility. That being the case, we do not feel that we can improve on the Referee's determination.

There do appear to be two major contributing factors to the claimant's current psychological condition. The reports and testimony of Dr. Charles Brown, claimant's treating psychiatrist, appear to be the most relevant medical evidence in this case. In his July 17, 1979 report Dr. Brown indicates that claimant was suffering from two psychiatric problems; the first being anxiety neurosis which was in his opinion directly related to the accident, and the second being a longstanding character disorder. This diagnosis is repeated in his report of August 1, 1980.

Dr. Brown testified at the hearing, but as noted by the Referee, he tended to be somewhat confusing and imprecise. There indeed seems to be something for everyone in his testimony. Examining Dr. Brown's testimony as a whole, we are convinced that the responsibility for claimant's psychological condition was properly assigned to Wausau. Dr. Brown's testimony can best be summarized by quoting from his report of July 17, 1979:

> "The anxiety neurosis was, in my opinion, directly related to his accident in that it would not be present if Mr. Ross had not sustained the accident. Whether it was the physical limitations he experienced in returning to work resulting in doubts about his own ability to keep up or fears related to further injury to himself or both, it is still my opinion that such anxiety would not be present if he had not sustained his injury."

We agree with the Referee that the evidence indicates that the claimant's industrial injury was the actual precipitating cause of his psychological reaction. It does not appear that the factors on the job in 1978-9 were such a contributory factor as to relieve Wausau of responsibility.

ORDER

The Referee's order dated March 19, 1981 is affirmed. Claimant's attorney is awarded $450 as and for a reasonable attorney's fee, payable by Employers Insurance of Wausau.

ALVIN CHAFFEE, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0032M
March 26, 1982
Own Motion Order

Claimant, through his attending physician, submitted medical information to SAIF indicating claimant had recently undergone a surgical procedure. The medical information submitted tends to establish that the surgery and present need for treatment are directly related to claimant's August 3, 1965 industrial injury. Claimant's aggravation rights have expired. SAIF has referred this matter to the Board for consideration under its own motion jurisdiction, pursuant to the provisions of ORS 656.278.

SAIF has accepted responsibility for claimant's surgery but contends that time loss is not due because claimant retired on May 1, 1981.

We concur with the SAIF's position. Claimant is entitled to payment of all medical treatment pursuant to the provisions of ORS 646.245 for his injury related condition.

IT IS SO ORDERED.

SANDRA ATWELL GARCIA, Claimant
William A. Galbreath, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09729
March 26, 1982
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.

BERLIE O. BOLD, Claimant
David Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07213
March 29, 1982
Order on Review

Reviewed by the Board en banc.

Claimant seeks Board review of Referee McCullough's order which upheld the SAIF Corporation's denial of time loss payments to claimant.

The record consists of 12 exhibits and a stipulation as to what the claimant would have testified to had he been called as a witness. From the record as thus established, we find that claimant was 48 years of age at the time he sustained a compensable injury while employed as a shop teacher. Claimant had been a journeyman welder for approximately 20 years, and during the summer recesses between school years, claimant typically was employed as a welder. In November, 1977 claimant sustained a fracture of his right hand in the course of his employment.

We also know from the record that in August, 1978 claimant was released by his physician to engage in teaching but not to engage in welding. The record is devoid of evidence suggesting an earlier release date for teaching, yet the record strongly suggests that claimant had in fact returned to work as a shop teacher prior to the end of the 1977-1978 school year.

The issue is whether claimant is entitled to time loss payments for the period of June 3, 1978 to August 25, 1978, the period during which claimant was not actively engaged in teaching, but was precluded from engaging in welding.

Claimant contends that he is entitled to time loss payments for that period of time because he regularly was employed during the summer recess as a welder, was unable to engage in that employment because of a compensable industrial injury, was not released by his physician to engage in that employment, was not medically stationary, and did not actually engage in teaching,

welding or any other employment during that time. SAIF contends that although claimant typically was employed as a welder during the summer, teaching was nevertheless claimant's "regular" employment.

We see a more fundamental issue than whether welding was or was not claimant's "regular" employment during the summer. If claimant returned to work as a shop teacher prior to the end of the school year, his entitlement to time loss payments ceased. We are familiar with the situation in which a physician is unsure whether a worker can return to work and releases the worker on a trial basis. In such cases, if the worker is unable to handle the employment, entitlement to time loss resumes. In this case, however, there is no evidence that claimant was released to engage in teaching on a trial basis, or that he ceased working prior to the end of the school year because of the inability to teach shop.

Admittedly, it is not clear from the record whether claimant did return to work as a teacher prior to the end of the 1977-1978 school year. We are not prepared to say that a claimant must necessarily or always disprove the existence of every event that would render the person ineligible for temporary total disability benefits. However, where evidence is present in the record suggesting a disqualifying event, it is incumbent upon the claimant to come forward with evidence that the claimant is eligible for (i.e., not disqualified from receiving) benefits. There is evidence in the record from which a reasonable person could infer that claimant had returned to work as a teacher, and therefore the burden was on claimant to prove that such was not the case.

ORDER

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

ALICE S. BREWER, Claimant
Eric R. Friedman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00687
March 29, 1982
Amended Order on Review

The Board issued its Order on Review in the above entitled matter on March 17, 1982 wherein we modified the Referee's order and affirmed SAIF Corporation's denial and affirmed the balance of the Referee's order.

By letter dated March 23, 1982 SAIF, through its legal counsel, requested that the Board clarify whether by affirming the balance of the Referee's order we affirmed the award of an attorney fee to claimant's attorney in the sum of $1,150. We did not so intend.

Our order on review is therefore amended in the order portion to read:

The Referee's order dated August 19, 1981 is modified.

That portion of the Referee's order which remanded claimant's bilateral carpal tunnel syndrome to SAIF for acceptance is reversed. SAIF's denial is affirmed. The award of an attorney's fee to claimant's attorney is reversed. The balance of the Referee's order is affirmed.

RICHARD L. GALLAGHER, Claimant
Robert Muir, Claimant's Attorney
Scott Terrall, Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04447 & 80-01980
March 29, 1982
Order Denying Reconsideration

The SAIF Corporation has moved for reconsideration of the Board's Order on Review dated February 4, 1982.

After due consideration, the motion is denied and the Order on Review is readopted and republished.

IT IS SO ORDERED.

ORRY W. HARMON, Claimant
Noreen Saltveit, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07664
March 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Mongrain's order which imposed a penalty and assessed attorney fees because of SAIF's noncompliance with the terms of an earlier order entered by Referee Gemmell.

We affirm and adopt Referee Mongrain's order in this case with the following additional comments. SAIF seems incensed at the thought of being penalized for noncompliance with Referee Gemmell's order after that order has been reversed by the Board and the Board has been upheld by the Court of Appeals. Harmon v. SAIF, 54 Or App 121 (1981). However, the duty to comply with Referee, Board and court orders pending further appeal, specified in ORS 656.313, has been part of the workers compensation system since January, 1966; this has created, since then, the possibility that compensation will have to be paid that is later determined by higher authority was not legally due. It seems rather late for SAIF to be offended by the consequences of ORS 656.313.

ORDER

The Referee's order dated June 29, 1981 is affirmed. Claimant's attorney is awarded $500 for services rendered on Board review, payable by the SAIF Corporation.

NICOLETTE L. HOOGEWERFF, Claimant
Marvin S. Nepom, Claimant's Attorney
Ridgway K. Foley, Jr., Defense Attorney

WCB 81-03693
March 29, 1982
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.

SAN J. LOPEZ, Claimant
John Dudrey, Claimant's Attorney
Frank Moscato, Defense Attorney
Leslie J. McKenzie, Defense Attorney

WCB 81-00930 & 81-00929
March 29, 1982
Order on Review

Reviewed by Board Members Lewis and McCallister.

The claimant seeks Board review of Referee Leahy's order which affirmed the Detemination Orders of August 14, 1980 and April 14, 1981 and found the employer was not responsible for claimant's left forearm medical bills incurred since June 17, 1980.

The facts as recited by the Referee are adopted as our own. We concur with the Referee that the employer is not responsible for claimant's left forearm condition but disagree with the date established by him. We conclude that the employer is responsible for medical care and treatment for claimant's left forearm until the new injury occurred, October 7, 1980.

ORDER

The Referee's order dated September 22, 1981 is modified.

The employer is not responsible for medical care and treatment of claimant's left forearm condition incurred after October 6, 1980.

The remainder of the Referee's order is affirmed.

DENNIS McMAHON, Claimant
Steven D. Johnson, Claimant's Attorney
Scott F. Gilman, Defense Attorney

WCB 81-03440, 81-01435 & 81-0156M
March 29, 1982
Order Denying Motion to Admit Supplementary Medical Report

The above entitled matter is presently pending Board review. By a cover letter dated February 11, 1982 claimant's attorney submitted a Motion to Admit Supplementary Medical Report.

Claimant's motion is denied. Robert A. Barnett, 31 Van Natta 172 (1981).

IT IS SO ORDERED.

CHARLES A. MURRAY, Claimant
Peter Hansen, Claimant's Attorney
Roger Warren, Defense Attorney

WCB 80-09364
March 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Williams' order which set aside its denial of treatment at the Northwest Pain Center and also set aside the Determination Order dated October 10, 1980 on the theory of premature closure.

While employed as a fuel truck driver, claimant twisted his back while refueling an aircraft on July 4, 1978. The initial diagnosis was lumbosacral strain, mild. The course of claimant's treatment and recovery were complicated by some cross signals between medical doctors and vocational rehabilitation professionals.

I

In April of 1980, Dr. Gritzka, one of claimant's treating doctors, recommended claimant's admission to the Northwest Pain Center. Claimant was ultimately interviewed at the Pain Center and found to have good motivation for admission. However, the carrier denied authorization for Pain Center treatment.

The carrier's position was based then, and is defended now, on the basis of claimant's unsettled vocational rehabilitation goals during the spring and summer of 1980. Field Services Division first referred claimant to Professional Rehabilitation Services, which first began working toward claimant's chosen goal of training to be an airplane flight instructor. During the summer of 1980, for reasons not reflected in the record, Professional Rehabilitation Services shifted claimant's rehabilitation program toward light assembly work, store clerk and sales -- areas in which claimant was not interested. In September of 1980, again for reasons not reflected in the record, Field Services Division transferred claimant's case from Professional Rehabilitation Services to Cascade Rehabilitation Services. Cascade developed yet another program for claimant's retraining as a computer programmer.

At or shortly after the time of Dr. Gritzka's recommendation of Pain Center treatment, claimant was taking the position that he very much wanted flight instructor training and was ready, willing and able to start and complete such a program. Had claimant been permitted to pursue this, his chosen vocational goal, there is no reason to believe he would have wanted to participate in the Pain Center program. Even in his testimony at the hearing, claimant did not express any interest in the Pain Center program. The carrier thus argues, in effect, that there is no harm in denying treatment that the claimant was not interested in at the time and is not interested in now.

The carrier's argument is reasonable but unconvincing. A requested authorization for medical treatment is just that -- a requested authorization. There may be many reasons why an injured worker or his doctors might decide not to follow through on a

given treatment modality. But when a carrier is asked for advance authorization, the only issues are whether the contemplated treatment is reasonably necessary and causally related to the compensable injury; the probability of the requested treatment actually being rendered is not then any concern of the workers compensation carrier.

As for necessity of treatment, we defer to the treating doctor absent compelling reasons to the contrary. Lucile Schaffer, 33 Van Natta 511 (1981). There are no compelling reasons to the contrary here. As for causal relationship, Dr. Gritzka by necessary implication documents a link between claimant's industrial back injury and the recommended Pain Center treatment; there is no evidence to the contrary. Despite the carrier's reasonable doubts, both in the summer of 1980 and today, about whether Pain Center treatment will ever be rendered, the carrier's denial of such treatment was erroneous.

II

The Determination Order dated October 10, 1980 granted compensation for temporary total disability through May 23, 1980. The Referee ruled that claimant was not "psychologically stationary" on that latter date and therefore set aside the Determination Order as premature.

The first suggestion of any possible psychological component to this claim is in the March, 1980 report of Orthopaedic Consultants. Although finding that claimant was medically stationary from an orthopedic and neurological standpoint, they found a moderate degree of functional interference and suggested a psychological examination. That examination was conducted by Dr. Meyers, who did not recommend any psychological treatment.

The Referee relied upon one sentence in Dr. Meyer's report: "It is also apparent that emotional and interpersonal problems may be preventing a more rapid recovery from his injury." We do not attach the same significance to this sentence as the Referee apparently did. In context, the reference to "interpersonal problems" seems to be Dr. Meyers' indirect way of saying that claimant should establish better rapport with his treating doctor, Dr. Gritzka. Both in context and in light of all of the evidence, the reference to "emotional problems" is obscure.

Despite the suggestion in the March, 1980 report of Orthopaedic Consultants, claimant has never really claimed that his July, 1978 injury caused a psychological problem or aggravated a preexisting psychological condition. The carrier has never denied any claim for psychological treatment. It paid for Dr. Meyers' consultation. It has since paid for some treatment by Dr. Vizzard which, as best we understand Dr. Vizzard's treatment, might best be called palliative psychological treatment. See especially Exhibit 59. All that claimant ever asked for an was denied was the Pain Center treatment discussed above, which is psychological only in the sense of being multi-disciplinary.

In sum, we have the Referee setting aside a Determination Order on the ground that claimant was not "psychologically stationary" even though it does not appear from the record that there is now or ever really was a psychological component to claimant's claim. Unquestionably, from an orthopedic and neurological standpoint, claimant was medically stationary in March, 1980 when so found by Orthopaedic Consultants or not later than April 3, 1980 when so found by his treating physician, Dr. Gritzka. Both of those dates preceed the temporary total disability cut-off date of May 23, 1980 in the challenged Determination Order.

There was, of course, on May 23, the possibility of Pain Center treatment recommended by Dr. Gritzka and denied by the carrier. However, under the confusing circumstances of claimant's vocational rehabilitation program(s) described above, we conclude that under the totality of these circumstances it was more reasonable to close claimant's claim, as the Determination Order did, subject to future reopening if and when claimant actually began participating in the Pain Center program. In sum, we conclude that the Determination Order dated October 10, 1980 should not have been set aside.

III

That conclusion raises two additional minor issues. The carrier paid temporary total disability for more than 17 weeks beyond the May 23, 1980 cut-off date stated in the October 10, 1980 Determination Order. The carrier claims a setoff for this overpayment. The carrier is entitled to its claimed setoff.

The employer also objects to the Referee's award of a $1,300 carrier-paid attorney fee, contending that at least some of the attorney's fee should have been awarded out of the additional time loss benefits made payable by the Referee's order. We agree with the employer. When a partial denial and a Determination Order are both set aside, resulting in payment of greater temporary total disability benefits, then a total attorney fee should be apportioned between that amount to be carrier-paid because claimant prevailed on the partial denial and that amount to be claimant-paid out of the increased time loss benefits.

But since we reinstate the Determinatin Order, the only attorney fees now at stake are entirely carrier-paid. In Clara M. Peoples, 31 Van Natta 134 (1981), we recognized a normal range of $800 to $1,200 for carrier-paid attorney fees for prevailing on a denied claim, with the ultimate test being efforts expended and results obtained. Here the result obtained--authorization for Pain Center treatment that may never be sought or rendered--is relatively modest; the attorney's fee should likewise be relatively modest.

ORDER

The Referee's order dated June 8, 1981 is affirmed in part and reversed in part. That portion that set aside the employer's denial of Pain Center treatment is affirmed. The remainder of the Referee's order is reversed and the following is substituted in its stead.

The Determination Order dated October 10, 1980 is reinstated. The employer is entitled to a setoff of $3,134.73 in accordance with OAR 436-54-320. Claimant's attorney is awarded $600 as a reasonable attorney's fee for services at the hearing in prevailing on the partial denial, payable by the carrier.

WILMA KIM BUHMAN, Claimant
Noreen Saltveit, Claimant's Attorney
Scott Kelley, Defense Attorney

WCB 79-10746
March 31, 1982
Order on Review

Reviewed by the Board en banc.

The employer seeks Board review of that portion of Referee James' order which granted claimant temporary total disability for the last two weeks in August 1979, for September 26-28, 1979 and for the period commencing September 26, 1980 and until closure under ORS 656.268.

Claimant sustained a compensable injury to her left shoulder on May 22, 1974. Her claim was initially closed on February 20, 1975. Claimant subsequently developed a condition diagnosed as fibromyositis which has been determined to be compensable and is largely responsible for her continuing problems. We concur with the conclusions reached by the Referee which were not appealed and will deal only with the issues raised by the employer.

The Referee granted claimant compensation for the last two weeks of August 1979 and for September 26-28, 1979. The employer attempts to use a lengthy section of Dr. Dunham's deposition to prove that this period of time loss was not authorized. However, the authorization for this time loss can be found in Exhibit 57 which is a report by Dr. Dunham and states the reason for the missed days including a short period of hospitalization. We conclude the time loss for the last two weeks in August 1979 and for September 26-28, 1979 is related to claimant's industrial injury and has been authorized by her treating physician.

The employer also contends that the part of the Referee's order which awarded temporary total disability payments commencing September 26, 1980 is in error. It is not completely clear to what extent the employer's argument is on the merits versus to what extent it is jurisdictional; we deduce the principal thrust to be jurisdictional. The jurisdictional problem arises from the following chronology:

Late 1979: Claimant made an aggravation claim. While it is not necessary for present purposes to identify the exact date of the claim, we deem Dr. Dunham's reports of August 15, October 2, November 9 and November 12, 1979 to cumulatively amount to a perfected aggravation claim.

December 1979: Claimant requests a hearing. The jurisdictional basis of this request for hearing is unclear; we disregard it for present purposes.

February 1980: Claimant's five-year aggravation rights ended.

March 5, 1980: The carrier denied claimant's aggravation claim.

March 17, 1980: Claimant requested a hearing on that denial.

In sum, claimant perfected an aggravation claim before the expiration of the five-year aggravation period, but that claim was not denied until after the expiration of aggravation rights and, necessarily, the March 17 request for hearing on the denial was also filed after the end of the aggravation period. The employer apparently argues in essence that the running of the five-year aggravation limit caused the Referee to lose jurisdiction over the aggravation claim.

We conclude the Referee did have jurisdiction under these circumstances. ORS 656.273(4) only requires that a "claim" for aggravation be filed within five years; that was done in this case. ORS 656.273(7) only requires that a request for hearing on a denied aggravation claim be made in accordance with ORS 656.283 and 656.319, i.e., within 60 days of the denial; claimant satisfied these requirements. Claimant could not request a hearing prior to the denial of the claim. Syphers v. K-W Logging, Inc., 51 Or App 769 (1981). We conclude that when the time period an employer or carrier is permitted to accept or deny a claim extends beyond the five-year aggravation limit, there is nevertheless continuing jurisdiction under ORS 656.283 to request a hearing on a denial.

We are reinforced in this conclusion by Coombs v. SAIF, 39 Or App 293 (1979), and Carter v. SAIF, 52 Or App 1027 (1981). Although involving different fact situations than does this case, in both Coombs and Carter the court found that the affected workers had hearing rights that extended beyond the five-year aggravation limitation. Likewise, we conclude here that claimant had hearing rights that extended beyond the aggravation limitation. Indeed, the extension of hearing rights we here recognize is far more modest than the extension of hearing rights mandated by the court in Coombs and Carter.

ORDER

The Referee's order dated February 12, 1981 is affirmed. Claimant's attorney is awarded $500 for services rendered on this Board review, payable by the employer.

GARY T. CHRISTENSEN, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 81-0268M
March 31, 1982
Own Motion Order & Determination

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and grant claimant compensation for temporary total disability from June 2, 1981 through June 21, 1981

This requested period of temporary total disability compensation arose from SAIF's refusal to authorize enrollment of the claimant in the Portland Pain Center as it was SAIF's desire to have claimant enrolled at the Northwest Pain Center which was the ultimate result. Had SAIF authorized claimant's enrollment at the Portland Pain Center he would have been enrolled on June 2, 1981 instead of having to wait almost three weeks, until June 22, 1981, for his enrollment at the Northwest Pain Center.

A Referee, in WCB Case No. 80-10356, ordered SAIF to pay a penalty on this period of June 2 through June 21, 1981 finding SAIF's action was unreasonable.

Based on the evidence we conclude that claimant is entitled to compensation for temporary total disability from June 2, 1981 through June 21, 1981. We base this conclusion on the fact that claimant was not employed and was eagerly awaiting enrollment and his request to enter the Portland Pain Center and his reasons therefor were reasonable and the delay in his payment of compensation for temporary total disability was based on SAIF's action.

IT IS SO ORDERED.

GARY T. CHRISTENSEN, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10356
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Mannix's order which granted claimant 25% of temporary total disability which would have been due him from June 2, 1981 through June 21, 1981 and a $1,000 fee to claimant's attorney.

We affirm the Referee's order on the issue of penalties and attorney's fees for SAIF's unreasonable refusal to authorize a certain pain clinic program. We agree with SAIF that the attorney fee ordered paid by SAIF to claimant's attorney is excessive and that portion of the Referee's order will be modified.

In Clara M. Peoples, 31 Van Natta 134 (1981) we recognized a normal range of $800 to $1,200 for carrier paid attorney fees for prevailing on a denied claim with the ultimate test being efforts expended and results obtained. Here the result obtained -- penalties of 25% on three weeks of temporary total disability -- is relatively modest and the attorney fee should likewise be relatively modest.

ORDER

The Referee's order dated June 30, 1981 is modified. Claimant's attorney is hereby granted as and for a reasonable attorney's fee for prevailing at the hearing, the sume of $600, payable by SAIF. Claimant's attorney is granted a reasonable attorney's fee at Board level in the sum of $400, payable by SAIF.

GORDON COX, Claimant
Nancy Tauman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-09762
March 31, 1982
Order of Dismissal

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

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

PAUL DIZICK, Claimant
R. Ray Heysell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04716
March 31, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Nichols' order which affirmed the May 2, 1980 Determination Order which granted claimant 30% unscheduled permanent partial disability for his low back, and 5% disability for loss of function of his right leg, denied the employer's request to reduce the amount of compensation granted by the Determination Order and allowed claimant's attorney a fee of $900, pursuant to OAR 438-47-050.

The only issue raised by the claimant is the extent of unscheduled permanent partial disability. Claimant contends he is disabled to a greater extent than the amount reflected in the award of the Determination Order. Additionally, SAIF has raised an issue concerning the propriety of the Referee's allowance of an attorney's fee award.

We accept the facts as recited by the Referee and adopt them as our own.

With respect to the issue of extent of unscheduled permanent partial disability, we agree with the Referee and affirm that portion of her order. We also agree with her allowance of an attorney's fee. SAIF contends that it was the claimant that initiated the hearing in the first instance since the record indicates that claimant's request for hearing was received on May 27, 1980 while the employer's request for hearing was received on May 30, 1980. The record also indicates, however, that the employer, by letter dated May 14, 1980 requested a hearing and addressed this request to the Compliance Division of the Workers Compensation Department. As such it is a valid request for hearing, and therefore the Referee's award of a reasonable attorney's fee was proper.

ORDER

The Referee's order dated June 2, 1981 is affirmed.

GUY FINCHAM, Claimant
Steven Huff, Claimant's Attorney
George Dunford, Attorney
Dennis L. Graves, Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04246
March 31, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant requests Board review of Referee Baker's order which set aside the April 21, 1981 order of the Compliance Division which had determined that the employer was a subject employer of subject workers for the purposes of workers' compensation. The issue for review is whether the employer is a non-subject employer because the claimant may be a non-subject worker under ORS 656.027(2), the "householder exemption," which exempts "... from mandatory workers' compensation coverage, "A worker employed to do gardening, maintenance, repair, remodelling or similar work in or about the private home of the person employing him."

Claimant was a 17-year-old student at the time he sustained his injury. On November 2, 1980 he fell from a ladder while doing construction work for the employer. His injuries apparently included an acute eipdural hematoma which required a left partial craniotomy.

Claimant was originally hired by the employer to pick fruit for two days in September, 1980, for which he was paid $4 per hour. The employer owned a 25-acre farm upon which he grew peaches, apples, cherries, grapes and berries. The employer required outside assistance in harvesting his crops for only a very short period of time once each year. Except for the cherries, all of his crops were sold from a self-service stand by the side of a nearby road. The employer's farm was not a generally profitable activity although it had shown a profit at times in the past. The employer generally considered it to be a "hobby farm."

On October 18, 1980 the employer engaged the claimant's services to help remodel a combination garage/barn about 65 feet from his house. Claimant was to work at installing and expanding a cold storage area for apples, for which he was also paid $4 per hour. Claimant was injured when he fell from a ladder while working on this project.

The Referee recited all of the factors which must be considered in determining whether the claimant is an independent contractor and concluded that he was not. We agree with that determination. Additionally, the Referee found that the employer had what was more akin to a family hobby farm rather than an agriculatural business, and as such was not required to furnish workers' compensation coverage under the exception provided in ORS 656.027(2).

The claimant contends that the facts of this case bring it under the rule announced in Anfilofieff v. SAIF, 52 Or App 127 (1981). In that case, the worker slipped on a ladder while nailing siding on a bath house at the employer's home. The court found that the exception of ORS 656.027(2) did not apply due to the fact that the claimant was employed many weeks prior to his injury to work as a carpenter on a housing project for the employer, who was a home builder. The worker was therefore not employed to do remodeling in or about the employer's private home. The bath house work was only incidental to his general employment.

The facts in this case in no way indicate that the claimant was hired as a general farm laborer for the employer. Claimant was originally hired to pick fruit for two days. There was also testimony by the claimant that he helped the employer's son build a road, and that he did some type of repair work. Claimant, however, admitted that he did not expect to be employed on a year round basis, but only when he was needed. Claimant was thus utilized on a sporadic, as-needed basis on one or two occasions. His employment to do the remodeling job could not be said to be incidental to any general employment. We find the facts of Anfilofieff to be easily distinguishable.

We also find Gordon Fritz, 26 Van Natta 215 (1978), to be distinguishable. The claimant in that case was injured while working on a house for the employer. The Board found that the house the claimant was working on was not the private residence of the employer, but a house purchased for the purpose of remodeling and resale, the employer's occupation. As noted, we have found that the employer was not really engaged in farming as a business, but as a hobby, and that the claimant was not hired as a general farm laborer. That being the case, we find that the employer is not a subject non-complying employer, as did the Referee, due to the exception contained in ORS 656.027(2).

ORDER

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

CHRISTINE NELSON GIVENS, Claimant
Richard T. Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05753 & 80-07341
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The SAIF Corporation requests Board review of Referee McSwain's order which: (1) set aside the Determination Order of December 11, 1979 as premature and ordered temporary total disability benefits to be resumed beginning on November 5, 1979; (2) set aside the July 15, 1980 denial by SAIF and ordered it to accept as compensable claimant's cervical and right thoracic outlet difficulties and the resulting surgery; (3) ordered that the matter be remanded to the Evaluation Division to determine if claim closure is appropriate; (4) denied claimant's request for penalties for unreasonable refusal of compensation and (5) allowed claimant's attorney a fee of $3,000 payable in addition to compensation.

Claimant was originally injured on April 4, 1978 while engaged in a self-defense training course for her employer. She was attempting to learn how to break free from choke holds, and her neck started to get stiff and painful the following day. The claimant had a long history of cervical problems prior to her industrial injury. The diagnosis of Dr. Bolin was cervical sprain. Treatment was conservative and the claim was closed by Determination Order on October 30, 1978 which allowed time loss benefits only.

In January of 1979 claimant ceased work and requested that her claim be reopened on the basis of aggravation. SAIF denied this request and a hearing ensued in WCB Case No. 79-01366 in which the Referee ordered that the claim be reopened. A second Determination Order issued on December 11, 1979 allowing 5% unscheduled permanent partial disability for the neck. Following the Referee's decision, but before the issuance of the second Determination Order, SAIF requested Board review of the Referee's order. The Board reversed the order of the Referee and found that the claimant failed to establish a worsening of her condition. Christine Nelson Givens, 29 Van Natta 21 (1980). In the meantime, the claimant filed another aggravation claim contending that her condition had worsened, which was denied by SAIF on July 15, 1980. Following a hearing on the denial, the Referee found it to be a matter of res judicata and dismissed the case, WCB Case No. 80-05753.

In the interim, claimant requested judicial review of the Board's determination. A request for hearing on the second Determination Order was deferred pending Court review of the Board's order. On November 10, 1980 the Court of Appeals reversed the Board's determination and reinstated the order of the Referee. Nelson v. SAIF, 49 Or App 111 (1980). While this was occurring, the claimant had requested Board review of the Referee's decision in the second hearing. The Board remanded WCB Case No. 80-05753 to the Hearings Division for the taking of additional evidence, to be heard in consolidation with claimant's request for a hearing on the second Determination Order, WCB Case No. 80-07341.

In January of 1979 claimant returned to Dr. Bolin complaining of suboccipital cephalalgia and tenderness and swelling in the suboccipital area. She was then seen in April of 1979 by Dr. Poulson who requested that the claim be reopened for diagnostic purposes. A myelogram in May found slight asymmetry of the nerve roots at C7-T1 with filling of the nerve root on the left side. No herniated discs were found. Dr. Poulson was of the opinion at that time that claimant was suffering from a degenerated cervical disc. In December of 1979 a cervical discogram was performed; the impression was a disc rupture at C4-C5 and C5-C6.

On December 13, 1979 Dr. Poulson indicated in a letter to SAIF that surgery was a consideration. On January 7, 1980 SAIF sent claimant a notice informing her that an examination had been scheduled for her on February 7, 1980 with the Orthopaedic Consultants. The purpose of the exam was stated to be the need to determine if cervical disc surgery was indicated, if the claimant's symptoms were related to her injury, if claimant was presently medically stationary and if claimant's condition was worse since October 23, 1979.

Claimant was seen by Dr. Gaiser on January 15, 1980. By letter, Dr. Gaiser indicated that the claimant developed a bruit over the subclavian artery with 90° shoulder abduction. Thoracic outlet symdrome was diagnosed. Apparently following this diagnosis, SAIF additionally requested the Orthopaedic Consultants, upon scheduled examination on February 7, 1980, to describe the relationship between the thoracic outlet syndrome and the claimant's industrial injury.

The record next indicates that Dr. Poulson, on January 29, 1980, decided to schedule the claimant for surgery on February 4, 1980. SAIF somehow learned of this and informed Dr. Poulson, Dr. Gaiser and the claimant by speed letter dated January 31, 1980 that the scheduled examination with the Orthopaedic Consultants was expected to be completed. The appointment was not kept and surgery proceeded. Degenerated C5-6 and C4-5 discs were found. Excision and interbody fusion were performed.

SAIF filed a complaint with the Workers Compensation Department Medical Director requesting action against Dr. Poulson for ignoring the scheduled examination by the Orthopaedic Consultants. On April 29, 1980 the Director notified Dr. Poulson that a repetition of his conduct could put payment of his fee in jeopardy. On August 11, 1980 Dr. Gaiser performed a transaxillary resection of the claimant's first rib for treatment of her thoracic outlet syndrome.

At the last hearing which is the subject of this request for review, the Referee found that the issue of compensability of the claimant's neck condition was addressed at the first hearing and by the Court of Appeals opinion. The Referee found that the complaints which led Dr. Poulson to perform a discogram and cervical surgery were undifferentiated from the complaints litigated previously. In essence, the Referee found the matter of the cervical surgery to be a matter of res judicata. Additionally the Referee found that the claimant's thoracic outlet syndrome "presumably" was a matter that was or could have been litigated at the prior hearing, and therefore also a matter of res judicata. With regard

to the claimant's failure to keep the scheduled independent examination, the Referee found that it would have interfered with her proper treatment and that SAIF was not wrongfully deprived of medical evidence, although it had been deprived of a chance to gather evidence.

SAIF has raised several issues for review. It first contends that where there has been a refusal to submit to an independent medical examination before elective surgery, that the claimant should be estopped to claim a relation between the injury and the surgery if the surgery caused permanent changes rendering a subsequent independent medical examination meaningless, or alternatively that there should be a strong presumption of nonrelationship.

There are three administrative rules and one statute which deal with SAIF's first contention. OAR 436-69-130 (now OAR 436-69-501), OAR 436-69-210 (now OAR 436-69-801), OAR 436-54-283 and ORS 656.325.

OAR 436-69-130 required that upon determination of a need to perform elective surgery, the surgeon is required to notify the insurer at least five working days prior to the date of the surgery. The insurer may then require the surgeon recommending the surgery to obtain an independent consultation concerning that surgery - in essence, a second opinion. OAR 436-69-210 gives the insurer the right to obtain medical examinations of an injured worker at reasonable times and places if such examinations do not delay or interrupt proper treatment of the worker - the same right provided for under the enabling statute, ORS 656.325.

The insurer in this case properly exercised its right to obtain an independent examination under the above-mentioned rules and statute, shortly after Dr. Poulson indicated that there may be a need for surgery in his December 13, 1979 report. No suggested date for the surgery was then given. In fact, Dr. Poulson admitted upon deposition that he had not even seen the claimant between December 12, 1979 and January 29, 1980, when he scheduled surgery to be performed on February 4, 1980.

Unfortunately for SAIF, however, that does not serve to extricate it from responsibility for the claimant's cervical surgery. The first hearing on this matter was held on September 24, 1979. The medical reports in evidence at the time of that hearing indicate that Dr. Poulson examined the claimant for complaints of neck pain, found a limited range of motion in the cervical spine and diagnosed probable degenerated cervical discs. The Referee noted that Dr. Poulson indicated in his deposition that the claimant's neck "condition" was aggravated and that it was related to her industrial injury. The Court of Appeals also noted the same symptoms in their opinion. Nelson, 49 Or App 114. We agree with the Referee that the surgery for the claimant's cervical condition essentially involved those very same symptoms claimant complained of and were litigated at the time of the previous hearing. In view of that fact, we find that the issue of the compensability for the claimant's cervical condition surgery has been litigated, resolved in claimant's favor and is now a matter of res judicata.

With regard to the issue of the claimant's thoracic outlet syndrome surgery, the Referee apparently found it also to be a matter of res judicata. SAIF contends that this was an error. The claimant admits, and we agree, that the matter was not previously the subject of litigation. The January 15, 1980 report of Dr. Gaiser did indicate that thoracic outlet syndrome surgery was a consideration. Upon learning of this, SAIF, as noted, requested the Orthopaedic Consultants upon examination of the claimant on February 7, 1980, to describe the relationship between the thoracic outlet syndrome and the industrial injury, and to give an opinion as to the need for surgery.

As previously noted OAR 436-69-130 is a medical rule directed at the surgeon recommending surgery. The only remedy for violation of that rule is contained in OAR 436-69-510, which provides that complaints alleging violation of the medical rules must be directed to the Medical Director in the first instance, who will then determine appropriate sanction for that doctor. If SAIF has a complaint about Dr. Gaiser, it must first direct its complaint to the Medical Director, not to the Referee or the Board. In any event, it appears that it was Dr. Poulson who violated the rule, and SAIF did complain to the Medical Director, and a reprimand was issued.

With regard to the provision of OAR 436-69-210 for an independent medical examination, we look to the enabling statutes for clarification. OAR 436-69-003 indicates that the enabling statutes for the medical rules are ORS 656.726(3), 656.248(2) and 656.794(3). All of these statutes relate to rulemaking authority in connection with accident and disease prevention, rehabilitation, regulation, enforcement and medical services. We therefore presume that the rule is aimed at the providers of medical services and that the only penalty for violation of that rule is contained in OAR 436-69-510.

In OAR 436-54-283, we find a rule directed at the worker, requiring submission to a medical examination scheduled by a carrier. That rule contains penalty provisions which provide that the insurer shall apply to the Compliance Division for suspension of the violating worker's compensation benefits. Any complaint SAIF may therefore have for the claimant's failure to keep the appointment must be first directed to the Compliance Division under that rule.

SAIF's contention that a claimant's failure to submit to an independent examination results in a presumption of nonrelation between the surgery and the injury is most persuasive, and although we are attracted to that idea, we would state the precept somewhat differently. There have been several cases decided under ORS 656.325. These include Finley v. SAIF, 34 Or App 129 (1978), Suell v. SAIF, 22 Or App 201 (1975) and Clemons v. Roseburg Lumber Co., 34 Or App 135 (1978). All of these cases relate to refusal by a claimant to submit to certain diagnostic procedures. The general rule of law that runs throughout this group of cases stands for the proposition that it is the claimant who bears the burden of proof in a compensation proceeding and that failure to provide evidence reasonably available, results in a weakness in the claimant's proof. ORS 656.325 provides that the appropriate

remedy is to request termination of the worker's benefits through the Director. Although this remedy was sought in Suell, the court nevertheless found that the refusal to undergo a reasonable diagnostic procedure would be a consideration in determining if the claimant had proved his case.

We find that the same reasoning is applicable to a situation where a claimant fails to submit to a medical examination at a reasonable time and place. Failure to submit to such an examination must be regarded as a weakness in the claimant's proof. It must be emphasized, however, that reasonableness is the main factor to consider in such a case. We find that the independent examination scheduled for claimant on February 7 was scheduled at a time reasonably convenient to the claimant. SAIF learned of the possibility of surgery in December of 1979, and scheduled the examination for February 7, 1980. We know from experience after reviewing hundreds of workers compensation cases that the delay of about two months is not unusual. An appropriate analogy here is to compare the delay the Board experiences in moving pending cases to hearing. That delay is frequently caused by the unavailability of lawyers to try a case. The delay, as here, in medical examination is frequently caused by the unavailability of medical examiners. Just as the worker could select a different and more available lawyer to try his case, the employer/carrier could select a different and more available physician to examine the worker. The lawyers who practice in the workers compensation system would likely consider the former to be an abridgement of their rights just as we consider the latter to be an abridgement of the employer/carrier's rights.

In this case the proposed surgery was not emergency surgery. It was clearly elective. SAIF, obviously, knew of the long term conservative treatment as the claimant and her physicians obviously must have known of the long term disagreement regarding SAIF's responsibility for any treatment. When the surgical approach was decided, SAIF advised the claimant and her doctors of the February 7, 1980 special examination. That notification, considering the proposed surgery was elective and had not yet been scheduled, should have become the primary factor in the surgery scheduling process, absent some change in condition which would have changed the nature of the surgery from "elective" to "emergency." It is passing strange that the surgery was scheduled for February 4, 1980, just three days before the scheduled examination. Dr. Poulson testified the February 4 date had not been set until January 29, and this action on his part is on its face unreasonable. If a February 4 date could be obtained, certainly a later date after the February 7 examination could probably more easily have been obtained. Dr. Poulson should have known that the results of the February 7 examination would be important, if not crucial to protection of the employer/carrier's rights. Considering all the facts, we consider SAIF acted reasonably and Dr. Poulson acted unreasonably; if we had the authority to order sanctions of any kind against him, we would do so.

With regard to the issue of compensability of claimant's thoracic outlet syndrome, we thus start with the proposition that claimant failed to undergo a reasonable diagnostic procedure and that this weighs against a finding that claimant sustained her burden of proof. The additional evidence is from both parties'

experts, Dr. Gaiser for the claimant and Dr. Norton for SAIF. Dr. Norton was more articulate and informative in his explanation of why he thought the claimant's injury did not cause or aggravate her thoracic outlet syndrome condition. On the other hand, Dr. Gaiser's opinion is bolstered by the fact that he was the treating surgeon who actually viewed claimant's condition at surgery. The evidence is close to being evenly balanced one way or the other. Considering that claimant had the burden of proof, that claimant's failure to undergo a reasonable diagnostic procedure supports an adverse inference and Dr. Norton's well articulated and cogent reasoning on the subject, we conclude that claimant has not sustained the burden of proving compensability of her thoracic outlet syndrome.

Claimant raises an issue concerning penalties and attorney fees for SAIF's failure to pay interim compensation within 14 days of submission of a claim for aggravation. We find that the January 15, 1980 Physicians Initial Report of Work Injury or Occupational Disease to be the first report indicating a medically verified inability to work which is related to claimant's industrial injury. ORS 656.273(3). As such, SAIF had an obligation to either deny the claim, or begin paying interim compensation beginning on the fourteenth day after notification. SAIF did neither. It apparently prefered to wait for the Board's Order on Review of April 7, 1980 which reversed the Referee's order. Therefore a penalty in the amount of 25% of the temporary total disability due from February 1, 1980 until the date of the Board's Order on Review, April 7, 1980, is assessed. SAIF's failure to pay compensation following the Board's order is at least a colorable excuse, so a penalty of 10% of the temporary total disability compensation due following the Board's order until issuance of the denial is assessed.

Although we question the date that the Referee assigned to the reopening of the claimant's claim, SAIF has not raised the issue, so we do not reach it. We also agree with the Referee that this claim should be remanded to the Evaluation Division in order to determine a proper closure date. It is clear from Dr. Gaiser's report of January 15, 1981 that claimant was stationary as of November 26, 1980 at least so far as her thoracic outlet problem was concerned. It will be up to the Evaluation Division to determine whether claimant was also stationary from her cervical surgery on or before that date.

ORDER

The Referee's order dated April 9, 1981 is affirmed in part and reversed in part. That portion of the order which set aside SAIF's denial of claimant's thoracic outlet syndrome condition is reversed and SAIF's denial is reinstated. That portion of the order which denied claimant's request for penalties is reversed and SAIF is ordered to pay claimant a penalty of 25% of all temporary total disability compensation due claimant from February 1, 1980 to April 7, 1980 and a penalty of 10% of all temporary total disability compensation due from April 7, 1980 to July 15, 1980. The remainder of the Referee's order is affirmed.

DAVID GUPTON, Claimant
James Francesconi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03320
March 31, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests Board review of Referee Leahy's order which approved the insurance carrier's denial of March 6, 1981 and its denial ab initio. Claimant contends that his work activity at Dave's Bunker Hill Shell worsened his preexisting bilateral epicondylitis and that the Referee improperly interpreted Bracke v. Baza'r, Inc., 51 Or App 627 (1981).

Claimant held three successive jobs that at first caused him to have symptoms of epicondylitis requiring medical services, and then eventually caused disablement. Claimant filed only against the second employer, Dave's Bunker Hill Shell.

Claimant's epicondylitis first showed up while he worked as a mechanic for Automotive Engine Repair from about June to October of 1979. He received elbow injections for pain in July, August and September. It appears that this exposure was injurious in that it caused the epicondylitis to reoccur after a three or four year period of claimant being asymptomatic.

Claimant then worked as a mechanic for Dave's Bunker Hill Shell from October 1979 to November 1980. During that time he had elbow injections in November 1979 and February 1980 and every four to six weeks thereafter throughout his employment at Dave's Shell. On August 5, 1980 Dr. Whitney (who treated claimant from March to October 1980 during claimant's employment at Dave's Shell) stated that if the injections did not show a longer response pretty soon, surgery might be necessary. It appears that this exposure was injurious and worsened the epicondylitis in that it caused the treating physician to consider surgery. Dr. Whitney reported on December 19, 1980, "...Mr. Gupton's employment definitely aggravated and caused a recurrence of his problem that he had three to four years ago with an interval of three to four years where he was essentially asymptomatic, and I feel that the patient's occupation is related to both elbows, as a mechanic uses both arms to a great deal of an extent lifting, pulling and working wrenches." Dr. Whitney reported on February 23, 1981: "The natural progression [of epicondylitis] is to improve and get better unless aggravated. I feel that the patient's present occupation has been the inciting factor to prevent improvement."

Claimant moved from Coos Bay to Portland and worked as a mechanic at Goodyear Tire Company from December 3, 1980 to January 16, 1981. At that point his new doctor, Dr. Gritzka, took claimant off work. Dr. Gritzka performed surgery in February 1981 to correct claimant's epicondylitis condition.

The claimant testified that his elbows were bothering him throughout his employment at Goodyear. Also, he said his job involved even a little bit more mechanic work than at the Shell station. He also testified that the pain gradually became so acute that he could not sleep. This acuteness began in September

1980 while at Dave's Shell and continued through the end of his employment with Goodyear. So, it appears that the quality of exposure at Goodyear was at least as injurious as that at Dave's Shell; however, the quantity of exposure at Goodyear lasted only one and one-half months, while the Dave's Shell job lasted thirteen months.

We find that the exposure at Dave's Shell was injurious in fact in that it contributed to claimant's bilateral epicondylitis by keeping it in an inflamed state with pain and numbness which eventually required surgical relief.

Generally, the employer who provided the last injurious exposure that could have contributed to the disease is the responsible employer. Inkley v. Forest Fiber Products Company, 288 Or 337 (1980). However, Bracke, supra, held that a claimant is not limited to filing a claim on the last employer with risk exposure. The claimant has the option to prove that a prior employer was responsible in fact. We find that the claimant has met that burden of proof regarding Dave's Shell's responsibility.

Bracke does not permit the last employer against whom a claimant has filed to show that the disease was caused during an earlier employment. Steven Lundmark, 32 Van Natta 107 (1981). Similarly, we do not interpret the reasoning behind Bracke to permit an earlier employer against whom a claim is filed to show that a subsequent employment also exposed the claimant to injury. Therefore, even though claimant suffered injurious exposure at Goodyear which was subsequent to the injurious exposure at Dave's Shell, Dave's Shell is not permitted to contend that Goodyear is responsible.

ORDER

The Referee's order of May 19, 1981 is reversed, and the insurance carrier's denial of March 6, 1981 and its denial ab initio are set aside. This claim is remanded to the insurance carrier for acceptance and processing in accordance with the Oregon Workers Compensation Laws.

Claimant's attorney is awarded the sum of $1,000 for services at hearing and $500 for services on review to be paid in addition to and not out of compensation.

BOARD MEMBER McCALLISTER, DISSENTING:

I disagree with the majority's opinion because it does too much violence to the "last injurious exposure rule."

The following analysis is premised on the understanding that the claimant has the burden to first establish compensability. A close reading of the facts in Bracke v. Basa'r, Inc., 51 Or App 627 (1981) reveals the Bracke court allowed the claimant to assert a claim against the employer where she received the last injurious exposure.

In Bracke the claimant held three successive jobs where she was exposed to certain chemicals during her employment as a meat wrapper. She suffered from a condition called "meat wrappers' asthma" which is caused by exposure to those chemicals.

The claimant filed against her first employer, Baza'r, and proved that she became sensitized to the chemicals there. Her doctor-specialist testified that once she became sensitized, she was sensitized for life and that further exposure would produce symptoms but would not worsen the underlying sensitization which she had already acquired. Exposure at her second or third jobs was not injurious because it could not worsen her condition. Thus, the last injurious exposure in fact took place at Baza'r.

The Bracke court said that the claimant could have chosen to assert a claim against her last employer, Thriftway, under the last risk exposure rule. That rule allows the claimant to file against the last employer where working conditions could have caused the disease. Had claimant done so, Thriftway would not have been permitted to avoid responsibility by showing that the condition had stabilized during a previous employment at Baza'r and was not worsened by her employment at Thriftway.

So the Bracke court left the claimant two filing options in successive risk exposure cases:

(1) Take the easier burden of proof by filing against the last employer where working conditions could have caused the disease, or

(2) take the harder burden of proof by filing against the employer where the evidence ultimately will show responsibility, in fact, for the disease.

In Bracke, the claimant chose option (2) and prevailed.

In this case, the claimant chose option (2) but, in my opinion, did not prevail. Unlike the evidence in Bracke, none of the doctors in this case expressed the opinion that the risk exposure at the second employment, Dave's Shell, exclusively caused the aggravation of claimant's bilateral epicondylitis. Rather, their opinions supported the conclusion that claimant's occupation as a mechanic generally caused the condition.

The Bracke court held at 51 Or App 627, 636:

> "Where the claimant is able to prove by a preponderance of the evidence that a prior employer was responsible in fact, the claim may be validly asserted against that prior employer and it is no defense that a subsequent employer exposed claimant to the same kind of risk if that risk was not injurious in fact. (Emphasis added.)

The flip side of that passage is that a prior employer can assert a defense that a subsequent employer exposed claimant to the same kind of risk when that risk is injurious in fact.

In this case Dave's Shell has successfully raised that defense and shown that claimant was exposed to the same kind of risk with a subsequent employer, Goodyear Tire Co., which was injurious in fact. In comparison, Baza'r could not have raised that defense in the Bracke case because of the unusual facts there.

Claimant clearly has a compensable claim for bilateral epicondylitis, but the wrong employer is having to pay for it. Since the claimant was unable to produce evidence which pointed to one particular employer in exclusion of all others, the responsibility for the claim should have fallen to the last employer with injurious risk exposure -- Goodyear Tire Co.

DELBERT HUTCHINSON, Claimant
Samuel Imperati, Claimant's Attorney
Dennis VavRosky, Defense Attorney

WCB 79-07340
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant and the employer seek Board review of Referee Leahy's order which affirmed the denial of claimant's aggravation claim, found claimant was stationary on October 16, 1979, denied his request for a referral to the Pain Center, affirmed the Determination Order award as modified by the medically stationary date, and ordered penalties in addition to the compensation not previously paid from March 29, 1979 to August 10, 1979 and penalties from October 15, 1979 through February 26, 1980 if the compensation for that period of time was not timely paid.

The general issues before us are claimant's entitlement to temporary disability compensation, aggravation, penalties, Pain Center referral, extent of disability and attorney fees.

Claimant sustained a compensable injury to his back on October 25, 1978. The claim was accepted by the carrier and time loss benefits were paid from October 25, 1978 through February 5, 1979 and from February 13, 1979 through March 30, 1979. Claimant was released for regular work by Dr. Klump as of February 6, 1979. He advised Dr. Klump on February 8th that he was unable to do the heavy lifting required in his job and wanted a light duty job until he could gradually work back into his regular job. On February 12, 1979 claimant told the doctor that he could not work due to his back and left leg pain. He was told by Dr. Klump to take a week off and then attempt to return to work. On March 6, 1979 Dr. Klump indicated that claimant was feeling much improved and his examination showed no abnormality. He advised claimant to attempt to be retrained in some type of lighter work.

Claimant began a course in refrigeration on March 28, 1979. Between that date and August 10, 1979 claimant apparently did not seek medical attention. The record is silent during this period of time with respect to a release for regular work. He saw Dr.

Bomengen on August 10, who found claimant had a post-operative laminectomy back which would require further evaluation. Claimant was hospitalized on August 26, 1979 for a myelogram.

Claimant saw Dr. Campagna on October 16, 1979 and advised him that he planned to return to work. All testing was within normal limits. The doctor felt claimant's condition was vocationally stationary and recommended rehabilitation. An examination by Dr. Klump on November 28, 1979 revealed full range of motion of the back.

A stipulation was issued on November 16, 1979 which covered several issues. (1) Temporary total disability benefits would continue to be paid until closure; (2) retroactivity (back to March 29, 1979) of temporary total disability compensation would not be resolved by the stipulation but rather by a future hearing; (3) the issue of penalties would also be reserved for a future hearing and (4) claimant's attorney was entitled to a fee equal to $312.

On December 12, 1979 Dr. Campagna advised the carrier that claimant was medically stationary as of October 16, 1979. A Determination Order was entered on June 9, 1980 which granted claimant compensation for temporary total disability from October 30, 1978 through February 5, 1979 and temporary partial disability from February 6, 1979 through February 26, 1980. Claimant was also granted compensation for 20% unscheduled low back disability.

Claimant saw Dr. Taylor on August 30, 1980 complaining of low back pain. He referred claimant to Dr. Hockey who was told that claimant had an increase in back pain on August 28, while working on the yarder. Dr. Hockey recommended that claimant should be admitted to the Pain Clinic to see if he could better adapt to living with his problem. On November 12, 1980 Dr. Hockey indicated claimant's condition was stationary but that he had considerable symptomatology which could best be handled by the Pain Clinic.

Because of the confusion surrounding this case, as evidenced by the lengthy briefs, we will attempt to handle each issue separately and as concisely as possible.

TEMPORARY DISABILITY - The Referee granted claimant compensation for temporary total disability from March 30, 1979 through August 8, 1979. We find the record is not clear on claimant's entitlement to this compensation since claimant apparently received no medical care during that time. We are aware that claimant was involved for some period of time in a refrigeration program for which he was receiving remuneration. After claimant terminated from the program, he continued to do refrigeration repair work on his own. Claimant's claim was reopened on August 10, 1979 after

he exacerbated his back condition while moving a refrigerator on dolly. Claimant was released for regular work on February 6, 1979. Due to his complaints, Dr. Klump told him to work at a light duty job for approximately two to three weeks until he could gradually work back into his regular job. Shortly after that report claimant started the refrigeration program. We do not find persuasive evidence to warrant payment of temporary total disability compensation between March 30, 1979 and August 8, 1979. Claimant has failed to show by a preponderance of the evidence that he is entitled to said compensation.

The June 9, 1980 Determination Order directed that compensation for time loss be paid between the dates in question. Claimant requests penalties for the carrier's failure to do so. We find that the November 16, 1979 Stipulation covered this particular issue when it directed that compensation for that period of time would be resolved at the time of a final hearing. The carrier failed to pay, evidently relying on the Stipulation. We conclude that the carrier should have paid temporary partial disability as directed by the Determination Order, but to the extent the carrier relied on the Stipulation, its failure to pay was not unreasonable. No penalties are due on this issue.

The next issue involves whether claimant's condition was medically stationary on October 16, 1979. The Referee so found and we agree. Dr. Campagna's reports are clear on this issue. The Determination Order should be so modified and compensation should cease as of that date. Penalties are not in order here because there was no proof offered to show that the carrier made the payment untimely. The carrier has asked for an offset due to the fact that they have paid temporary disability compensation up to at least May, 1980. Claimant is vehemently opposed to this offset. However, the Workers Compensation Department rules allow for this offset and we conclude that it is proper in this case. ORS 436-54-320.

AGGRAVATION - We agree with the Referee that there is no proof of a worsened condition in August, 1980. The medical evidence simply fails to support that contention. We also find no proof of a new injury. We conclude claimant is entitled to have his medical expenses paid under the provisions of ORS 656.245 for his increased symptomatology. Claimant argues that Dr. Hockey's recommendation that he enter the Pain Clinic is evidence that he was not medically stationary and that his condition could improve. Also, if claimant does not go to the Pain Clinic, claimant asserts he will have substantial permanent disability. Because the Pain Clinic could improve claimant's ability to function, claimant argues that he is not legally medically stationary. We do not find this proof of aggravation. Dr. Hockey stated, and we agree, that the Pain Clinic could be invaluable to claimant in helping him cope with his pain, but it is unlikely that it would change the status of his disability. Claimant has failed to prove he sustained an aggravation of his 1978 injury.

PAIN CLINIC - We find Dr. Hockey's reports sufficient to support a referral to the Pain Clinic. At the time claimant is admitted to the program, he is entitled to claim reopening for the payment of temporary total disability compensation and all related expenses. The Referee's finding on this issue should be reversed.

EXTENT OF PERMANENT DISABILITY - Applying the Department's rules which govern the rating of claimant's disability, we conclude the award granted by the Determination Order was proper. OAR 436-65-600, et seq.

ATTORNEY FEES - Claimant prevailed on the issues of temporary total disability and penalties at the hearing level. The Referee granted an attorney fee of $950. This is in error as the fee should have been a percentage of the increased award. However, because claimant failed to prevail on any issue except entitlement to a program at the Pain Clinic, this problem is inconsequential. Claimant's attorney is entitled to a small fee for prevailing on the issue of claimant's entitlement to the Pain Clinic. The fee granted by the Referee at the hearing is reversed.

ORDER

The Referee's order dated December 24, 1980 and amended on January 6, 1981 is modified. For the purpose of clarity we will list all the issues below whether the result reached by the Referee has been changed or not.

Claimant is not entitled to compensation for temporary partial disability from March 30, 1979 through August 8, 1979. No penalties are assessed.

The Determination Order, dated June 9, 1980 is modified to show that claimant became medically stationary on October 16, 1979. All compensation paid for temporary disability after that date may be applied as an offset against any future award claimant may receive. The Determination Order, with respect to claimant's unscheduled disability award, is affirmed.

The carrier's denial of claimant's aggravation claim is approved.

Claimant is entitled to a referral to the Pain Clinic. Upon admittance, he is entitled to a reopening under ORS 656.273.

Claimant's attorney is granted as a reasonable attorney's fee the sum of $350, payable by the carrier, for his services before the Referee and the Board on the issue of the carrier's refusal to allow claimant to attend the Pain Clinic. The attorney fee granted by the Referee is reversed.

JOHN JOHNSON, Claimant
Mark Schively, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-03695
March 31, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Foster's order which set aside SAIF's February 22, 1980 denial of claimant's aggravation claim, refused to rule on the issue of extent of permanent partial disability raised in the original request for hearing, which was an appeal by SAIF from the October 19, 1978 Determination Order which awarded claimant 50% unscheduled disability for his low back and 15% for loss of his left foot. SAIF contends that the claimant's 1980 hospitalization, for which the aggravation claim was filed, is a direct sequelae of claimant's previous multiple back injuries, not related to the fractured talus in his left ankle suffered on the job on August 1, 1977 for which SAIF was responsible. SAIF also objects to the low back disability award of the Determination Order.

At the July 10, 1980 hearing, 145 exhibits were submitted which detail a long and complicated medical history. Claimant first sustained an industrial injury to the coccyx in 1961. In 1964 a second injury was incurred and diagnosed as lumbosacral strain. In 1965 a decompressive laminectomy with removal of a protruded L4 disc, mid-line, was performed. A report from Dr. McIntosh dated March 29, 1966 diagnosed degenerative disc disease, L4-5 level. The claim was closed on December 12, 1966 with an award of 35% loss of function of arm. In 1968, a second laminectomy, L4-5 with fusion of L4 to the sacrum was performed. An order dated June 27, 1969 closed the claim with an award of 35% loss of an arm for a total of 70% loss of the right leg.

In 1970 an industrial injury to the claimant's left shoulder is reported while he was working in Alaska. Claimant was subsequently involved in a motor vehicle accident in 1971. The January 14, 1972 report of Dr. Campagna indicates that claimant fractured two ribs in October of 1971. In May of 1972 a decompressive laminectomy, L3 was performed with spinal fusion of L3 to L4.

Claimant enjoyed a substantially injury-free interlude until 1975 when he fell on his back while working in California. Claimant continued to complain of back pain, but Dr. Stevenson found no objective evidence to sustain these complaints upon examination on December 19, 1975. In 1976 claimant was involved in another motor vehicle accident which Dr. Ampel reported exacerbated claimant's low back pain. Dr. Campagna noted in his October 19, 1976 report that functional overlay clouded the organic picture. Claimant's California claim was compromised in March of 1977 with a settlement of $6,000, the equivalent of 19% unscheduled disability.

The current claim originated in an August 1, 1977 incident in which claimant injured his left ankle when he jumped off a yarder onto a log. The ankle was set in a cast which was removed on October 10, 1977. The first indication of a recurrence of back

pain is in Dr. Wilson's report of October 20, 1977. Dr. Wilson notes in his February 20, 1978 report that with regard to claimant's back, he suffered "an apparent exacerbation which occurred that evening while he was sitting and watching television." The assault on the claimant's body resumed on April 13, 1978 when he fell in the shower and fractured his ribs. Another incident is recorded in the June 10, 1978 report of the Orthopaedic Consultants relating that claimant was sawing firewood in April of 1978 when his back "went out." The Determination Order of October 19, 1978 which closed the August 1, 1977 ankle injury claim awarded claimant 50% unscheduled disability for his low back and 15% for loss of his left foot.

On January 21, 1980 a myelogram was performed by Dr. Doyle who diagnosed post surgical changes with "... lateral and ventral defect at L2-3, which may represent additional disc disease, not present on a previous examination." (Emphasis added.) Dr. Wilson in his January 29, 1980 report noted spinal canal stenosis at L2-3 above his three level spinal fusion and recommended surgical decompression. A decompressive laminectomy at L2-3 was carried out on March 24, 1980.

The Referee found that "there seems to be little question in Dr. Wilson's opinion that claimant's [back] problems are related to his ankle injury in 1977, and that it was a material contributing factor to his hospitalization." Our analysis of the record leads us to a different conclusion.

This aggravation claim involves responsibility for claimant's back surgery in 1980. This back surgery originally stemmed from the January 1980 myelogram which found spinal canal stenosis. Dr. Wilson in his January 25, 1980 discharge summary stated that, "It appears connected," -- a cryptic passage we discuss more fully below.

On July 5, 1980 Dr. Tennyson examined the claimant's medical records at SAIF's request. Dr. Tennyson concluded:

> "Based upon all of the above, I would have great difficulty in ascribing this patient's stenosis of the spinal canal (assuming that this indeed is the correct diagnosis) to his industrial injury of August 2, 1977. I would be more inclined to agree with the opinion of Dr. N. J. Wilson as noted in his operative note at the time of the patient's most recent surgery on March 24, 1980, to wit, that due to overgrowth of the spinal fusion and settling due to degenerative disc disease, the spinal stenosis had come about. This degeneration and overgrowth of spinal fusion I would relate to his previous surgeries and previous injuries, not all of which have been industrial."

and additionally:

"The fact that this patient was able to return to work as a yarder operator following his injury of August 1977, for nearly a year without progressive radicular symptomatology would make me doubt that the injury of August 2, 1977 was a material contributing factor to the development of his apparent spinal stenosis."

Claimant's treating physician, Dr. Wilson, was deposed on October 2, 1980. When asked if he agreed with Dr. Tennyson's findings, Dr. Wilson stated:

"Well, I could not completely agree with Mr. Tennyson's number five from the standpoint that I would feel there are multiple factors involved in this situation. One of which is overgrowth of bone from the man's previous spinal fusion."

When questioned closely regarding the connection between the August 1977 injury and claimant's surgery, Dr. Wilson read from his January 25, 1980 discharge summary and explained what he meant when he stated, "It appears connected," stating "...my intention was that it appears connected with his previous low back problems." (Emphasis added.) Dr. Wilson further stated:

"I think I've already testified that I feel the causes of his situation are multiple and it's difficult--I think the causes I named in my previous discussion of the situation--and it would be difficult for me to pin the situation down to one single incident."

During the hearing Dr. Tennyson also testified regarding causation. Dr. Tennyson, interpreting Dr. Wilson's reports, stated that the surgery was necessitated by the overgrowth of bone of the patient's previous spinal fusion and degeneration of the L2-3 disc. Dr. Tennyson refused to relate the August 1977 ankle injury to the claimant's surgery:

"Q. Does the mechanical low back pain that resulted as a result--excuse me. Mechanical low back pain arising out of the immobilization of the left ankle materially contribute to the spinal stenosis?

"A. I can't see that one can make a case to relate these two in any way. Certainly, Mr. Johnson is with a history of four back surgeries, has got ample reason to have mechanical low back pain. It's well known in patients with pre-existing back injuries and previous fusions of the back, if they have to have a leg in a cast or even in a

> splint type of arrangement and walk with crutches because of the altered weight bearing. They have an exacerbation in their chronic back pain and a worsening of the mechanical components thereof.
>
> "Q. But is that worsening of mechanical components the sort of thing that increases the stenosis in narrowing of the spinal canal?
>
> "A. I don't think one could make that correlation."

Neither claimant's treating physician nor Dr. Tennyson was able to relate the 1980 surgery to the August 1977 ankle injury. We are unable to locate any reference in the record by Dr. Wilson that he was of the opinion that the 1977 ankle injury was a "material contributing factor" to claimant's hospitalization in 1980. There are, however, indications in the record that the 1977 ankle injury may have temporarily increased claimant's back pain. Dr. Wilson in his April 20, 1978 letter indicated that so far as the claimant's attribution of his back trouble to the ankle injury was concerned, that:

> "This would appear to be possible from a gait standpoint, putting more strain on an already symptomatic low back, however as Doctor Corson has indicated, and declined to comment on, this is a very complex disability situation with multiple injuries over a good many years."

The Orthopaedic Consultants' report of June 10, 1978 stated:

> "We do feel that there is a causal relationship between his ankle injury and an aggravation of his back difficulty. This would be because of a direct injury to his back, as well as additional stresses placed on his back by having to walk with a cast."

The February 22, 1979 reply letter of the Orthopaedic Consultants further elaborated, stating:

> "With regard to your first question about the exact nature of the causal relationship between the ankle trauma and back injury, we would say there is probable more likely an inexact relationship."

The reply went on to indicate that the back was aggravated by the additional stresses from having to walk with a cast on his leg.

All these reports relate to claimant's back condition before the January 1980 myelogram found spinal canal stenosis. As already noted, the stenosis and resulting surgery can not be, on this record, related to the August 1977 injury. It is, therefore, obvious that the reports connecting the ankle injury and resulting back complaints only deal with a temporary increase of pain resulting from claimant's use of a cast and crutches following the ankle injury. It should also be noted that claimant testified that the pain he experienced prior and subsequent to the 1977 injury was the same he had experienced off-and-on since 1964. With respect to that portion of the Orthopaedic Consultants' February 22, 1979 reply letter relating that claimant experienced "significant residuals" due to the 1977 injury, it becomes apparent from subsequent evidence that claimant had been suffering from a degenerative process involving boney overgrowth from his prior fusion for quite some time and which the Orthopaedic Consultants were not aware of at the time of their examination. We, therefore, find that claimant has failed to establish that his 1980 surgery and hospitalization were in any way related to his August 1977 ankle injury.

During the hearing, SAIF specifically requested that the Referee rule on the question of the permanent partial disability awarded by the October 19, 1978 Determination Order. The Referee refused to rule on that issue because he set aside SAIF's denial of claimant's aggravation claim. Since the Board has found to the contrary on the aggravation issue, we will proceed to rule on the permanent partial disability issue.

In order to rule on the issue of extent of permanent partial disability as a result of the August 1977 injury, it is necessary to compare the claimant's condition prior to that injury to his condition subsequent to it. Such a comparison leads to a conclusion that claimant suffered no additional permanent partial disability to his back as a result of the 1977 injury. A comparison of the physical findings contained in Dr. Forcades' report of August 5, 1976 with those found in the various reports subsequent to the 1977 injury show little change in claimant's underlying back condition. The only report in the record indicating that claimant suffered any additional disability as a result of the 1977 injury is the Orthopaedic Consultants' February 22, 1979 reply letter which stated that claimant's condition prior to their examination to be in the moderate disability range and in the lower limits of moderately severe following the 1977 injury. Their attribution of all the claimant's additional post-1977 disability to the ankle injury, however, is misplaced since they were not aware that claimant was suffering a degenerative condition of the spine. None of the other medical reports following the 1977 injury indicate that claimant suffered any additional permanent partial disability as a result of the 1977 injury. This conclusion is further supported by Dr. Wilson's testimony taken upon deposition:

"Q. And then down at the bottom there he continues to have low back and leg discomfort when he's up an around for any length of time. Now first of all, Doctor, that's a complaint that's been with Mr. Johnson for a number of years; is that right?

"A. Yes. Mr. Johnson, during the period he was being treated for his sprained ankle, he was on crutches. And, of course, it is my feeling that his ambulatory situation on the crutches placed more strain on his back and that some of his complaints during this time were secondary to that. (Emphasis added.)

"Q. Mechanical low back pain?

"A. Yes."

The treating physician thus does not attribute any permanent back disability to the 1977 ankle injury. To the extent that the Orthopaedic Consultants opine otherwise, we are not persuaded. The Determination Order allowing additional permanent partial disability for claimant's low back was, therefore, incorrect.

ORDER

The Referee's order dated December 5, 1980 is reversed. The SAIF Corporation's denial of February 22, 1980 is affirmed. That portion of the Determination Order dated October 19, 1978 awarding claimant 50% permanent partial disability for low back is reversed. Those portions of the Determination Order allowing 15% for loss of the left leg and allowing temporary total disability from August 1, 1977 through September 19, 1978 have not been contested and are, therefore, affirmed.

MICHAEL W. JOHNSON, Claimant
James E. Dicey, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11350
March 31, 1982
Order on Review

Reviewed by Board Members Lewis and McCallister.

Claimant seeks Board review of Referee Mongrain's order which granted him compensation for 25% unscheduled low back disability. Claimant contends this award is inadequate.

After de novo review, the Board affirms the conclusion reached by the Referee. Claimant argues that his post-injury earnings are approximately 50% of what he was earning as a fireman prior to the injury. There is no question that claimant cannot return to fireman-type work. However, claimant seems to have confused "loss of wage earning capacity" with loss of wages. Ford v. SAIF, 7 Or App 549 (1972) states that a worker's post-injury wages are not the only factor to consider. Depending upon the circumstances, a worker's wages might be of great, little or no importance in determining his actual loss of wage earning capacity. The carrier notes a point of interest: using claimant's argument, if he had obtained a job earning more than a fireman, he would have been entitled to no compensation for permanent disability.

The claimant in this case is relatively young, has a good education and a bright-normal intelligence. When using the guidelines of OAR 436-65-600, et. seq., in a manner most favorable to claimant, he still has 72% of the general labor market open to him.

The Referee stated that "[e]arning capacity necessarily looks to the future . . ." (Emphasis in original.) The words "future" and "potential" have recently become buzz words in Workers Compensation cases. We find that the award granted by the Referee adequately compensates him for his present loss of earning capacity. All the factors pertinent to the determination of unscheduled disability have been considered. Claimant is not entitled to an increased award in order to help him make up lost wages or in order to "tide him over" until he can find a better paying job. The order of the Referee should be affirmed.

ORDER

The Referee's order dated July 24, 1981 is affirmed.

MARLENE L. KNIGHT, Claimant
Steven P. Pickens, Claimant's Attorney
Patrick Ford, Defense Attorney

WCB 80-06474
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Daron's order which determined claimant's claim for occupational disease to both feet was not compensable. The basis for this decision was primarily claimant's failure to file her claim timely under ORS 656.807; the Referee also stated the claim was not compensable under the test in Robert Sanchez, 32 Van Natta 80 (1981), which stated that a claimant's work activities must be the "sole culprit" for the aggravation of the underlying condition leading to disability.

We affirm the findings of fact reached by the Referee. However, we disagree with his conclusion and reverse his order.

Before the issue of compensability can be discussed, the issue of timeliness must be considered. We have previously held that it is not within the authority of the Referee to rule on an "issue" that was never raised. The issue of timeliness in this case was not mentioned in the carrier's denial, was not the subject of a response to the Request for Hearing and was not even alluded to at the hearing. The first mention of the subject was in the Referee's Opinion and Order. The issue of timeliness in this case should have been raised as a defense by the carrier in order to be viable. Claimant's case will, therefore, be considered on its merits.

The Referee determined that under Weller v. Union Carbide, 288 Or 27 (1979) and James v. SAIF, 290 Or 343 (1981), claimant's claim was compensable. It is undisputed that her original neuromas were not caused by her work activities. However, her work activities caused a worsening to the point that she required surgery and suffered from a definite disability. We agree with the Referee that her work activities were the contributing source for the onset of the occupational disease condition. The Referee determined claimant failed in her claim under the ruling in Robert Sanchez, supra, because her work activities were not the "sole culprit" for her disability. This case has since been reversed by the Court of Appeals and is not the standard to be applied in cases such as this.

We find that Weller, supra, is not applicable in this case because claimant's underlying condition was asymptomatic prior to the beginning of her problems in 1976. See Patricia Lewis, WCB Case No. 80-10226, 34 Van Natta 202, (March 15, 1982). It is necessary for claimant to show she suffers an occupational disease as defined in ORS 656.802 and that her work activities are the major contributing cause of her disability. We conclude claimant has proven the compensability of her claim. See James, supra, and Gygi v. SAIF, 55 Or App 570 (1982).

ORDER

The Referee's order dated September 9, 1981 is reversed. Claimant's claim for occupational disease to both feet is remanded to the carrier for acceptance and payment of compensation to which she is entitled until closure under ORS 656.268. Claimant is entitled to temporary total disability compensation only for the period of time during which she was unable to work due to residuals of her occupational disease condition.

Claimant's attorney is hereby granted as a reasonable fee for his services, both at the hearing and at Board level, a sum equal to $1,000.

DEL C. LUCAS, Claimant
Larry Bruun, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01241
March 31, 1982
Order on Review

Reviewed by Board Members Lewis and McCallister.

Claimant seeks Board review of Referee Williams' order which found the claim was properly closed by the Determination Order and found claimant was not entitled to any compensation for his neck condition. The Referee also ruled that claimant's low back problems were not related to his compensable injury of March 6, 1980.

Claimant sustained a compensable injury on March 6, 1980 while unloading cases of cigarettes. He saw Dr. Cherry on March 12, with complaints of neck and left shoulder pain. He was treated conservatively and again saw Dr. Cherry on April 4, this time with complaints of low back pain. He was hospitalized immediately for conservative treatment. On April 10, claimant filed a Form 801 which listed his complaints as arm, shoulder, neck and back pain. His claim was accepted and benefits paid.

Claimant had a left shoulder injury in 1972 and a low back strain in 1974 with no apparent residuals. Dr. Cherry has been claimant's treating physician for all of these injuries.

The initial issue before us is whether claimant was medically stationary on September 26, 1980 as found by Dr. Stolzberg. We agree with the Referee that the evidence as a whole substantiates the closure date of September 26, 1980.

The second issue before us is claimant's entitlement to an award of permanent disability. The Referee ruled that claimant's low back complaints could not be considered in a rating of impairment. We disagree. Claimant included his low back complaints on the Form 801 and their relationship to his March 6, 1980 injury is unquestioned by Dr. Cherry. Claimant specifically mentioned his low back problems in his opening statement at the hearing. SAIF Corporation never questioned claimant's contention. Admittedly, SAIF can deny a condition at any time, however, they have not done so. The first time they questioned the low back condition was in their brief before the Board, after the Referee ruled the condition was not compensable.

We conclude that, at this time, claimant's low back condition is properly before us as being related to his March 6, 1980 industrial injury. Based on the guidelines set forth in OAR 436-65-600 et. seq., we find claimant has suffered a 10% impairment. He is 43 years of age with at least one year of college. His primary work experience is as a truck driver. Claimant has superior intelligence. The medical evidence indicates he is now limited to light work. We, therefore, conclude claimant is entitled to 48° for 15% unscheduled disability due to his March 6, 1980 injury.

ORDER

The Referee's order dated August 28, 1981 is modified. Claimant is hereby granted compensation equal to 48° for 15% unscheduled disability for his neck, left shoulder and low back conditions resulting from the March 6, 1980 industrial injury.

Claimant's attorney is awarded 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.

SHAWNEE L. LUELLEN, Claimant
Jeffrey Mutnick, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-09635
March 31, 1982
Order on Review

Reviewed by Board Members Lewis and McCallister.

SAIF Corporation seeks Board review of Referee Peterson's order which granted claimant an increased award for a total equal to 80° for 25% unscheduled back disability. SAIF contends that since the Referee had no evidence other than that which was considered by the Evaluation Division, the 5% award of the Determination Order should be affirmed.

Claimant sustained a compensable back strain on August 10, 1978 while working as a trim loader for Weyerhaeuser. After a period of conservative treatment it was determined that she should avoid repetitive lifting of over 20 to 30 pounds and repetitive bending and twisting. Her objective findings translated into a minimal physical impairment. Her subjective complaints suggested a moderate impairment.

Claimant is 30 years old, has a tenth grade education, and has work experience in sawmill work and waitressing. Her doctor recommended that she change jobs due to her back condition.

The Referee determined claimant had moderate impairment and was limited to light work. Based on the guidelines in OAR 436-65-600, et. seq., he concluded claimant was entitled to compensation for 25% unscheduled disability.

We find this rating is too high. Claimant's actual physical impairment is only minimal. Based on OAR 436-65-605, she is really only limited to medium work. Claimant is young and has a background in waitress work which does not seem to be precluded to her. Based on our perception of the guidelines in OAR 436-65-600, et. seq., when considered in light of the above findings, we conclude a more appropriate award would be 48° for 15% unscheduled disability.

ORDER

The Referee's order dated October 13, 1981 is modified. Claimant is hereby granted compensation equal to 48° for 15% unscheduled back disability for her injury of August 10, 1978. This award is in lieu of that granted by the Referee in his order. Claimant's attorney fee should be adjusted accordingly.

DERALD W. McKENZIE, Claimant
David D. Lipton, Claimant's Attorney
Ridgway K. Foley, Defense Attorney

WCB 81-02287
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The carrier, EBI, seeks Board review of Referee Shebley's order finding that claimant sustained a compensable aggravation of a previous industrial injury, ordering acceptance of the claim by carrier, ordering payment of temporary total disability, awarding additional permanent partial disability and allowing attorney fees in the amount of 25% of the increased award of permanent disability compensation and in the further amount of $850 for prevailing on the issue of compensability of a denied claim.

Carrier contends that claimant did not prove a compensable worsening of his low back condition, and therefore is not entitled to time loss payments, an increase in permanent disability or attorney fees. Carrier further contends that even if claimant did sustain a compensable aggravation, the award of $850 in addition to other attorney fees was unreasonable. Claimant cross-appealed and contends that he is entitled to additional attorney fees and a penalty for carrier's failure to deny or begin interim compensation within 14 days after carrier had notice or knowledge of a medically verified aggravation claim.

We affirm and adopt the Referee's Opinion and Order, and in addition, award a 10% penalty and allow an additional $100 in attorney fees for the carrier's unreasonable delay in denying or beginning interim compensation payments.

The issue of claimant's entitlement to attorney fees and a penalty for carrier's unreasonable delay in responding to claimant's aggravation claim was raised at the hearing but not decided by the Referee. The salient facts are as follows:

March 7, 1981 or thereabouts - claimant sustains a worsening of his industrially related back condition.

March 13 - claimant's physician admits claimant to the hospital.

March 17 - someone from claimant's physician's office telephones carrier and informs carrier that claimant has been hospitalized.

March 21 - a letter is prepared over claimant's physician's signature attesting to the aggravation and confirming claimant's hospitalization.

April 3 - carrier receives physician's letter of March 21.

April 6 or thereabouts - carrier arranges an examination of claimant by Orthopaedic Consultants for April 16.

April 16 - claimant is examined by Orthopaedic Consultants.

April 20 - carrier receives consultant's report.

April 24 - carrier denies claimant's claim.

The denial was not issued until 38 days after receipt of notice by telephone from claimant's physician's office, 34 days after preparation of the physician's letter and 21 days after actual receipt of the letter by carrier.

We have reviewed claimant's physician's letter and, contrary to carrier's contention, find that it states the necessary elements for an initial report of an aggravation claim as required by ORS 656.273(6). The record does not establish that the earlier telephone call from the physician's office to the carrier provided all the necessary information to satisfy the initial aggravation claim report requirements. However, that telephone call, taken together with the date of the hospitalization and the date on the physician's letter should have alerted the carrier to the need to expedite. Awaiting the consultant's report for a few days might otherwise have been reasonable, but not in light of the advance notice the claim carrier received. It follows that claimant is entitled to a penalty and attorney fees. Since the delay was only seven days after the outside 14 day limit, under the guidelines set down in Zelda M. Bahler, 33 Van Natta 478 (1981), we assess a 10% penalty.

With respect to attorney fees, under the Zelda M. Bahler guidelines, in the absence of evidence suggesting unusual circumstances and in light of the fees claimant's counsel has already received, the Board would make no additional award. However, there is evidence here (see Exhibit 27) indicating that claimant's counsel was involved in the effort to obtain interim compensation. Therefore, we allow an additional $100 in attorney fees in the way of a penalty against carrier.

ORDER

The Referee's order dated July 24, 1981 is modified to provide for the following additional terms. By way of a penalty against EBI for its unreasonable delay in responding to claimant's aggravation claim, claimant is awarded an amount equal to 10% of the compensation due claimant as of April 24, 1981, and claimant's attorney is allowed $100 in attorney fees. In addition, claimant's attorney is allowed a fee of $300 for his services before the Board, payable by the carrier.

WILLIAM S. McMICHAEL, Claimant
Gerald Doblie, Claimant's Attorney
Scott Terrall, Defense Attorney

WCB 79-09744
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The employer seeks Board review of Referee Braverman's order which granted claimant a total award of 60% loss of his left leg. The employer contends that the award granted is excessive.

Claimant was, and is, employed as a trimsaw operator for Willamette Industries. In 1974 he injured his left leg and subsequently underwent surgery. The record discloses that the claim was closed with an award of 19% loss of the left leg which was modified to 25% loss of the left leg after a hearing.

Claimant returned to Willamette Industries and on October 1, 1979 sustained a new injury accepted by the employer as a self-insured. Claimant underwent a lateral menisectomy performed by Dr. Hoda and in January of 1980 was released to his regular occupation. Claimant returned to work and, at the time of hearing, was still so employed. His claim was closed by a Determination Order of March 14, 1980 which granted him 5% loss of the left leg. The Referee granted claimant a total award for his loss of use of the left leg of 60%.

We agree with the appellant in its brief that, "Neither the medical evidence, the testimony at hearing, nor a combination of the two, support an award of 60 percent for loss of use of claimant's left leg."

The evidence before us indicates that claimant was granted 25% loss of the left leg from his 1974 industrial injury. However, upon agreement of counsel, without any basis in the record, it was stipulated that claimant had received 30% loss of his left leg from the 1974 injury.

We find, based on the medical and lay evidence, that for this 1979 industrial injury, claimant has sustained 20% loss of use of his left leg for a total award to date of 50%. This award is based on our analysis of the evidence in light of OAR 436-65-535, et. seq., using that rule as a guideline.

In arriving at his conclusion on the extent of claimant's scheduled disability, the Referee relied upon former OAR 438-22-100, the administrative rule previously governing the evaluation of scheduled disabilities for injury to the extremities. That rule was amended March 20, 1980 by Administrative Order 4-1980, effective April 1, 1980 and promulgated as OAR Chapter 436, Division 65, "Claims Evaluation and Determination." OAR 436-65-535, et. seq., is the appropriate rule to apply to this claim. OSEA v. WCD, 51 Or App 55 (1981); Dennis Gardner, 31 Van Natta 191 (1981). It was an error for the Referee to apply former OAR 438-22-100, which has been superseded.

ORDER

The Referee's order dated May 20, 1981 is modified. The Determination Order of March 14, 1980 is modified and claimant is granted an award of 20% loss of the left leg.

KARL NUSE, Claimant
Evohl F. Malagon, Claimant's Attorney
Lawrence Paulson, Defense Attorney

Own Motion 81-0271M
March 31, 1982
Order Vacating Own Motion Order

The Board issued its Own Motion Order in the above entitled matter on March 4, 1982 wherein we found claimant's claim arising out of a May 31, 1973 industrial injury should be reopened as of his hospitalization in December 1980 and until closure is authorized.

It has finally been brought to our attention that the carrier issued a formal denial on February 26, 1982 and the claimant has requested a hearing on that denial. This pending hearing request likely deals with overlapping issues and, therefore, the Board doubts it has jurisdiction to grant own motion relief in such an instance and concludes that it is now inappropriate to grant such relief in the face of the hearing presently requested. Garold Hurley, 81-0134M (February 22, 1982).

Therefore, our Own Motion Order dated March 4, 1982 is hereby vacated. After resolution of the pending hearing request, the parties may renew application for own motion relief.

IT IS SO ORDERED.

ROBERT J. QUEEN, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
Paul L. Roess, Defense Attorney

WCB 79-03862
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

SAIF Corporation seeks Board review of Referee Wolff's order which set aside its denial of compensability of claimant's occupational disease claim and remanded it for acceptance retroactive to claimant's hospitalization in December, 1978.

Claimant was employed as a wood foreman for a logging operation. On August 7 or 8, 1978 he experienced an episode of chest pain. The temperature was about 100°. Claimant testified his left arm would not work, he could not eat lunch and suffered shortness of breath. Claimant had experienced shortness of breath and also had had the left arm problem before. Claimant contiunued in this employment until December, 1978. On December 11, 1978 he was hospitalized.

The initial hospital diagnosis was cardiomegaly mild to moderate with pulmonary edema and cardiac arrhythmia with early congestive heart failure. On December 14, he was transported to Sacred Heart Hospital. Dr. Keene diagnosed arteriosclerotic heart disease. Subsequently claimant suffered a sudden onset of neurological deficit due to embolic phenomenon. Dr. Keene reported that claimant was admitted with exertional angina and congestive heart failure and three hours later he suffered a cerebral-vascular accident.

Claimant filed his claim on January 23, 1979. On March 14, 1979 Dr. Keene reported he could not relate claimant's condition to his work activity. SAIF's denial was issued March 29, 1979.

Dr. Kloster, who only reviewed the evidence submitted, concurred with Dr. Keene's opinion. Dr. Kloster felt claimant had severe arteriosclerotic heart disease with an old myocardial infarction and congestive heart failure. He opined that probably increasing symptoms in the summer of 1978 represented an onset of congestive heart failure; that at some point atrial fibrillation and increased oxygen requirement of claimant's heart muscle imposed by these made him less tolerant of exercise resulting in occasional exertional angina and increasing exertional dyspnea. Dr. Kloster felt that the work activity was not a material contributing cause of the development of coronary heart disease or development of complication of myocardial infarction. He felt that the work activity only manifested symptoms which could equally and as easily have been provoked by exertion recreationally or by personal activities.

Dr. Wysham examined the claimant and reported on April 8, 1980 that in his opinion the work activity may have materially contributed to the myocardial infarction.

The Referee stated that he relied on Drs. Wysham and Kloster and "concludes claimant has established that the work activity was a materially contributing cause of the malfunctioning of the claimant's heart." We disagree.

The test for determining compensability of an occupational disease is set forth in James v. SAIF, 290 Or 343 (1981), in which the court held that in order for a condition to be compensable as an occupational disease it must be determined "whether it was caused by circumstances 'to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment.'" "Caused" has since been refined to mean that the work activity must be the "major contributing cause" of a disease. SAIF v. Gygi, 55 Or App 570 (1982).

We find the opinion of Dr. Keene, who initially treated the claimant, and with whom Dr. Kloster concurred, to be the most persuasive opinion evidence. Dr. Keene clearly indicated that although claimant possibly suffered a myocardial infarction, it was not documented. He believed claimant in fact did have a myocardial infarction and that it was unrelated to claimant's work activities and produced no pathological change in claimant's heart. Claimant suffered symptoms, but there was no progression. Dr. Keene believed that claimant's congestive heart failure was aggravated in terms of symptoms by the work activity but any activity on or off the job would likely have produced the same symptoms. Dr. Keene felt claimant would have had the congestive heart failure if he had never worked as a logger.

In summary, the evidence in this case indicates that claimant had severe arteriosclerotic heart disease as an underlying condition and the preponderance of evidence presented is that activity either on or off the job would have led claimant to suffer congestive heart failure. Therefore, we conclude claimant has failed to prove by a preponderance of the evidence that work activity was "a major contributing cause" of his heart condition.

ORDER

The Referee's order dated August 11, 1981 is reversed. The SAIF's denial of compensability dated March 29, 1979 is reinstated and affirmed.

DONALD W. RICHEY, Claimant
Larry Bruun, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al, Defense Attorneys

WCB 80-11143
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of Referee Neal's order which found claimant's condition in May, 1981 was related to his 1978 industrial injury and remanded his aggravation claim to it for acceptance and the payment of benefits as required by law.

We affirm the conclusion reached by the Referee with the following comment. In the Referee's opinion portion of her order she stated:

> "I also find the SAIF Corporation is responsible for claimant's current disability because he was injured while in an approved vocational rehabilitation program carried under the SAIF claim number, under the principles set forth in Wood V. SAIF 30 Or App 1103 (1977). . . ."

We find that the Wood case is not applicable, as claimant did not suffer any injury while in a vocational rehabilitation program. Instead, claimant's symptoms gradually worsened until he was hospitalized in May, 1981. The question that was before the Referee that is now before the Board is the responsibility for claimant's condition in May, 1981 as between the compensation carriers. The fact that claimant was enrolled in an authorized vocational rehabilitation program when his condition became disabling does not assist us in making the determination of responsibility.

ORDER

The Referee's order dated September 15, 1981 is affirmed. Claimant's attorney is awarded $350 as and for a reasonable attorney's fee, payable by SAIF.

CONNIE L. THOMPSON, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02230
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

SAIF Corporation seeks Board review of that portion of Referee Peterson's order which granted claimant an award of 15% loss of use of the right forearm. SAIF contends that the award is excessive.

The facts as recited by the Referee are adopted as our own.

We reverse the Referee and restore the 5% award granted by the Determination Order. The Referee found that claimant's testimony was inconsistent, hesitant and confused and he concluded it should be given little weight and rated claimant's loss of function of her right forearm based primarily on the documentary evidence. We agree with this methodology.

We find that the documentary evidence does not indicate any loss of function of claimant's right forearm to be any greater than the 5% awarded by the Determination Order. The preponderance of medical evidence indicates claimant's on-going pain complaints are not corroborated by objective physical findings. X-rays taken on three different occasions are all within normal limits. In November, 1979 Dr. Rockey reported that, "I cannot find any significant pathology in this lady to explain her symptoms on a physical basis." This conclusion on the part of Dr. Rockey is reiterated in the remainder of his reports.

We conclude that based on the medical evidence there is no jusitifiable basis for any increased award of permanent partial disability.

ORDER

The Referee's order dated August 7, 1981 is modified. That portion that granted an increased award of permanent partial disability for impairment of claimant's right forearm is reversed and the Determination Order dated October 30, 1979 is reinstated. The balance of the Referee's order is affirmed.

GORDON TURLEY, Claimant
Brian Welch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11183
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Gemmell's order which granted claimant an award of 67.5° for 50% loss of both the right and left foot; granted claimant compensation for temporary total disability from August 31, 1979 to May 28, 1980 less amounts already paid; and assessed a 15% penalty against SAIF based on the amount of temporary total disability compensation award.

The issues raised by SAIF for review are: 1) Whether the Referee had jurisdiction to review extent of permanent disability when the issue of compensability is on appeal, 2) if the Referee had jurisdiction, should it have been exercised when compensability had yet to be finally determined, 3) is there evidence to support the Referee's award of 50% loss of each foot and 4) whether there was a basis for the Referee's assessment of penalties and fees.

We accept the facts as recited by the Referee and adopt them as our own.

With regard to issues one and two, the Court of Appeals in SAIF v. Turley, 52 Or App 839 (1981), rev. denied, 29 Or 504 (1981), affirmed without opinion the Board's Order on Review in Gordon D. Turley, 30 Van Natta 211 (November 20, 1980), which upheld the Referee's determination finding claimant's occupational disease claim to be compensable. Since that is the case, we find issues one and two to be moot.

With regard to issue three, we reverse the Referee's conclusion. We find that the work exposure did not create any permanent partial disability but did cause callouses to develop which became so painful as to become disabling. Scheduled disability is rated as loss of function of a scheduled member. We find no impairment rating in the medical evidence indicating any residuals from this occupational exposure. Claimant had significant pre-existing deformities of his feet. Dr. Blumberg indicated that the callouses developed were due largely to the manner in which claimant must walk as a result of the deformities caused by the frostbite he suffered as a child. The doctor felt these callouses would have developed no matter where he walked.

We conclude that there is no medical evidence to support claimant's contention that his occupational exposure caused any further loss of function of his feet beyond that caused by his pre-existing condition. It is quite unfortunate that the rating must be limited to scheduled disability because the claimant is now precluded from his regular occupation, or any occupation requiring standing on his feet or walking, and has sustained a significant loss of wage earning capacity.

On the issue of the penalty assessed against SAIF by the Referee, we are in total agreement. This is not a case of simple "unreasonable processing" of the claim, but a situation where SAIF refused to pay compensation due under an order of a Referee.

ORDER

The Referee's order dated May 1, 1981 is affirmed in part and reversed in part. That portion of the order which allowed the claimant 50% scheduled permanent partial disability for loss of each foot is reversed. The remainder of the Referee's order is affirmed.

LEWIS TWIST, Claimant
Peter Hansen, Claimant's Attorney
David Horne, Defense Attorney

WCB 80-07811
March 31, 1982
Order on Reconsideration

Reviewed by the Board en banc.

The carrier has moved for reconsideration of the Board's Order on Review dated January 26, 1982. That order reversed the Referee and found claimant's aggravation claim to be compensable.

A chronological review will best set the stage for discussion of the carrier's contentions in its motion for reconsideration:

September 1977: Claimant sustained a compensable back injury which was processed to closure by Determination Order.

March 30, 1979: Claimant's request for hearing on the extent of disability awarded by the Determination Order was resolved by a Stipulated Order, i.e., settlement, that awarded claimant an additional 10% permanent partial unscheduled disability.

November 1979: Claimant filed his first aggravation claim.

March 11, 1980: A hearing was held before Referee Neal on the denial of claimant's first aggravation claim. That denial was upheld by Referee Neal, the Board on review and the Court of Appeals.

March 12, 1980: Claimant is first examined by Dr. Misko who ultimately performed back surgery in July of 1980. This surgery is the basis of claimant's second aggravation claim which is presently before us.

The question raised by the carrier's motion for reconsideration is: What is the appropriate time period during which to measure whether claimant's condition worsened. Our Order on Review focused on the period after March 30, 1979, the date of the stipulated order which we found to be the last arrangement of compensation. This approach is consistent with the literal wording of the aggravation statute, ORS 656.273(1), which creates

an entitlement to "additional compensation . . . for worsened conditions" after "the last award or arrangement of compensation." The carrier argues that we should focus only on the period after March 11, 1980, the date of the hearing on claimant's first aggravation claim, because under the res judicata doctrine it was determined in that proceeding that claimant's condition had not then compensably worsened. The carrier's argument is significant in this case because of the coincidence that Dr. Misko first saw claimant the day after the hearing on the first aggravation claim and because Dr. Misko rather emphatically testified that claimant's condition was no worse at the time of his July 1980 surgery than it was the first day Dr. Misko examined claimant, i.e., March 12, 1980.

We disagree with the carrier's position on both factual and legal grounds. The factual problem is: Exactly what was determined in the proceeding on claimant's first aggravation claim? Because the Board affirmed and adopted Referee Neal's order and the Court of Appeals affirmed without opinion, 52 Or App 598 (1981), the only information we have about what was previously litigated comes from Referee Neal's order itself. That order is an exhibit in this case. It states:

> "As the parties agreed the main issue is whether claimant's incident on November 7, 1979 constitutes a new injury to cut off Tektronix's responsibility for reopening his claim as an aggravation of his 1977 industrial injury.
>
> "After the Stipulated Order in March 1979, claimant basically was okay with only minor ups and downs. He was able to work part time. Following the November 1979 incident, Dr. Eilers found a mild increase in objective findings and great increase in subject complaints (Exhibit 38). Claimant for the first time since January 1979 had leg symptoms again. He could no longer work. He needed increased conservative therapy of a type he had not had for several years. As Dr. Eilers described the November event, it was of the type to push claimant over the scale. The incident was significant in claimant's mind at least to point that he sought the opinion of a number of doctors and mentioned this incident as increasing his problem to those doctors. While Dr. North gave the opinion that claimant's current symptomatology was related probably to his 1977 incident as he could find no evidence of physical impairment, Dr. Eiler, who has treated claimant the longest, is best able to judge the effect of this incident on claimant's condition, as Dr. North acknowledged.

* * * *

> "IT IS THEREFORE ORDERED that the employer's January 10, 1980 denial is approved."

Referee Pferdner's order in this case adopted the following interpretation of Referee Neal's order in the earlier case:

> "At hearing [before Referee Neal] it was found that in April 1979 the claimant began working as a job developer and consultant for injured workers and entered into his own business in this line of employment in mid-August of 1979. It was further found that on November 7, 1979 while so employed the claimant sustained an intervening traumatic injury to his low back which independently contributed to and worsened the claimant's low back condition. On this basis, the denial issued by the employer was affirmed . . ."

This intervening-injury interpretation is plausible, especially when comparing just the first and third paragraphs of the passage quoted from Referee Neal's order.

However, Referee Neal's second paragraph leaves that interpretation in doubt in our minds. Assuming the same exhibits were introduced in the earlier proceeding as have been introduced in this case, Dr. Eilers' reports now appear as Exhibits 51 and 53 and Dr. North's reports now appear as Exhibits 56 and 57. These reports simply do not address, directly or indirectly, the aggravation versus new injury distinction. In sum, we are uncertain from Referee Neal's order exactly what was decided in the earlier proceeding.

The legal issue is how the res judicata doctrine should be applied in cases involving aggravation claims. There are certainly some situations in which the decision on an earlier aggravation claim would bar a subsequent aggravation claim. A claimant cannot present at a hearing on a second aggravation claim exactly the same evidence that was presented at an earlier hearing on a prior aggravation claim; in such a situation the result of the first hearing is res judicata. Ralph F. Guerra, 33 Van Natta 680 (1981). Nor can a claimant present in a subsequent aggravation hearing evidence that was available or could have been obtained at the time of the first aggravation hearing. Guerra, supra. But that is not the situation in this case. Here the claimant was involved in on-going medical treatment at the time of the first aggravation hearing and as a consequence of that treatment it was subsequently discovered that claimant required surgery and surgery was performed.

As a second illustration of res judicata bar in aggravation litigation, suppose there were an original injury followed by a first aggravation claim which was denied followed by a second

aggravation claim. If the first aggravation claim were denied on the basis that the claimant had suffered a new intervening injury, then as we understand Crosby v. General Distributors, 33 Or App 543 (1978), there would be no possibility of asserting any further aggravation claims in connection with the original injury. But that is not the situation in this case because, as discussed above, it is not clear to us that claimant's first aggravation claim was resolved adversely to his position on the basis of a new intervening injury theory or finding. The side that asserts the affirmative defenses of res judicata or collateral estoppel has the burden of proving what was previously litigated.

When the central question is aggravation litigation is whether claimant's condition has worsened, which is probably the most typical situation, we conclude that the res judicata doctrine does not require doing other than the plain meaning of ORS 656.273(1) -- determine whether the claimant's condition has worsened since the last arrangement of compensation regardless of intervening denial(s) of prior aggravation claim(s). The res judicata doctrine does not require treating ORS 656.273(1) as amended de facto, which is really the thrust of the carrier's argument here. Applying that reasoning in this case, we regard the proper analysis to be whether claimant's condition worsened since the last arrangement of compensation in March of 1979, and not whether claimant's condition worsened since the hearing on his earlier aggravation claim in March of 1980. Looking to the longer time frame, we adhere to the conclusion that claimant's condition worsened and that his second aggravation claim should have been accepted.

Finally, claimant challenges our authority to reconsider an Order on Review as we have done in this case. Claimant argues that the sole remedy of a party dissatisfied by an Order on Review is to appeal to the Court of Appeals. We disagree with claimant's argument. ORS 183.482(6) permits an agency to withdraw an order for reconsideration even after an appeal is filed in the Court of Appeals. While ORS 183.315(1) states that certain parts of ORS Chapter 183 do not apply to this Board, ORS 183.482(6) is not one of the sections enumerated as inapplicable. If we can reconsider an order even after an appeal to the Court of Appeals, it is even more obvious that we can reconsider an order before an appeal to the Court of Appeals is filed.

ORDER

The Board's Order on Review dated January 26, 1982 is, after reconsideration, readopted and republished.

BOARD MEMBER McCALLISTER DISSENTING, IN PART:

I respectfully disagree in part with the majority opinion.

Claimant compensably injured his low back September 6, 1977. The claim was accepted and processed to closure. The last arrangement of compensation was a stipulation dated March 30, 1979 which increased claimant's permanent partial disability from 10% unscheduled to 20% unscheduled.

In November, 1979 claimant's low back condition became aggravated. The employer/carrier denied the aggravation claim. After a March 11, 1980 hearing, Referee Neal determined that claimant had, in November, 1979, sustained a new injury - that is, November 7, 1979 there occurred an intervening traumatic injury which independently contributed to and worsened the claimant's low back condition(s). Referee Neal's decision was affirmed by the Board and the Court of Appeals, 52 Or App 598 (1981).

In July, 1980 claimant had surgery on his low back. The surgery was performed to correct condition(s) which were present and considered at the time of the hearing on the claimant's November, 1979 aggravation claim. The claimant, at the first aggravation claim hearing proved his condition had worsened but failed to prove that worsened condition(s) was related to the September, 1977 compensable injury. It seems to me that once the non-relatedness of the worsened condition was established and that the condition(s) for which Dr. Misko, et. al., operated on claimant were not proved to be any different from the condition(s) at the first aggravation hearing, then the July, 1980 surgery should be attributed to the November, 1979 intervening traumatic incident. See Crosby v. General Distributors, 33 Or App 543 (1978).

I find that Referee Pferdner properly interpreted Referee Neal's prior order and would affirm his conclusion.

In sum, on reconsideration of the Board's January 26, 1982 Order on Review, I would set aside that order and substitute an order which affirms Referee Pferdner's order which approved the employer/carrier's denial.

I concur completely with the majority opinion regarding the Board's authority to reconsider an Order on Review.

WILLIAM Z. VINSON, Claimant
Allen Murphy, Claimant's Attorney
Leslie J. McKenzie, Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04115, 81-04116, 81-04117, 81-04118 & 81-04119
March 31, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

This is a controversy arising under ORS 656.307 between successive carriers for the same employer resulting from multiple compensable injuries sustained by claimant over a 15 month period. The second carrier, EBI, seeks Board review of Referee Braverman's order finding that the last two injuries sustained by claimant were new injuries for which EBI was responsible.

The issue is whether the last two injuries sustained by claimant were new injuries or aggravations of previous injuries sustained by claimant when SAIF was the employer's carrier.

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

Claimant sustained an injury to his inguinal area in January, 1980 while lifting sheetrock for employer, Herman Fisher Company. In February, 1980 claimant fell off a ladder, reinjured his inguinal area and experienced some back pain. Claimant injured his neck, upper back and shoulders in July, 1980 while lifting sheetrock over his head. SAIF's coverage of employer ended September 30, 1980; EBI's coverage began effective the following day. Claimant sustained injuries to his back in January and again in March, 1981 while working with sheetrock.

We have examined claimant's testimony and the medical evidence. Applying the "last injurious exposure" rule of Smith v. Ed's Pancake House, 27 Or App 361 (1976), we find that while the claimant may have continued to experience some low back pain as a result of his 1980 injuries, the medical evidence indicates that claimant's low back pain did not become a significant factor until after the January, 1981 incident. The record reveals that from February 6, 1980, the date of claimant's second injury, to September 30, 1980, the date SAIF coverage terminated, claimant was seen by four physicians for a total of 13 encounters. Some tenderness in claimant's back was recorded immediately following the February, 1980 fall, but thereafter no mention is made in the medical records of low back pain until November, 1980. Even then the report of low back pain seems incidental, and it was not until January and February, 1981, following the January 29, 1981 injury that a specific diagnosis of low back strain is found in the chart notes. Thereafter, low back pain appears to be claimant's major complaint.

Our opinion should not be understood to question the credibility of claimant who reported to various physicians that he "re-aggravated" his July, 1980 injury and who testified that his back hurt more or less constantly following the July, 1980 injury. "Aggravation" as we use the term is a word of art, and the "last injurious exposure" rule requires a finding of a new injury even if the previous injury continues to play a significant role in the underlying condition so long as the subsequent work activity contributes independently to the ultimate status of the condition.

Given the nature of the incidents that precipitated the various injuries, and considering claimant's testimony and the medical evidence, we are convinced that claimant's work activity after EBI coverage began contributed independently to claimant's present back condition.

ORDER

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

WORKERS' COMPENSATION CASES

January-March 1982

Decided in the Oregon Court of Appeals:

Decided in the Oregon Supreme Court:

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of A. L. Florence, Claimant.

FLORENCE,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION, et al,
Respondents.

(SAIF Claim No. ED 297834, CA A20340)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 21, 1981.

Douglas L. Minson, Hillsboro, argued the cause and filed the brief for petitioner.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent State Accident Insurance Fund Corporation. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Paul Mackey, Deputy County Counsel, Portland, argued the cause and filed the brief for respondent Multnomah County.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

GILLETTE, P. J.

Reversed and remanded with instructions to reinstate referee's order.

Roberts, J., dissenting.

GILLETTE, P. J.

The issue in this workers' compensation case is whether claimant's right knee condition is compensable and, if it is, which of two carriers is responsible.

Claimant is a 60-year old heavy equipment operator. An operation to remove cartilage from the inside of his right knee was performed in 1947; a second operation for the same purpose was performed on the left knee in 1967. In May, 1978, while climbing down from the road grader he normally operated for his employer, claimant slipped and injured his left knee. SAIF accepted responsibility for the injury and paid time loss benefits. Claimant testified that his *right* knee began to cause him pain within a day or two after the injury to the left knee, although his treating physician did not document any symptoms in the right knee until August, 1978. On July 1, 1978, Multnomah County became a direct responsibility employer. On January 17, 1979, SAIF denied responsibility for the right knee condition; the county denied responsibility on January 23, 1979.

The referee, relying on testimony by claimant's treating physician, an orthopedic surgeon, found "a direct causal connection" between the injury to the left knee and claimant's right knee problems. The treating physician, Dr. Eilers, had stated that two work-related factors caused the onset of symptoms in claimant's right knee. First, he said, the pain from the injury to the left knee caused claimant to shift more weight to the right knee, which was already weakened by degenerative arthritis; second, claimant's ordinary position in the operation of the road grader, leaning on the right leg to look out and observe the blade, placed stress on the right knee. Dr. Pasquesi, a consulting physician, agreed. He described claimant as a man with a preexisting degenerative arthritic condition in the right knee, which was "undoubtedly aggravated" by the May, 1978, injury.

The Workers' Compensation Board, citing *Weiler v. Union Carbide Corporation,* 288 Or 27, 602 P2d 259 (1979), reversed the referee, finding that claimant had not shown that his "underlying condition was worsened by his work activity."

In view of the evidence we have cited, the Board's resort to *Weller* is obscure. The *Weller* test is the standard of proof relating to a claim for an *occupational disease.* In the case before us, however, claimant has not filed an occupational disease claim. SAIF and the employer were advised of claimant's problem with his right knee through the medical reports they received from claimant's treating physician relating to the May, 1978, *injury* to claimant's left knee and an injury to his left elbow suffered in another fall from his grader in September, 1978; no new claim was filed. Claimant's attorney, at the hearing before the referee, said the treating doctor had never told claimant he had an occupational disease, and claimant testified he had never heard the words "occupational disease" before the day of the hearing. Following the hearing before the referee, claimant's attorney wrote to the referee, stating that claimant was, by that letter, making an occupational disease claim. Both carriers were allowed to respond. Before us, claimant maintains that he should prevail either on his claim that the right knee condition is "a part of the accepted industrial injury to the left knee" or on a claim for an occupational disease.

As we view this case, the Board's application of an occupational disease/ *Weller* analysis was misplaced. It was the *injury* to his other knee which materially contributed to the symptomatology which is before us now; the testimony of claimant's treating physician clearly establishes that fact. Claimant is entitled to receive medical services for the right knee. *See Smith v. Brooks-Scanlon,* 54 Or App 730, ___ P2d ___ (1981); *Wood v. SAIF,* 30 Or App 1103, 1108, 569 P2d 648 (1977), *rev den* 282 Or 189 (1978).

In view of our conclusion that the right knee condition is to be treated as arising out of the compensable injury to the left knee, SAIF is the responsible carrier. *See Eber v. Royal Globe,* 54 Or App 940, ___ P2d ___ (1981).

The order of the Board is reversed and remanded with instructions to reinstate the referee's opinion.

ROBERTS, J., dissenting.

I dissent from the majority opinion because I do not agree that "the Board's resort to *Weller* is obscure." Slip opinion at 2.

Weller v. Union Carbide Corporation, 288 Or 27, 29, 602 P2d 259 (1979), posed the following question: "Does a worker have a compensable claim where: (1) he has an underlying disease which is symptomatic; (2) his work results in a worsening of his symptoms not produced by a concomitant worsening of the underlying disease process; and (3) the worsening requires either medical services or results in disability or both?" The court then answered the question in the negative.[1]

The Supreme Court allowed review of *Weller* "along with [three other cases] * * * to consider problems seemingly common to these cases of the effect of work activity and conditions on an underlying pathological condition in the worker's body." 288 Or at 29. My interpretation of *Weller* is that where that "work activity and conditions" includes a job-related injury, and that injury affects an underlying pathological condition of the worker, the *Weller* test appropriately can be applied. One element of the test is proof by a preponderance of evidence that a worsening of the underlying disease has occurred. 288 Or at 35. Claimant here failed to prove that the underlying disease in his right knee has worsened as a result of the injury to his left knee.

The degenerative arthritis in claimant's right knee was not caused by the injury to his left knee. What has occurred is an onset of symptoms. Claimant's brief admits that

> "As to whether the disease process was anatomically or physiologically worsened or merely made symptomatic by virtue of the traumatic injury, the best the treating doctor could do without surgery to examine the physiology of the knee was to say that the injury to the left knee was like throwing a match into a gas can."

Claimant states "the disability in the *right* knee was caused by the pathological change to the *left* knee." If *Weller* applies, this is not the proper analysis. The question is whether there has been a worsening of the underlying disease in the ***right*** knee caused by circumstances to which claimant is not ordinarily exposed other than at work.

[1] Even though the claim here is one for medical services, not compensation, for the uninjured knee, that distinction does not make any difference.

Beaudry v. Winchester Plywood Co., 255 Or 503, 469 P2d 25 (1970). Claimant's treating physician testified:

"* * * It's not a great accelerating of degenerative arthritis that occurs. What it is, is making an increase there that was minimally symptomatic. Not enough to come into the hospital or see a doctor, to making that symptomatic where he does rely and wants to rely on medication * * *. You're not going to see any change in his knee joints for a number of years, a lot more changes. It's a gradual thing, so it's not a great change, but it's a — it's the taking of that asymptomatic and making it symptomatic enough for me to have to do something about it.

"Q. I don't want to belabor the point. My impression, if this man - I don't know what his true history is - if he had been working for five years on this grader until September when he quits, then that five-year period produced some acceleration gradually of his knee conditions, both knees?

"A. That's true.

"Q. And we're talking the about [sic] right knee. We also have another factor of him compensating for his left knee after a slip and fall, putting a little more pressure on the right?

"A. (nodding head).

"Q. And it's the two of these conditions together, plus any other variables which are unknown, which produces his disability?

"A. At the present time, yes.

"* * * * *

"Q. Would it be your opinion that sometime in the future he would need resurfacing of both knees?

"A. If he had not had anything?

"Q. No injuries. If he worked, but just as a result of the natural progression of this degenerative process.

"A. There's no question about it. This man's going to end up having it, regardless of what he's done, job or no job, if he would have stopped ten years ago. * * *

"* * * * *

"A. I think he was—I think this whole thing just happened to get him at a time that he was getting close to this whole thing anyway. * * *.

"* * * * *."

As to causation, the physician was quite clear that both the work and the injury were only a part of the problem:

"* * * * *

"A. I think any activities he's going to do — he has chronic, long-standing degenerative knee joint disease. Any activity he's going to do is going to bother him. It's going to aggravate him. That condition is stirred up, and I can't — I'm unable to separate, you know, how much of that is home, what percentage of it is work. It's all kind of the total thing.

"* * * * *."

The other two medical opinions were that claimant's injury precipitated *symptoms* in the right knee or aggravated the pre-existing condition of that knee. Without more, the appearance of an increase in symptoms of an underlying disease is not in itself compensable. *See Cooper v. SAIF,* 54 Or App 659, 635 P2d 1067; *Autwell v. Tri-Met,* 48 Or App 99, 615 P2d 1201, *rev den* 290 Or 211 (1980). Likewise, pain resulting in disability or requiring medical services, whether temporary or permanent, is compensable only if an underlying pathological change in the disease has been established. *See Stupfel v. Edward Hines Lumber Co.,* 288 Or 39, 43, 602 P2d 264 (1979).

I would affirm the decision of the board.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Katherine Casteel, Claimant.

CASTEEL,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB Case No. 80-01021
and 80-04530, CA A21441)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 26, 1981.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, Kahn & O'Leary, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund, Salem, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Order modified to award 50 percent permanent partial disability.

ROBERTS, J.

In this Workers' Compensation case the referee determined that claimant is permanently and totally disabled; the Board reversed, awarding 10 percent disability for a back condition. We modify the award.

Claimant is a 66-year-old woman who has been employed principally as a restaurant worker, except for work as a shipyard pipe-welder during World War II. She suffered her first compensable injury in October, 1976, when she injured her back. She was hospitalized for a week and wore a back brace for a while. She returned to work in June, 1977. In June, 1978, she suffered a job-related fracture of her right hip. She attempted to return to work in June, 1979, but worked only as a "relief" worker two days a week. She attempted to take a full-time job but was unable to continue after one week. Claimant has other health problems, including diabetes and a heart condition, which are not job related.

The referee stated in his opinion,

> "* * * I find that the last injury, the hip injury, is the final precipitating and material cause of her inability to work. The evidence is not clear that the back injury continued to be a material contributing cause of the subsequent deterioration in her back, and the denial of the aggravation claim should be approved. All pre-existing disability, whether or not industrially related, must of course be considered in evaluating the loss of earning capacity after the last industrial injury. * * *."

The Board disagreed with the referee's decision, saying:

> "It is inexplicable to the Board how the Referee could have concluded that claimant was permanently and totally disabled from his findings that (1) claimant had not proven her back condition had worsened since the September 20, 1977 Determination Order which awarded no permanent disability and (2) claimant had a normal functioning hip."

As to the back condition, the referee found deterioration, but did not relate it to the initial back injury. The Board, on the other hand, found the medical evidence established an aggravation,[1] which was the basis of the 10

[1] The Board said,

> "This evidence does not establish a compensable worsening of claimant's back condition. If there are more compression fractures now than there were

percent award. Because we agree with the Board that there was an aggravation of the back condition, we affirm that decision, but we believe the award should have been greater.

The treating doctor's report, dated March, 1979, indicates that claimant must use a "quad cane" to get around, that her back symptoms are frequently very troublesome and limit her mobility and that, in spite of an excellent recovery from the hip surgery, "she is still considerably disabled from her back symptoms and probably will need to engage in a sedentary occupation from now on." In February, 1980, the same doctor wrote that "[s]he seems to have deteriorated considerably over the past two years, and I think she is no longer fit for employment *at this stage.*" (Emphasis supplied). We interpret this to mean that, while claimant's condition had deteriorated, it was not impossible that it might improve so that she could again become regularly employed. This doctor noted, for instance, that claimant had become obese but declined to indicate if this fact affected her back problem. We conclude that the medical evidence does not establish permanent total disability.[2]

Claimant is correct in arguing that ORS 656.206(1)(a),[3] which defines "permanent total disability," includes

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in 1976, nothing in the evidence documents any connection with the 1976 injury or any other connection with claimant's work. Claimant's generalized osteoporotic change is, so far as we can tell from this record, merely natural degeneration consistent with claimant's age and not connected with her work or 1976 back injury.

"There is one other item of evidence that does lend some support to claimant's aggravation claim. Dr. Duff's May 1, 1978 report compared 1976 x-rays: 'The fracture of L-1 has changed over the period between the two films, and there is about 50 percent loss of height now as compared with 20 percent previously * * *. [The] compression fracture of L-1 * * * seems to be progressively settling, and it is probably responsible for her pain.' This medical evidence, albeit cryptic, combined with claimant's testimony about her subjective difficulties, does lead us to the conclusion that claimant has established a compensable worsening of her back condition."

[2] Claimant's original treating physician, who retired in 1979 and referred her to Dr. Duff, had found her "totally and permanently disabled *so far as working at her regular occupation as cook is concerned.*" (Emphasis supplied.)

[3] ORS 656.206(1)(a) provides:

"'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body

pre-existing disabilities. *Hill v. SAIF,* 38 Or App 13, 588 P2d 1287 (1979); *Lohr v. SAIF,* 48 Or App 979, 618 P2d 468 (1980). However, even adding claimant's other physical problems into the calculation with the compensable injury, no finding of permanent total disability results. Claimant's own testimony fails to demonstrate that the non-job-related ailments contribute to her inability to be employed.[4]

The remaining question is the determination of an appropriate award. The extent of permanent partial disability is measured by the loss of earning capacity due to the compensable injury, taking into account age, education, training, skills and work experience. ORS 656.214(5); *Smith v. SAIF,* 51 Or App 833, 836, 617 P2d 495 (1981);

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which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which he is able to perform after rehabilitation."

[4] Claimant's pertinent testimony follows:

"Q You said you had surgery for your eye condition in '78. As near as you can recall, was it before or after your hip surgery?

"A It was before.

"Q Okay.

"A I had laser surgery.

"Q All right. Has that stabilized your eye condition?

"A It apparently has, because they told me, at the time, that I — if it didn't work, I'd be totally blind in a few weeks time, and I can still see.

"Q have you had to have your prescription changed for your glasses?

"A Oh, yes.

"Q You're still able to see all right with the glasses?

"A Yes.

"Q All right. And you haven't been hospitalized for the diabetic condition, say, for the last three years or so?

"A I've never been hospitalized for it.

"Q And you haven't been hospitalized because of the heart problems in that same period of time?

"A No.

"Q Do you take anything for the heart problem?

"A Oh, yes. I have one pill I have to take once a day and one I take twice a day."

Harris v. SAIF, 55 Or App 158, ____ P2d ____ (December 14, 1981.) The evidence indicates claimant is more than 10 percent disabled; however, it does not persuade us that claimant is permanently and totally disabled. We conclude an award of 50 percent unscheduled partial disability is appropriate under the circumstances.

The order of the Board is modified to award 50 percent permanent partial disability.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Geraldine Moore, Claimant.

MOORE,
Petitioner,
v.
COMMODORE CORP., et al,
Respondents.

(WCB. Nos. 79-11,081, 80-221, CA A20410)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 17, 1981.

Alice Goldstein, Portland, argued the cause for petitioner. With her on the brief was Welch, Bruun & Green, Portland.

Samuel R. Blair, Salem, argued the cause for respondent Truckers Insurance Co. With him on the brief was Blair & McDonald.

Ridgway K. Foley, Jr., Portland, argued the cause for respondent Insurance Company of North America. With him on the brief was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

No appearance by respondent Commodore Corp.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Reversed and remanded for a determination of the extent of claimant's disability, and award of interim compensation, penalties and attorney fees.

VAN HOOMISSEN, J.

Claimant appeals an order of the Workers' Compensation Board (Board) affirming the referee's order which affirmed the denials issued by Truckers Insurance Company (Truckers) and Insurance Company of North America (INA) and affirmed the determination order of January 17, 1979, whereby claimant was awarded 7.5 degrees for 15% permanent partial disability compensation for loss of use of her right forearm. Claimant contends she has suffered either an aggravation arising from her right forearm injury or a new injury to her right shoulder, that the award is inadequate and should include the shoulder condition, and that she is entitled to interim compensation, penalties and attorney fees.

In February, 1977, Commodore Corporation employed claimant in a job requiring use of a powered staple gun and heavy, repetitive lifting. In April, 1978, she filed a claim form complaining of "Sharp continual pain and aching in right elbow, wrist and if use arm it aggravates right shoulder," and that month she was treated for medial epicondylitis of the right arm, which Dr. Wimmer "felt to be work related."

In May, 1978, Dr. Fleshman, an orthopedist, performed a carpal tunnel release on claimant's right forearm. After she complained of pain in her shoulder, Dr. Fleshman advised her that the carpal tunnel release should help the shoulder.

Claimant returned to work in August, 1978, but continued to experience pain and swelling in the right shoulder. In October, 1978, she went back to Dr. Fleshman, still complaining of pain in her right shoulder, which he diagnosed as acute tendonitis. In December, 1978, Dr. Fleshman conducted a closing examination and found that her condition had returned to normal status. That same month she was transferred to a new position demanding repetitive overhead stapling and heavy lifting. In January, 1979, a determination order was issued awarding her compensation equal to 7.5 degrees for 5% loss of the right forearm.

On July 1, 1979, Commodore Corporation changed insurance carriers from Truckers to INA.

tunnel surgery, while claimant continued to experience some pain in her wrist and arm, her primary problem became increasing pain in her shoulder. When she returned to work in August, 1978, she had to take aspirin daily to endure the shoulder pain. In October, 1978, when she returned to Dr. Fleshman, he noted:

> "Claimant comes at the time we expected to do her closing exam, but in the interim, she has been sparing the arm, because of an acute tendonitis of the same shoulder. * * *"

Later, Dr. Fleshman concluded:

> "Thus, you see, that on 10-23-78, we did in fact record an attack of acute tendonitis of the right shoulder which she felt was occasioned by the door hanging occupation.
>
> "She was not again seen for the shoulder until 10-23-79, but that was on referral from Dr. Wimmer, with a history of 3-4 weeks of difficulty. It would seem then, that INA's contention is correct, that the shoulder problem did appear during the autumn months of 1978."

In January, 1980, Dr. Fleshman reported that claimant had complained of recurrent shoulder pain in October and November, 1979, "* * * 13 months after she first complained of shoulder pain," and the record shows that she had complained to her doctors about her shoulder since April, 1978.

The second issue is whether claimant's condition is an aggravation of her earlier injury or a new injury. We conclude that claimant's 1979 shoulder condition was a compensable aggravation of her April, 1978, condition[1] and remand to the Board to determine the extent of claimant's disability.

Claimant next contends that she is entitled to interim compensation because Truckers untimely denied the claim. In an aggravation claim the insurer has the duty

[1] The referee also denied the claim because "pain is not an injury or condition." Although that is literally correct, the disabling effect of pain may be considered in determining the effect of any injury. *Walker v. Compensation Department,* 248 Or 195, 196, 432 P2d 1018 (1967); *Wilson v. State Ind. Acc. Comm.* 189 Or 114, 124, 219 P2d 138 (1950). Here, the pain syndrome is compensable. The medical reports variously diagnose her condition as tendonitis, biceps long head proximal tendon synovitis, and nerve lesion. Even though there is no precise anatomic diagnosis, the medical reports clearly establish an injury.

to pay interim compensation "* * * no later than the 14th day after * * * notice or knowledge of medically verified inability to work resulting from the worsened condition." ORS 656.272(6). In *Silsby v. SAIF,* 39 Or App 555, 563, 592 P2d 1074 (1979), we held that verification need go no further than to state that a worsened condition exists arising out of the original injury or disease. The issue is whether the letters Dr. Fleshman sent to Truckers constituted medical verification of claimant's worsened condition.

In his January, 1980, letter, Dr. Fleshman reviewed claimant's medical history, including the carpal tunnel release and her later problems with her right arm and shoulder. He also noted "* * * that on 10-23-78, we did in fact record an attack of acute tendonitis of the right shoulder which she felt was occasioned by the door hanging occupation." He also stated that she was then unable to work, although he expected she would recover. This letter constituted sufficient verification of claimant's condition, because it gave Truckers notice that the present shoulder problems first occurred while Truckers was still on the risk.

Claimant also contends she is entitled to penalties and attorney fees, because Truckers did not accept or deny her claim within 60 days of her employer receiving notice of her claim. ORS 656.262(5). Claimant filed a claim form with her employer on November 13, 1979. Truckers did not deny her claim until March, 1980. The referee found that the aggravation claim was not "perfected" until March 14, 1980, when claimant's attorney sent Truckers a letter requesting that the claim be reopened on the basis of aggravation.

The statute governing compensation for aggravation claims provides:

> "(2) To obtain additional medical services or disability compensation, the injured worker must file a claim for aggravation with the State Accident Insurance Fund Corporation or the direct responsibility employer. * * *" ORS 656.273(2).

Here, claimant satisfied her statutory duty by filing the claim with her employer. After the claim was filed, the

duty shifted to her employer to notify its carriers who might be liable on the claim or incur the penalties mandated by ORS 656.262(8).[2] The policy underlying the penalty provisions is to insure that claims are promptly resolved. *Hewes v. SAIF,* 36 Or App 91, 96, 583 P2d 576 (1978); *see Silsby v. SAIF, supra,* 39 Or App at 562. Here, more than 60 days elapsed after claimant had filed her claim. Therefore, claimant is entitled to penalties and attorney fees.

Reversed and remanded for a determination of the extent of claimant's disability, and for award of interim compensation, penalties and attorney fees.

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[2] ORS 656.262(8) provides:

"If the fund or direct responsibility employer or its insurer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the fund or direct responsiblity employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Lance P. Reynolds, Claimant.

RENOLDS-CROFT, INC., et al,
Petitioners,
v.
BILL MORRISON COMPANY, et al,
Respondents.

(WCB No. 79-3058-E, CA A20453)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 17, 1981.

Mildred J. Carmack, Portland, argued the cause for petitioners. With her on the brief were Ridgway K. Foley, Jr., Delbert J. Brenneman, and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Darrell E. Bewley, Appellate Counsel for State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondents State Accident Insurance Fund and Bill Morrison Company.

Burton J. Fallgren, Portland, waived appearance for respondent Lance P. Reynolds.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Reversed and remanded with instructions to vacate the order and to dismiss.

VAN HOOMISSEN, J.

This case concerns the jurisdiction of the Workers' Compensation Board to settle a dispute between two carriers, Royal Globe Insurance Company (Royal) and SAIF. Royal seeks judicial review of an order of the Board which requires Royal to reimburse SAIF for an overpayment of benefits made by SAIF to claimant Reynolds, an employe of Royal's insured, Renolds-Croft, Inc.

Reynolds suffered a wrist fracture in 1973 while employed at Renolds-Croft. Royal accepted the claim and processed it until closure in 1975. Reynolds suffered another injury to the same wrist in 1976, which was diagnosed as a carpal tunnel syndrome. At that time he was employed by Bill Morrison Co., which was insured by SAIF. Reynolds filed a claim with Bill Morrison Co. and an aggravation claim with Renolds-Croft. Royal denied the aggravation claim on the ground that Reynolds' problem resulted from a new injury. Reynolds did not appeal that denial. SAIF accepted the claim and began temporary total disability payments.

In 1977, Reynolds began to suffer from degenerative arthritis, requiring surgery in 1978. The arthritis related to the 1973 injury, and Royal reopened his 1973 claim and made temporary total disability payments from September 7 to 22, 1978.

Reynolds' carpal tunnel syndrome became medically stationary in July, 1977. However, because of confusing and contradictory reports from Reynolds' physician, due perhaps to his failure to distinguish between separate injuries to the same wrist, SAIF continued to make temporary total disability payments until September, 1978, resulting in a claimed overpayment of $6,583.91.[1]

Its attempt to obtain voluntary reimbursement from Royal being unsuccessful, SAIF asked for a hearing. Royal filed a special appearance, contending that the Board

[1] After discovering the overpayment, SAIF withheld a $525 permanent partial disability payment from Reynolds, offsetting this amount against the overpayment. Royal contends that this makes SAIF and Reynolds adverse parties and prevents SAIF from purporting to represent Reynolds to obtain Board jurisdiction. Because of our disposition of the case, we do not reach this contention.

lacked jurisdiction. The referee found that he had jurisdiction and ordered Royal to reimburse SAIF; he later vacated that order on the ground that he lacked jurisdiction. On review, the Board reversed, holding it had jurisdiction, and ordered Royal to reimburse SAIF. Royal then petitioned this court for review.

Royal relies upon ORS 656.704(2), which provides:

> "For the purpose of determining the respective authority of the director and the board to conduct hearings, investigations and other proceedings under ORS 656.001 to 656.794, and for determining the procedure for the conduct and review thereof, matters concerning a claim under ORS 656.001 to 656.794 are those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue. * * *"

In *SAIF v. Broadway Cab,* 52 Or App 689, 629 P2d 829, *rev den* 291 Or 662 (1981), we found that ORS 656.704(2), when read in conjunction with ORS 656.708(3)[2] (responsibilities of the Hearings Division), divests referees and the Board of jurisdiction over any case except one in which a worker's right to receive compensation, or the amount thereof, is directly in issue. Here, Reynolds' right to receive compensation is not in issue.[3] The issue here is whether the Board has jurisdiction to resolve a dispute between carriers.

SAIF relies upon ORS 656.307(1), which provides in part:

> "Where there is an issue regarding:
> "* * * * *
>
> "(c) Responsibility between two or more employers or their insurers involving payment of compensation for two or more accidental injuries; * * *
> "* * * * *

[2] ORS 656.708(3) provides:

> "The Hearings Division is continued within the board. The division has the responsibility for providing an impartial forum for deciding all cases, disputes and controversies arising under ORS 654.001 to 654.295, all cases, disputes and controversies regarding matters concerning a claim under ORS 656.001 to 656.794, and for conducting such other hearings and proceedings as may be prescribed by law."

[3] With two exceptions not involved here. *See SAIF v. Broadway Cab Co.,* 52 Or App 689, 693, 629 P2d 829, *rev den* 291 Or 622 (1981).

> "the director shall, by order, designate who shall pay the claim, if the claim is otherwise compensable. * * * When a determination of the responsible paying party has been made, the director shall direct any necessary monetary adjustment between the parties involved. * * *"

Oregon law formerly vested jurisdiction in the Board to make such determinations. However, that authority was transferred to the Director of the Worker's Compensation Department in 1977. Oregon Laws 1977, ch 804, § 54.[4] SAIF attempts to avoid the express terms of ORS 656.704(2), *supra,* by contending that this court has indicated that the Director and the Board share jurisdiction. Neither case cited by SAIF supports this proposition. *Oremus v. Oregonian Pub. Co.,* 3 Or App 92, 470 P2d 162, *rev den* (1970), was decided before jurisdiction was transferred to the director, and in *Bell v. Hartman,* 44 Or App 21, 604 P2d 1273, *rev'd* 289 Or 447, 615 P2d 314 (1980), compensation was directly in issue.

We hold that the Board has no jurisdiction over the subject matter of the dispute between the carriers.

Reversed and remanded with instructions to vacate the order and to dismiss.

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[4] The division of authority between the Board and the Director is made explicit by statute. ORS 656.704(2); ORS 656.726. The Director has the power to prescribe procedural rules and to conduct hearings, investigations and other proceedings pursuant to ORS 654.001 to 654.295 and ORS 656.001 to 656.794 regarding all matters other than those specifically assigned to the Board or the Hearings Division. ORS 656.726(3)(g); *see also,* ORS 656.708(5).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Robert Gygi, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner,
v.
GYGI,
Respondent.

(No. 79-9683, CA 19945)

Judicial Review from Workers Compensation Board.

Argued and submitted July 24, 1981.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for petitioner. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Robert K. Udziela, Portland, argued the cause for respondent. With him on the brief was Pozzi, Wilson, Atchison, Kahn & O'Leary, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

Affirmed.

THORNTON, J., dissenting opinion.

RICHARDSON, P.J.

The State Accident Insurance Fund appeals from the order of the Workers' Compensation Board which affirmed the hearing referee's decision that claimant's mental illness is a compensable occupational disease. SAIF contends the Board erred in determining that claimant's psychiatric disability was caused or aggravated by on-the-job stress. ORS 656.802(1)(a). We review *de novo,* ORS 656.298(6), and affirm.

Claimant has been a self-employed[1] attorney since his graduation from law school in 1960. He specialized in business and corporation law, and in the late 1960's he became involved in arranging public stock offerings for corporations. Following the decline of the stock market in 1969, several of the corporations claimant represented began to founder. In 1970 he was named defendant in a class action brought on behalf of shareholders of one of those corporations. The complaint sought several million dollars in damages, far in excess of claimant's malpractice insurance coverage. In 1972, after a partial trial, claimant was found to be liable.[2] The case was finally settled late in 1974. Claimant was named defendant in at least three other similar shareholder suits in the period from 1970 to 1976. After claimant's liability was established in the first class action, the Oregon State Bar brought a disciplinary proceeding against him early in 1974. In November, 1975, the Supreme Court dismissed the proceeding.[3] During the time of these actions against him, claimant suffered a considerable loss of professional respect. This, plus adverse media publicity and the large amount of time spent working on his own defense and on attempts to salvage the corporations, led to loss of income and a decrease in new clients.

In November or December of 1973, claimant began to drink alcohol excessively and to abuse over-the-counter and prescription tranquilizers and anti-depressants. As claimant explained:

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[1] Claimant is covered as a "subject worker" by SAIF under ORS 656.128.

[2] *Blakely v. Lisac,* 357 F Supp 255 (D Or 1972).

[3] *In re Robert Neil Gygi,* 273 Or 443, 541 P2d 1392 (1975).

> "* * * I began to feel guilty about what had happened to these corporations and to the shareholders' losses. I felt since I had a particular gift for getting those companies public, I bore a large responsibility for saving them. In most cases, I wasn't able to do it; and the stress of the lawsuits and the affect on my reputation, they just all combined and made me feel very guilty about myself and the way to avoid feeling guilty was to drink."

From January, 1975, through March, 1979, claimant was hospitalized on a number of occasions and treated for acute depression, alcohol abuse and attempted suicide.

Claimant filed a claim for compensation for depression and alcoholism. The referee concluded that claimant's condition was the cumulative result of employment-related stress and therefore was compensable under ORS 656.802(1)(a). The Board affirmed, and SAIF appeals.

SAIF contends that claimant abuses alcohol in reaction to stress from any source and reacts the same way to employment-related stress and stress from off-the-job conditions. Thus, SAIF argues, claimant failed to prove that his condition arose from circumstances "to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment." ORS 656.802(1)(a).

In *James v. SAIF,* 290 Or 343, 624 P2d 565 (1981), the court held that a claimant seeking compensation for an occupational disease must show not only that the condition arose within the scope of employment, but must also establish that the condition "was caused by circumstances 'to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment.' ORS 656.802 (1)(a)." 290 Or at 348. The court noted that the condition need not be *caused* by on-the-job factors, but rather that "the cause of the disease, *aggravation* or *exacerbation* of the disease must be one which is ordinarily encountered only on the job." 290 Or at 350. (Emphasis added.) *See Weller v. Union Carbide,* 288 Or 27, 602 P2d 259 (1979); *Beaudry v. Winchester Plywood Co.,* 255 Or 503, 469 P2d 25 (1970). The court laid out a test for making this determination:

> "* * * If this off-the-job condition or exposure is a condition substantially the same as that on the job *when*

> *viewed as a cause* of the particular kind of disease claimed as an 'occupational disease,' it precludes the claim under ORS 656.802(1)(a). * * *" 290 Or at 350 (emphasis original).

We do not interpret the Supreme Court's test to require that the at-work conditions be the sole cause of disability. In *Beaudry v. Winchester Plywood Co., supra,* the court held that aggravation of the claimant's preexisting bursitis condition was compensable as an occupational disease. The claimant's work activities required him to stand for eight hours on a vibrating platform which the medical evidence described as the "most traumatizing activity" relating to his disability. Compensation was allowed, even though the evidence indicated the claimant's bursitis was aggravated by nonwork activities of standing, walking and climbing stairs. *Beaudry* was cited with approval in *James v. SAIF, supra.*

We conclude that ORS 656.802(1)(a) does not require that the occupational disease be caused or aggravated solely by the work conditions. If the at-work conditions, when compared to the nonemployment exposure, are the major contributing cause of the disability, then compensation is warranted.

The psychiatrists who examined claimant essentially agree in their diagnoses: chronic, severe or psychotic depression or depressive neurosis, complicated by chronic alcoholism. They were not unanimous, however, in their identification of the source of claimant's problems.

Dr. McCulloch, claimant's treating psychiatrist from the first hospitalization in 1975 until September, 1978, reported: "Mr. Gygi has suffered chronic and severe depression and alcoholism which was aggravated by the nature of his work and the extensive disciplinary proceedings against him." A second physician, Dr. Atkinson, treated claimant during his five-month hospitalization in 1978-79. He stated: "I agree that both illnesses diagnosed above [i.e., psychotic depression and chronic alcoholism] are *in part* the result of employment-related stress. Work severely aggravated patient's proneness to mental illness." Dr. Atkinson also stated: "Given the long, complicated history, it is nearly impossible to accurately determine the

proportion of illness caused by job-related stress. It was a substantial factor."

At SAIF's request, claimant was examined by three psychiatrists. Dr. Quan, who examined claimant September 7, 1979, reported:

> "On the basis of what Mr. Gygi reports to me, he provides a sequence of events which strongly supports his contention that his depression and alcohol abuse followed reverses that related to his practice of law. * * * That his personality could be regarded as vulnerable to situational stresses, especially of the magnitude that he encountered seems also clear.
>
> "* * * * *
>
> "Without other, possibly more objective, data, Mr. Gygi's reported history seems reasonable and on that basis, it would appear that his mental condition has been aggravated by the stress of his work."

Dr. Colbach examined claimant on October 1, 1979. He reported:

> "This man gives a history of long standing personality defects. He apparently has always been an insecure, anxious, somewhat passive dependent personality whose high intelligence helped get him through life. Twenty years ago he was taking antidepressant medication, however, and in 1966 he had his first indications of an alcohol problem.
>
> "Still he was able to make it in life. His real downfall began in the 1970's due to problems in his law practice here in Portland. These problems have apparently exacerbated his preexisting personality defects, leading to an increased reliance on alcohol, drug abuse and recurring depressions, at least one of which was psychotic in nature.
>
> "My diagnoses would essentially be the same as those of Dr. Quan. * * *
>
> "* * * * *
>
> "This has to be seen as one of those borderline cases. Obviously this man has long standing personality problems. Because of these problems he ran his law practice in a rather erratic manner and directed his practice into a very risky area. He involved himself in some marginal situations which backfired on him, leading to his further mental deterioration. When the practice fell apart, he fell apart. So the stresses of his practice did contribute to many of his current difficulties. It is just about impossible for me to say how much responsibility for this SAIF should assume."

Finally, Dr. Parvaresh examined claimant on October 17, 1979. He identified three etiological factors for claimant's "psychiatric problem": (1) the excessive drinking stemming from his marriage difficulties in 1966-67; (2) claimant's upbringing - the "push for achievement without reward"; and (3) "what he went through between 1970 and 1975" - the stress of the lawsuits and the disciplinary proceedings. Referring to this third factor, Dr. Parvaresh stated:

> "* * * On face value, this may indicate added stress which might very well have aggravated a pre-existing condition. On the other hand, on closer scrutiny one finds that he began to create problems for himself within his practice by making bad decisions and giving poor advice because of his underlying psychiatric problems which had pre-existed the subsequent stresses on the job. That is to say, had he not made poor professional decisions because of his underlying psychiatric problem, he probably would not have had the lawsuit and disciplinary action against him and therefore there would not have been the stresses that he believes aggravated his psychiatric condition. I do not know whether a psychiatrist can adequately answer this, this is a question of social policy, that is how far the State Accident Insurance Fund would go to cover an employee. As I understand the present policy indicates what happens on the job materially contributed to the workman's injury and if I am interpretting this correctly, then Mr. Gygi's problem appears to me not job related."

Dr. Parvaresh clarified this statement in a deposition made part of the record before the referee. He explained that claimant's situation differed from the case of a mediocre lawyer who is working over his head. In the latter case, on-the-job stress obviously would be the cause of psychiatric problems. On the other hand, claimant was extremely intelligent and competent, and he was doing a job he was capable of handling. Claimant's problem was his own creation, the result of his preexisting neurosis and predilection for alcohol. Job stress, then, the doctor said, was not the cause of claimant's problem.[4]

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[4] The relevant portion of Dr. Parvaresh's deposition states:

"Q Doctor, we have a fairly unique individual here, in that — I don't believe there's any qeustion that he was extremely intelligent, well-respected, foremost in his field, and then these sort of problems developed. Suppose,

We conclude that claimant's condition was aggravated by stress that he was subjected to while on the job. Certainly he was highly susceptible to depression and alcoholism resulting from stress in many situations in his life. Nonetheless, when viewed as a cause of his disability, the stress he faced while on the job was of greater intensity and was not substantially the same as the stress faced off the job. *James v. SAIF, supra,* 290 Or at 350. In short, the work-related stress was the major contributing cause of claimant's disability.

Claimant's treating psychiatrists both state that on-the-job stress aggravated his preexisting mental health

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Doctor, we had an individual who was of a mediocre nature in law school and in performance and was put into this position of responsibility. Would your opinion change as to the course of the materiality of the pressure, the job stress?

"A Yes.

"Q Would you explain that a little bit, please?

"A For the sake of understanding, I believe Mr. Gygi, when he started his law practice, because he was knowledgeable, he had good educational background, he was quite sharp and smart, he really didn't have any problem dealing with what the job required of him. But this was his own psychological problem that created secondary problem for him, so he runs into problem.

"On the other hand, if, say, Mr. Gygi was not really so sharp, and he was not so up to date on the type of work he did, yet he joined the law firm that suddenly placed him into a position where he had to do things that were well above, well over his head, and yet he couldn't afford really to come forward and say, 'I can't do this,' because this was a good job that was given to him. At that point, yes, the job would materially contribute to the problem. In other words, the person who was functioning within his own limitation had no problem before, that suddenly he gets in a job that is way over his head, then he's going to begin to worry about his competency, whether or not he's doing a good job, he's going to very anxious because he's dealing with issues that he's not too well versed on.

"Q You are talking about the hypothetical mediocre person?

"A Yes. So in that response, you don't really have much problem as a psychiatrist to understand why he got upset, because suddenly he was faced with something he was not really trained to handle, and he was not competent to deal with.

"Q But in this case, what is the difference?

"A The difference really is that Mr. Gygi is a very — at least at the time was extremely smart, sharp, trained, he was respected, so he really didn't have any problem dealing with what his job required of him. And had he not had the psychological problem in the form of neuroses and alcoholism, he would not have had problems; he would have continued to be successful in what he did, so these two are quite different issues."

problem. The three examining psychiatrists agree in their diagnoses and, except for Dr. Parvaresh, agree that on-the-job stress substantially aggravated his condition. While Dr. Parvaresh does not concur, it appears that he is making a judgment of social policy, not a medical judgment. Although claimant, being self-employed, may have been the author of his own downfall, his condition arose because of his response to the demands of his law practice.

Affirmed.

THORNTON, J., dissenting.

My review of this record convinces me that claimant has not established by a preponderance of the evidence that his alcoholism and physical and mental breakdown constituted a compensable occupational disease arising out of and in the course and scope of his employment. Contrary to the view of the evidence taken by the majority, the evidence persuades me that claimant's condition did not result from on-the-job stress.

Unlike the claimants in *James v. SAIF,* 290 Or 343, 624 P2d 565 (1981), and *Paresi v. SAIF,* 290 Or 365, 624 P2d 572 (1981), which the majority relies upon, this claimant for the most part created his own problems and his own stresses. There have been a number of similar cases involving claimed on-the-job stress. In each case we concluded after a *de novo* review of the record that the claimant had not established by a preponderance of the evidence an occupational disease (or industrial injury). These include the following: *Friesen v. Gould Inc.,* 18 Or App 120, 523 P2d 1285 (1974), where a bookkeeper-clerical worker complained of work stress related to her immediate supervisor, which allegedly cause a nervous upset; *Williams v. SAIF,* 36 Or App 211, 584 P2d 327, *rev den* 284 Or 235 (1978), where an administrative official in the Bureau of Labor complained of work stress which allegedly produced what amounted to an occupational disease. Another case involving in part claimed work stresses incident to the practice of law, and in which we also rejected a claim of work-connected disability, is *Giovanini v. SAIF,* 35 Or App 352, 581 P2d 139 (1978). In *Giovanini* this court affirmed without opinion a decision of the Workers' Compensation Board denying compensation where claimant had suffered

a myocardial infarction after an extended period of heavy legal work which was followed by a violent family argument after he had returned home in the evening.

A claim of emotional stress was also involved in *Robb v. Employment Div.*, 54 Or App 471, 635 P2d 392 (1981), an unemployment compensation case. This court affirmed a decision of the EAB which held that claimant had failed to establish that her stress problems were of such gravity that she had no alternative but to resign her employment and denied her unemployment compensation claim.

On the basis of the above authorities, in my view it would be an unwarranted expansion of workers compensation to rule in the case at bar that claimant is presently suffering from a bona fide occupational disease and to charge these claim costs to the State Accident Insurance Fund.

For the above reasons, I respectfully dissent.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Iona Mathews, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner,
v.
MATHEWS,
Respondent.

(WCB No. 80-06675, CA A21933)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 18, 1981.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for petitioner.

Peter W. McSwain, Eugene, argued the cause for respondent. On the brief were Evohl F. Malagon, and Malagon, Velure & Yates, Eugene.

Before Buttler, Presiding Judge, and Joseph, Chief Judge,* and Warden, Judge.

BUTTLER, P. J.

Affirmed.

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* Joseph, C. J., *vice* Warren, J.

BUTTLER, P. J.

State Accident Insurance Fund Corporation (SAIF) appeals from a determination by the Workers' Compensation Board (Board) affirming the referee's order requiring SAIF to pay forthwith certain medical services expenses incurred by claimant. The question is whether an insurer may withhold payment for medical services expenses pending disposition on appeal. The answer depends on whether ORS 656.313, as amended by Oregon Laws 1979, chapter 673, section 1,[1] applies to a case in which the compensable injury arose before the effective date of the amendment.

Claimant sustained a compensable injury in July, 1973. Sometime in 1979, claimant requested reopening of the claim in order to obtain payment for additional medical

[1] Oregon Laws 1979, chapter 673, section 1, which became effective October 3, 1979, added sections (3) and (4) to ORS 656.313, which, as amended, reads as follows:

"(1) Filing by an employer or the State Accident Insurance Fund Corporation of a request for review or court appeal shall not stay payment of compensation to a claimant.

"(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal.

"(3) If an insurer or self-insured employer denies the compensability of all or any portion of a claim submitted for medical services, the insurer or self-insured employer shall send notice of the denial to each provider of such medical services. After receiving notice of the denial, a medical service provider may submit bills for the disputed medical services to the provider of health insurance for the injured worker. The health insurance provider shall pay all such bills in accordance with the limits, terms and conditions of the policy. If the injured worker has no health insurance, such bills may be submitted to the injured worker. A provider of disputed medical services shall make no further effort to collect disputed medical service bills from the injured worker until the issue of compensability of the medical services has been finally determined. When the compensability issue has been finally determined, the insurer or self-insured employer shall notify each affected medical service provider and each affected health insurance provider of the results of the determination. If the services are determined to be compensable, each health insurance provider that has paid claims pursuant to this subsection has a right of action to recover the costs thereof from the insurer or self-insured employer. As used in this subsection, 'health insurance' has the meaning for that term provided in ORS 731.162.

"(4) Notwithstanding ORS 656.005, for the purpose of this section, 'compensation' means benefits payable pursuant to the provisions of ORS 656.204 to 656.208, 656.210 and 656.214 and does not include the payment of medical services."

services. On November 19, 1979, SAIF, in its denial of the claim, refused to pay interim medical costs. By a referee's opinion and order on June 9, 1980, after a hearing, the claim was remanded to SAIF for reopening for payment of compensation for aggravation. SAIF appealed that decision to the Board. By stipulation of the parties, a new hearing was held on February 4, 1981, concerning SAIF's refusal to pay interim medical services expenses pending disposition on appeal. The referee held that the 1979 amendment, n 1, *supra,* had only prospective application to medical services for claims in which the compensable injury occurred after the effective date of the amendment. The Board affirmed.

On appeal, SAIF first contends that because ORS 656.313(1) speaks in terms of "compensation to the claimant," payments to medical services providers are not compensation within the meaning of the former rule. We indicated the contrary in *Wisherd v. Paul Koch Volkswagen,* 28 Or App 513, 517-18, 559 P2d 1305, *rev den, appeal dismissed* 434 US 898, 98 S Ct 290, 54 L Ed 2d 185 (1977):

> "* * * The clear intent of ORS 656.313 is to require the immediate payment of all compensation due by virtue of the order when the order is entered. Compensation, as defined by ORS 656.005(9), includes medical expenses of the type at issue here:
>
> " 'Compensation" includes all benefits, including medical services, provided for a compensable injury * * *.' "

SAIF also contends that the 1979 amendments affect only the remedy and not a substantive right afforded claimants and hence may properly be applied "retrospectively," *i.e.,* to claims involving injuries sustained before the effective date of the amendment. That contention ignores the express language of ORS 656.202(2)[2]:

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

We have held that the quoted statute requires that a survivor's rights to continuation of disability payments after the death of a worker, including the claimed right to

[2] Although ORS 656.202(2) was the linchpin of the referee's decision, SAIF failed to cite this statute in its brief on appeal.

redetermination of permanent partial disability, is governed by the law in effect at the date of injury. *Bradley v. SAIF,* 38 Or App 559, 562, 590 P2d 784, *rev den* 287 Or 123 (1979). In *Bradley,* we stated that the key factor in retroactive application questions is legislative intent, and we quoted the Supreme Court's statement in *Joseph v. Lowery,* 261 Or 545, 548-49, 495 P2d 273 (1972):

> " '[T]his court has refused to give retroactive application to the provisions of statutes which affect the legal rights and obligations arising out of past actions. This is without respect to whether the change might be "procedural or remedial" or "substantive" in a strictly technical sense.' "

See also, Held v. Product Manufacturing Company, 286 Or 67, 71, 592 P2d 1005 (1979). In *Bradley,* we reasoned that application of the amended form of ORS 656.218, allowing survivors to obtain a redetermination of disability, would change the rights and obligations arising out of past transactions. We concluded that, in light of the express language of ORS 656.202(2), the general presumption against retroactive application, and the absence of legislative history supporting retroactivity, the changes wrought by the 1973 legislature applied prospectively only.

Here, ORS 656.313 contains no language excepting it from the purview of ORS 656.202(2). At the time of claimant's injury, the law in force required medical services expenses to be paid pending disposition of the claim on appeal. *Wisherd v. Paul Koch Volkswagen, supra.* We hold that ORS 656.202(2) requires that that compensatory arrangement be continued in this case. We see no indication that the rule of ORS 656.202(2) was intended to be qualified by the amendment of ORS 656.313.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of

GRABLE,
Petitioner,
v.
WEYERHAEUSER COMPANY,
Respondent.

(CA 16671, SC 27174)

Submitted on remand from the Oregon Supreme Court, July 28, 1981.

Judicial Review from Workers' Compensation Board.

Thomas A. Huntsberger, Springfield, argued the cause for petitioner. With him on the brief was Ackerman & DeWenter, Springfield.

J. W. McCracken, Jr., Eugene, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

GILLETTE, P. J.

Reversed and remanded with instructions to accept the claimant's claim for aggravation.

GILLETTE, P. J.

This workers' compensation case is before us on remand from the Supreme Court. The issue is compensability.

FACTS AND PROCEDURAL HISTORY

Claimant had originally suffered a compensable injury to his back on February 21, 1978, while lifting heavy blocks of wood. He subsequently returned to work on April 3, 1978, and was released for full duty on May 8, 1978. He continued regular employment until October 28, 1978, when he again injured his back while lifting a steel pipe onto his home's roof. It is agreed that this latter event was not connected with work.

Claimant sought to have his February, 1978, claim reopened; his employer refused. After a hearing, the referee, utilizing the "last injurious exposure" rule of *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976), concluded that the claimant was not entitled to reopen. The Workers' Compensation Board affirmed the referee. On appeal, this court affirmed without opinion. *Grable v. Weyerhaeuser Company,* 47 Or App 1, 614 P2d 635 (1980). The Supreme Court granted review and reversed and remanded the case to this court. *Grable v. Weyerhaeuser Company,* 291 Or 387, 631 P2d 768 (1981).

SUPREME COURT ANALYSIS

The Supreme Court's concern with this case lay in the referee's (and, by implication, the Board's and this court's) use of *Smith v. Ed's Pancake House, supra,* in analyzing the facts. *Smith* was a case involving successive injuries where both were work-related, and the issue was which of two insurance carriers would be responsible for the claimant's condition; by contrast, the present case is one in which only the first of the two injurious events was work-connected. The Supreme Court held that *Smith* was inapplicable. *Grable v. Weyerhaeuser Company, supra,* 291 Or 401-402.

The Supreme Court in *Grable* reviewed a number of cases decided by this court in which, unlike *Smith,* the second injury was off the job. The court found from these cases that we have stated the rule applicable to such

circumstances in two different ways. The first, found in *Lemons v. Compensation Department,* 2 Or App 128, 467 P2d 128 (1970), and *Standley v. SAIF,* 8 Or App 429, 495 P2d 283 (1972), the court summarized as follows:

> "The rule to be drawn from *Lemons* and *Standley* is that where a worker suffers an on-the-job injury and thereafter the condition resulting from that injury is worsened by an off-the-job injury, the compensation insurance carrier will be required to afford workers' compensation benefits for the worsened condition *if the worker shows that the on-the-job injury is a material contributing cause of the worsened condition." Grable v. Weyerhaeuser Company, supra,* 291 Or at 393. (Emphasis supplied.)

The second way was found by the court in our opinion in *Christenson v. SAIF,* 27 Or App 595, 599, 557 P2d 48 (1976), where we said:

> *" 'The rule generally applied in this kind of case is that once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent non-industrial cause.* The issue in cases involving the range of compensable consequences flowing from a primary injury is nearly exclusively the medical issue of casual connection between the primary injury and the subsequent medical complications. 1 Larson, Workmen's Compensation Law 3-279, § 13.11 (1972).' " *Grable v. Weyerhaeuser Company, supra,* 291 Or at 397. (Emphasis supplied.)

The Supreme Court, after reviewing these two different formulations of the appropriate analytical approach, concluded that either was acceptable as a statement of the applicable law:

> "We believe that the compensability of a worsened condition following an off-the-job injury may be determined equally as well under the rule stated and applied in *Lemons* and *Standley* as that stated by Professor Larson and paraphrased in *Christensen.* We conclude that if the claimant establishes that the compensable injury is a 'material contributing cause' of his worsened condition, he has thereby necessarily established that the worsened condition is not the result of an 'independent intervening' non-industrial cause. We hold that an employer is required to pay workers' compensation benefits for worsening of a worker's condition where the worsening is the result of

both a compensable on-the-job back injury and a subsequent off-the-job injury to the same part of the body if the worker establishes that the on-the-job injury is a material contributing cause of the worsened condition." *Grable v. Weyerhaeuser Company, supra,* 291 Or at 400-401.

ANALYSIS ON REVIEW[1]

As noted, claimant first injured his low back on February 22, 1978, while lifting oversize blocks from a chip conveyor. He saw Dr. Thomas, who diagnosed a severe sprain to the supporting structures of the thoracic spine and sacroiliac joint. Thomas released claimant for light work on April 3, 1978, and for full time work at his regular job on May 8, 1978. Thomas believed claimant had a very small, "less than 5%," permanent impairment.

After the pipe lifting incident, claimant saw a different doctor, Dr. Woodworth on October 20, 1978. Claimant was in acute distress from the lower back injury—bending over, flexed at the hips, was his only comfortable position. Dr. Scofield first saw claimant on November 9, 1978. His pain was still severe. After a number of examinations, she concluded that claimant had "permanent lumbosacral with weight bearing disability." Her diagnosis was "[a l]ongstanding chronic injury to [an] inherently weak and defective L-5 S-1 motor unit." Dr. Scofield referred claimant to Dr. Fechtel, who generally concurred in the earlier diagnosis: "This patient is suffering from residuals from multiple lumbo-sacral sprains imposed upon a structurally deficient spine."

On June 28, 1979, in response to a specific question from claimant's counsel, Dr. Scofield wrote:

> "* * * As you know, I did not care for [claimant] during his February, 1978 injury and recuperation period. I have reviewed Dr. Thomas' reports. Since no x-rays were taken, he was unaware of the genetic structural defect to that area. The sharp pain experienced from lifting a heavy chip block * * * is in my opinion most likely due to a L5 S1 disc protrusion. His congenital condition predisposes him to

[1] The Supreme Court, in remanding, left to this court a determination of whether to remand this case to the Board or, exercising our *de novo* review function, to decide the case ourselves. We find the record adequate for review and see no reason to remand to the Board to take further evidence.

this type of injury and the February injury was a contributing factor to the second injury in October. The location and severity of the pain were identical. The February injury is based upon a congenital weakness predisposing the area to a disc type of injury. The suggested protrusion is related to subsequent injury as a protrusion can linger on for some time.

"* * * * *

"* * * The February injury did cause impairment that the October injury built upon, but I cannot rate disability for each separate injury. * * *"

Dr. Scofield further explained,

"* * *[Claimant] has had in his spine since his teenage years a deficiency in the normal bio-mechanical integrity of the spine, predisposing him to injury. * * *

"The injury in February further damaged the area and set up conditions that made it possible to be injured as in what happened in October. * * * The question as to whether the October injury was a reinjury to his low back from the February incident is positive in my mind. The same area, same type of pain, and doing a similar type of maneuver all substantiate my opinion.

"Had he not been injured in February, it would have taken more stress to injure his spine in October. * * *"

Claimant was also examined by Dr. Smith, who concluded that the October injury was an "exacerbation" of the February incident. His report implied that claimant may never have been fully medically stationary before the second incident. In response to direct questions, both Scofield and Smith also opined that the February incident was a "material contributing factor" to his second injury.

The medical evidence just outlined is unrebutted. It establishes, under our opinions in *Lemons, Standley* and *Christensen,* as those opinions have been harmonized in *Grable v. Weyerhaeuser Company,* that this claim is compensable.

Reversed and remanded with instructions to accept the claimant's claim for aggravation.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Shirley B. Johnson, Claimant.

JOHNSON,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(No. 79-7925, CA A20259)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for reconsideration filed December 9, 1981. Former opinion filed August 24, 1981, 53 Or App 627, 633 P2d 17, November 9, 1981, 54 Or App 620, 635 P2d 1053.

Allan H. Coons and Coons and Hall, Eugene, for petition.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Petition for reconsideration allowed; former opinion modified and adhered to.

WARDEN, J.

In this workers' compensation case, claimant appeals from an order of the Board which modified the opinion and order of the referee and held that surgery performed on claimant's left knee was not causally related to a compensable industrial injury. Claimant also appeals the portion of the order reducing the attorney fee award from $750 to $450.

While working in the woods as a choker setter, claimant sustained an injury when a choker hook struck his left knee. Claimant immediately sought medical treatment and, after a series of ineffective conservative procedures, was scheduled for surgery. The pre-operation diagnosis was "possible torn meniscus, left knee."[1] The surgical procedure consisted of an arthroscopy,[2] during which no meniscal tear was observed. The arthroscopy did, however, lead to a diagnosis of a synovial plica (a fold in the membrane lining the knee joint). Upon discovery of the plica, the arthroscope was removed, the incision closed and a new incision was made for the purpose of repairing the folded membrane.

In a post-operative report, Dr. Harris evaluated claimant's condition as follows:

> "The synovial plica is a poorly understood phenomenon. The relationship, if any, to trauma has not been definitely proven. * * * I would tend to consider this an idiopathic condition, although the trauma to this portion of the knee reported by the patient on 9-17-79 may have been instrumental in causing the condition to become symptomatic. * * * "

Claimant's claim was initially denied. After a hearing, the referee ordered that the claim be approved and compensation awarded. The opinion and order stated, in part:

> "Based upon all of the evidence in the record I find that claimant did sustain an injury to his left knee on September 17, 1979. The evidence shows that claimant had no

[1] The meniscus is a fibro-cartilage within the joint.

[2] Arthroscopy is a procedure by which a device, the arthroscope, is surgically inserted into a joint, enabling a surgeon to view the internal structures of the joint.

> prior left knee problems or injuries. Claimant's testimony is corroborated by Mr. Fahlstrom who admits that claimant immediately reported to him that he had been hit and injured himself and that claimant was limping. The following day claimant sought medical treatment and reported the injury to the doctor. I further find based upon the medical evidence that it is medically probable that the treatment which claimant received including surgery was the result of the injury which he incurred."

The order included an award of attorney fees in the amount of $750.

On review, the Board modified the order of the referee, stating in part:

> " * * * We find, as [the referee] did, that claimant's claim is compensable. We also find, however, that the surgery performed by Dr. Harris is not compensably related to his industrial injury based on the evidence presented. Dr. Harris reported that synovial plica, which he felt was a poorly understood phenomenon, and any relationship to trauma has not been proven, * * *
>
> " * * * * *
>
> "Claimant's surgery performed by Dr. Harris is found not [to] be causally related to his compensable industrial injury.
>
> "The attorney fee granted by the Referee at the hearing level is reduced from $750 granted by the Referee in his order to $450, payable by the employer/carrier."

On appeal to this court, claimant first assigns as error the Board's conclusion that surgery performed on claimant's knee was not compensable. Under the provisions of ORS 656.245(1), a claimant is entitled to medical services "for such period as the nature of his injury or the process of recovery requires," if he proves by a preponderance of the evidence that his condition resulted from a compensable injury. *McGarry v. SAIF,* 24 Or App 883, 888, 547 P2d 654 (1976). Employer does not contest the Board's finding that claimant's injury is compensable. The sole issue, therefore, is whether claimant's "condition" was causally related to that injury.

Medical causation presents a question of fact, and proof of medical causation requires expert medical testimony establishing that the impact to the knee, in this case,

was a material contributing factor in producing the condition which required the surgery. *Edwards v. SAIF,* 30 Or App 21, 23, 566 P2d 189 (1977). The medical evidence as to the cause of the synovial plica is inconclusive. Dr. Harris could not say that the blow to claimant's knee created the synovial plica or caused that condition to become symptomatic. We agree with the Board that claimant has not sustained his burden of proving that the synovial plica was caused by the choker hook striking his knee and, therefore, that the surgery to repair it was "not compensably related to his industrial injury."

That does not mean, however, that none of the surgical procedure is compensable. Dr. Harris performed the arthroscopy, thinking that the industrial injury might have produced a tear in the meniscus. The medical record supports a determination that the blow to claimant's knee directly resulted in the need for exploratory surgery. When no meniscal tear was discovered, Dr. Harris withdrew the arthroscope and proceeded to operate on the part of the knee affected by the synovial plica. Had the arthroscopy been performed in a separate surgery, it would have been a compensable medical service related to the treatment of claimant's knee injury. We conclude that, under the circumstances of this case, where there was a separate exploratory procedure performed as a result of the industrial injury, that procedure is compensable, even though the subsequent procedure relieving the idiopathic condition is not. *See Vester v. Diamond Lumber Co.,* 21 Or App 587, 535 P2d 1373 (1975), where a non-injury-related aneurysm discovered during diagnosis and treatment of a back injury was held not compensable.

Claimant's second assignment of error is that the Board erred in reducing the referee's award of attorney fees. The referee awarded claimant $750 in attorney fees for prevailing on a previously disallowed claim. ORS 656.386. The employer, D & R Timber, appealed the order of the referee, but did not contest the amount of attorney fees awarded in either its request for review or in its brief. Upon review, the Board upheld the referee's determination that the claim was compensable. Claimant prevailed on a previously disallowed claim *at the Board level,* and the

Board was without authority to reduce the award of attorney fees on its own motion. *See Moe v. Ceiling Systems,* 44 Or App 429, 434, 606 P2d 644 (1980).

The case is remanded to the Board with instructions to enter an order that claimant is entitled to medical expenses associated with the arthroscopy, but not expenses associated with the repair of the synovial plica; and we reverse the portion of the order which reduced the award of attorney fees.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
James F. Raifsnider, Claimant.

RAIFSNIDER,
Petitioner,
v.
CAVEMAN INDUSTRIES, INC., et al,
Respondents.

(WCB Nos. 79-9409, 79-1549, and 78-8036
CA A20580)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 26, 1981.

Patricia L. Thompson, Portland, argued the cause for petitioner. With her on the brief was Drakulich & Carlson, Portland.

Paul D. Clayton, Eugene, argued the cause for respondents. With him on the brief was Luvaas, Cobb, Richards & Fraser, P.C., Eugene.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Affirmed in part; reversed and remanded in part with instructions to accept the claim for low back injury.

ROBERTS, J.

We have granted reconsideration in this case to respond to petitioner's contention that we applied the wrong standard of proof in her workers' compensation claim. Petitioner points to language in the next-to-last paragraph of the opinion in which we stated that the two doctors who testified "* * * could not say with any medical certainty that her work caused any acceleration or worsening of the underlying condition." Petitioner maintains that "certainty" is not required. Petitioner is correct. We stated clearly, earlier in the opinion, that we affirmed the Board's finding that claimant had not shown *by a preponderance of the evidence* that her work had caused a worsening of her underlying disease. 54 Or App at 623. *See also, Hutcheson v. Weyerhaeuser,* 288 Or 51, 602 P2d 268 (1979). Our paraphrasing of the doctors' testimony did not change the quantum of proof. However, because the wording of our former opinion may be misleading, the paragraph at issue is amended to read:

> "The two doctors who testified by deposition as to claimant's condition stated clearly and repeatedly, in response to precise questioning by claimant's attorney, that, although claimant's symptoms were increased, they could not say that her work caused any acceleration or worsening of the underlying condition. The Board's denial was therefore correct."

Petition for reconsideration granted; former opinion modified and adhered to.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Michael A. Brooks, Claimant.

BROOKS,
Petitioner,
v.
D & R TIMBER,
Respondent.

(WCB Case No. 79-10425, CA A20435)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 29, 1981.

Thomas E. Sweeney, Cannon Beach, argued the cause for petitioner. With him on the brief was Sweeney & Casterline, Cannon Beach.

Margaret H. Leek Leiberan, Portland, argued the cause for respondent. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Before Buttler, Presiding Judge, Joseph, Chief Judge, and Warden, Judge.

WARDEN, J.

Affirmed in part; reversed in part and remanded with instructions to enter an order for payment of medical expenses of the arthroscopy, but not those for repair of the synovial plica, and reinstating the referee's order awarding attorney fees.

VAN HOOMISSEN, J.

Claimant made two claims, the first for an April, 1978, injury to his low back and the second for a June, 1978, injury to his right shoulder. The right shoulder claim is not involved in this appeal. Employer's carrier denied claimant's low back claim. The referee found that claimant's back condition was compensable and that claimant was entitled to a penalty and attorney fees for unreasonable delay in denying the claim. On review, the Workers' Compensation Board reversed the referee. We review *de novo* ORS 656.298.

Claimant's job involved lifting and carrying sheets of chipboard weighing 75-100 pounds. In April, 1978, he experienced hip pain and a grating sensation in his low back. This condition was experienced over a two week period and led to a visit to the hospital on May 7. The examining physician diagnosed back sprain and prescribed bed rest. In June, 1978, claimant suffered a job-related injury to his right shoulder, which led to another hospital visit. In July, he was seen by Dr. Melson, a neurologist, concerning both the back and the right shoulder conditions. In August, a right rib resection was performed to relieve the shoulder condition, but no therapy was instituted for the low back. Claimant was off work from June, 1978, until October, 1979. During that entire period he suffered pain in his back and shoulder. He worked operating a forklift in October and November, 1979, but was unable to continue working because of pain.

In October, 1978, employer's carrier denied claimant's back claim on the ground that there was "insufficient showing that these problems result from your industrial injury of 6-29-78." In November, 1978, the carrier added as an additional ground for denying the claim that "[t]hese complaints were never reported as work-related to our insured."[1] Claimant requested a hearing. The referee found

[1] Claimant contends employer had knowledge of his back problem because he gave employer a doctor's slip dated June 29, 1978, regarding work restrictions. Employer, in effect, denied receiving notice of the back problem. The referee found that the slip

> "was not only untimely but it does not even specify an injury or condition. The first knowledge of injury of the low back was in Dr. Melson's report of July 6, 1978."

that the low back condition was work-related and that employer was not prejudiced by untimely notice of that injury and awarded claimant penalties and attorney fees for delay.

Claimant contends that the Board erred in finding that his back injury was not compensable. The Board stated:

> "We are not persuaded by the medical evidence that [the low back injury] arose out of and in the course of employment."

Claimant had no history of back problems before the incident in April, 1978. For a month or two prior to the injury, he had been required to lift heavy sheets of chipboard. He went to the hospital complaining of an injury to his low back and related his employment as the cause. The treating physician told claimant to refrain from working for a few days. He continued working, however, at the same activity for a month or so and then at another job also requiring bending and stooping.

A number of physicians subsequently identified claimant's employment as the cause of his back injury. Dr. Melson examined claimant in July, 1978, and reported that his back pain was related to lifting chipboard. Dr. Litwiller stated:

> "On 10/23/78, Mr. Raifsnider presented himself in our office complaining primarily of low back pain and some occasional right hip numbness. This has been a problem since 6/29/78, when he was working with his arms above his head, while lifting chipboard. * * *"

The carrier's consultant, Dr. Hockey, stated:

> "Mr. Raifsnider has had a fairly constant complaint of low back problems aggravated by certain movements and I do feel that his on-the-job injury of June 29, [1978] precipitated some of the strain. * * *"

Dr. Edwards testified that claimant's back problems were work related. After reviewing the record, we agree with the referee that claimant has proved the compensability of his back condition by a preponderance of the medical evidence. *Hutcheson v. Weyerhaeuser,* 288 Or 51, 55, 602 P2d 268 (1979).

Claimant also contends the Board erred in finding that he failed to notify employer of his back injury within 30 days of its occurance. ORS 656.265(1). The Board stated:

> "Claimant's various and assorted claims for his low back condition were not timely."

ORS 656.265(4)(a) provides that the defense of late claim filing is available to the employer only when the delay in the claimant's filing has prejudiced the employer. The employer bears the burden to prove prejudice. *Higgins v. Med. Research Foundation,* 48 Or App 29, 32, 615 P2d 1192 (1980); *see Inkley v. Forest Fiber Products Co.,* 288 Or 337, 348, 605 P2d 1175 (1980); *Satterfield v. Compensation Dept.,* 1 Or App 524, 528, 465 P2d 239 (1970). The referee found no evidence of prejudice to employer. Similarly, the Board made no specific finding of prejudice. Employer argues that it was prejudiced, relying on *Vandre v. Weyerhaeuser Co.,* 42 Or App 705, 601 P2d 1265 (1979). The facts of *Vandre,* however, are distinguishable. Unlike in *Vandre,* this claimant's injury manifested itself soon after the alleged incident, and there was opportunity for reasonably prompt treatment. Claimant was treated in the hospital on May 7, 1978, and, when the pain persisted, was treated again on July 6, 1978. Considering the record as a whole, we find that employer has failed to carry its burden of proving prejudice.

Claimant also contends that employer's carrier unreasonably delayed in denying his claim. In awarding a penalty, the referee found the carrier had unreasonably refused to pay compensation between the time employer received notice of the claim in July, 1978, and the time the claim was denied in October, 1978. ORS 656.262(5).[2] The Board concluded that, although the denial was erroneous in part, genuine and understandable confusion surrounded the claim and, therefore, the denial was not unreasonable. The Board found that the confusion existed because it was unclear "what claimant was claiming, when he was claiming it, and what the basis of the claims was."

[2] ORS 656.262(5), in relevant part, provides:

> "Written notice of acceptance or denial of the claim shall be furnished to the claimant by the corporation or direct responsibility employer within 60 days after the employer has notice or knowledge of the claim. * * *"

The award of penalties is a matter largely within the Board's expertise. *Button v. SAIF,* 45 Or App 295, 300, 608 P2d 206, *rev den* 289 Or 107 (1980). Here, confusion existed over whether the claimed back injury had occurred in June, 1978, or earlier in April or May. Also, the claim filed with employer in July, 1978, noted shoulder and arm injuries but not claimant's low back problems. Claimant waited until December, 1978, to file a claim *detailing* his back injury. On that record, we decline to alter the Board's decision.

Affirmed in part; reversed and remanded in part with instructions to accept the claim for low back injury.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Walter J. Dethlefs, Claimant.

DETHLEFS,
Petitioner,
v.
HYSTER CO.,
Respondent.

(WCB No. 79-04604, CA A21593)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 25, 1981.

Richard A. Sly, Portland, argued the cause for appellant. With him on the brief was Bloom, Marandas & Sly, Portland.

Roger R. Warren, Beaverton, argued the cause for respondent. On the brief was David Horne, Beaverton.

Evohl F. Malagon and Malagon, Velure & Yates, Eugene, filed a brief amicus curiae for Oregon Workers Compensation Attorneys Association.

Mildred J. Carmack and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland, filed a brief amicus curiae for Association of Workers' Compensation Defense Attorneys.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Reversed and remanded with instructions to accept and pay benefits for the vasomotor rhinitis and the related headaches.

THORNTON, J.

The issue presented in this appeal is the proper test for compensability of an occupational disease claim. Claimant appeals from denial by the Workers' Compensation Board of his claim for vasomotor rhinitis and headaches. He claims the Board erred (1) in ruling that the proper test is whether the disease was caused *solely* by the work environment and (2) in refusing to admit additional evidence post-hearing on the issue of (a) whether claimant's rhinitis was the result of work exposure and (b) the validity of medical assumptions made by Dr. Bardana.

The Board found that there was no evidence that claimant's allergic rhinitis, arteriosclerosis or labyrinth disease resulting therefrom are causally related to his employment, but it found that there was competent evidence claimant's employment was a substantial contributing cause to his vasomotor rhinitis and that the vasomotor rhinitis was a substantial contributing cause of claimant's headaches. The Board agreed with the referee that

> "* * * claimant's employment was a substantial contributing cause to his vasomotor rhinitis and that the vasomotor rhinitis was a substantial contributing cause of claimant's headaches"; * * *.

However, on the basis of *Thompson v. SAIF,* 51 Or App 395, 625 P2d 1348 (1981), the Board concluded that claimant had failed to prove that his rhinitis in general was caused *solely* by the work environment.

The essential facts are as follows: Claimant is a 61 year old oxyacetylene burner. He was employed by respondent for 22 years. All of his work is performed in the employer's plate shop, a building about 100 feet wide and a block and a half long with a 40 foot ceiling. The working conditions were described by the referee as follows:

> "* * * One end of the building has a basement area in which there are three burning machines utilizing up to eight torches each. Claimant's booth is in the center of the building and is bordered on one side by the paint area, on another side by a welding area and on the third side by the assembly line. Claimant sometimes operates a single torch and sometimes operates a two torch machine.
>
> "Defendant manufactures finished machines from raw materials, including large quantities of steel plate, and in

> the process the atmosphere in the plate shop is subjected to * * * by-products of the manufacturing process. The steel ranges in thickness from sheet metal to 12 inches, although it is ordinarily one-half inch or less. Some of the metal is 'pickled', resulting in it being covered with an oily residue, and some of the metal is stored outside and is rusty. The oily and rusty metal is alleged to produce the greater pollution when cut with a torch.
>
> "There are overhead doors on three sides of the building which are left open during the warmer months. In colder months the doors are kept closed. There are four exhaust fans and a 'dust hog' in the plate shop, but one or more of the exhaust fans is usually inoperative. The 'dust hog' has either never been used because of unavailable power requirements or was only used for a few days before it was unplugged."

It was conceded that claimant had been exposed during that period to a variety of airborne pollutants at work and that he suffered from allergic rhinitis[1] as well as vasomotor rhinitis[2] and headaches.

Claimant initially consulted Dr. Daniel Billmeyer for some of the symptoms recited above. He was found to be quite allergic to house dust, house dust mites, grass, mycogone and bacteria, and treatment was started. In addition claimant was examined and treated extensively by other specialists.

Claimant has a deviated septum, making it difficult to breath through his nose and to wear a mask when working. He developed an allergic reaction to various common environmental irritants, including fresh mown grass; also symptoms of vertigo developed as a result of a hyperactive labyrinth secondary to arteriosclerosis. His headaches became so severe they caused him to become nauseated and occasionally resulted in vomiting and syncope. Claimant

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[1] Allergic rhinitis is defined as:

"Pale boggy swelling of nasal mucosa associated with sneezing and watery discharge, attributable to hypersensitivity to foreign substances." Stedman's Medical Dictionary, Second Unabridged Lawyers' Edition (1966).

[2] Vasomotor rhinitis is defined as:

"Congestion of nasal mucosa without infection or allergy." Stedman's Medical Dictionary, Second Unabridged Lawyers' Edition (1976).

endeavored unsuccessfully to return to work on several occasions. Each time his symptoms recurred, and he was unable to continue.

In *SAIF v. Gygi,* 55 Or App 570, ___ P2d ___ (1982), we said:

> "We conclude that ORS 656.802(1)(a) does not require that the occupational disease be caused or aggravated solely by the work conditions. If the at-work conditions, when compared to the nonemployment exposure, is the major contributing cause of the disability, then compensation is warranted."

Based on our *de novo* examination of the evidence and the authorities we reach the following conclusions:

1) The Board erred in ruling that claimant must show that an occupational disease must be caused solely by the work environment. *SAIF v. Gygi, supra;*

2) Claimant has established by a preponderance of the evidence that he is suffering from vasomotor rhinitis and that his employment was the major contributing cause to said disease and to claimant's headaches;

3) Claimant has failed to establish by a preponderance of the evidence that his allergic rhinitis, arteriosclerosis and labyrinth disease is causally related to his employment; and

4) We agree with the Board that the evidence sought to be introduced by claimant post-hearing as to whether his allergic rhinitis was the result of work exposure could have been obtained prior to the hearing and therefore was properly refused.

Reversed and remanded for acceptance and payment of benefits for the vasomotor rhinitis condition and the related headaches pursuant to the Workers' Compensation Act.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of June Pyle, Claimant.

PYLE,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB Case No. 79-07762, CA A21166)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 23, 1981.

Robert H. Grant, and Grant, Ferguson & Carter, Medford, filed the brief for petitioner.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARDEN, J.

Affirmed in part; reversed in part and remanded with instructions to award claimant travel expenses from the Oregon-Washington border to her treating physicians in the Medford area.

WARDEN, J.

In this workers' compensation case, claimant appeals the order of the Workers' Compensation Board which found that claimant was not entitled to certain medical expenses and travel expenses awarded by the referee.

Claimant sustained a compensable injury to her left hand on November 9, 1970. Since the time of injury, there has been a long course of treatment, including 14 surgical procedures. SAIF continued to provide medical services to the claimant pursuant to ORS 656.245(1)[1] and the Board's own motion order[2] until June, 1979, when SAIF rejected claimant's request for reimbursement of travel expenses from her new home in Yakima, Washington, to her doctors' offices in Medford and Ashland. In January, 1980, claimant's request for payment of bills relating to treatment of an esophogeal condition and to the use of a drug, Prednisone, were also denied. After a hearing, the referee found the claims to be compensable. On May 5, 1980, the Board reversed the order in its entirety.

On *de novo* review, we find that the evidence supports the Board's conclusions that the esophogeal condition is unrelated to the industrial injury and that the drug, Prednisone, was prescribed to treat a pre-existing condition. Neither expense is, therefore, compensable.

As for travel expenses, in the recently decided case of *Smith v. Chase Bag Company,* 54 Or App 261, 634 P2d 809, *rev den* 292 Or 334 (1981), this court allowed reimbursement for travel expenses from claimant's new home

[1] ORS 656.245(1) provides:

"For every compensable injury, the direct responsibility employer or the State Accident Insurance Fund Corporation shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires, including such medical services as may be required after a determination of permanent disability. Such medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services."

[2] Claimant's claim was originally closed in 1974, but was reopened by the Board's own motion in 1977. The claim was again closed by the Board's own motion determination order on May 18, 1979.

in Veneta to his treating doctor in Molalla. We stated in that case:

> "* * * Claimant is seeking payment for travel expenses to obtain 'medical services for conditions resulting from his injury.' ORS 656.245(1). He is free to choose his own physician within the State of Oregon, pursuant to ORS 656.245(2). He began his treatment with Dr. Butt while he resided near the doctor's Molalla office. He is receiving care to which he is entitled for conditions resulting from his injury. ORS 656.245(1); *Bowser v. Evans Product Company,* 270 Or 841, 530 P2d 44 (1974). * * * Claimant is entitled to reimbursement for reasonable travel expenses for trips made to visit his treating doctor. OAR 436-54-270; *Francoeur v. SAIF,* [17 Or App 37, 520 P2d 477 (1974)]." 54 Or App at 265-266.

The facts of this case are similar. Claimant began treatment with her psychiatrist and two other physicians in the Medford area. She subsequently moved to Yakima to care for her mother. Dr. McCook, claimant's psychiatrist, testified:

> "I strongly recommend that she continue. I would hope that she continues in treatment with me. I believe it's important that she sustain that rapport with her physician. Perhaps most importantly with her psychiatrist. Her illness and the type of response that she has to her stress, I would prescribe *[sic]* as an agitative depression. * * * I have found that her illness and her typical reaction to that make it even more difficult in establishing relationships. * * * I certainly believe that it would be in her best interests [to continue her relationship with her treating physicians in the Medford area]."

We find that claimant has met her burden to prove that the visits to her physicians are necessary to the treatment of her condition. SAIF contends, however, that claimant must also prove that the medical services she receives in Medford are unique and cannot be obtained closer to her home. There is no such requirement in the statutes or under the holding in *Smith.* The legislative grant to workers of the right to choose their own physicians within the state of Oregon, ORS 656.245(2), precludes us from denying a claim for travel expenses ***within the state's borders.***

We therefore remand to the Board with instructions to modify its order to allow claimant travel expenses

from the Oregon-Washington border to her treating physicians in the Medford area. Affirmed in part; reversed in part and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Pauline Bohnke, Claimant.

BOHNKE,
Petitioner,
v.
EMPLOYEE BENEFITS INSURANCE COMPANY, et al,
Respondents.

(WCB Case No. 80-02336, CA A21906)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 18, 1981.

J. Rion Bourgeois, Portland, argued the cause and filed the brief for petitioner.

Emil R. Berg, Portland, argued the cause for respondents. With him on the brief was Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARDEN, J.

Reversed and remanded with instructions to award 75 percent permanent partial disability.

WARDEN, J.

Claimant appeals from a determination of the Workers' Compensation Board awarding her 40 percent unscheduled permanent partial disability. The referee had found claimant to be permanently and totally disabled. Claimant seeks reinstatement of the referee's award.

Claimant was employed in a medical laboratory in 1971; she developed serum hepatitis after puncturing her hand while cleaning contaminated glass pipettes. Despite a continuous and varied course of treatment, the condition persisted, and, in 1978, it finally became evident to claimant's physicians that this was indeed a permanent condition. As a result of the prolonged liver disease, she developed an enduring depressive reaction to her physical condition, involving a cluster of symptoms, including insomnia, poor appetite, frequent crying, chronic fear and anxiety, nervousness and extreme indecisiveness. Her weight dropped from 122 to 98 pounds. She has not worked since 1971. In the period from 1975 to 1977, she was quite actively engaged in job counselling and rehabilitation. In 1976, because of her lack of stamina, she discontinued a course in licensed practical nursing at a community college after six weeks.

In October, 1979, claimant's treating physician found her "chronic persistent Type B hepatitis" to be "very mild." In November, 1979, claimant's treating psychiatrist characterized her psychological condition as involving "mild to moderate emotionally disturbed responses under ordinary stress." He testified at the hearing that further attempts at retraining would likely only worsen claimant's depression, which he felt was, at that point, unlikely to improve. On the other hand, a consulting psychiatrist, who reviewed the records and examined claimant in September, 1979, testified at the hearing that the most promising approach was one involving "occupational therapy"; he described claimant's psychological disability as mild.

The Board reversed the referee's award of permanent total disability, in part, apparently, because claimant had contributed to the failure of her rehabilitation effort by unrealistically pursuing medically-oriented careers from

which she is precluded due to her chronic hepatitis.[1] But it was not until 1978 that claimant was told by her physicians that her liver condition was permanent.

The issue here is the extent of claimant's loss of earning capacity due to the compensable injury, taking into account age, education, training, skills and work experience. ORS 656.214(5). The extent of permanent partial disability here, in our view, is greater than awarded by the Board. The Board mischaracterized the testimony of claimant's treating psychiatrist with respect to the extent of her disability by quoting a rating of 10 to 45 percent "disability." (See n 1, *supra.*) That range of figures, in fact, refers to the American Medical Association's guide to evaluation of permanent *impairment* with respect to claimant's psychological condition. Impairment is not equivalent to loss of earning capacity. This claimant was 50 years old at the time of the hearing. Her principal employment throughout her working life and her chief marketable skill was in nursing as a nurse's aide. There is no serious dispute that claimant is now effectively foreclosed from any medically-related occupation by virtue of her liver condition alone, and her psychological condition seriously limits retraining for employment in another field. Claimant has, however, had two years of college education.

In our view, the medical evidence, indicating a mild physical disease and mild to moderate emotional problems, does not establish permanent total disability; nor are we persuaded that this claimant is in the so-called odd lot

[1] The Board's order recited, in relevant part:

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

category of permanent total disability. *See Wilson v Weyerhaeuser,* 30 Or App 403, 409, 567 P2d 567 (1977). Since 1978, claimant has failed to make reasonable efforts to become employed in a non-medical job. *See* ORS 656.206(3).[2]

In the exercise of our independent judgment on *de novo* review, we measure the extent of unscheduled disability at 75 percent, and we reverse and remand with instructions to make that award.

[2] ORS 656.206(3) provides:

"The worker has the burden of proving permanent total disability status and must establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Dale Scofield, Claimant.

NATIONAL FARMERS' UNION INSURANCE,
Petitioner,
v.
SCOFIELD, et al,
Respondents.

(WCB 78-3310, 78-7638, CA A20339)

Judicial Review from Workers' Compensation Board.

On respondent Dale Scofield's petition for attorney fees filed December 3, 1981.

Martin J. McKeown, Eugene, for petitioner.

Frank A. Moscato, Portland, filed a petition contra for respondent Employers Insurance of Wausau.

Before Thornton, Presiding Judge, and Warden and Young, Judges.

THORNTON, J.

Costs and attorney fee allowed.

THORNTON, J.

This workers' compensation case is now before us on a petition for allowance of costs. In our opinion on the merits (54 Or App 804, 636 P2d 970 (1981), *former opinion adhered to as modified,* 55 Or App 820, ____ P2d ____ (February 2, 1982), we expressly determined that National Farmers' Union Insurance was the prevailing party and that costs should be assessed against Employers Insurance of Wausau. Scofield, claimant and one of the original respondents, now seeks his costs and an attorney fee.

Ordinarily, a proceeding to determine which of two or more insurance carriers is responsible for an otherwise compensable injury pursuant to ORS 656.307 does not involve a denied claim entitling claimant to costs and an attorney fee under ORS 656.382(2) or ORS 656.386(1). *Hanna v. McGrew Bros. Sawmill,* 45 Or App 757, 609 P2d 422 (1980). However, Wausau contended, in addition, that claimant's claim was barred either by his alleged failure to give timely notice under ORS 656.265(1) or because there was no compensable aggravation proved. Claimant was required to appear and contest Wausau's contention that he was not entitled to compensation. Because he was required to defend his right to receive compensation benefits and because his compensation was not disallowed or reduced, he is entitled to costs and an attorney fee paid by Wausau. ORS 656.382(2). *Hanna v. McGrew Bros. Sawmill, supra.*

Costs and attorney fee allowed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Walter Hubble, Claimant.

HUBBLE,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(No. 79-10883, CA A21021)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1981.

Rolf Olson, Salem, argued the cause for petitioner. With him on the brief was Olson, Hittle, Gardner & Evans, Salem.

Darrell Bewley, Associate Counsel for SAIF, Salem, argued the cause and filed the brief for respondent.

Before Joseph, Chief Judge, and Warden and Warren, Judges.

JOSEPH, C. J.

Reversed and remanded with instructions to allow the claim.

JOSEPH, C. J.

Claimant appeals an order of the Workers' Compensation Board affirming the referee's determination that claimant's knee injury was non-compensable under ORS 656.005(8)(a).[1] We review *de novo.* ORS 656.298(6).

Claimant, a 53-year-old construction inspector employed by the University of Oregon Health Sciences Center, suffered a knee injury as he walked down a straight corridor at the dental school at the Center. The referee found that

> "* * * as he stepped forward with his left foot to take his next step his left knee buckled somewhat and he was in sudden, severe pain. He had never injured his left knee prior to the date in question and did not slip, twist, change his direction or alter his course or pace prior to the occurrence of the incident."

The next day, claimant saw Dr. Gerow, who diagnosed his injury as an "internal derangement left knee." About two weeks later, Dr. Kaesche performed an arthroscopy and partial meniscectomy of the left medial meniscus. In a letter to claimant's attorney, he stated:

> "In my experience, individuals tear their cartilage in their knee when walking and twisting. There is a certain amount of twisting which occurs with normal walking, more so with going up or down stairs or certainly with walking on any wet or slippery surfaces."

The referee found that medical, but not legal, causation was established and denied recovery. He cited *Otto v. Moak Chevrolet,* 36 Or App 149, 583 P2d 594 (1978), *rev den* 285 Or 319 (1979), for the proposition that, for an injury to "arise out of" employment, it must be traceable to the nature of the work or to some risk of the work to which the employee is exposed. He presumably found that claimant's knee injury was traceable to neither one. We disagree.

Claimant's supervisor testified that claimant's job involved a "fair amount" of office work and a

[1] ORS 656.005(8)(a) defines "compensable injury," in part, as one "arising out of and in the course of employment." The referee found that claimant's injury did not arise out of his employment.

> "* * * substantial amount of in-the-field inspection work which requires him to spend five to six of every eight hours in the field on the jobs climbing ladders * * *"

and standing or walking "either straight in a normal condition or walking over or climbing stairs." Claimant testified that at the time of the injury he was walking fast to get to a dental school project, because he had quite a number of jobs to cover that day.

Contrary to the Board's conclusion, the fact that his walking was not limited to his on-duty activities does not render his injury non-compensable.[2] Walking was part of claimant's job; hence the risk of injury from walking was a risk of that job. He has established a sufficient work relationship between his injury and his job to recover under the statute. *See Rogers v. SAIF,* 289 Or 633, 616 P2d 485 (1980). He need not show that his injury was precipitated by an activity that could be engaged in only during his work. *See, e.g., Youngren v. Weyerhaeuser,* 41 Or App 333, 597 P2d 1302, *rev den* 288 Or 81 (1979).

Reversed and remanded with instructions to allow the claim.

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[2]The Board supports this contention with citations to cases which construe ORS 656.802(1)(a). *See Thompson v. SAIF,* 51 Or App 395, 625 P2d 1348 (1981), *and Henry v. SAIF,* 39 Or App 795, 593 P2d 1251 (1979). However, because that statute defines when an employee has suffered an *occupational disease,* rather than an accidental injury, those citations are inappropriate.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of William Valtinson, Claimant.

VALTINSON,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(No. 80-07387, CA A21494)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1981.

Peter W. McSwain, Salem, argued the cause for petitioner. On the brief were Lyle C. Velure, and Malagon, Velure & Yates, Eugene.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Joseph, Chief Judge, and Richardson and Warren, Judges.

RICHARDSON, J.

Reversed and remanded with instructions to reinstate the order of the referee.

RICHARDSON, J.

Claimant appeals an order of the Workers' Compensation Board reversing the referee's order that the State Accident Insurance Fund accept his low back injury claim. The sole issue in this case is whether claimant suffered a compensable on-the-job injury or merely has non-compensable symptoms of an occupational disease. On *de novo* review, ORS 656.298(6), we find claimant sustained a compensable injury and reverse the Board's order.

Claimant has a long history of low back problems. He underwent surgery in 1956 and 1961 and was treated again in 1974 after lifting an oil barrel while on the job. Since the 1974 incident and until the present claim arose, claimant had no problems with his back. In 1976 he began working as a county corrections officer. The job entailed physical exertion on occasion, especially in restraining prisoners. His co-workers testified that he carried out his duties without complaint, and claimant stated that he had no problems resulting from this work. He also was active in recreational activities, with no back problems.

On June 21, 1980, claimant drove the jail van from Grants Pass to Portland to pick up a prisoner and transport him to Grants Pass. During the return trip, claimant began to experience sharp low back pains which radiated into his right leg. Driving the jail van was not part of his usual job duties, but was an extra duty that the county employees could voluntarily perform. A week before June 21, claimant had accompanied another employee to Salem on a similar mission and had had no resulting problems. He did little or none of the driving on that trip. However, he was alone on the trip to Portland and did all of the driving, stopping only for short breaks. Because of the pain, claimant was unable to return to his job. He promptly reported the incident, sought medical treatment and filed a claim with SAIF.

Claimant was examined by Dr. Kendall on June 30, 1980. His report stated: "IMPRESSION: Exacerbation of chronic low back pain (work-related)." SAIF denied the claim on July 24, 1980, finding no evidence of an on-the-job accident or incident that could have produced the condition. Dr. Campagna examined claimant on July 28, 1980. His

report stated: "IMPRESSION: Severe nerve root compression L5 right, secondary to herniated nucleus pulposus as a result of industrial accident of 6-21-80."

The issue is whether claimant sustained an on-the-job injury, which is compensable, or merely suffers from increased symptoms of a preexisting condition, which is not compensable. The Workers' Compensation Board considered the claim to be the latter, and it reversed the referee's order to SAIF to accept the claim.

SAIF concedes that if the exertion of driving from Grants Pass to Portland is deemed an injurious event, the claim is compensable, but it argues that the onset of claimant's pain was gradual and the driving incident produced only symptoms of claimant's underlying back problem. The critical inquiry is whether the driving incident occasioned an injury.

The Supreme Court distinguished between an injury and a disease in *James v. SAIF,* 290 Or 343, 348, 624 P2d 565 (1981), adopting our reasoning in *O'Neal v. Sisters of Providence,* 22 Or App 9, 537 P2d 580 (1975):

> "'* * * What set[s] occupational diseases apart from accidental injuries [is] both the fact that they can [not] honestly be said to be unexpected, since they [are] recognized as an inherent hazard of continued exposure to conditions of the particular employment, and the fact that they [are] gradual rather than sudden in onset. * * *'" 22 Or App at 16 (quoting 1A Larson, Workmen's Compensation Law, § 41.31 (1973)).

The court in *James* illustrated the distinction by discussing *Olson v. State Ind. Acc. Com.,* 222 Or 407, 352 P2d 1096 (1960), in which a worker died from a heart attack that occurred while he was performing no more than the usual exertion on his job. The court observed: "If the heart condition in *Olson* had been an occupational disease rather than an injury, it would not have been compensable." 290 Or at 350. The court concluded that *Olson* was correct in determining that claimant's heart condition was the result of a compensable injury.

In the present case claimant was subjected to the ordinary stress of his job but, because of his susceptibility to back problems, the stress of the long drive resulted in

injury. The injury was unexpected, as claimant had been free of low back trouble since 1974. The injury was sudden, in that it affected claimant in only a matter of hours. The evidence pointed to no instantaneous event that caused his pinched nerve. The distinction between disease and injury, described in *James v. SAIF, supra,* is based in part on whether there is a sudden onset of the condition as opposed to a gradual one. We do not equate "sudden in onset" with instantaneous. It is clear that the injury from the physical stress of driving the van occurred during a discrete period, as compared to the onset of an occupational disease over a long period of time. Both examining physicians linked claimant's condition to work activity. We are satisfied that claimant's drive to Portland on June 21, 1980, was an injurious event. *Cf. Sauer v. Pioneer Adjustment,* 44 Or App 715, 606 P2d 1177, *rev den* 289 Or 45 (1980) (back injured when claimant stood up rapidly from bent-over position in swivel chair); *Patitucci v. Boise Cascade Corp.,* 8 Or App 503, 495 P2d 36 (1972) (back injury superimposed on underlying psychological problems). Claimant sustained a compensable on-the-job injury.

Reversed and remanded with instructions to reinstate the order of the referee.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Phillip Barrett, Claimant.

BARRETT,
Petitioner,
v.
COAST RANGE PLYWOOD et al,
Respondents.

(WCB No. 79-09391, CA A20721)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 30, 1981.

Linda C. Love, Salem, argued the cause for petitioner. On the brief were Rolf Olson and Olson, Hittle, Gardner & Evans, Salem.

Marshall C. Cheney, Portland, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, Young, Judge, and Roberts, Judge Pro Tempore.

YOUNG, J.

Affirmed.

YOUNG, J.

Claimant appeals from an order of the Workers' Compensation Board affirming an order of the referee denying penalties and attorney's fees relating to the suspension of compensation payments following claimant's failure to keep an appointment for a medical examination. We review *de novo,* ORS 656.298(6), and affirm.

The insurer, by letter dated February 6, 1980, notified claimant to submit himself for a medical examination[1] at a specified time and place on February 25, 1980. The letter contained the following caveat:

> "This appointment has been made specially for you and if you cannot keep it for any reason, please contact me immediately. I must request suspension of compensation benefits if you do not keep this appointment and if I do not hear from you."

Claimant was unable to keep the scheduled appointment, and his attorney replied to the insurer:

> "[Claimant] informs me he will be unable to attend the appointment you have scheduled * * * on February 22.
>
> "Please reschedule this appointment at a later date and in the meantime, please comply with the Board Rules regarding independent evaluations."[2]

On February 27, 1980, the insurer submitted a request for consent to suspend compensation payments to the Workers' Compensation Department,[3] and an order authorizing suspension of payments was granted effective March 31, 1980. The evidence was that claimant did have a "valid reason" under OAR 436-54-283(3) for not keeping the appointment; on advice of his treating physician, he required bed rest due to a severe reaction to treatment.

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[1] If a claimant, "* * * refuses to submit to such [medical examination], or obstructs the same, his rights to compensation shall be suspended with the consent of the director until the examination takes place * * *." ORS 656.325(1).

[2] The attorney's letter misstated the appointment date. After receipt of the attorney's letter the insurer telephoned the attorney but was unable to contact him and left a message asking the attorney to return the call. The call was not returned.

[3] The insurer's request for consent to suspend payments was misdirected to the Evaluation Division of the Department. OAR 436-54-283(5) provides that an application requesting consent to suspend payments shall be submitted to the Compliance Division.

It is clear from the foregoing that the insurer failed to comply with the pertinent rules[4] when it scheduled the

[4] The "procedural rules" relied upon by the referee are:

OAR 436-54-281 provides:

"(1) The Compliance Division is responsible for issuing an order of consent to the suspension of compensation by an insurer or self-insured employer under the following conditions:

"(a) An order shall be issued if the worker, when requested by the Director, insurer or self-insured employer, fails or refuses to submit to medical examination, or obstructs the same at a time and from time to time at a place reasonably convenient for the worker. The compensation under the order shall be suspended until the examination has taken place. No compensation shall be due or paid during such period.

"* * * * *

"(c) An order shall be issued for any period of time during which a worker refuses to submit to such medical or surgical treatment as is reasonably essential to promote recovery. No compensation shall be due or paid during such period."

OAR 436-54-283, in pertinent part, provides:

"(1) A worker shall submit to medical examination at a time and, from time to time, at a place reasonably convenient for the worker when requested to do so by the Director, insurer or self-insured employer. For the purposes of this section, the Callahan Center shall be presumed to be a place reasonably convenient for an examination of any worker receiving benefits pursuant to ORS Chapter 656.

"(2) The director, insurer or self-insured employer shall notify the worker in writing at least 10 days prior to the examination of the following:

"(a) purpose of the examination,

"(b) the date, time and place of the examination, and

"(c) in prominent or bold-face type the paragraph:

"ATTENDANCE OF THIS EXAMINATION IS MANDATORY. YOU ARE RESPONSIBLE FOR NOTIFYING US PRIOR TO THE DATE OR TIME OF THE EXAMINATION OF ANY VALID REASON WHY YOU CANNOT ATTEND AS SCHEDULED. FAILURE TO ATTEND THIS EXAMINATION, OBSTRUCTION OF SAME, OR AN INVALID REASON FOR NOT ATTENDING SHALL RESULT IN SUSPENSION OF YOUR COMPENSATION BENEFITS PURSUANT TO ORS 656.325 and OAR 436-54.

"(3) The Director, insurer or self-insured employer upon receipt from the worker of a valid reason for not attending a scheduled examination or not completing an authorized program shall determine whether to reschedule same. If the examination is to be rescheduled, the Department, insurer or self-insured employer shall immediately reschedule the worker for the requested examination as soon as possible in the future and consistent with the ability of the worker to submit to such examination."

OAR 436-69-210 provides:

"(1) The Board, the Director, or insurer have the right to obtain medical examinations of the worker by physicians of their choice. The worker shall be

medical examination. Specifically, the insurer's letter of February 6, 1980, failed to state the purpose of the examination and did not contain the required cautionary language. OAR 436-54-283(2)(a) and (c), OAR 436-69-210(1). The insurer did not determine whether the examination was at a place, time or interval reasonably convenient to claimant. OAR 436-69-610(1). Claimant's treating physician was not consulted before the scheduling of the examination as required by OAR 436-29-210(2). Nor did the insurer determine if the scheduled examination would delay or interrupt claimant's treatment. OAR 436-69-210(1). Although claimant had a "valid reason" not to keep the appointment, he did not advise the insurer of that fact and failed to keep the scheduled appointment. OAR 436-54-281(1)(a) and OAR 436-54-283(3).

The referee found that the insurer failed to "comply substantially with the procedural rules * * * of the Workers' Compensation Department pertaining to submitting claimant to a required medical examination * * *." The referee set aside the suspension order but declined to award penalties and fees, because "* * * the delay and hardship, if any, caused in this case because of the issuance of the order of suspension was contributed to by the claimant or his agent." The referee concluded that claimant had failed to prove by a preponderance of the evidence his entitlement to penalties and fees.

Claimant argues that penalties and attorney's fees should be awarded because of the insurer's "unreasonable resistance" to the payment of compensation. Claimant cites no statute or Board Rule for that proposition. Penalties and fees can be awarded only when expressly authorized by statute. *Brown v. EBI Companies,* 289 Or 905, 618 P2d 959 (1980); *Morgan v. Stimson Lumber Company,* 288 Or 595,

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notified of the purpose of the examination. Such examinations shall be at places, times, and intervals reasonably convenient to the worker, and shall not delay or interrupt proper treatment of the worker.

"(2) The person requesting the examination should consult with the attending physician and endeavor to choose a mutually agreeable examiner. However, the selection of the examiner finally rests with the Board, the Department or insurer.

"(3) The person requesting the examination shall send a copy of the report to the treating physician."

607 P2d 150 (1980); *Korter v. EBI Companies, Inc.*, 46 Or App 43, 610 P2d 312 (1980), 51 Or App 206, 625 P2d 668 (1981); *Atwood v. SAIF*, 30 Or App 1009, 569 P2d 52 (1977). Claimant's use of the quoted langauge suggests that ORS 656.262(8) and ORS 656.382(1) form the basis for his argument. ORS 656.262(8)[5] authorizes a penalty for unreasonable delay or refusal to pay compensation plus any attorney fee which may be assessed under ORS 656.382, which requires the payment of attorney fees when a direct responsibility employer or SAIF "unreasonably resists the payment of compensation." *Williams v. SAIF*, 31 Or App 1301, 1306, 572 P2d 658 (1977), *rev den* (1978).[6]

We have found no case and none has been cited that deals with the precise question now before us.[7] The narrow issue is whether ORS 656.262(a) and ORS 656.382 or any Board Rule authorizes assessment of penalties or the award of attorney's fees when the insurer violates the pertinent rules relating to the procedure to schedule medical examinations.

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[5] ORS 656.262(8) provides, in pertinent part:

"If the corporation or direct responsibility employer or its insurer *unreasonably refuses* to pay compensation, or unreasonably delays acceptance or denial of a claim, the direct responsibility employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382." (Emphasis added.)

[6] ORS 656.382(1) and (2) provide:

"(1) If a direct responsibility employer or the State Accident Insurance Fund Corporation refuses to pay compensation due under an order of a referee, board or court, or otherwise *unreasonably resists* the payment of compensation, the employer or corporation shall pay to the claimant or his attorney a reasonable attorney's fee as provided in subsection (2) of this section. To the extent a contributing employer has caused the corporation to be charged such fees, such employer may be charged with those fees.

"(2) If a request for hearing, request for review or court appeal is initiated by an employer or the corporation, and the referee, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or corporation shall be required to pay to the claimant or his attorney a reasonable attorney's fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at the hearing, review or appeal." (Emphasis added.)

[7] *But see Morgan v. Stimson Lumber Company, supra*, which held that the Board did not exceed its statutory authority when it ordered the employer to pay a penalty and attorney fee for delaying or refusing prompt payment or decision of a claim by failing to honor the claimant's request for certain documents pursuant to OAR 436-83-460.

The difficulty of resolving the issue is compounded by the fact that the Department, acting through its Compliance Division, must consent to the suspension of payments prior to actual suspension by the insurer. ORS 656.325(1), *supra;* OAR 436-54-281(1)(a) and (c). Here, the insurer's request for consent to suspend included the insurer's letter notifying claimant of the scheduled examination and the claimant's response. It is clear from a reading of the request that it did not comply with the rules. Nonetheless, the Compliance Division found a sufficient basis to conclude that claimant failed to submit to the examination, and it consented to the suspension of payments, even though the Compliance Division, by its own rules, has authority to deny a request for suspension "because of an improper request." OAR 436-54-281(5). Given the Compliance Division's consent to the insurer's actions, we agree with the Board that the insurer's actions were not unreasonable under either ORS 656.262(a) or ORS 656.382 — assuming either statute (or both) is otherwise applicable.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Joe McKenzie, Claimant.

R. A. GRAY & COMPANY,
Petitioner,
v.
McKENZIE,
Respondent.

(WCB Case No. 80-03508, CA A21273)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1981.

Emil R. Berg, Portland, argued the cause for petitioner. On the brief were Margaret H. Leek Leiberan, and Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Rolf Olson, Salem, argued the cause for respondent. On the brief were Gregg R. Hraca, and Olson, Hittle, Gardner & Evans, Salem.

Before Joseph, Chief Judge, and Warden and Warren, Judges.

PER CURIAM.

Order modified to provide that claimant's award of permanent and total disability be made retroactive to July 2, 1980. Affirmed as modified.

PER CURIAM.

In this workers' compensation case, employer appeals an order of the Workers' Compensation Board, which reversed the order of the referee and held that claimant's neurological disorder was causally related to his 1978 injury and that claimant's condition had become aggravated. The Board awarded claimant permanent total disability commencing June 3, 1981, the date of the order.

On *de novo* review, we affirm the order of the Board awarding permanent total disability and find that claimant established that he was permanently and totally disabled as of July 2, 1980, when Dr. Rafal diagnosed claimant's condition as progressive supranuclear palsy. *Morris v. Denny's,* 53 Or App 863, 633 P2d 827 (1981).

Order modified to provide that claimant's award of permanent and total disability be made retroactive to July 2, 1980. Affirmed as modified.

In the Matter of the Compensation of
Kathy Larsen, Claimant,

Kathy Larsen, Petitioner,

v. No. 80-00797
CA A20709

Taylor & Company, and Aetna Insurance Company,

Respondents.

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Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1981.

Alice Goldstein, Portland, argued the cause for petitioner. With her on the brief was Welch, Bruun and Green, Portland.

Emil R. Berg, Portland, argued the cause for respondents. On the brief were Daryll E. Klein, and Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Joseph, Chief Judge, and Warden and Warren, Judges.

JOSEPH, C. J.

Reversed; referee's order reinstated.

LLARS

FILED: 3/22/82

JOSEPH, C. J.

Claimant appeals from an order of the Workers' Compensation Board reversing the referee's award of temporary disability compensation, a 25 percent penalty and attorney fees. We reverse.

Claimant suffered a compensable injury to her shoulder on May 7, 1979, and her claim was accepted. On January 21, 1980, the direct responsibility employer unilaterally suspended temporary disability payments. A determination order was issued on April 22, 1980, which awarded temporary total disability compensation from May 9, 1979, through September 30, 1979, less time worked. At the hearing on that order pursuant to defendant's request, the referee found claimant was entitled to temporary total disability compensation from February 5 to February 25, 1980, and to temporary partial disability compensation from February 26 to March 5, 1980. He also awarded her a 25 percent penalty, for the insurer's unreasonable refusal to pay those additional amounts, and attorney fees. ORS 656.262(9). The employer appealed only the penalty and attorney fees to the Board.

The Board modified the referee's order by denying compensation for the period February 5 through March 6, 1980, and the penalty and attorney fees.[1]

Temporary disability benefits may properly be terminated only if the claimant is medically stationary. ORS 656.268(1). On our de novo review of the record, we conclude that claimant was not medically stationary at the time of the employer's suspension of benefits, and it was unreasonable to suspend those benefits when a determination order on the matter had not yet been issued. ORS 262.268(2),(3).

The order of the Board is reversed, and the referee's order is reinstated.

FOOTNOTES

1

It is clear that the Board can reach issues not raised by the parties. Russell v. A & D Terminals, 50 Or App 27, 31, 621 P2d 1221 (1981); Neely v. SAIF, 43 Or App 319, 323-24, 602 P2d 1101 (1979), rev den 288 Or 493 (1980). It was appropriate for the Board to consider the question of claimant's entitlement to time loss compensation when only the issue of the employer's unreasonable conduct was raised. The two inquiries are related, for in determining the reasonableness of the employer's refusal to pay compensation the Board necessarily looked at the evidence of compensability.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Diane Likens, Claimant.

Diane Likens,

Petitioner,

v. WCB Case No. 80-02647
CA A21006

State Accident Insurance Fund Corporation,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted September 23, 1981.

Alice Goldstein, Portland, argued the cause for petitioner. On the brief was Welch, Bruun and Green, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARREN, J.

Denial of occupational disease claim affirmed; denial of temporary compensation, penalties and attorney fees reversed and remanded for determination of penalties and attorney fees.

FILED: March 22, 1982

WARREN, J.

Claimant appeals from a Workers' Compensation Board order that affirmed the referee's denial of her claims for compensation for occupational disease and for temporary total disability compensation, penalties and attorney fees because of the State Accident Insurance Fund's (SAIF) untimely denial of her claim. We affirm the denial of the occupational disease claim and reverse and remand the denial of temporary compensation, penalties and attorney fees.

Claimant quit her job February 13, 1979, allegedly due to low back pain. She submitted her notice of claim on January 7, 1980, three days after receiving a doctor's opinion purporting to connect her low back pain to her employment. On March 19, 1980, SAIF denied her claim for insufficient evidence and untimely filing. Claimant received no temporary compensation. The referee concluded that claimant had timely filed her claim but had failed to carry her burden of proof. He found her testimony not to be credible and her doctor's opinions supporting her claim to be based on incomplete information supplied by claimant. SAIF offered no contrary medical evidence. This case turns on claimant's credibility. The record contains numerous inconsistencies and discrepancies in her evidence. We conclude that claimant failed to carry her burden to prove occupational disease.

Temporary total disability compensation, however, is another question, for which the referee's and Board's answers were wrong, though for different reasons. The referee concluded that no temporary compensation was awardable, because claimant had not proved her

"disease" to be compensable. The Board affirmed the denial after noting the referee's conclusion to be erroneous under Jones v. Emanuel Hospital, 280 Or 147, 570 P2d 70 (1977). The Board said:

> " * * * [Under Jones], interim compensation may be due whether or not the claim is ultimately found to be compensable. However, in this case, no interim compensation is due. * * * [Because there] is no proof claimant was off work due to her back condition and also no medical evidence presented authorizing time loss[,] * * * claimant has failed to prove her entitlement to interim compensation for SAIF's late denial."[1]

In Jones, the court construed ORS 656.262 to require payment of temporary total disability compensation no later than the 14th day after the employer has notice of the claim: " * * * ORS 656.262 gives the employer two choices: deny the claim or make interim payments." 280 Or at 151. Here, the employer did neither. The validity of the claim, as later determined, is irrelevant.[2] The court in Jones held that the employer may not choose to delay acceptance or denial of the claim while making no temporary payments; further, because a claimant is not required to repay temporary total disability compensation, the court held that a claimant is entitled to recover unpaid temporary compensation even if the claim has finally been denied. The court did not condition that recovery on a claimant's proof of entitlement.

In Jones, the court also held the claimant to be entitled to penalties and attorney fees for the employer's unreasonable refusal to pay temporary benefits. Here, SAIF's denial was 12 days late. On appeal, it attempts to excuse that delay, but we find no excuse. SAIF merely and impermissibly "gamble[d] on the ultimate outcome." Jones v. Emanuel Hospital, supra, 280 Or at 152.

We find that SAIF unreasonably delayed denial and unreasonably resisted payment of temporary benefits. Claimant is entitled to recover not only those benefits, but penalties and attorney fees. ORS 656.262(8); Jones v. Emanuel Hospital, supra, 280 Or at 152-53. We remand for determination of the appropriate penalty up to 25 percent of the amount due and of reasonable attorney fees.

Denial of occupational disease claim is affirmed; denial of temporary compensation, penalties and attorney fees is reversed and remanded for a determination of penalties and attorney fees.

FOOTNOTE

1

The physician's report supporting her claim concluded that claimant had low back disability aggravated by lifting on the job. He coud not determine whether the low back pain was caused by the lifting.

2

SAIF did not contend in this case that claimant was not a "subject worker" at the time she allegedly sustained her occupational disease. See Bell v. Hartman, 289 Or 447, 615 P2d 314 (1980).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
of Harold B. Looper, Claimant.

Harold B. Looper,

Petitioner,

v.

WCB No. 78-5162
CA A22227

State Accident Insurance Fund Corporation,

Respondent.

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Judicial Review from Workers' Compensation Board.

Argued and submitted February 22, 1982.

A. E. Piazza, Medford, argued the cause and filed the brief for petitioner.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

BUTTLER, P. J.

Reversed and remanded with instructions to reinstate the referee's award of permanent total disability.

Cite as 56 Or App 537 (1982)

FILED 3/22/82.

BUTTLER, P. J.

Claimant appeals from an order of the Workers' Compensation Board (Board) reversing the referee's award of permanent total disability and awarding claimant 75 percent scheduled disability for his left leg, 40 percent scheduled disability for his left arm, and 25 percent unscheduled disability for problems involving his head and trunk area. We review de novo.

Since 1936, claimant has worked as co-owner and "outside" manager of a small oil products distributing company. On August 1, 1975, the tank truck claimant was driving collided with a logging truck, as a result of which claimant suffered a concussion, a basal skull fracture, a crushed rib cage on his left side with a torn and collapsed left lung requiring a chest tube, a shattered left leg below the knee requiring a complete knee replacement, and a thoracic outlet problem with his left shoulder and arm, requiring surgical removal of the one unbroken rib on his left side.

At the time of the injury, claimant was a healthy man of 58 years capable of performing vigorous physical labor. After the accident, claimant was left with several substantial impairments. We base our findings on the medical reports and on the testimony of claimant and his wife, whom the referee found to be "totally credible" witnesses. Claimant's rib cage area healed abnormally, causing grating sensations with movement; he has constant pain, which is intensified by sitting for more than one-half hour, by any lifting or by walking more than a block. His left arm is clumsy and very weak; his hand cannot

be used effectively for manipulation, and merely holding an object requires concentration. His left leg is 1-3/4 inches shorter than his right one, requiring claimant to wear a built-up left shoe; he suffers constant pain in his leg. Claimant's tolerance level for standing is from one-half to one hour. He is unable to bend, squat, crawl or climb. His leg problems have caused several falls. He also has nodules around his knee, which are exquisitely tender and easily irritated. His left hip is painful when he walks.

Because of an enlarged kidney, claimant's medication was reduced, but even the reduced dosage causes some dizziness and ringing in his ears. Because of pain, and despite the medication, claimant finds it necessary to rest for an hour and a half each mid-day, lying on his back. Since the accident, claimant has experienced frequent memory loss and finds it difficult to concentrate. The accident and its aftermath have also had an effect on his personality; claimant's wife testified that petty irritations now upset him to the point of near violence.

At the hearing, a vocational expert testified that within medically documented restrictions,[1] claimant could perform the jobs of parking lot attendant, gate tender, hotel-motel clerk and answering service operator. The expert conceded, however, that if claimant found it necessary to rest one and one half hours in the mid-day, he could not regularly perform any of the suggested jobs. The referee stated that he was not convinced by the testimony of the vocational expert that claimant could function in any job on a regular basis.

In reversing the referee's finding of permanent total disability, the Board concluded that claimant was not totally incapacitated as a medical or physical matter and that he had not met the burden of satisfying ORS 656.206(3).[2] The Board was persuaded by the vocational expert that claimant was capable of performing certain jobs; it emphasized that claimant testified he has made no attempt to find work. Claimant also testified, however, that he has been in too much pain to seek work. Moreover, the vocational expert did not take into account claimant's age and additional work restrictions caused by the pain.

In our view, it would be unrealistic to say that this man (63 years old at the time of the hearing) with a 10th-grade education has a reasonable expectation of being able to sell his services to an employer. Wilson v. Weyerhaeuser, 30 Or App 403, 412-13, 567 P2d 567 (1977). Under the circumstances, it would have been futile for claimant to have attempted to find employment. Morris v. Denny's, 50 Or App 533, 538, 623 P2d 1118 (1981); Butcher v. SAIF, 45 Or App 313, 317, 608 P2d 575 (1980). Claimant has sustained his burden of proving that he is permanently incapacitated from regularly performing work at a gainful and suitable occupation. ORS 656.206(1)(a).[3]

Reversed and remanded with instructions to reinstate the referee's award of permanent total disability.

FOOTNOTES

1

Under one doctor's set of restrictions, claimant could sit for two hours, stand for two hours, and walk for one hour during the course of a work day, lift 11 to 20 pounds occasionally, but could carry no weight.

2

ORS 656.206(3) provides:

"(3) 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."

3

ORS 656.206(1)(a) provides:

"(1) As used in this section:

"(a) 'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which he is able to perform after rehabilitation."

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc*

In the matter of the compensation
of Rex Harris, Claimant,

Petitioner on Review,

v.

SAIF Corporation,

Respondent on Review.

* * * * *

WCB No. 79-7093
CA 19723
SC 27908

On review from the Court of Appeals.**

Argued and submitted November 2, 1981.

Cynthia L. Barrett, Portland argued the cause for petitioner. Charles Paulson, Portland, filed the brief for petitioner.

Darrell E. Bewley, Salem, filed the brief and argued the cause for respondent. With him on the brief were K. R. Maloney and James A. Blevins, Salem.

CAMPBELL, J.

The decision of the Court of Appeals is reversed and the matter remanded to the Court of Appeals with instructions to remand to the Workers' Compensation Board.

* Tongue, J., retired February 7, 1982.

** Appeal from the Order of the Workers' Compensation Board.

52 Or App 233; ___ P2d ____ (1981).

CAMPBELL, J.

Claimant Harris, who had been adjudged permanently totally disabled in 1970 as a result of a work-related accident, appealed from an order of the Workers' Compensation Board (Board) which found him no longer permanently totally disabled and prospectively reduced his disability compensation award. The Court of Appeals affirmed without opinion and claimant petitioned this court for review contending that (1) the Board had erroneously placed the burden of proof upon him to show continuance of his disability rather than upon the insurer to establish a change of circumstances warranting award modification, and (2) the Board erred in basing its finding that he was no longer permanently totally disabled upon income he had earned through real estate investments.

There is no dispute in this action that claimant was substantially disabled by a compensable on-the-job injury and that he remains disabled to some degree. The dispute centers upon the present extent of his disability and the propriety of the Board action in reducing his compensation award. For reasons set out below, we agree with the basic contentions of the claimant and reverse and remand this cause to the Board for reconsideration of its order.

In September of 1967, claimant suffered a severe job-related injury when a rock shattered the windshield of the pickup he was driving and struck him in the head. He sustained multiple skull fractures and organic brain damage and was hospitalized for two weeks after the accident. His initial complaints were memory failure, sinus difficulties, tenderness and stiffness in the neck, a deformed face, and inability to open his mouth.

At the time of the accident, claimant had had a long and stable work history, including 17 continuous years as a stock delivery driver for his employer, an oil products firm. Despite his injuries, claimant was highly motiviated to return to work. After recuperation, he was examined by doctors of the Workers' Compensation Board; the discharge committee eventually found him to be only minimally physically disabled, ineligible for vocational rehabilitation, and well enough to be released to resume his former job. Claimant returned to his job in February 1968, but during the summer of 1969 he made serious errors at work, improperly mixing fuels, which cost his employer a considerable amount of money. The errors were apparently the result of claimant's continuing memory and attention problems. Soon after the incident, claimant was demoted. Even with a position of less responsibility, however, claimant was not able to perform satisfactorily and his employment was eventually terminated.

He was thereupon reevaluated by the Board and by a Determination Order dated June 3, 1970, he was found to be permanently totally disabled. Claimant's permanent physical impairments, though significant, were relatively minor; injury-related mental and psychological problems, however, including distractability, loss of memory, depression and anxiety adversely affected his employability in the type of positions in which he was formerly employed.

During December 1970, claimant began an extended course of psychotherapy with a psychiatrist and enrolled in Columbia Basin Community College for coursework in real estate sales. The psychiatrist's initial report was that claimant had extremely regressed following the accident and was slowly learning to cope

with his disability. Therapy was discontinued in July 1972 with the doctor reporting that claimant "is going to make a satisfactory adjustment but he definitely will have some permanent, partial disability."

The next medical reports in the file, dated March 1976 and December 1977, found claimant's condition essentially unchanged over the preceding seven years, but noted that he was adjusting well to his disabilities. In late 1977 claimant started seeing his psychiatrist again in drug therapy as well as psychotherapy. In October of 1979, his psychiatrist opined that despite the therapy claimant remained totally disabled, only marginally adjusted to life, and in need of further treatment.

Notwithstanding the medical reports which continued to state that claimant's disability remained essentially unchanged since his accident, the State Accident Insurance Fund (SAIF), his insurer, requested a reevaluation and reduction in his award pursuant to ORS 656.206. Citing the fact that claimant had become a licensed real estate agent in 1972 and had enjoyed rather high incomes in the years 1973 through 1979, SAIF argued that claimant was no longer permanently totally disabled. After investigation, the Evaluation Division of the Workers' Compensation Department agreed and recommended to the Board that claimant's permanent total disability be terminated and his compensation be reduced to 48 degrees for 15 percent unscheduled head disability. By order dated July 31, 1979, the Board concurred with the Division recommendation.

Claimant then requested a hearing to seek reinstatement of his award. See ORS 656.283(1), OAR 436-65-225(2). By opinion and order dated April 25, 1980, the Board referee found that claimant

remained permanently and totally disabled, reversed the July 31, 1979, order reducing his disability award, and reinstated his prior permanent and total disability award. Pursuant to ORS 656.295, SAIF requested Board review alleging that claimant had not proven himself to be permanently totally disabled. After de novo review, the Board by order dated December 19, 1980, again revoked claimant's permanent total disability award, modified the referee determination and awarded claimant compensation equal to 240 degrees for 75 percent unscheduled disability in lieu of prior awards. It is this order from which claimant appealed.

The threshold issue to be resolved is: In a proceeding to diminish or terminate a prior disability compensation award, does the claimant have the burden of proof to establish that his or her disability is continuing, or does the employer or insurer bear the burden to establish a change in circumstances sufficient to justify award reduction? Claimant contends that the burden should have been on SAIF in this case and that the Board had erroneously placed the burden upon him.

The record is unclear on the issue. SAIF was the initiator of this proceeding to reduce claimant's permanent total disability award; pursuant to ORS 656.206(5) it reexamined claimant's file, forwarded its results to the Workers' Compensation Department, and requested a reevaluation and reduction of claimant's award.[1] The July 31, 1979, Board order reducing claimant's award is ambiguous regarding the burden of proof issue, concluding only that "claimant can no longer be considered permanently and totally disabled * * *." After the hearing requested by claimant, the April 15, 1980, opinion and order issued by the referee indicates only that he agreed with claimant on the merits and found it "convincing that claimant is permanently totally disabled, and has been since June 1, 1970."

In seeking Board review of the referee determination in claimant's favor, SAIF contended that "claimant had not proven he is permanently and totally disabled." The Board agreed with SAIF both on the merits and on the burden of proof issue: "After making an independent review of the record in this case, we find the claimant has lost a considerable portion of wage earning capacity, but he has not proven he is permanently and totally disabled." (Emphasis added.)

In his appeal to the Court of Appeals, claimant assigned this placement of the burden of proof as error, citing Bentley v. SAIF, 38 Or App 473, 590 P2d 746 (1979). In Bentley SAIF was appealing a Board refusal to reduce a permanent total disability award; it alleged that the claimant there had not proven that she remained so disabled. The Court of Appeals held:

> "The worker seeking a permanent total disability award has the burden of proving that status in the first instance. ORS 656.206(3). The Act says nothing respecting the burden of proof for a downward adjustment of the award. We think if either the employer or insurer seeks a reduction in the award based upon an improvement of the worker's earning capacity it must establish the necessary change. It is not sufficient to allege a change in conditions and thereby shift the burden of proof to the claimant to establish a lack of change." 38 Or App at 478.

In its brief before the Court of Appeals, SAIF acknowledged the Bentley rule but argued that the evidence in the record was sufficient to uphold the Board decision on the merits; that is, SAIF contended that, even if it had the burden of proof, it had carried it. The Court of Appeals, in affirming without opinion or any citation, left the parties and this court without an inkling as to the rationale for its decision -- did it conclude that the Board did not err in placing the burden of proof upon the claimant (thereby implicitly overruling or distinguishing Bentley), or did it agree

with SAIF's contention and decide that, based upon its own de novo review of the record, SAIF had carried its burden of proof?[2]

In his petition for review here, the claimant reiterates his arguments below, but SAIF has changed its tack. Contrary to its earlier acquiescence in the Bentley rule, SAIF now contends that the Board was correct in placing the burden of proof upon the claimant. We accepted review in part to clarify this procedural problem.

It is quite clear that a disability claimant seeking, in the first instance, permanent total disability status has the burden of proving that he is so disabled, that he is willing to seek regular and gainful employment, and that he has made reasonable efforts to obtain such employment. ORS 656.206(3); OAR 436-65-700(4). As the Bentley quote above notes, however, there is no express statutory provision dealing with burden of proof in award adjustment proceedings. Although the Board has the authority to adopt procedural rules to govern its consideration of claims (ORS 656.704(1); OAR 436-83-010), it has adopted no rules on the subject. Bentley, moreover, is the only Oregon case on point.

Thus, the resolution of this issue will turn upon traditional notions of burden of proof. The general rule is that the burden of proof is upon the proponent of a fact or position, the party who would be unsuccessful if no evidence were introduced on either side. See, Oregon Evidence Code Rules 305-307 (replacing ORS 41.210); ORS 183.450(2).[3]

Where modification or termination of an award is sought upon the ground that there has been a significant change in claimant's condition since the grant of the original award, it is generally held that the burden to allege and prove the requisite change should be upon the party requesting the modification. 3 Larson, Workmen's

Compensation Law 15-523, § 81.33 (1976); note, Burden of Proof in Proceedings to Modify Workmen's Compensation Agreements, 75 Dickenson L. Rev. 352 (1971). Where a party to a disability compensation award seeks to have the award modified or terminated, it is generally necessary to establish a change of circumstances sufficient to warrant the relief sought. See Gettman v. SAIF, 289 Or 609, 614, 616 P2d 473 (1980); Bentley v. SAIF, supra, 38 Or App at 478; 3 Larson, supra at §§ 81.20-81.33. Thus, where the insurer or employer seeks to reduce or terminate a claimant's disability compensation award, it is incumbent upon it to establish sufficient change of circumstances. Bentley v. SAIF, supra. Conversely, where the claimant seeks to have his or her award increased, the claimant has the burden of proof. See Hisey v. State Indus. Acc. Commn., 163 Or 696, 700, 99 P2d 475 (1940); Fisher v. Consolidated Freightways, Inc., 12 Or App 417, 507 P2d 53 (1973).

SAIF argues, for the first time before this court, that because of the procedure set out in the statutes for Board reevaluation of awards, the rule should be different. SAIF's argument is as follows:[4] ORS 656.206(5) requires employers or insurers to periodically reexamine permanent total disability cases and to forward the results of such reexamination to the department. The Evaluation Division then reevaluates the claim to see if an award modification is justified. If the division determines that the award should be changed, the recommendation is sent on to the Board. If the Board concurs, it will issue an order modifying the award. The aggrieved party may then demand a hearing on the modification; in the absence of a timely hearing request, however, the order becomes final. If the award is reduced or terminated, the

claimant has the right to demand a hearing before a referee and seek reinstatement of the original award. SAIF argues that since the claimant at such a hearing is seeking to overturn a Board order, the burden of proof should be upon him or her to establish that the extent of disability is greater than the order recognizes.

This argument misconstrues the nature of the procedural process. The claimant in the post-modification hearing is not in the same posture as an initial claimant -- such a claimant has had his or her prior final award unilaterally modified by the Board and is challenging the propriety of that action. The post-modification hearing is not strictly an "appeal" from the modification order, but rather a substitution for a pre-modification hearing. The Board's action in unilaterally modifying a claimant's award without a prior hearing does not serve to ipso facto shift the burden from the insurer/employer (to establish sufficient change in claimant's condition) to the claimant (to establish that his or her condition is worse than the modification order recognizes). Where the Board unilaterally modifies a prior award and the aggrieved party demands a hearing, the cause is heard de novo before the referee and the issue to be decided is whether there has been a sufficient change in claimant's condition to justify the modification. Thus in the award adjustment proceeding the burden of proof is upon the party alleging change in condition and not necessarily upon the party who demanded the hearing. In the case at bar, it is evident that the Board placed the burden of proof upon claimant despite the fact that SAIF was the party alleging a change in circumstances and seeking a modification of the award. We hold this to have been error.

Our decision that the Board had erroneously placed the burden

of proof upon claimant does not resolve this case. The Court of Appeals decision affirming the Board's action may have been based upon its de novo review of the evidence and a finding for SAIF on the facts. Thus, the second issue to be resolved is whether there was sufficient evidence to justify the diminution of claimant's award.[5]

Claimant contends that the Board based its determination that he was no longer permanently totally disabled on earnings he had made through real estate investments and that such "passive" income should be deemed irrelevant to a disability determination. It is his position that a mere finding that he is capable of earning money is not sufficient in and of itself to justify revocation of his permanent total disability status; he argues that such an action can be based "only upon a specific finding that the claimant presently is able to perform a gainful and suitable occupation." See Gettman v. SAIF, supra, 289 Or at 614; ORS 656.206(1)(a). SAIF contends that the evidence in the record and the findings below are sufficient to justify the Board's action.

The evidence in the record is largely undisputed and shows that, despite his disabilities, claimant has been able over the past several years to earn a considerable amount of money. Soon after completing his coursework in real estate sales at the community college and obtaining a real estate agent's license in 1972, claimant invested in a large tract of land for subdivision. To finance his investment he borrowed $70,000 from an acquaintance, cashed in $14,000 in stock benefits obtained through his former employer, and withdrew $8,000 from his savings. In addition to the return on his investment in the tract, claimant was to receive a

portion of the broker's fee on each lot sold. Although claimant has been "hired" by a real estate agency as a result of this investment, he receives neither a salary from the firm nor any portion of its income other than the commissions from sales within the subdivision. Besides his subdivision investment, claimant has also purchased several mobile home lots and rental homes, which he manages and from which he receives rental income.

There is evidence in the record to suggest that claimant has been relatively active in the subdivision's development. He testified before the referee that he decided which prospective builders could build and where and that he showed homes, wrote up earnest money agreements, advised on financing, and otherwise dealt with the builders. In addition, there is evidence that claimant advised his investment partner in other financial dealings. As a result of sales within the subdivision between the years 1973 and 1979,[6] claimant reported earnings ranging from $9,000 in 1974 to $55,000 in 1978.[7] This is not to say, however, that claimant is working regularly; the record indicates that because of his mental, physical, and psychological problems his work schedule has been inconsistent and variable.

The referee, after hearing the testimony and reviewing the evidence, concluded:

> " * * * It is undeniable that claimant, especially in 1978, enjoyed a rather high income. Income is not the criteria [sic] in determining unscheduled disability. Earning capacity is the measure. The evidence is convincing that claimant has not been able to earn anything since early 1979 and that his income is really not earnings. It is the result of investments claimant made when he found he no longer could work at Standard Oil. * * * But even if [his subdivision sales] had not come to a halt it is doubtful that claimant, in his present state of recovery, is capable of making a living selling real estate or in any other capacity."

On review the Board concluded:

> "After de novo review, we do not find that claimant is permanently and totally disabled. The evidence establishes the claimant is capable of doing many things and is very active. Also the evidence establishes the claimant, through investment and real estate transactions, has been able to earn money. His ability to do so can be considered in determining his loss of wage earning capacity. After making an independent review of the record in this case, we find the claimant has lost a considerable portion of wage earning capacity, but he has not proven he is permanently and totally disabled."

As the referee correctly noted, income is not the criterion for determining whether a claimant is permanently totally disabled. A severely injured and incapacitated worker, to take an extreme example, who is able to "earn" a living through income received from bank deposit interest, trust distributions, or stock dividends is nonetheless disabled, despite the fact that this income may exceed to a considerable extent the wage he earned at his former job prior to his disabling injury. In Gettman v. SAIF, supra, we set out the relevant test for adjusting permanent total disability awards:

> "* * *[A] permanent total disability award is based upon existing occupational abilities. That award can be adjusted if the claimant is no longer permanently incapacitated from regularly performing work at a gainful and suitable occupation." 289 Or at 615.

See also ORS 656.206(1)(a) which defines "permanent total disability" as:

> " * * * the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the workers from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which the worker is able to perform after rehabilitation."

The determination of permanent total disability status does not turn upon whether the claimant has money-earning capacity, but

rather upon whether the claimant is currently employable or able to sell his services on a regular basis in a hypothetically normal labor market. See Bentley v. SAIF, supra, 38 Or App at 478; Wilson v. Weyerhaeuser Co., 30 Or App 403, 408-409, 567 P2d 567 (1977); OAR 436-65-700(5); 2 Larson supra, § 57.21 at 10-101 to 10-102. In discussing the "odd-lot"doctrine,[8] Larson notes:

> "'Total disability' in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial. The task is to phrase a rule delimiting the amount and character of work a man can be able to do without forfeiting his totally disabled status. * * *
>
> " * * *
>
> "The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps." Id. at 57.51, 10-164.21 to 10-164.49." (Footnotes omitted).

The fact that a claimant may have an income, even a substantial one, or that he or she is able to perform a variety of activities does not mean ipso facto that he or she is no longer permanently totally disabled.[9] As we expressly held in Gettman,

> "* * * whether this claimant is permanently totally disabled must be decided upon conditions existing at the time of decision, and his award of compensation for permanent total disability can be reduced only upon a specific finding that the claimant presently is able to perform a gainful and suitable occupation." 289 Or at 614 (emphasis added.)

There is no such specific finding in this case. In rejecting the referee's finding that claimant remained permanently and totally disabled, the Board merely concluded that claimant "is very active" and "has been able to earn money." There was no finding that

claimant is currently employable in any recognized labor market or that he is presently able to regularly perform any gainful and suitable occupation. A severely disabled worker who through luck or pluck is able to generate an income cannot be denied permanent total disability status simply because he or she has demonstrated an ability to "earn money." The claimant's ability to work, not his or her financial situation is the criterion for disability compensation.

This is not to say, of course, that investment or self-generated income is irrelevant to a disability determination or that employability only in the manual labor, 9-to-5 job market may be considered. An injured worker capable of earning a significant income through mental labor alone on a regular basis may be found to be non-permanently totally disabled despite severe physical handicaps. Claimant suggests a "passive" vs. "active" dichotomy with regard to income, making the latter but not the former relevant to a disability determination. Although the suggestion is not without appeal, we need only to reiterate our Gettman holding that a claimant's permanent total disability award can only be revoked or diminished upon a specific and express finding that he or she is presently able to regularly perform a gainful and suitable occupation and further note that a claimant's ability to generate income is only relevant insofar as it tends to establish his or her employability at some such occupation. A claimant's demonstrated ability to earn money is, in and of itself, insufficient.

Since we are unable to ascertain on this record whether the Board or the Court of Appeals applied the correct rule of law and whether they would have reached the same result, in their fact-finding function, under the analysis set out above, the matter must

be remanded to the Board to reconsider the evidence in light of this opinion. Inkley v. Forest Fiber Products Co., 288 Or 337, 345-346, 605 P2d 1175 (1980).

Reversed and remanded to the Court of Appeals with instructions to remand to the Workers' Compensation Board.

FOOTNOTES

1. ORS 656.206(5) provides:

> "Each insurer shall reexamine periodically each permanent total disability claim for which the insurer has current payment responsibility to determine whether the worker is currently permanently incapacitated from regularly performing work at a gainful and suitable occupation. Reexamination shall be conducted every two years or at such other more frequent interval as the director may describe. Reexamination shall include such medical examinations and reports as the insurer considers necessary or the director may require. The insurer shall forward to the director the results of each reexamination."

See also ORS 656.325(3), which provides:

> "A worker who has received an award for unscheduled permanent total or unscheduled partial disability should be encouraged to make a reasonable effort to reduce his disability; and his award shall be subject to periodic examination and adjustment in conformity with ORS 656.268."

For the administrative rules governing reevaluation of awards under these provisions, see OAR 436-65-100 to -225.

2. The concerns we expressed in Gettman v. SAIF, 289 Or 609, 612-613, 615-616 (Linde, J., specially concurring), 616 P2d 473 (1980), Rogers v. SAIF, 289 Or 633, 616 P2d 485 (1980), and Grable v. Weyerhaeuser Co., 291 Or 387, 391 (n 4), 631 P2d 781 (1981), are apropos here.

3. Where the Workers' Compensation Act does not provide for a procedure for administrative review of actions or orders of the department or SAIF, the relevant provisions of the Oregon Administrative Procedure Act (ORS 183.310 to 183.500) are applicable. ORS 656.704(1); OAR 436-83-010. ORS 183.450(2) provides that "[t]he burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position."

To the extent that there is ambiguity regarding the burden of proof placement, not only is there a well-established general rule of liberal constuction vis-a-vis the Workers' Compensation Act in favor of injured workers and compensation (see Fossum v. SAIF, 289 Or 777, 782-783, 619 P2d 233 (1980)), but also the department's administrative procedural rules are expressly required to be liberally construed in their favor. OAR 436-83-020.

4. See generally ORS 656.206(5), 656.268 - .298, 656.-.319 - .325; OAR 436-65-100 to - 225, 436-83-810; 38 Op AG 2069, 2074-2077 (1978).

5. The Court of Appeals reviews Board orders de novo on the facts. ORS 656.298. This court, on the other hand, reviews only for errors of law; we do not review the evidence independently, but will rely upon the findings of fact below. Sahnow v. Fireman's Fund Ins. Co., 260 Or 564, 491 P2d 997 (1971). Inasmuch as the Court of Appeals did not issue any written findings of fact, we must use those of the Board and referee, and the undisputed facts appearing in the record. In essence, we must determine whether these findings and facts would have been sufficient to allow the Court of Appeals, on its de novo review, to properly affirm the Board's order.

6. Due to sewer permit problems, sales within the subdivision ceased in 1979 and have not resumed. There is no evidence that claimant has received any income since 1979 from his real estate activities or otherwise.

7. Claimant's income for those years is as follows: $11,019 in 1973; $9,242 in 1974; 1975's figures are missing; $22,228 in 1976; $23,499 in 1977; $55,366 in 1978; and $25,197 in 1979. Claimant's income tax statements are not in the record and there is no indication whether these figures are gross or net income, or whether they include income from other sources, such as his wife and family.

8. See generally Wilson v. Weyerhaeuser Co., 30 Or App 403, 567 P2d 567 (1977); Mansfield v. Caplener Bros., 10 Or App 545, 500 P2d 1221 (1972); Skelton, Workmen's Compensation in Oregon: Ten Years After, 12 Will. L. J. 1, 30-34 (1975).

9. See Hill v. U.S. Plywood Champion Co., 12 Or App 1, 503 P2d 728 (1972), rev den (1973) (claimant permanently totally disabled even though has some income from fishing and cattle raising). See also Hoffmeister v. State Indus. Acc. Comm., 176 Or 216, 222-223, 156 P2d 834 (1945), where this court, under a somewhat different statutory scheme, held that a claimant's disability award could only be modified where there was found to be a significant change in his or her physical condition and that economic changes were irrelevant.

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