MARY LOU CLAYPOOL, Claimant
Richard Nesting, Claimant's Attorney
Rankin, McMurry et al, Defense Attorneys

WCB 81-04210
July 6, 1982
Order on Review

Reviewed by the Board en banc.

The self-insured employer seeks Board review of Referee Gemmell's order which directed it to comply with a disputed claim settlement previously approved by another Referee and assessed a penalty for the employer's failure to comply earlier without need for claimant to initiate this enforcement proceeding. The employer contends: (1) Referee Gemmell erred in concluding that approval of a disputed claim settlement pursuant to ORS 656.289(4) is subject to the provisions of ORS 656.289(3); (2) a disputed claim settlement is subject to being set aside on such grounds as mutual mistake or breach of the agreement by the claimant; (3) there was a mutual mistake or a breach of the agreement by the claimant in this case justifying rescission of the disputed claim settlement; and (4) penalties and attorney fees are not appropriate.

We agree with the facts as recited by the Referee, which in relevant part are as follows:

> "Claimant filed claim for alleged industrial injuries/occupational disease allegedly sustained on November 30, 1979 and September 22, 1980. On December 15, 1980, the defendant denied the claims. Claimant timely requested a hearing. Before hearing, the parties entered into settlement negotiations. A written Disputed Claim Stipulation was prepared by claimant's counsel, signed by him, signed by the claimant and signed by counsel for the defendant. The Disputed Claim Stipulation signed by all parties or their representatives was then presented to Referee Williams for approval. Referee Williams signed the Stipulation on April 2, 1981. The agreement so approved provided:
>
> 'IT IS HEREBY STIPULATED AND AGREED that the matter be compromised and settled subject to the approval of the Workers' Compensation Board by Washington County School District No. 48 and Fred S. James Company of Oregon paying, and the Claimant, Mary Lou Claypool, accepting the sum of $8,500.00, and in consideration of this payment, the Claimant's claim shall remain in its denied status, and the Claimant shall take no Workers' Compensation benefits on account of said claim.

'IT IS FURTHER AGREED that said sum includes all benefits, claims, demands, liabilities, suits, actions, costs, or any other obligations in any manner related to, arising our of or claimed to have arisen out of or be connected with the alleged claim mentioned above.

'IT IS FURTHER AGREED that Claimant shall hold Washington County School District No. 48 and Fred S. James & Company of Oregon harmless from any and all medical expenses incurred as a result of the above-mentioned claims, in reference to the carrier's denial letter, and thereafter as a result of the Claimant's condition.

'IT IS FURTHER AGREED that Richard O. Nesting, Attorney for the Claimant, shall be awarded a reasonable attorney fee of 25% of the first $8,000.00, which shall not exceed a reasonable attorney fee in the sum of $2,000.00. The attorney fee shall be paid out of the above-referenced settlement sum and not in addition thereto.

'IT IS FURTHER AGREED that Claimant and her attorney be awarded the above sums in a lump sum payment, and that the Claimant's Request for Hearing is hereby dismissed.'

"Subsequent to the issuance of the Order approving the Stipulation, counsel for defendant wrote to counsel for claimant stating that he was confirming that claimant had announced her intention not to return to employment with the defendant self-insured. When advised that claimant had no such intention, defendant failed and refused to comply with the Stipulation, taking the position that the Stipulation should be set aside because of mutual mistake. Defendant contends that a part of the negotiations and ultimate agreement was a promise by claimant that she would terminate her employment. Claimant contends that no such condition was a part of her negotiations or agreement."

I

The Referee in this case concluded that a Referee's approval of a disputed claim settlement pursuant to ORS 656.289(4) contemplated giving the parties notice of appeal rights pursuant to ORS 656.289(3). That statute provides:

"(1) Upon the conclusion of any hearing or prior thereto with concurrence of the parties, the referee shall promptly and not later than 30 days after the hearing determine the matter and make an order in accordance with his determination.

"(2) A copy of the order shall be sent forthwith by mail to the director and to all parties in interest.

"(3) The order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the board under ORS 656.295. When one party requests a review by the board, the other party or parties shall have the remainder of the 30-day period and in no case less than 10 days in which to request board review in the same manner. The 10-day requirement may carry the period of time allowed for board reviews beyond the 30th day. The order shall contain a statement explaining the rights of the parties under this subsection and ORS 656.295.

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

We conclude that subsections (1) to (3) apply to orders issued after hearings or otherwise disposing of contested issues. Subsection (4) is unique and as a matter of substance stands alone, despite the happenstance of its codification in ORS 656.289, because a disputed claim settlement is not approved following a hearing and is not contested; indeed, both parties want the same thing, agency approval of their agreement.

The action of a Referee or the Board in approving a disputed claim settlement is usually expressed in the form of an "order." Nothing in the statute requires an order of approval. Expression of approval in the form of an order is largely customary. That custom is a matter of efficiency when a pending request for hearing or request for Board review is dismissed upon approval of a disputed claim settlement. The efficiency is that a single signature or group of signatures on a single document simultaneously results in approval of the disputed claim settlement and dismissal of the pending hearing/review request. But as a matter of technical administrative law, the only order is the order of dismissal; the simultaneous approval of the disputed claim settlement does not become an order in general administrative law or specifically under ORS ch 656 merely because it is embodied for convenience in the same document.

Also, disputed claim settlements are tendered for approval when none of the parties involved has any request for relief pending before this agency. Such situations can be identified when the last digit of the seven-digit WCB number is the letter "S", e.g., WCB Case No. 82-9999S indicates that a stipulation or disputed claim settlement was submitted for approval without there being any pending hearing request involving the parties or claim in question. Notwithstanding what may have become conventional terminology, the approval of a disputed claim settlement in such a context is not an administrative order subject to ORS 656.289(3).

In summary, an order of dismissal -- entered because of approval of a disputed claim settlement or for any other reason -- is final if not appealed within 30 days, but the action of approving a disputed claim settlement does not acquire the same finality.

II

The Referee in this case reasoned that, once 30 days had passed after the approval of a disputed claim settlement, the only ground for setting aside such a settlement would be fraud. We disagree.

We note and emphasize at the outset of our analysis that, regardless of the theoretical grounds upon which a disputed claim settlement might be set aside, for the reasons stated in James Leppe, 31 Van Natta 130 (1981), we regard vacating prior settlements to be an extraordinary remedy to be granted sparingly only in the most extreme situations.

Conceptually, disputed claim settlements can be viewed in two ways. They might just be in the nature of private contractual agreements subject to a condition subsequent, i.e., ratification by a third party -- a Referee or the Board. Under this view all of the standard contract defenses -- misrepresentation, duress, mistake, etc. -- would be available lines of attack on a disputed claim settlement. Second, an approved disputed claim settlement could be viewed in the nature of an agency order. For reasons stated above, we think this second view is less accurate, but find the alternative possible conceptualizations not especially significant. Even if an approved disputed claim settlement were regarded as an agency order, the grounds for setting it aside are substantially the same for purposes of this case as the standard contract defenses. Cf. Rule 71 B of the Oregon Rules of Civil Procedure which provides that the grounds for setting aside a judgment include mistake, inadvertance, surprise, excusable neglect, fraud, misrepresentation or other misconduct of an adverse party.

We conclude that the employer's attacks on the disputed claim settlement in this proceeding, couched in contract language of "mutual mistake of fact" and "breach of the agreement", are cognizable regardless of which conceptual view of an approved disputed claim settlement is adopted.

III

Turning to the employer's specific allegations, the employer contends, first, that there was a mutual mistake of fact arising from a misunderstanding over whether claimant was to cease working for it as part of the agreed disposition of her workers compensation claim. Witnesses from the employer School District testified that the District regularly agrees to give workers compensation claimants "generous" settlement awards in exchange for resignation from employment with the District. Claimant's attorney offered evidence to the effect that claimant had agreed she would not seek reemployment at the specific high school to which she was last assigned in connection with the settlement of her workers compensation claim but that there was no agreement about resigning her position with the School District.

We are concerned that the standard operating procedure described by the employer at least violates the spirit of ORS 659.410 which makes it an unlawful employment practice to discriminate against an employee for filing a workers compensation claim. Also, one would think that something of such importance to the employer as claimant's resignation from employment would have been part of the parties' written agreement. The employer was represented by counsel and there is no suggestion that the parties meant to include the termination of claimant's employment in their written agreement but due to clerical error or other inadvertence failed to do so. Considering the extraordinary nature of the remedy sought, Leppe, supra, we are not persuaded the employer has established a mutual mistake justifying setting aside the disputed claim settlement.

The employer next alleges that claimant materially breached the following provision of the disputed claim settlement:

> "IT IS FURTHER AGREED that said sum includes all benefits, claims, demands, liabilities, suits, actions, costs, or any other obligations in any manner related to, arising out of or claimed to have arisen out of or be connected with the alleged claim mentioned above."

The alleged breach is that claimant filed a grievance with the employer concerning sick pay; that grievance encompassed at least some of the matters resolved in the workers compensation disputed claim settlement; therefore, claimant did not accept the disputed claim settlement amount in final settlement of all liabilities arising out of her workers compensation claim.

The flaw is that neither claimant nor the employer had signed the disputed claim settlement, although it was under active negotiation, at the time claimant filed the sick-pay grievance, nor had the disputed claim settlement been approved by a Referee. We fail to see how claimant could have breached an agreement before there was any agreement. Also, even after executed by the parties, the agreement was without legal effect until approved by a Referee or the Board. Phyllis J. Moore, 33 Van Natta 703 (1981); Minnie K. Carter, 33 Van Natta 574 (1981). The filing of the sick-pay grievance was not a breach of the disputed claim

settlement because there was no binding agreement between the parties when it was filed; whether continuing to pursue that grievance after the disputed claim settlement was executed and approved by a Referee would be a breach is not developed in the record or argued by the parties.

IV

The Referee imposed a 15% penalty and awarded a $1000 employer-paid attorney fee because of the employer's noncompliance with the disputed claim settlement. We conclude that the attorney's fee and the penalty require separate analysis.

ORS 656.382(1) provides:

> "If an insurer or self-insured employer refuses to pay compensation due under an order of a referee, board or court, or otherwise unreasonably resists the payment of compensation, the employer or insurer shall pay to the claimant or the attorney of the claimant a reasonable attorney's fee . . ."

We first conclude that this statute applies to the failure to pay amounts due under an approved disputed claim settlement, regardless of whether such amounts are technically "compensation" or such amounts are technically due under an "order." Any other interpretation would leave a claimant who was not paid amounts due under an approved disputed claim settlement with no effective remedy.

The question then becomes: Does entitlement to an employer/insurer-paid attorney fee depend only on a wrongful refusal to pay compensation due, or instead must the refusal to pay be both wrong and unreasonable. Either interpretation of ORS 656.382(1) is possible; the ambiguity is created by the phrase "otherwise unreasonably resists," suggesting the possibility the concept of unreasonableness modifies the earlier reference to refusal to pay compensation due under an order.

Finding the statute ambiguous, we feel we can resolve the ambiguity on policy grounds. Employer/insurer-paid fees are intended in large part to promote the availability of administrative and judicial remedies. If entitlement to employer/insurer paid fees depended on refusal to comply with an approved disputed claim settlement or agency order and the refusal had to be both wrong and unreasonable before attorney fees could be awarded, the additional burden of proving unreasonableness, see Mavis v. SAIF, 45 Or App 1059, 1062-63 (1980), could frustrate the availability of remedies. We conclude that an award of attorney fees under ORS 656.382(1) for noncompliance with an order or agreement to pay compensation depends only on establishing that the noncompliance was wrong.

The Referee's award of a penalty, on the other hand, has to be assessed on different statutory and policy grounds. The primary policy foundation for an award of a penalty is to deter employers and insurers from violating their duties under the statutes and administrative rules. Merely erroneous nonpayment of compensation does not automatically trigger entitlement to a penalty; under ORS 656.262(9) and ORS 656.382(1) the standard is unreasonable refusal, resistance or delay in paying compensation. Nothing in the Referee's order or the claimant's brief identifies what the employer did or did not do that was unreasonable. The employer tendered the disputed settlement amount within a week after the settlement was approved. At that time it was discovered that the parties were proceeding with different understandings of whether claimant would or would not terminate her employment. When the parties were unable to resolve their disagreement, claimant requested a hearing. The employer apparently cooperated in having the hearing scheduled on an expedited basis (the hearing was requested May 4, 1981 and held July 8, 1981). At that hearing and by virtue of this order the employer's arguments to set aside the disputed claim settlement have not prevailed, but those arguments are not frivolous or otherwise unreasonable. We conclude that the Referee's award of a penalty was inappropriate.

ORDER

The Referee's order dated October 22, 1981 is affirmed in part and reversed in part. That portion imposing a penalty is reversed. The balance of the Referee's order is affirmed.

CLYDE M. HARGENS, Claimant
Hayner, Waring et al, Claimant's Attorneys
Paul Roess, Defense Attorney

WCB 80-09628
July 6, 1982
Order on Reconsideration

The SAIF Corporation has moved for reconsideration of the Board's Order on Review dated June 25, 1982.

All of the issues and arguments in SAIF's motion, including the appropriate amount of carrier-paid attorney fees to award under the circumstances of this case, were considered by the Board at the time of Board review that led to our June 25, 1982 order.

ORDER

SAIF Corporation's motion for reconsideration is denied.

LAVONA HATMAKER, Claimant
Larry Bruun, Claimant's Attorney
Keith Skelton, Defense Attorney

WCB 80-01194
July 6, 1982
Order on Review

Reviewed by the Board en banc.

The employer seeks Board review of Referee Nichols' order which found the Determination Order of January 15, 1980 was premature and set it aside on the ground that claimant was not medically stationary at that time and ordered that compensation for temporary total disability be paid to claimant from August 6, 1979 to July 13, 1980.

Claimant injured her back on December 12, 1977 while pulling a pressboard from a roller. Between the date of injury and August of 1979, claimant was treated or examined by Drs. Emenhiser, Reid, Fleshman, Cronk, Martens, Halferty and Anderson -- a truly amazing amount of medical attention, considering that over this 20 month period: (1) all doctors described the injury as a mild strain or sprain; (2) initially the doctors involved estimated claimant would be able to return to work within a few days or in a month or less; (3) no doctor could find any evidence of any orthopaedic or neurological impairment; (4) several of the doctors found that claimant had full range of motion in her back, no muscle spasms and no tenderness; and (5) all doctors who expressed an opinion expressed the opinion that claimant was able to work.

In August of 1979, twenty months after her injury, claimant began treatment with Dr. Clibborn, a chiropractor. He provided manipulation treatment three times a week for about the next eight months. Dr. Clibborn opines that claimant was not medically stationary throughout the course of his treatment.

Two months after beginning chiropractic treatment claimant was examined by Dr. Anderson, an orthopaedic specialist. He found no impairment due to claimant's 1977 industrial injury. He believed that claimant, who is five feet nine inches tall and weighed 234 pounds in 1978, needed to lose weight and do exercises to improve her weak abdominal musculature. Dr. Anderson concluded that the chiropractic treatment then being rendered was of no benefit.

The challenged Determination Order was issued on the basis of Dr. Anderson's report. It awarded temporary total disability from August 6, 1979, when claimant began treatment with Dr. Clibborn, to October 9, 1979, when claimant was examined by Dr. Anderson. The issue is whether claimant is entitled to additional temporary total disability until July 13, 1980 when Dr. Clibborn concluded that she was medically stationary.

In so ordering, the Referee found Dr. Clibborn's opinion that claimant was not medically stationary until July of 1980 more persuasive on the ground that he was claimant's treating physician. We disagree. As a legal matter, it is not essential that the treating physician declare a claimant medically stationary in order for claim closure to be appropriate and warranted. ORS 656.268; OAR 436-65-010. As a practical matter, however, we do tend to defer to the opinion of a treating physician about whether a claimant is stationary.

But we find such deference not here sufficient to tip the scale in claimant's favor for three reasons:

(1) A treating physician is in the best position to express an opinion when he or she treats the claimant constantly from the injury throughout the recovery period. Dr. Clibborn does not here have that advantage; he did not become involved in claimant's treatment until almost two years after the 1977 injury and admitted he did not see any of the prior medical reports except for Dr. Anderson's.

(2) When there is a conflict in medical opinion, we look in part to the relative expertise of the experts. The preponderance of the expertise has to go to the seven doctors, including three orthopaedic specialists, who examined or treated claimant in addition to Dr. Clibborn, none of whom agree with any of Dr. Clibborn's conclusions.

(3) The persuasiveness of any expert's opinion depends largely on the reasons given in support of that opinion. We find weaknesses in Dr. Clibborn's analysis. He admitted that upon examination claimant had normal flexion and extension of the lumbar spine. Yet he believed claimant had symptoms of a ruptured or pressured disc. Dr. Clibborn was unable to explain why none of the medical doctors who had examined or treated claimant could find symptoms of disc involvement, nor able to explain how chiropractic manipulation three times a week would aid a ruptured disc.

For all of these reasons, we are not persuaded that claimant was other than medically stationary on October 9, 1979 as stated in the challenged Determination Order dated January 15, 1980. It follows that claim closure at that time was not premature.

Claimant's request for hearing also raised an issue about the extent of disability awarded by the January 15, 1980 Determination Order. The Referee did not reach that issue because of her conclusion that the Determination Order was premature. Since we disagree with that conclusion, this case must be remanded for consideration of the issue of extent of permanent disability.

ORDER

The Referee's orders dated November 6, 1980 and December 22, 1980 are reversed and this case is remanded to the Referee for further proceedings consistent with this order.

BOARD MEMBER LEWIS DISSENTING:

I respectfully dissent. I would affirm and adopt the Referee's well written and well reasoned opinion and award an attorney's fee of $550 on Board review.

KENNETH L. HOLSTON, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04016
July 6, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant seeks Board review of Referee Danner's order that upheld the SAIF Corporation's denial of reimbursement for travel expenses from Eugene to Medford for claimant to be examined/ treated by Dr. Campagna.

The Referee's decision was reasonable, rational and consistent with prior Board decisions. Gerald E. Oar, 31 Van Natta 170 (1981); Earl Bartrum, 17 Van Natta 242 (1976). However, subsequent Court of Appeals decisions have established a different rule.

We adopt the Referee's statement of the facts:

> "[Claimant] was treated by or examined by no less than four neurosurgeons, four orthopedic surgeons, two physicians whose specialities are not indicated, and one chiropractic physician [in the Eugene-Springfield community where he lives]. * * * On the recommendation of his attorney, the claimant then chose still another neurosurgeon [Dr. Campagna], practicing in Medford, a distance of 160 miles from Eugene. * * * Claimant's right to choose [his treating doctor] does not necessarily indicate an automatic duty of travel expense payment. Eugene is a metropolitan area with a population in excess of 100,000. The Referee takes official notice that there are at least six neurosurgeons listed in the telephone book. It is unreasonable to assume that claimant was required to go to Medford to find a treating doctor."

In addition, at the hearing the parties stipulated that Dr. Campagna was claimant's treating physician. It is unclear whether the parties were using this term in the same sense as it is defined in the Department's rules, which provide that a claimant may have only one treating physician at a time, OAR 436-69-401(2), because there is some indication in the record that claimant continued treatment with Dr. Nagel in Eugene even after he began "treatment" with Dr. Campagna in Medford. But we decline to look behind the parties' stipulation.

Since the Referee's decision, the Court of Appeals has decided Pyle v. SAIF, 55 Or App 965 (1982), and Smith v. Chase Bag Co., 54 Or App 261 (1981). In both cases the claimants involved had begun treatment with a doctor in the community where they lived, then moved some distance away and continued treating with the same doctor. In both cases the court held the claimants entitled to reimbursement for the cost of travel to continue treating with the doctors they had begun treatment with before moving.

There are two possible interpretations of Pyle and Smith. First, the court may have been ruling, consistent with the specific facts before it, only that a worker who relocates should be paid transportation costs to continue treatment with his or her pre-relocation physician. This interpretation of Pyle and Smith was apparently adopted by the Workers Compensation Department in its rules. OAR 436-54-245(4) provides:

> "The worker may choose an attending physician within the state of Oregon. Reimbursement to the worker of transporation costs to visit the attending physician, however, may be limited to within a city, or metropolitan area, or the distance to the nearest city or metropolitan area, from where the worker resides and where a physician providing like services is available. A worker who relocates within the state of Oregon may continue treating with the attending physician and be reimbursed transportation costs accordingly. If an insurer or self-insured employer chooses to limit reimbursement to the nearest available city, or metropolitan area, a written explanation shall be provided the worker along with a list of physicians who provide the like services within an acceptable distance of the worker. The
>
> worker shall be made aware of the fact treatment may continue with any attending physician within the state of Oregon of the worker's choice, but the reimbursement of transportation costs will be limited as described."

In other than the relocated worker situation, the Department's rule makes reimbursement for travel expense subject to a test of reasonableness, the same test the Board had used in previous cases. Oar and Bartrum, supra.

The other possible interpretation of the decisions of the Court of Appeals in Pyle and Smith is that reasonableness is irrelevant; that an injured worker has an absolute right to select his or her treating doctor within the state, and thus an injured worker has an absolute right to be reimbursed for any and all travel within the state associated with receipt of compensable medical care. The earlier case, Smith, cited the Department's administrative rule then in effect, OAR 436-54-270(2)(a), regarding reimbursement for "reasonable" travel costs, 54 Or App at 265 n. 2, and concluded the claimant was "entitled to reimbursement for reasonable travel expenses for trips made to visit his treating doctor." 54 Or App 266 (emphasis added). The latter case, Pyle, seems to expand on Smith:

> "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 . . . precludes us from denying a claim for travel expenses within the state's borders." Pyle, supra, 55 Or App at 968.

While the meaning of the metamorphosis from Smith (reasonable travel costs) to Pyle ("no such requirement . . . in Smith") is certainly debatable, we interpret the above quoted passage from Pyle to adopt the rule that there is no reasonableness limitation on a claim for travel expenses despite the reasonableness limitation now stated in OAR 436-54-245(4). We, however, feel bound to follow our understanding of Pyle rather than the Department's administrative rule.

To graphically illustrate the meaning of Pyle for the benefit of persons charged with the often difficult responsibility of administering claims, a claimant who lived in the Portland area where the greatest quantity and probably quality of medical service is available could choose to travel to the southeast corner of this state to be treated by an inexperienced doctor or even faith healer, ORS 656.010. Or a claimant from Astoria could drive past all the medical care available in Portland on the way to a doctor's appointment in eastern Oregon. Or a claimant who liked the coast could choose to be initially treated by a doctor in a coastal community, and then change to a treating doctor in Bend during the ski season. If the medical treatment is itself compensable, then the cost of travel to the location of treatment is also compensable without exception. And reimburseable travel includes transportation, lodging and meals. OAR 436-54-270(2)(b). It matters not whether we agree with the analysis or conclusion of the Court of Appeals in Pyle; we are bound by that decision.

ORDER

The Referee's orders dated October 5, 1981 and December 14, 1981 are reversed. The SAIF Corporation's denial of claimant's claim for reimbursement for travel expenses from Eugene/Springfield to Medford for treatment by Dr. Campagna is set aside and that claim is remanded to SAIF to provide compensation in accordance with this order.

Claimant's attorney is awarded $750 for services rendered at hearing and on Board review in overturning SAIF's partial denial, payable by the SAIF Corporation.

WILLIAM R. MABE, Claimant
Malagon & Velure, Claimant's Attorneys
Wolf, Griffith et al, Defense Attorneys
David Horne, Defense Attorney

WCB 81-02524 & 80-06635
July 6, 1982
Order on Review

Reviewed by the Board en banc.

The employer, Roseburg Lumber Company, requests review of Referee Daron's order which remanded claimant's claim to it for medical expenses incurred for treatment of his low back condtion. Claimant has cross-requested review on the issues of penalties and attorney's fees.

Three claims were consolidated for a single hearing. WCB Case No. 80-06635 is a request for hearing on the refusal of Employers Insurance of Wausau, as insurer of Roseburg Lumber, to pay claimant's medical bills under ORS 656.245. WCB Case No. 81-02524 is a request for hearing on a denial of compensation issued by EBI Company, carrier for Douglas Security Company. The third case, WCB Case No. 80-10949 is a request for the Board to exercise its own motion jurisdiction and reopen the original 1973 injury claim against Wausau. The Board referred this request to the Hearings Division for hearing and a recommendation. This Order On Review encompasses the first two cases. The own motion issue is dealt with in a separate order, issued this same day. All three of these cases essentially address the same issue, i.e. who is responsible for claimant's most recent low back problems.

Claimant first injured his back while working for Roseburg Lumber on May 18, 1973. He underwent surgery in 1973 for excision of herniated nucleous pulposus at both the L3-4 and L4-5 intervertebral spaces. In 1976, claimant experienced an exacerbation of the original injury and underwent a laminectomy and decompression of the L5-S1 nerve roots on the left and L5 on the right and a lateral type spinal fusion from L4 to the sacrum. By June of 1978, claimant had been awarded a total of 50% unscheduled permanent partial disability for the back injury at Roseburg. Claimant went to work for Douglas Security as a security patrolman in November of 1978. He left Douglas Security in June of 1979 to work for Douglas County Corrrections Division as a corrections reserve officer. Douglas County was not joined as a party to any of the three cases.

Claimant experienced continued pain after the 1976 surgery, although it did not prevent him from working until May of 1980. While working for Douglas County, claimant's back pain began to increase, ultimately resulting in a lumbar laminectomy and disc excision at L3-4 on August 8, 1980. Claimant has not worked since this time although he was released to work by his doctor on March 26, 1981.

The Referee found that claimant's 1980 worsening resulted from and was an exacerbation of claimant's injury at Roseburg Lumber. We agree. Claimant's low back problems, including the current degeneration of the L3-4 disc, all cascade from the original 1973 injury at Roseburg.

Claimant experienced no accidents or injuries to his back at either of the two subsequent jobs, nor is there any evidence of off-the-job injuries. Claimant did not experience any increase in pain or loss of function while working for Douglas Security. Although claimant's symptoms increased while working for Douglas County, the work there was the lightest of the three jobs and the evidence indicates that claimant was not engaged in any strenuous activity at that job.

Claimant's treating physician, Dr. Wilson, stated in his letter of August 25, 1981:

> "It is a well recognized fact that people who have lumbar spinal fusions with normal activity, place additional stress on the joint above. In Mr. Mabe's incidence, at the L-3-4 level. This can result in acceleration of degenerative changes in the disc space and some subsequent nerve root compression. This can occur without the advent of injury, and multiple small traumas produced by every day activity, of course, can play a part in this as well."
>
> "I do not feel that I can medically separate causation factors between his spinal fusion and his activities since 1976."

There were no injurious exposures at claimant's jobs after leaving Roseburg. The mobile security patrolman position at Douglas Security did involve getting in and out of a car a number of times each night. However, claimant had no difficulty carrying out his duties and, as stated earlier, he experienced no increase in symptoms while working there. His last job, as a part-time correctional officer for Douglas County was essentially sedentary, involving no strenuous activity whatsoever. We find that claimant's worsened condition is the result of a natural deterioration of his spine proximately resulting from the 1973 injury at Roseburg and subsequent surgeries.

Claimant has asserted that Wausau should have used the ORS 656.307 procedure to settle the responsibility question. However, because this case involves an issue of Wausau's responsibility under the own motion authority of the Board, the ORS 656.307 procedure is inapplicable under current law.

ORDER

The Referee's Order in WCB Case NO. 81-02524 (invoving EBI and Douglas Security Co.) dated November 4, 1981 is affirmed.

The Referee's Order on WCB Case No. 80-06635 (involving Wausau and Roseburg Lumber Co.) dated November 4, 1981 is affirmed.

Claimant's attorney is awarded $300 as a reasonable attorney's fee for services rendered on Board review, to be paid by Employers Insurance Company of Wausau.

RICHARD PICK, Claimant
Pozzi, Wilson, et al, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-08204
July 6, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The carrier seeks Board review of Referee Peterson's order that vacated the Redetermination Order dated July 31, 1980 that had reduced claimant's prior award for permanent total disability to 40% unscheduled disability, reinstated claimant's permanent total disability award and assessed penalties and attorney fees because of the carrier's unilateral setoff of permanent total benefits granted by the Redetermination Order. The issues are whether claimant remains permanently and totally disabled, the propriety of the setoff taken by the carrier and the propriety of the penalties and attorney fees awarded by the Referee.

On April 12, 1977 a Referee in an earlier proceeding found claimant was permanently and totally disabled because of the consequences of his August 18, 1975 compensable back injury. On December 8, 1977 the Board found claimant was not permanently and totally disabled and awarded 80% partial disability. Richard C. Pick, 23 Van Natta 237 (1977). On July 5, 1978 the Court of Appeals reversed the Board and awarded claimant permanent total disability. Pick vs. Broadway Cab Co., 35 Or App 219 (1978). The present proceeding arises from the carrier's request pursuant to ORS 656.206(5) for re-examination of claimant's total disability award.

I.

In this kind of proceeding, Bentley vs. SAIF, 28 Or App 473 (1979), permits termination of a prior total disability award only when there has been a material change in the worker's physical or vocational situation. The carrier argues the Bentley burden of proof has no foundation in the statutes and is therefore judicial legislation. Since the carrier's brief so arguing was filed, the Supreme Court in Harris vs. SAIF, 292 Or 683 (1982), seems to have ratified the high burden of proof contemplated by Bentley. The carrier may feel it is receiving a one-two punch from the appellate courts: First, they rely on the possibility of future modification in the process of making an initial award of total disability, e.g., Gettman vs. SAIF, 289 Or 609, 615 (1980); second, they then make future modification in such an award practically impossible, e.g., Bentley and Harris. If judicial legislation all this be, nevertheless we have previously followed it, Sherman Hammond, 34 Van Natta 111 (1982), Angel B. Albarez, 33 Van Natta 598 (1981), and feel obligated to do so in this case.

The carrier has not proven any material improvement in this proceeding. We regard the carrier's line of analysis to the effect that "new evidence raises doubts about claimant's credibility" to be more in the nature of an argument that the prior Referee and court decisions finding claimant totally disabled were incorrect; we do not regard this as any really "new" evidence of any real "change" in claimant's condition.

II.

By virtue of the prior Referee and court orders, the carrier paid claimant total disability benefits from April of 1977 to the Redetermination Order issued in July of 1980. That Redetermination Order found claimant's partial loss of earning capacity to be 40%. Since the carrier had previously paid considerably more than the value of a 40% unscheduled disability award, the question arose of whether it was entitled to setoff any prior total disability payments against the partial disability award in the Redetermination Order.

Numerous difficult issues can arise in the context of setoff problems, but we find the specific issue in this case toward the relatively easy end of the spectrum. The concept of a redetermination of an award of total disability pursuant to ORS 656.206(5) is that a worker was previously totally disabled but now, because of changed circumstances, no longer is totally disabled. It follows, we think, that an award of partial disability made at the time of redetermination is not subject to a setoff on account of compensation previously paid for total disability before the effective date of the redetermination.

The result in this case is that the carrier was obligated to pay claimant for 40% partial disability in addition to and after paying claimant for more than three years of total disability. This result may not be completely logical. Cf. Bell vs. Hartman, 289 Or 447, 451-52 (1980): "Perhaps this distinction is not wholly logical . . . Nevertheless, we agree with the distinction."

III.

For the reasons stated above, the carrier's act of taking a setoff against claimant's partial disability award because of prior total disability payments was wrong. Whether it was also unreasonable, triggering entitlement to penalties and attorney fees depends, under the facts and procedural posture of this case, on two interrelated issues: (1) whether claimant timely raised a penalty issue; and (2) what evidence can be considered to determine the reasonableness of the carrier's action.

Claimant's request for hearing claimed entitlement "to penalties and the payment of attoney fees" without any indication of the basis of that claimed entitlement. At the beginning of the hearing, claimant's attorney agreed with the Referee's elaboraton on that issue: "the claimant is raising a penalty issue, seeking an award of a penalty and a related attorney fee, based on a contention that the insurer showed no change of circumstances to justify it seeking a redetermination of the permanent total disability award." It was not until the conclusion of the hearing that claimant's attorney raised the suggestion that penalties were appropriate on the additional basis of the carrier's erroneous setoff.

In response, the carrier's written closing argument filed with the Referee included as attachments an Own Motion Determination of the Board and various memoranda and correspondence that the carrier offered as support for the proposition that it reasonably believed at the time that it was entitled to the setoff which it took. The Referee's response in his order was as follows:

> "The only 'authorities' that North Pacific's counsel has offered for using the PTD payments as an offset is correspondence relating to Workers' Compensation Board decisions in cases involving two other claimants. In one instance the 'authority' is a Boise Cascade Corporation interoffice memo of July 1979 to the 'file' of claimant Elmer Petz summarizing an ex parte telephone conversation with the Chairman of the Board about how to interpret an Own Motion Order entered on February 2, 1979. The other 'authority' is a September 1980 ex parte letter from the Appeals Counsel of the Board to Boise Cascade, responding to a letter inquiry on how to interpret a Board Order on the claim of Gerald Mayes. That correspondence was simply appended to North
>
> Pacific's closing argument, and had not been offered during the hearing. Disregarding the impropriety of such inquiries on how to interpret Board decisions, and further disregarding the hearsay nature of the correspondence, it has no status whatsoever as authority for interpreting either the law or the Board cases in question. Even the direct testimony of the Board Chairman could not be offered on how to interpret the Board decision."

In the Board's view, the Referee's comments notably fail to address a very simple point: Given that claimant's attorney did not raise this specific basis for imposition of a penalty until after the conclusion of the evidentiary portion of the hearing, exactly when did the Referee expect the carrier would be able to offer evidence regarding the reasonableness of its conduct?

In Mavis vs. SAIF, 45 Or App 1059 (1980), the court held that penalty issues have to be raised at the time of hearing. We understand this rule to require, for present purposes, that penalty issues be raised at an early point in the hearing process, i.e. in time for parties to present evidence on that issue. We believe, furthermore, that since the rationale of the Mavis rule is to permit introduction of relevant evidence there is some obligation to specifically define the claimed basis for imposition of a penalty so that it will be known what evidence is relevant. Stated differently, a general prayer for penalty such as contained in claimant's amended request for hearing is insufficient to put the employer/carrier on notice that it must offer evidence on any and all possible grounds for imposition of a penalty.

Neither the claimant nor the Referee can have it both ways; either the issue of a penalty because of the carrier's setoff action was not timely raised; or the carrier is entitled to have its evidence on that point considered.

And considering that evidence, we conclude that the carrier's setoff action, although wrong, was not unreasonable. The documents submitted by the carrier all involve at least arguably analogous situations in which a previous permanent total disability award was setoff against a subsequent permanent partial disability award -- just what the carrier did in this case. Under these circumstances, we cannot agree that the carrier's setoff was unreasonable.

We agree with the Referee's analysis on the penalty as originally framed -- the carrier's act of submitting the question of the continuation of claimant's total disability award for redetermination was not unreasonable.

Finally, on claimant's constitutional argument, we only note that the Board has previously concluded that it lacks authority to rule on constitutional questions. Sidney A. Stone, 31 Van Natta 84 (1981).

ORDER

The Referee's order dated September 4, 1981 is modified. That portion that imposed a 25% penalty and ordered payment of a penalty attorney fee of $500 is reversed. The balance of the Referee's order is affirmed.

GEORGE F. WEILAND, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 79-06914 & 79-03871
July 6, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Mannix's order that set aside SAIF's denial (or partial denial, see part II of this order, infra) of claimant's occupational disease claim for psychological disability and migraine headaches. The Referee ordered temporary total disability compensation to be paid between December 22, 1977 and June 10, 1981 (the date of the hearing) and assessed a 25% penalty on that compensation. The Referee dismissed a separate claim against Linn County for the same condition due to untimely filing of the claim.

SAIF argues claimant's psychological condition is not compensable and that the Referee's award of penalties should be reversed or modified. Claimant defends the Referee's conclusion regarding the Lane County claim and also argues his claim against Linn County was timely.

I

The Referee wrote an extremely comprehensive order and we agree with and adopt his recitation of the facts. The real problem in this case is not resolving conflicts in the facts, but instead the question of the deductions, inferences and analysis to be drawn from basically uncontested facts.

Briefly, the background facts about which there is no dispute are as follows. Claimant worked for the Linn County Sheriff Department between 1961 and 1969. He started as a jailer/dispatcher but moved rapidly up through the ranks, becoming a lieutenant about 1967 or 1968.

In 1969, after he had testified for the State in a drug prosecution, claimant was charged with giving false testimony in that proceeding. After the misdemeanor false swearing charge was filed, claimant resigned from the Linn County Sheriff Department under pressure in December of 1969. A year later claimant was tried on the false swearing charge and found not guilty.

After leaving Linn County claimant worked about 18 months in a plywood mill and then about a year for the Lake Oswego Police Department.

In June, 1972 claimant went to work for the Lane County Sheriff's Department. He was assigned a position as supervisor of the Florence substation. Although claimant was experiencing headaches as early as 1961 and was hospitalized at the U. S. Veterans Administration hospital for two weeks in 1962, there is nothing further in the record with respect to claimant's headaches until 1975 when claimant began to experience headaches of the migraine type with some associated loss of vision. Claimant first sought aid from his family physician who eventually referred him to a

neurologist. This treatment came to the attention of claimant's supervisors in 1977. At the end of his shift on September 21, 1977 claimant's supervisors ordered him placed on sick leave. On December 21, 1977 claimant's Lane County employment was terminated on the ground that his medical condition made him unfit for law enforcement duty. Because of this removal for medical reasons, claimant began receiving monthly benefits under a group disability policy.

Claimant was first examined by and began treatment with a psychiatrist about nine months later, in September of 1978, on referral from his attorney.

II

There are at least as many problems as usual in this case about what is being claimed and what is being denied. The Referee contributed to this uncertainty by carving - too thinly, we think - claimant's overall medical/psychiatric condition into at least four component parts.

Regardless of what the parties' understanding of the situation may have been in May of 1979 when SAIF issued a strangely-worded denial letter, as things now stand we think there is only one claim (for migraine headaches/vision loss/psychological condition) and one denial (of all of the above). We fully agree with the Referee's comment: "Medical science cannot yet fully discern the cause of migraine headaches." But in the present posture of this case it seems that all attorneys involved and all doctors involved believe or assume there is some form of causal link between claimant's headaches and his psychological symptoms. There is one claim and one denial.

III

The Referee's thin slicing produced one line of analysis that cannot be sustained under any conceptualization of what this case is about. The Referee found and reasoned: (1) part of claimant's psychological condition is depression; (2) this depression "was caused by claimant's reaction to his treatment by Lane County in dismissing him from employment"; and (3) claimant's depression is therefore a compensable condition.

Accepting the first and second premises as true for sake of discussion, the stated conclusion does not follow. In Henry McGarrah, 33 Van Natta 584A (1981), we held that an adverse psychological reaction to ordinary and reasonable supervision does not arise in the course and scope of employment. In McGarrah, in which the claimant was also a law enforcement officer, a psychological condition was argued to have been caused by, among other things, management's decision to transfer the claimant to another shift.

If the psychological consequences of ordinary supervision in an on-going employer-employee relationship, such as involved in McGarrah, are not compensable, it should be even more obvious that the psychological consequences of management's decision to terminate that relationship are not compensable. This has to be especially true in public safety areas of employment, such as law

enforcement. Public safety employees can be and are expected to meet and to maintain the highest standards of physical and mental fitness because of the special demands of such employment. If management applied those standards in a way that produced an erroneous termination, we assume there would be remedies available other than an award of workers compensation benefits.

IV

We agree with the Referee's methodology - it is necessary to snythesize the evidence in this case to arrive at any conclusion. Our snythesis, however, differs from the Referee's. We infer and deduce as follows:

(1) Claimant has a passive-aggressive personality structure that has caused him minor problems all his life.

(2) The major specific incident in claimant's life which may well have contributed to his condition today was the criminal charge made against him in Linn County in 1969. Although he continued to work until 1977, claimant's ability to cope gradually deteriorated. Since 1969 claimant has felt and now displays a high level of anger against the Linn County officials who were involved in bringing that charge against him and in pressuring him into resigning from the Sheriff Department. We specifically disagree with the Referee's assessment that claimant was able to "bounce back" from this 1969 incident. Claimant's testimony about his constant and increasing anxiety since 1969 when his law enforcement work required him to testify in court strongly suggests otherwise.

(3) While claimant's major problems arise from the criminal charges against him a dozen years ago, of secondary relevance is claimant's general problems with authority figures who "cross" him, and specific problems, not defined in this record with any precision, with his Lane County supervisors.

(4) There are no other possible causes of claimant's condition that are verified by the medical evidence.

Elaborating on our last finding, claimant testified that while he was working for Lane County in charge of the Florence substation he often complained to his supervisors about low-quality equipment assigned to that office and requested additional personnel; that he was on call constantly and worked long hours frequently, resulting in the loss of a lot of sleep; and that he disliked putting people in jail and resented the lack of respect shown him by "criminal types." However, the extensive medical reports in this case do not even mention any of these problems as even possibly contributing to claimant's condition. Either claimant did not give this history to any of the many doctors he saw or none of those doctors regarded these factors as significant. In sum, the possible causes of claimant's condition are limited to the Linn County false-swearing incident and some ill-defined conflict with his Lane County supervisors.

Based on our findings, we conclude that claimant's Lane County claim is not compensable. Being charged with false swearing is not something "to which an employee is not ordinarily subjected or

exposed other than during" employment within the meaning of ORS 656.802(1)(a). Such a charge could be made against anyone at anytime. Indeed, it is the rare exception that such charges are made against law enforcement personnel. Also, claimant's adverse reaction to and conflicts with his Lane County supervisors did not arise in the course and scope of employment under Henry McGarrah, supra.

The test for compensability of an occupational disease claim is major contributing cause. SAIF v. Gygi, 55 Or App 570 (1982). We conclude claimant has not satisfied this test. Indeed, all that the Referee found was that claimant's work activity was a material contributing cause of his disability. This is something less than major cause.

Claimant's reliance on the last injurious exposure rule does not produce a different result. As we have consistently held, the last injurious exposure rule governs only responsibility, not compensability. Evelyn LaBella, 30 Van Natta 738 (1981), affirmed without opinion, 54 Or App 779 (1981); Herb Ferris, WCB Case No. 80-05978, 34 Van Natta 470 (April 19, 1982).

V

We turn to the question of claimant's entitlement to interim compensation and penalties. As previously noted, after claimant was dismissed by Lane County for medical reasons he began receiving benefits under a group disability policy and was still receiving those benefits three-and-a-half years later at the time of the hearing. As also previously noted, the Referee ordered temporary total disability compensation paid for that same three-and-a-half years period, i.e., from December 22, 1977 when claimant left Lane County until June 10, 1981 when the hearing was held. Neither the Referee nor claimant offers any reasons why claimant should be entitled to both group disability benefits and temporary total disability benefits during this period, which adds up to more income for claimant than if he had continued working.

SAIF received claimant's claim on February 14, 1978. SAIF then wrote Dr. Myers concerning claimant's time loss. On May 5, 1978 Dr. Myers advised SAIF that he had not authorized any time loss. It was not until Dr. Carter's September, 1978 report that time loss was medically authorized; however, Dr. Carter failed to state when temporary total disability compensation should commence. For reasons not apparent in the record, SAIF did not receive Dr. Carter's September, 1978 report until March 13, 1979. SAIF did not deny claimant's claim until May 29, 1979, not having paid any interim compensation since receipt of Dr. Carter's report. Putting aside the question of why claimant was entitled to any temporary total disability compensation while he was receiving group disability benefits -- a question no party has raised, claimant was entitled to interim compensation between March 13, 1979 and May 29, 1979. The penalty for failure to pay interim compensation will be limited to this period.

VI

We agree with and adopt that portion of the Referee's order that found claimant's August, 1979 claim against Linn County, where claimant had last worked in December, 1969, was not timely.

ORDER

The Referee's order dated August 28, 1981 is modified. That portion that set aside SAIF's May 29, 1979 denial on the Lane County claim is reversed and SAIF's denial is reinstated and affirmed. That portion that ordered temporary total disability compensation paid between December 22, 1977 and June 10, 1981 and assessed a 25% penalty on that amount of compensation is reversed; in lieu thereof, SAIF is liable for and shall pay temporary total disability compensation for the period between March 13, 1979 and May 29, 1979 and shall pay a 25% penalty on the compensation due during that period. That portion that awarded an attorney fee for prevailing on SAIF's denial is reversed. The balance of the Referee's order, including that portion that awarded an attorney fee because of SAIF's unreasonable refusal to pay temporary total disability compensation, is affirmed.

BOARD MEMBER LEWIS DISSENTING:

I would respectfully dissent and would affirm and adopt the Referee's Opinion and Order. This was a very complex case, the Referee did a fine job in sorting out the issues and anything I might add would be a futile attempt on my part to try and point out facts that have been well addressed in the order. I would award an attorney fee of $700 to claimant's attorney for review at the Board level.

ELMER W. BAIRD, Claimant
Robert Chapman, Claimant's Attorney
Foster & Purdy, Defense Attorneys

WCB 81-03814
July 7, 1982
Order of Dismissal

Claimant has requested Board review of Referee Gemmell's order that set aside the January 9, 1981 Determination Order as premature and ordered that claimant be paid time loss benefits from November 14, 1980 until his claim was properly closed.

Claimant prevailed before the Referee. Having found premature claim closure, there was no further or additional relief that the Referee could have granted to claimant.

We believe that it is implicit in all of the various statutory references to Board review, ORS 656.289(3) and 656.295, that the review process must be initiated by a party aggrieved by the Referee's order. Since the Referee's order in this case granted all possible relief to claimant, he was not aggrieved by that order and has no standing to seek review of it.

ORDER

Claimant's request for Board review is dismissed.

ANTHONY DOLYNIUK, Claimant
Don Swink, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02478 & 81-04932
July 7, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

SAIF Corporation seeks Board review of Referee Pferdner's order which granted claimant compensation for 20% unscheduled disability for injury to his low back. SAIF contends the Determination Orders which granted claimant no compensation for permanent disability should be affirmed.

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

SAIF attached an Affidavit to its brief in an attempt to get the Board to consider new "evidence." The Board did not and generally will not consider any documentation submitted to it in such a manner. See Robert Barnett, 31 Van Natta 172 (1981).

ORDER

The Referee's order dated November 25, 1981 is affirmed. Claimant's attorney is awarded $350 as and for a reasonable attorney's fee, payable by SAIF.

EDWIN C. EVENSIZER, Claimant
Gatti & Gatti, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10727 & 81-01047
July 7, 1982
Order on Reconsideration

Claimant has moved for reconsideration of the Board's Order on Review dated June 4, 1982.

Claimant contends that we made factual errors in our analysis that concluded that he had not proven a causal connection between his 1978 knee injury and certain disputed 1980 medical treatment. The proof of the causal connection here at issue depends upon interpretation of various medical reports, primarily Exhibit 28. Having again reviewed the record, we continue to find the medical reports inconclusive and adhere to our prior conclusion.

Claimant also argues he is entitled to an award of attorney fees on Board review. The SAIF Corporation agrees with claimant's position.

ORDER

Claimant's attorney is awarded $300 for services rendered on Board review, payable by the SAIF Corporation. Except as thereby modified, the Board's Order on Review dated June 4, 1982 is readopted and republished.

LYLE S. FORD, Claimant
Elden Rosenthal, Claimant's Attorney
Allen Reel, Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07611
July 7, 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.

ALAN D. MAERZ, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04168
July 7, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation seeks Board review of Referee McCullough's order which granted claimant an additional 40% permanent disability for a total award equal to 144° for 45% unscheduled disability for injury to his low back. SAIF contends the June 9, 1980 Determination Order granting compensation for 5% permanent disability should be affirmed.

We make the following findings of fact:

(1) Claimant sustained a compensable low back sprain on February 20, 1980.

(2) Claimant was suffering from back pain, not only in the mid back but also in the low back, prior to his industrial injury.

(3) The physicians involved in claimant's care have had trouble distinguishing between the residuals of his industrial injury and his other noncompensable back problems.

(4) The Orthopaedic Consultants rated claimant's impairment due to the injury as minimal. The opinions of the other physicians involved are generally consistent with this rating.

We now consider claimant's disability in light of the guidelines set forth in OAR 436-65-600, et. seq. We conclude claimant's impairment is 5%. He is 33 years old (-2) with a tenth grade education (+5). Based on the medical evidence, we find he is probably precluded from his regular job and has some restrictions placed on his activities (+5). Based on an SVP of 2, GED of 3 and claimant's restriction to medium work, we find he has 14% of the general labor market still open to him (+1). Combining all of the above factors, we conclude claimant would be more properly compensated with an award equal to 80° for 25% unscheduled disability.

ORDER

The Referee's order dated November 20, 1981 is modified.

Claimant is granted compensation equal to 80° for 25% unscheduled disability for injury to his low back. This award is in lieu of that granted by the Referee and the Determination Order.

Claimant's attorney's fee should be adjusted accordingly.

SHIRLEY BRADLEY, Claimant WCB 81-03523
Franklin, Bennett et al., Claimant's Attorneys July 9, 1982
Schwabe, Williamson et al., Defense Attorneys Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer seeks Board review of that portion of Referee Gemmell's order which granted claimant compensation for 40% unscheduled disability for injury to her low back. The employer contends this award is excessive.

The Board accepts the facts as recited by the Referee.

Claimant sustained a compensable injury on June 27, 1978 for which she has received a 10% award by the last Determination Order. Claimant has received various treatments from several doctors over the last four years. Most recently her treating physician has been Dr. Sampson, a California orthopedist. It appears that the Referee gave substantial weight to Dr. Sampson's November 3, 1981 report which states:

> "Work restrictions allowing light work only. This assumes that the patient has lost approximately 50% of her working capacity and assumes also that she should not be in a position where she has to do any lifting, bending, stooping or bending and should be limited to that type of work which allows her to ambulate somewhat and to alternate standing and sitting positions."

We do not find that the disposition of claimant's case should depend on the above report. Claimant's condition has had a series of ups and downs over the years. The most accurate medical reports would be, therefore, the most recent. In April 1981, just shortly before claimant was found to be medically stationary, Dr. Talmage, an orthopedic surgeon, examined claimant. He found no objective factors of disability, but noted subjective minimal to slight lower back pain which becomes worse with heavy work. He felt she would be precluded from very heavy work and would be unable to return to her previous occupation as a custom painter. Dr. Sampson then examined claimant in May 1981 and indicated his complete concurrence with Dr. Talmage's report. In September 1981 after another examination by Dr. Sampson, it was determined that claimant's condition was improving. Based on this last series of reports, it is difficult for us to give any credence to Dr. Sampson's November 1981 report quoted earlier. There is no evidence he examined claimant in November and no explanation for the sudden change in his opinion.

Based on a totality of the medical evidence, we find claimant is suffering from approximately 10% impairment. Under the guidelines set forth in OAR 436-65-600, et. seq., we reach the following ratings for claimant's social/vocational factors. Claimant is 29 years old (-4 value) with a GED and some additional schooling at a community college (0 value). The SVP of her job as truck painter is a 4 (+3 value). She has some restrictions placed on her and is

precluded from her regular job (+5 value). A compilation of the above facts indicates she has 51% of the general labor market still open to her (-25 value). After combining the above factors, we conclude claimant would be more properly compensated with an award of 48° for 15% unscheduled disability for injury to her low back.

ORDER

The Referee's order dated December 17, 1981 is modified.

Claimant is hereby granted compensation equal to 48° for 15% unscheduled disability for injury to her low back. This award is in lieu of that granted by the Referee's order. The attorney fee granted by the Referee for this award should be adjusted accordingly.

The remainder of the Referee's order is affirmed.

ROY BRITT, Claimant
Richard W. Condon, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-00869 & 81-03770
July 9, 1982
Order on Review

Reviewed by the Board en banc.

SAIF Corporation seeks Board review of Referee Fink's order which determined claimant's condition was causally connected to his employment with Portland Plastering. SAIF contends claimant's current condition is either an aggravation of his injury while employed for Eagle Foundry (EBI) or not compensable at all.

Claimant sustained a compensable injury while working for Eagle Foundry on March 15, 1979. It was diagnosed as a fracture of the fifth metacarpal. He also developed infection in the web space between his right little finger and ring finger which required treatment. Closing exam was done on November 11, 1979, and a subsequent Determination Order granted claimant compensation for 15% loss of the right little finger.

On October 24, 1980, while picking up a plaster bucket, claimant experienced sharp pain up into his arm and neck with tingling above the elbow. He has had the same experience numerous times since that day both at work and off the job.

The Referee determined this was a .307-type case and found SAIF responsible. This case goes beyond the scope of ORS 656.307 in that SAIF not only contends it is not responsible but also that the claim is not even compensable.

The medical evidence is divided between two physicians. Dr. Forwood, a chiropractor, contends claimant's condition is an aggravation of his March 1979 injury. Dr. Button, a hand specialist, contends claimant has a new carpal tunnel condition and it is causally connected to his work with the second employer.

The Referee was persuaded by Dr. Button's report of March 27, 1981. We, too, find claimant is suffering from a compensable occupational disease diagnosed as carpal tunnel syndrome. We also conclude claimant has provided the requisite proof that his work at Portland Plastering was the major contributing cause of his condition. SAIF v. Gygi, 55 Or App 570 (1982).

SAIF requests that it be found not responsible for Dr. Forwood's services. Under ORS 656.245(1) and (3) SAIF's request is denied.

ORDER

The Referee's order dated September 22, 1981 is affirmed. Claimant's attorney is awarded $350 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

CHAIRMAN BARNES, dissenting in part:

It would seem to me that the issue of responsibility for Dr. Forwood's bills is not distinct from the issue of new injury versus aggravation; or, stated differently, that the answer to the question of responsibility for those bills would necessarily follow from our conclusion that claimant sustained a new injury in 1980 while employed at Portland Plastering and thus SAIF is responsible for the compensable treatment of that injury.

But SAIF presents separate argument on the issue of Dr. Forwood's bills, and the Board majority addresses that issue separately. If there really is a separate issue, I submit the majority has not offered any reason for its disposition. Dr. Forwood thought he was treating claimant for the consequences of the 1979 Eagle Foundry/EBI injury, not the 1980 Portland Plastering/SAIF injury. If that were correct as a factual matter, EBI rather than SAIF would be responsible for payment for Dr. Forwood's treatment. Nothing in ORS 656.245(1) or 656.245(3), cited by the majority, provides otherwise.

Still assuming there really is any additional issue about Dr. Forwood's bills, I submit that on this record that issue is not ripe for decision. If SAIF were to deny the compensability of any of Dr. Forwood's treatment as causally related to the 1980 Portland Plastering/SAIF claim for any reasons other than the aggravation/new injury issue decided herein, that additional issue--whatever it might be--would be ripe for decision at that time.

CURTIS CRAIG, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 77-01874
July 9, 1982
Order of Dismissal

Reviewed by Board Members Barnes and Ferris.

The surviving widow (hereinafter "claimant") of the deceased worker requests Board review of Referee Seifert's order which granted the SAIF Corporation's May 27, 1981 Motion to Dismiss claimant's supplemental hearing request concerning a December 24, 1980 claim for occupational disease.

Curtis Craig, deceased, sustained an industrial injury to his back on November 12, 1976 while employed by Nice Electric Company. Dr. Fleming diagnosed acute back sprain and a fractured rib. A Form 801 was signed by the deceased on December 10, 1976. Claimant was examined by Dr. Tawakol on December 21, 1976. The diagnosis was lung cancer. Mr. Craig died on February 1, 1977. On February 22, 1977 claimant filed a claim for widow's benefits with the SAIF Corporation. The claim alleged that the November, 1976 injury resulted in the deceased becoming permanently and totally disabled at the time of his death, and:

> "Or, in the alternative to the foregoing, that the injury sustained while working at [Nice] Electric caused, or accelerated or aggravated a cancerous condition; or, left him in such a weakened condition that the cancer condition was hastened, thereby causing his death earlier than what would have otherwise been the case."

On March 23, 1977 SAIF issued its denial. Claimant, through her attorney, filed a request for hearing. Strangely enough, the request is dated March 18, 1977, five days prior to the issuance of SAIF's denial, although it was received by the Board on March 23, 1977, the same date as the denial. See Syphers v. K-W Logging, Inc., 51 Or App 769 (1981). The request for hearing stated the issues as being temporary total disability, permanent partial disability and permanent total disability. On December 17, 1979 claimant's attorney withdrew. On December 24, 1980 claimant's subsequent attorney filed an occupational disease claim, contending that Mr. Craig's death was caused by an occupational disease, resulting from exposure to trichloroethylene at work. This claim was denied on January 23, 1981. On February 3, 1981 claimant amended her pending request for hearing to include an appeal of the January 23, 1981 denial. SAIF subsequently moved to dismiss that issue based on untimely filing of the claim for occupational disease. Claimant appeals from the Referee's order allowing that motion.

We conclude that the Referee's order is not a final order and thus claimant's request for review at this time is premature. A final order determines the rights of the parties so that no further questions can arise before the Referee. See Mendenhall v. SAIF, 16 Or App 136 (1974). The Referee's order in this case is not final under that definition; it merely severed the issue of the denial

of claimant's December 24, 1980 occupational disease claim from consideration at the hearing on claimant's original March 18, 1977 request for hearing that, so far as we know, is still pending. That pending hearing request will lead to the entry of a final order by a Referee and the issue claimant now seeks reviewed will be subject to review at that time.

If we did have jurisdiction, we would agree with claimant's argument that the Referee incorrectly applied Million v. SAIF, 45 Or App 1097 (1980). That case involved a situation where a claimant first sought compensation for a denied injury claim. The denial was upheld by the Board and the Court of Appeals. The claimant then sought compensation for the same condition based on a theory of occupational disease. The Court affirmed the Board's finding that the issue had been disposed of by the prior hearing. Res judicata applied in Million because the claimant had already had a hearing on her claim, and had failed to assert the alternative theory of causation at that hearing. By contrast, the claimant in the current case has not yet had a hearing to address the issue of causation of her husband's death. If the claim was timely filed, res judicata would not prevent the issue from being litigated at the hearing.

The question of the timeliness of claimant's December 24, 1980 occupational disease claim will ultimately depend on reconciling disparate lines of appellate court decisions interpreting the time limits in the occupational disease statute. ORS 656.807 (1975) stated:

> "(1) Except as otherwise limited for silicosis, all occupational disease claims shall be void unless a claim is filed with the State Accident Insurance Fund or direct responsibility employer within five years after the last exposure in employment subject to the Workmen's Compensation Law and within 180 days from the date the claimant becomes disabled or is informed by a physician that he is suffering from an occupational disease whichever is later.
>
> "(2) If the occupational disease results in death, a claim may be filed within 180 days after the date of the death; and the provisions of subsection (1) of this section do not limit the filing of a claim in fatal cases to less than 180 days from the date of death.
>
> "(4) The procedure for processing occupational disease claims shall be the same as provided for accidental injuries under ORS 656.001 to 656.794."

The statute has been since renumbered but the relevant portions remain unchanged.

In Fossum v. SAIF, 289 Or 777 (1980), it would seem that the Supreme Court interpreted the 5-year and 180-day limits stated in ORS 656.807(2) as limitations of ultimate repose.

> "Because the claim of a widow is an independent claim, if a worker died at the end of two years without filing a claim for compensation, his widow would not have three more years in which to file a claim for widow's benefits within the five-year period specified in subsection (1). Instead, because a claim for widow's benefits is an independent claim, she would be required to file her claim within 180 days of his death, as required by subsection (2)." 289 Or at 784.

In a line of cases originating with Gronquist v. SAIF, 25 Or App 27 (1976), and running at least through Higgins v. Medical Research Foundation, 48 Or App 29 (1980), the Court of Appeals has concluded that there is no limitation of ultimate repose for occupational disease claims. The Court of Appeals has relied upon the cross reference in ORS 656.807(4) to the procedure for processing accidental injury claims and the fact that under the judicial constructions of ORS 656.265 governing accidental injury claims there is no limitation of ultimate repose for such claims.

It is difficult to reconcile the Gronquist line of cases with the analysis in the Supreme Court's earlier decision in Printz v. SCD, 253 Or 148 (1969), especially in light of statutory changes since the Printz decision. Printz, if still good law, is perhaps most relevant in this case because, like this case, it involved an occupational disease claim made by a surviving spouse.

However, in Inkley v. Forest Fiber Products, 288 Or 337 (1980), the Supreme Court, without mentioning Printz, cited Gronquist with apparent approval: "We can think of no reason to deny occupational disease claimants the same excuses for late or deficient filing as are available to injured workers under the Workers' Compensation Law." 288 Or at 347.

In summary, just looking at the three Supreme Court cases, it is unclear whether there is a limitation of ultimate repose for occupational disease claims. Fossum strongly suggests there is. The anaylsis in Printz suggests there is. Inkley says there is not. It is an uncomfortable situation, but jurisdication over this issue, despite the discomfort, remains with the Referee.

ORDER

Claimant's request for Board review is dismissed and this case is remanded to the Referee for further proceedings.

DIXIE FITZPATRICK, Claimant
Welch, Bruun et al., Claimant's Attorneys
Cheney & Kelley, Defense Attorney

WCB 80-07316
July 9, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer seeks Board review and the claimant cross-requests review of Referee St. Martin's order which found claimant permanently and totally disabled as of the date of the hearing, February 20, 1981. The employer contends that claimant is not permanently and totally disabled as a consequence of her 1972 hand injury; claimant defends the Referee's award and argues that the commencement date of the award should be July 16, 1980.

Claimant sustained a compensable injury on October 10, 1972 when her left hand was crushed in a punch press. Over the years since that injury, claimant has received treatment both for her hand injury and for a variety of other physical problems. In addition, claimant has developed psychological impairment as a result of the 1972 injury.

A. Physical Impairment.

Claimant's original injury resulted in the partial amputation of her left thumb, complete amputation of her left index finger and almost complete amputation of her left long finger. Claimant has undergone at least six operations for reconstruction and repair of what remains of her left hand. Since that injury in 1972, claimant has contended that the hand injury has resulted in impairment in several other areas. To relieve radiating pain up her left arm and into her left shoulder, probably because of median nerve damage at the time of the original injury, claimant underwent a dorsal sympathectomy. According to claimant, that operation did little to relieve her left arm/shoulder pain.

Over the following years, claimant made a variety of complaints regarding right hand/arm/shoulder impairment. These complaints ultimately led to right thoracic outlet syndrome surgery. Again, according to claimant, the surgery did not relieve her right hand/arm/shoulder problems.

Claimant has also complained of and been examined and/or treated for urologic, low back and leg problems.

B. Psychological Impairment.

Early in the course of claimant's treatment following the 1972 injury, several doctors suggested the possibility that there was a psychological component to her pain complaints, many of which had no objective basis. Claimant ultimately began psychological treatment with Dr. Janzer in September of 1977. There are eleven reports in the record from Dr. Janzer, running through 1980. These reports are unusually uninformative about the course of treatment, diagnosis, prognosis and opinion about permanent impairment. Dr. Colbach's comprehensive report dated August 6, 1979 is far more illuminating. It established that claimant's 1972 hand injury caused a worsening of her preexisting psychological conditions and opined that claimant's permanent impairment due to psychological impairment "is mild."

A physical manifestation of claimant's psychological impairment is her colitis condition. In an earlier proceeding, WCB Case No. 78-01156, a Referee found that this colitis condition was causally related to claimant's 1972 hand injury.

C. Prior Awards.

Three Determination Orders have been issued. In addition to about six years of temporary total disability benefits, claimant has been awarded compensation for 100% loss of her left arm. Also, claimant has been awarded a total of 25% unscheduled disability. The first Determination Order awarded 10% unscheduled disability for claimant's continuing left shoulder pain following her dorsal sympathectomy. The second Determination Order awarded 5% unscheduled disability for injury to claimant's "thorax"; we cannot tell from the record the basis of this award unless it was intended to be additional compensation for the residuals of claimant's sympathectomy. The final Determination Order awarded 10% unscheduled disability for claimant's psychological condition.

D. Vocational Rehabilitation.

Before about 1975, claimant was apparently interested in returning to work with the same employer where she had been injured in 1972. For reasons not clear in the record, claimant did not return to that employment. Since about 1975, when that effort fell through, claimant has done nothing to seek employment.

Rather, since 1975, claimant has been offered a variety of vocational rehabilitation assistance. Claimant has rejected all tendered assistance. The pattern in the vocational reports is consistent, running from a 1976 comment about her "uncooperativeness" to a 1980 comment: "Ms. Fitzpatrick informed me that she is not physically or mentally ready for vocational assistance at this time."

E. Analysis.

Many of the doctors who have treated or examined claimant believe that her physical complaints are exaggerated. For example, Dr. Cruickshank reported in 1975:

> "It is my opinion that this patient is not having the pain of which she is complaining. I always like to give the patient the benefit of the doubt, but when I persistently get hysterical findings and only subjective complaints of pain, but no other evidence, it is hard for one to accept the patient's story."

And Dr. Nathan reported in 1979:

> "Several inconsistencies are noted in the patient's complaints and her response to the examinations performed by each therapist individually. The patient made multiple facial and postural contortions in the examination. For example, when the hand

> was being examined, she would make grimaces indicating discomfort. However, when she was distracted, the same examination could be performed without evidence of distress."

Claimant undoubtedly and unfortunately has significant left hand/arm/shoulder impairment. But claimant has already received the maximum possible award for loss of use of her entire left arm. And recent indications suggest this award may be generous; the more recent medical reports note there is no atrophy in claimant's left arm even seven to eight years post-injury, and one report refers to increasing callus on what remains of claimant's left hand, suggesting increasing use of it.

We fail to see how claimant's right hand/arm/shoulder impairment, if any, is a compensable consequence of her 1972 left hand injury. Dr. Bird reported on June 24, 1976: "Although I feel that the symptoms in Ms. Fitzpatrick's right arm may well be related to the injury of the left hand, I am unable to state within the realm of reasonable medical probability that this is in fact true." Dr. Pasquesi stated on May 21, 1980 that "it is difficult for an orthopedist to understand" how a left hand injury could have caused right thoracic outlet syndrome. The Board has the same difficulty. Although the employer apparently paid for claimant's right hand/arm/shoulder treatment, it was entitled to do so, ORS 656.018(4), without thereby admitting that claimant's right-sided impairment is a compensable consequence of her left hand injury, ORS 656.262(8). We will not consider claimant's right-sided impairment in determining the compensation to which claimant is now entitled.

We find Dr. Colbach's opinion persuasive in rating claimant's psychological impairment arising from her industrial injury as mild. We are not impressed by Dr. Janzer's less overt approach:

> "While I am in general agreement with Dr. Colbach's report, we do not agree on the extent to which her 1972 industrial injury has impaired her mental health. This particular issue, I believe, requires a more formal arena for adequate and useful discussion."

At the time Dr. Janzer made that statement, OAR 436-69-215(1) required treating physicians to "describe" an injured worker's permanent impairment. That rule has since been amended and renumbered; OAR 436-69-601 now requires a treating physician either to report to the insurer or employer regarding an injured worker's permanent impairment or to refer the worker to another physician for a closing examination.

Although Dr. Colbach was aware of claimant's colitis condition, it is not clear whether his impairment rating of "mild" took into account that condition as a manifestation of claimant's psychological impairment. There are no medical reports that comment on the severity of the colitis condition; some reports imply it is controllable with medication. Claimant's testimony at the hearing was to the effect that her colitis condition is very

severe. We simply cannot believe that claimant's colitis, previously found causally linked to her 1972 hand injury, was as severe as she described at the hearing because: (1) claimant was at that point more than eight years post-injury; (2) at that point claimant had received more than three years of psychological treatment from Dr. Janzer who, in refusing to find claimant medically stationary, had repeatedly described his treatment as improving her psychological condition; (3) claimant's colitis is barely mentioned in Dr. Janzer's eleven reports in the record; and (4) numerous other doctors, some quoted above, recorded their impressions of claimant's tendency to exaggerate her symptoms.

There is a colitis condition. Its severity is debatable. Whether it was considered by Dr. Colbach is unknown. We conclude that the fairest approach under all of these circumstances is to interpret Dr. Colbach's rating of mild psychological impairment as meaning at the upper end of that range, i.e., about 20% psychological impairment.

Turning to the social/vocational factors, claimant is only 38 years of age with an eighth grade education. After her 1972 injury she worked toward obtaining her GED and apparently has only one test remaining to achieve it. Most of claimant's work experience has been in manual work. Her adaptability to other work is now a question mark because of her lack of interest in vocational rehabilitation.

An injured worker generally has a duty to attempt to reduce his or her disability. ORS 656.325(3). An injured worker claiming permanent total disability specifically has a duty to make reasonable efforts to seek employment. ORS 656.206(3). Claimant does not argue she has complied with these statutory duties; she argues she is exempt from them.

In some cases the courts have held claimants, because of their severe disabilities, did not need to comply with the seek-work requirement of ORS 656.206(3) in order to be found totally disabled. Looper v. SAIF, 56 Or App 437 (1982); Smith v. Brooks-Scanlon, 54 Or App 730 (1981); Peterson v. SAIF, 52 Or App 731 (1981); Morris v. Denny's, 50 Or App 533 (1981); Butcher v. SAIF, 45 Or App 313 (1980). In other cases the courts have held the claimants did not qualify for awards of permanent disability because of failure to satisfy the seek-work requirement of ORS 656.206(3). Gettman v. SAIF, 44 Or App 295 (1980); Smith v. SAIF, 51 Or App 833 (1981); Shaw v. Portland Laundry/Dry Cleaning, 47 Or App 1041 (1980); Andus v. SAIF, 43 Or App 813 (1979); Wilburn v. SAIF, 43 Or App 611 (1979); Waler v. SAIF, 42 Or App 133 (1979); Potterf v. SAIF, 41 Or App 755 (1979); Burks v. Western Irrigation, 36 Or App 587 (1978). We cannot discern any sharp dividing line between the claimants so disabled that they need not seek work and the claimants expected to seek work despite their disabilities.

Without any more specific guidance, we feel free to exercise our own judgment about whether claimant was subject to the seek-work requirement of ORS 656.206(3). We conclude that she was. As stated above, despite numerous complaints about other parts of the body and despite right shoulder treatment, we conclude that claimant's permanent physical impairment as a compensable consequence of her 1972 injury involves only her left hand/arm/shoulder. As also stated above, we believe that claimant's permanent psychological impairment as a compensable consequence of her 1972 injury is about 20%. A partially amputated hand, pain in the arm and shoulder, and mild psychological impairment is not the quantity or quality of disability that should excuse compliance with ORS 656.206(3). The social/vocational factors do not alter that conclusion. Claimant is relatively young and has about average education and intelligence.

Notwithstanding all these reasons to expect that a job search might have proved to be successful in a hypothetically normal labor market, claimant has made no job search since at least 1975, but instead has repeatedly rejected job training and placement assistance. We conclude that claimant is not permanently and totally disabled.

We also conclude that claimant's permanent partial disability due to her psychological condition is greater than the 10% award in the most recent Determination Order. Applying OAR 436-65-600, et. seq. to our findings stated above, we conclude that claimant's unscheduled disability for her left shoulder condition and psychological condition amounts to 50%. Since claimant has been awarded 25% unscheduled disability by prior Determination Orders, we will now increase her award an additional 25%.

ORDER

The Referee's order dated April 8, 1981 is reversed. Claimant is awarded 80° for 25% permanent partial unscheduled disability. This award is in addition to that granted by all prior Determination Orders and in lieu of that granted by the Referee's order.

Claimant's attorney is allowed 25% of the increased compensation awarded by this order (i.e., compensation in addition to that awarded by Determination Orders) as and for a reasonable attorney's fee, in lieu of the attorney's fee allowed by the Referee's order.

JAMES D. RANSOM, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Jerry McCallister, Defense Attorney

WCB 80-06002 & 80-11561
July 12, 1982
Order on Reconsideration

The Board entered its Order on Review in the above entitled matter on May 25, 1982 wherein the Referee's order was modified and the denial of aggravation was reversed. We concluded the aggravation claim had been accepted by stipulation and "processed to closure."

By a letter dated June 24, 1982 claimant's attorney requested reconsideration of our order on the ground that the post-stipulation the Determination Order of July 21, 1980 had not rated claimant's disability in connection with his carpal tunnel syndrome condition. Based on this Motion for Reconsideration the Board abated its Order on Review by an order dated June 24, 1982.

After a reevaluation of the record before us and our prior order, we agree with claimant's attorney. Therefore, our Order on Review is hereby modified in that the Order portion shall read as follows:

> "The Referee's order dated October 5, 1981 is modified. The denial of aggravation dated June 23, 1980 is reversed and it is recognized that the aggravation claim has been accepted per the approved stipulation of the parties. The carrier is hereby ordered to submit this claim to the Evaluation Division for rating of disability related to the carpal tunnel syndrome condition, if any. The remainder of the Referee's order is affirmed."

ORDER

As modified herein, the Board's Order on Review dated May 25, 1982 is readopted and republished.

CARL SABIN, Claimant
Wiswall, Svoboda et al., Claimant's Attorneys
Scwabe, Williamson et al, Defense Attorneys

WCB 81-03987
July 12, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests Board review of Referee Foster's order which upheld the employer's denial of his claim for an alleged compensable left knee injury. The issues are compensability and whether claimant's claim was timely.

As for compensability, we affirm and adopt the following portion of the Referee's order:

> "The medical evidence was not decisive. The history given by the claimant to his treating physicians was not clear or consistent. Those doctors are not certain as to claimant's history. The claimant has claimed both off-the-job and on-the-job injuries. He did not make it clear to any of his treating physicians just where and how his injury occurred. In addition he filed an 801 Form several months after the alleged industrial injury took place."

In affirming, we understand the essence of the Referee's order to be: (1) the medical evidence is inconclusive and any opinions therein are necessarily based on claimant's history to the doctors; and (2) claimant's credibility is suspect. Also, the Referee was correct in relying on the delayed assertion of a claim as some circumstantial evidence that there was no at-work injury. See Ruth M. Case, 33 Van Natta 490 (1981), aff'd 57 Or App 565 (1982).

The Referee made no separate findings on the timeliness issue Claimant testified he orally reported his knee injury to "his employer" within a few days of its occurrance. Because of doubts about claimant's credibility, we are not prepared to so find. The question thus becomes whether the employer was prejudiced by claimant's filing of an April, 1981 written claim for an alleged February, 1981 injury. See ORS 656.265. Although the employer's brief presents a strong argument that its investigation and preparation were prejudiced by the belated claim, as things now stand the ambiguities and contradictions in the record are prejudicial to claimant, not to the employer.

ORDER

The Referee's order dated December 2, 1981 is affirmed.

ROBERT W. DALTON, Claimant
Coons & Hall, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 78-05068 & 78-05069
July 14, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests Board review of Referee Knapp's order which found he was not entitled to additional compensation beyond that awarded by the Determination Order of June 21, 1978 which allowed claimant benefits for temporary total disability and scheduled disability equal to 100% for loss of his right leg. Claimant contends that he is permanently and totally disabled, or in the alternative, that he is entitled to an additional award for unscheduled permanent partial disability.

Claimant injured his right knee on December 14, 1967 while employed as a custodian for Southwest Oregon Community College. In 1968 Dr. Smith performed an arthrotomy and excision of the medial meniscus. Complications followed and claimant was not stationary until July 17, 1971. The August 10, 1971 Determination Order allowed 75° for partial loss of a right leg. On August 12, 1971, two days following the issuance of the Determination Order, claimant fell while working on a water drainage system for his employer and suffered a fractured femur. Again, complications followed which eventually necessitated an above-knee right leg amputation in 1976.

Following the amputation, claimant experienced phantom leg pain, back and neck pain, right wrist pain caused by increased pressure on the wrist from use of crutches combined with an old wrist fracture, and jactitation (tossing to and fro) of the right leg stump, apparently caused by or involving muscle spasms in the thigh. Attempts made to control the jactitation condition were unsuccessful. In addition to these difficulties, claimant suffers from an underlying schizotypal personality disorder predating his injury and a severe hysterical conversion reaction.

The Referee found that the law in effect at the time of claimant's injury provided that the maximum allowable for loss of use of a scheduled member was the statutory amount, and factors relating to loss of earning capacity could not be considered, citing Jones v. Comp. Dept., 25 Or App 177 (1968), and Kajundzick v. SIAC, 164 Or 510 (1940). He went on to state that the applicable law precluded consideration of unscheduled disability in determining if the claimant is permanently and totally disabled. The Referee also found that claimant failed to satisfy his burden of proof under Woodman v. Georgia Pacific Corp., 289 Or 551 (1980), in that there was no evidence that claimant's wrist, left leg, back and neck pain were either independent or permanent in nature and that no evidence was submitted establishing that the claimant's psychological condition, muscle spasms, jactitation and phantom leg pain "were conditions which would not be exceptionable (sic) if they did not occur as a result of his amputation."

Claimant contends that the Referee misconstrued the law in determining that factors relative to loss of earning capacity could not be considered in determining if claimant is permanently and

totally disabled. We disagree. Surratt v. Gunderson Bros., 259 Or 65 (1971), and Hill v. SAIF, 38 Or App 12 (1979) are explicit in ennunciating the rule that for pre-1975 scheduled injuries, the schedule is exclusive, and, assuming that the claimant suffered no unscheduled injuries in addition to his scheduled injury, that factors relating to loss of earning capacity are not relevant to the award.

Claimant argues in the alternative that his injury has aggravated his underlying psychological condition, resulting in unscheduled disability, and that this allows a consideration of the factors relevant to inability to work resulting in permanent and total disability. Claimant additionally points out that even if he is not permanently and totally disabled, that he is entitled to an award of unscheduled disability based on the "spreading disability" concept contained in Woodman v. Georgia Pacific Corp., 289 Or 551 (1980).

Claimant's arguments expose what we believe to be a disturbing conflict between Woodman and the line of cases beginning with Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972). In Patitucci the court held that a finding of permanent total disability was warranted where the claimant had suffered an industrial injury involving her cervical spine, not totally disabling her, but resulting in a psychological reaction to the injury. Although the psychological condition was preexisting, the court held that if the industrial injury was a contributing factor to the disability, that it was compensable. In other words, aggravation of a preexisting psychological condition by an industrial injury is compensable. Under Patitucci, the claimant in this case would be required only to establish that his industrial injury made a more than de minimis contribution to his current psychological condition.

Apparently under Patitucci, it makes no difference whether the injury suffered by claimant is scheduled or unscheduled. Woodman, however, seems to announce a rule requiring a different burden of proof if the claimant's injury is scheduled. Woodman requires the claimant to pass a three-prong test establishing: (1) that he is suffering an independent disability to an unscheduled part of the body; (2) that the resulting disability must not be an intrinsic result such that failure to occur would be a surprise, but at a minimum, must be common or probable result before compensation will result; and (3) these criteria must be applied to the general working population of men and women and not to the individual. It is also apparent that Woodman applies in cases involving psychological disabilities resulting from a scheduled injury. As the court noted:

> "Rather, the dispute concerns the physiological (possibly also the psychic) consequences of an injury to a scheduled part of the body for other, unscheduled areas." (Emphasis added.) 289 Or at 556-557. See also 289 Or at 555.

There is a conflict between Patitucci and Woodman in regard to the element of proof upon which a claimant must present evidence in order to establish entitlement to compensation for his resulting psychological reaction.

It is possible to interpret Patitucci and Woodman in such a manner as to resolve this conflict. Patitucci and the cases decided subsequent to it involved claimants who sustain unscheduled disabilities as a result of their industrial injury. Haugen v. Beautique A Go-Go, 18 Or App 132 (1974), Marek v. Portland Jeep, 21 Or App 386 (1975), Martin v. SAIF, 26 Or App 571 (1976), and Hargens v. SAIF, 34 Or App 311 (1978), all involved unscheduled back injuries. Wilburn v. SAIF, 43 Or App 611 (1979), and Barnhardt v. La-Pac Corp., 51 Or App 329 (1981), involved unscheduled cervical injuries. The issue usually involved in those cases was the compensability of the resulting psychological condition. This could lead to the following conclusion. When a claimant suffers an unscheduled injury and has a subsequent adverse psychological reaction, the issue involved is generally the compensability of that condition. When a claimant suffers a scheduled injury, the issue involved, although it could also be compensability, is generally whether or not the claimant has already been compensated for that condition by his scheduled award. A claimant who is successful under the Woodman test has established that the legislature did not intend for his secondary bodily and psychic consequences of the scheduled loss to be included in his award for a scheduled injury. Once a claimant establishes that his condition is a result of his injury, he must then establish that he has not already been compensated for it when he received his scheduled award. Justification for this seeming incongruity could be found in the concept of exclusivity of scheduled awards.

We are not convinced that this is a particularly adequate or convincing resolution to the conflict between Patitucci and Woodman. There does not seem to be any justification in requiring a claimant who sustains a scheduled injury to meet a higher burden of proof in establishing his entitlement to an award of unscheduled disability for a psychological reaction to that injury, than a claimant who suffers a psychological reaction to an unscheduled injury. However, Woodman is clearly the applicable precedent and the ruling of the Supreme Court must be followed in cases that are not distinguishable.

Examining the medical evidence in light of Woodman, we find ourselves in agreement with the Referee. Claimant has not established that he suffered any permanent impairment as a result of his low back, neck, left leg and wrist pain, or from his psychological reaction. With regard to claimant's jactitation condition, claimant has not established that this condition involves any unscheduled portions of his body. He has already received an award equal to 100% loss of the right leg, and so far as we are able to discern, the jactitation condition only involves his right leg. Since claimant has already received the maximum allowed by schedule for his leg, he is entitled to no further award. With regard to claimant's psychological condition, we are also in agreement with the Referee, that the burden of proof under Woodman has not been met. Claimant has not submitted any evidence that his psychological reaction is not an intrinsic result of his scheduled loss such that its failure to occur would be surprise.

ORDER

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

DARLA J. ENGOM, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06678
July 14, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee McCullough's order which granted claimant an additional award of 64° unscheduled back and shoulder disability. Claimant contends that she is entitled to an additional award of permanent partial disability for her right and left arms, shoulder, neck and low back.

The facts as recited by the Referee are adopted as our own. The Determination Orders issued during the prolonged history of this claim are as follows:

1. The first Determination Order dated January 28, 1976 granted claimant an award of 20% unscheduled neck disability.

2. The second Determination Order dated October 17, 1978 granted an additional 10% for neck and left shoulder disability and an award of 5% loss of the left arm.

3. The third Determination Order dated August 6, 1980 granted 57.6° for 30% loss of the right arm and an additional 38.4° for 20% loss of the left arm.

4. The fourth Determination Order dated July 16, 1981 states that claimant is granted no additional permanent partial disability in excess of the Determination Order of January 28, 1976 and in lieu of the Determination Order of October 17, 1978.

The Referee stated:

> ". . .the fourth Determination Order had the effect of expunging all of the awards for permanent partial disability in excess of that granted by the Determination Order of January 28, 1976 and, therefore, claimant at the present time has received 64° for unscheduled neck and shoulder disability."

We reverse portions of the appealed July 16, 1981 Determination Order. The Evaluation Division has no authority, especially in light of the medical record in this case, to, in essence, wipe out medically verified permanent partial disability from its prior orders. This record before us is abundant with evidence concerning claimant's disability to the left and right arms. The prior awards for this disability are adequate and are reinstated.

We concur with the award for unscheduled disability granted by the Referee which totaled 40%. However, because of our reinstatement of the prior Determination Orders the Referee's order must be modified.

ORDER

The Referee's order dated January 8, 1982 is modified.

The four Determination Orders entered in this case are reinstated with the exception of the fourth Determination Order of July 16, 1980 which is modified to delete that portion revoking the prior Determination Orders.

Claimant is hereby granted an award of 32° for 10% unscheduled disability, making a total award to date of 40% unscheduled disability. This award is in lieu of all prior awards.

DANIEL J. HUMELAND, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02718
July 14, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation seeks Board review of Referee Wolff's order which set aside its partial denial. The Referee also granted claimant an award of 45% unscheduled disability, an increase of 20% over the 25% granted by the March 26, 1981 Determination Order.

We adopt the facts as recited by the Referee.

We agree with the Referee's conclusion that claimant's surgery in May of 1980 and continuing low back problems are SAIF's responsibility based on Dr. Hoda's opinion. We, therefore, affirm that portion of the Referee's order that set aside SAIF's partial denial.

On the extent of disability issue, we reverse the Referee and reinstate the Determination Order. SAIF's brief between pages 6 and 9 correctly summarizes the evidence and accurately indicates how the standards stated in OAR 436-65-600 et seq result in the conclusion that claimant is properly compensated for his loss of wage earning capacity by an award of 25% unscheduled disability. We agree with and adopt by this reference the analysis in SAIF"s brief.

ORDER

The Referee's order dated October 27, 1981 is affirmed in part and reversed in part. That portion that set aside SAIF's partial denial is affirmed. That portion that awarded claimant an additional 20% unscheduled disability is reversed and the Determination Order dated March 26, 1981 is reinstated and affirmed.

EUGENE MUELHAUSER, Claimant
Galton, Popick et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-01127
July 14, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation has requested review of Referee Menashe's order dated November 13, 1981. SAIF contends that the Referee should have deferred hearing any issue of extent of permanent disability until after the post-rehabilitation Determination Order, and that, in any event, the medical evidence does not support an award of 35% unscheduled permanent partial disability.

We find it was proper for the Referee to hear evidence on the extent of disability in a hearing that was held before claimant completed his authorized program of vocational rehabilitation. As the law now stands, a claimant has a right to a hearing determining the extent of disability as it presently exists. Under present Board rules, the hearing may not be postponed, over the claimant's objection, until after the vocational rehabilitation program is completed. Larry J. Barnett, WCB Case No. 79-00387 (December 31, 1981); Leedy v. Knox, 34 Or App 911, 921 (1978); Minor v. Delta Truck Lines, 43 Or App 29, 32 (1979).

We agree with the Referee that claimant has suffered a work related disability equal to 112° or 35% unscheduled permanent partial disability.

ORDER

The Referee's order dated November 13, 1981 is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee, payable by the carrier, for his services on Board review.

BARBARA STAHL, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-03332
July 14, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee Peterson's order which affirmed SAIF Corporation's denial of her claim for hypertension.

The facts of this case are relatively simple. Claimant has a preexisting hypertension condition which has been satisfactorily controlled for many years with medication. On January 31, 1980 her blood pressure became markedly elevated while at work. Her condition gradually improved with doctor's care until April 7, 1980 when she suffered another episode of high blood pressure. She was immediately hospitalized for this episode.

Claimant contends that emotional stress from work caused an exacerbation of her underlying condition. The nature of claimant's work is such that she had added pressure at the end of each quarter in order to get out certain federal reports. During the period in question claimant had taken on several other duties in addition to these already demanding quarterly reports and her normal job responsibilities. Claimant did work some overtime during these months and there is little dispute that she was under additional work-related stress.

SAIF contends that claimant has other significant factors in her life which are contributing to her high blood pressure. She drinks coffee on a regular basis, was smoking up to three packs of cigarettes a day, is overweight and has been involved in some serious emotional problems with her husband. At the time of the April 1980 episode, claimant had been attempting to quit smoking due to fear of a stroke. She was under a lot of stress due to inability to quit smoking and also her inability to lose weight.

SAIF, in its closing argument before the Referee (which was also incorporated in the Referee's order) contended claimant's high blood pressure was not due solely to her work and, therefore, could not be compensable. The Referee indicated claimant had failed to show her work-induced stress was the material contributing cause of the episodes of high blood pressure. He especially could not find that her work was the "primary culprit" for claimant's problem.

We find the controlling test in this case is that found in SAIF v. Gygi, 55 Or App 570 (1982). Claimant must show that her work stress was the major cause of her disability. Claimant argues that all the other factors in her life mentioned above were problems for the last ten years and had not caused her blood pressure to go up. Therefore, she feels, the job stress is responsible for her condition in January and April of 1980. We generally agree with claimant's first contention. However, the evidence indicates that those "other factors" were more significant than claimant would have us believe. Her inability to stop smoking and lose weight had her noticeably upset in April 1980. Her family relationships also were causing severe emotional problems during that time, according to Dr. Kelber. Although claimant's job stress was a definite factor in her exacerbated condition, we conclude she has failed to show that it was the major cause of her elevated blood pressure.

ORDER

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

RICHARD D. TURPIN, Claimant
Olson, Hittle, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03349
July 14, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests, and claimant cross-requests, Board review of Referee Pferdner's order which affirmed SAIF's denial of claimant's aggravation claim, ordered SAIF to reopen the claim beginning on May 22, 1981, to pay compensation until closure pursuant to ORS 656.268 and ordered SAIF to pay $1,000 to claimant's counsel as a reasonable attorney's fee for unreasonable refusal to accept or deny a claim.

Claimant was originally injured on March 21, 1979 while employed by the Oregon State Penitentiary. The injury was diagnosed as an acute sprain of the thoracic spine incurred while attempting to pull a pallet of frozen food off a truck. Claimant treated with Drs. Quijano and Buza and eventually was released for work. The Determination Order of October 29, 1979 allowed benefits for time loss only.

Claimant thereafter began treating with Dr. Chester. By stipulation of July 1980, the claim was reopened. Closure again followed with a Determination Order issued July 10, 1980. Again, only benefits for temporary total disability were allowed. Following the issuance of the July 1980 Determination Order, claimant again changed physicians, selecting Dr. Cash as his treating physician. It was Dr. Cash's opinion that claimant exhibited symptoms of thoracic outlet syndrome. Claimant was examined by Orthopaedic Consultants on October 6, 1980 and was found to be medically stationary. By stipulation of November 19, 1980 claimant was allowed compensation for temporary total disability and 56° for neck and upper back disability. An aggravation claim was filed on February 12, 1981 which was denied by SAIF on March 30, 1981.

Claimant was examined by Dr. Donald Smith on May 19, 1981. Dr. Smith thought that bilateral thoracic outlet syndrome was suggested. Dr. Gaiser examined claimant on July 8, 1981 and stated in his report that claimant had typical thoracic outlet findings on both sides. Claimant was examined by Dr. Raaf who, in an extremely extensive report, was of the opinion that claimant exhibited insufficient symptomatology to justify thoracic outlet surgery. Apparently, however, by the time of the hearing, the medical consensus was that the surgery was advisable. Indeed, SAIF agreed at the hearing that the claim should be reopened.

The Referee found the last award or arrangement of compensation, for the purpose of establishing a claim for aggravation under ORS 656.273(1), was the November 19, 1981 stipulation. He found the only medical information that came into SAIF's possession between that date and the issuance of the denial not to have been sufficient to establish a claim for aggravation, and, therefore, upheld the March 30, 1981 denial. The Referee did find, however, that the May 22, 1981 report of Dr. Smith did establish a valid aggravation claim and that SAIF's failure to accept or deny that aggravation claim constituted unreasonable delay in accepting or denying a claim and awarded claimant's attorney a $1,000 fee, payable by SAIF.

SAIF contends that the Referee erred in deciding the claim for aggravation based on the May 22, 1981 report of Dr. Smith on the grounds that the specific claim forming the basis of the Referee's decision had not been raised by either the claimant or SAIF at the hearing. Alternatively, SAIF contends that Dr. Smith's report does not constitute a valid claim for aggravation. Claimant has cross appealed, contending that Dr. Buza's December 1, 1980 report rather than Dr. Smith's report was sufficient to establish a claim for aggravation.

With regard to SAIF's contention, an examination of the record leads us to a conclusion that the Referee committed no error in proceeding to determine that a valid aggravation claim had been established by Dr. Smith's report. The transcript of the hearing discloses that both claimant and defense counsel were somewhat uncertain as to just what issues were being litigated at the hearing. The Referee framed the issues as follows: "1. The compensability of claimant's aggravation claim; 2. A continuing denial of reopening of the case; 3. The starting date of temporary total disability compensation alleging December, 1980 would be proper; and 4. Attorney fees for prevailing on a denied case." We believe that the second and third issues were framed in a sufficiently broad manner to have put SAIF on notice that the Referee was going to examine all of the evidence in relation to claimant's aggravation claim for the purpose of determining whether or not it had been established either prior to or subsequent to the issuance of SAIF's denial. Neither counsel disagreed with this approach. It seems that SAIF would have objected to the inclusion of any exhibits dated subsequent to its March 30, 1981 denial if it really believed it was litigating the validity of the claim to that point in time only. This is especially true in view of the fact that counsel for SAIF agreed at the hearing that the claim should be reopened, with apparently the proper date of reopening the only issue at that point.

SAIF cites Michael R. Petkovich, 34 Van Natta 98 (1982), for the proposition that the Referee may not make gratuitious findings on issues not raised by the parties. In that case, we stated: "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." 34 Van Natta at 98. We adhere to that belief, but as noted above, we believe that the issues as stated were sufficiently broad to allow the Referee to dispose of the claimant's aggravation claim in its entirety, and this is certainly preferable to piecemeal litigation when the entire claim can be disposed of in a single hearing.

The issue concerns the Referee's assignment of May 22, 1981 as the date on which a valid claim for aggravation was established. Claimant contends that the December 1, 1980 report of Dr. Buza establishes a claim for aggravation. The Referee found that Dr. Buza's report did not reflect any change in claimant's condition, for better or worse. We believe that the best that can be said of Dr. Buza's December 1980 report is that it sets forth a claim for medical services pursuant to ORS 656.245, and agree with the Referee that it does not establish a worsening when compared with

claimant's condition on November 19, 1980. Although SAIF may legitimately question Dr. Smith's findings and recommendations, we nevertheless agree with the Referee that his May 22, 1981 report constitutes a valid aggravation claim, meeting the requirements of ORS 656.273(3) and (6).

ORDER

The Referee's order dated December 15, 1981 is affirmed. Claimant's attorney is awarded $275 as and for a reasonable attorney's fee for services rendered on Board review, payable by SAIF.

ROGER BALLINGER, Claimant
Nick Chaivoe, Claimant's Attorney
Lindsey, Hart et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-08724 & 80-09824
July 15, 1982
Order on Further Reconsideration

The SAIF Corporation has moved for reconsideration of the Board's Order on Reconsideration dated June 15, 1982.

The facts, briefly, giving rise to this third Board order in this case are as follows:

1975: Claimant compensably injured while working for Portland Iron and Wire, insured by Western Employer's Insurance Company's predecessor in interest.

1979: Claimant compensably injured while working for Western Steel Erectors, insured by SAIF.

1980: Claimant has surgery.

The issue on these facts is whether Western Employer's or SAIF is responsible for claimant's 1980 surgery.

Our June 15, 1982 Order on Reconsideration concluded that the applicable rule was: "The insurer on the risk at the time of the more recent injury is responsible for future medical care and other compensation unless that insurer sustains the burden of proving that the medical care, etc., involves a separate and distinct part of the body than was involved in the most recent injury." Applying that rule, we found SAIF responsible for the 1980 surgery because it did not prove that the surgery involved a separate and distinct part of the body than was involved in claimant's 1979 compensable injury.

In its motion for reconsideration, SAIF argues it did sustain the burden of proof contemplated by our prior order. SAIF relies upon the testimony of Dr. Norton, which it accurately paraphrases as follows:

> "SAIF's witness meticulously described the distinction between the 1975 blow to the chest wall and the 1979 injury to the long thoracic nerve. He carefully explained the mechanisms of the two injuries, describing in detail the skeletal and muscular arrangements and how the force of the two separate traumas caused entirely distinguishable results."

We have no doubt about Dr. Norton's qualifications or expertise. But we are not persuaded by his analysis in this case. Here the ultimate question is cause and effect relationships between a 1975 injury and/or a 1979 injury and 1980 surgery. Being persuaded about such relationships necessarily depends largely on detailed information about each of those events. The present record does contain considerable detail about the 1979 injury. It contains less detail about the 1980 surgery. And it contains much less detail about the 1975 injury.

As indicated by the paraphrase of his testimony quoted above from SAIF's motion, Dr. Norton had a very concrete understanding of the nature and consequences of claimant's 1975 and 1979 injuries. We agree with Dr. Norton's understanding of the 1979 injury. However, we find insufficient information in the record upon which to either agree or disagree with Dr. Norton's understanding of the 1975 injury. We thus conclude that Dr. Norton's testimony, though impressive in many respects, is insufficient to tip the burden of persuasion in our minds in SAIF's favor under the rule established in our prior Order on Reconsideration.

ORDER

As supplemented herein, the Board's Order on Reconsideration dated June 15, 1982 is readopted and republished effective this date.

CLIFFORD BELL, Claimant
John Parkhurst, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 81-08659
July 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 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.

BARBARA MEYER, Claimant
Michael B. Dye, Claimant's Attorney
Rankin, McMurry et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06237 & 81-07208
July 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.

RICHARD R. MILLER, Claimant
Richard Nesting, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 80-00986
July 19, 1982
Order of Dismissal

The employer and its insurance carrier has moved for a dismissal of the above-captioned case on the ground and for the reason that claimant has not timely filed an appellant's brief and has not prosecuted his appeal in a timely fashion.

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.

MAXINE WINEBARGER, Claimant
Kenneth Peterson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-09623 & 81-09624
July 19, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by 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.

EUGENE CREAMER, Claimant
Malagon & Velure, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys
Cosgrave, Kester et al., Defense Attorneys

WCB 80-7555
July 20, 1982
Own Motion on Reconsideration

Claimant moves for reconsideration of the effective date of claim reopening as established by our Own Motion Order dated June 8, 1982.

Claimant sustained compensable back injuries in 1961 and 1966. The present request for own motion relief raised both the questions of whether any relief should be granted and, if so, which of the prior employers would be responsible. The Referee recommended and we found that claimant's back condition had worsened. We relied primarily on Dr. Wilson's recommendation that further back surgery was now indicated. The Referee recommended and we found that claimant's 1966 employer was responsible for payment of compensation in connection with claimant's current condition.

These conclusions then raised the third issue of the date of claim reopening. Claimant contends he has not been able to work since October of 1978 due to back and leg pain. We concluded and, having again reviewed the record, continue to believe that part of claimant's leg pain was due to an unrelated vascular condition that was surgically corrected in November of 1980. The Referee also concluded that part of claimant's inability to work after 1978 was due to the vascular problem and recommended claim reopening effective February 1, 1981 -- the date by which, the Referee theorized, claimant had fully recovered from his vascular surgery and thus beyond which all continuing disability was due solely to claimant's back condition.

Following standard procedure, we sent the parties a copy of the Referee's recommendation and asked for their comments. Claimant responded: "The position of the claimant . . . is in complete keeping with the recommendations of the Referee."

Despite that prior agreement with the recommendations of the Referee, claimant's motion for reconsideration of our Own Motion Order now argues that his claim should be reopened effective when he left work in October of 1978. Claimant now argues:

> "The Board should not seize upon an unrelated health problem to deny this claimant the compensation to which he is entitled under the Workers Compensation Act."

The problem with claimant's argument is that he is not now entitled to any compensation under the Act. When claimant's aggravation rights on his 1961 and 1966 injuries expired, his entitlement to compensation under the Act ended, with the exception of medical services pursuant to ORS 656.245. Any receipt of compensation now depends not on rights or entitlement under the Act, but instead on the Board's discretion under ORS 656.278. That statute provides that after rights under the Act end, the Board has continuing discretion to award additional compensation "if in its opinion such action is justified."

Our June 8, 1982 Own Motion Order expressed the opinion that claim reopening was justified upon hospitalization for the back surgery recommended by Dr. Wilson. Upon reconsideration, that remains our opinion. The Referee recommended, claimant previously agreed and we found that part of claimant's inability to work after 1978 was due to his noncompensable vascular condition. We were not persuaded by the Referee's theory that claimant was fully recovered from the vascular surgery by February 1, 1981 or the Referee's further implicit belief that claimant has no permanent impairment as a result of that surgery. Finally, the evidence of a casual connection between claimant's current back condition and his 1966 industrial injury is only marginally persuasive. For these reasons, our opinion is and was that the action justified is claim reopening effective upon hospitalization for the surgery recommended by Dr. Wilson.

ORDER

As supplemented herein, the Board's Own Motion Order dated June 8, 1982 is readopted and republished.

HAROLD CURRY, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 81-0215M
July 20, 1982
Own Motion Determination

By Own Motion Order dated December 22, 1981 the Board reopened claimant's claim for his October 25, 1968 back injury for additional treatment recommended by Dr. Cherry. The claim has now been submitted for closure.

Claimant is awarded compensation for temporary total disability from November 9, 1981 to the date of this Order and no additional award for permanent partial disability.

Since we reopened this claim, some question has arisen of whether claimant has carpal tunnel syndrome and, if so, whether it is causally related to his 1968 back injury. If claimant now claims he has carpal tunnel syndrome that requires compensable medical treatment, SAIF would be obligated to accept or deny a claim for medical services and claimant could then request a hearing on such a denial of medical services. ORS 656.245(1) and 656.245(2). Therefore, we do not believe it is appropriate in connection with this own motion proceeding to express any opinion on whether the available medical evidence indicates the presence of carpal tunnel syndrome or the need for any medical treatment for such a condition.

Also, since we reopened this claim, a question has arisen concerning SAIF's processing of the claim. After SAIF advised claimant of an independent medical examination it had scheduled, claimant responded that he already had an appointment with his own doctor scheduled for the same date and time as the appointment that had been set up for the independent medical examination. A SAIF representative then called claimant's doctor's office and rescheduled claimant's appointment.

Pursuant to an Order to Show Cause, the Board held a hearing on whether this conduct subjected SAIF to any possible penalty for unreasonable interference in the doctor-patient relationship in the course of compensable treatment. SAIF defended its action on the ground that the rescheduling of claimant's appointment with his own doctor did not interfere in any way with claimant's treatment. Factually, SAIF so established. However, we question whether lack of interference with treatment is a sufficient justification for an employer or insurer to ever unilaterally reschedule an appointment a claimant has made with his own doctor and strongly recommend that this not be done absent the most extraordinary circumstances. But the evidence submitted at the hearing before the Board satisfied us that SAIF's conduct in this case was not so unreasonable as to warrant any possible penalty.

In summary, claimant is awarded compensation for temporary total disability as stated above, any question of the need for medical services for carpal tunnel syndrome as a compensable consequence of claimant's 1968 back injury will have to be initially resolved elsewhere and we find SAIF's action in rescheduling claimant's doctor's appointment highly questionable but not unreasonable.

IT IS SO ORDERED.

ROBERT DeGRAFF, Claimant
Olson, Hittle et al., Claimant's Attorneys
Roger Warren, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-07405 & 78-09173
July 20, 1982
Order on Reconsideration of Order on Remand

The Board issued its Order on Remand herein on May 25, 1982. The SAIF Corporation and claimant both moved for reconsideration of that order, although for different reasons. The Board abated its Order on Remand by order of June 25, 1982.

Claimant's request for reconsideration is more in the nature of a request for an allowance of an attorney's fee, since our Order on Remand contained no such provision. SAIF's request for reconsideration is based upon a provision in our Order on Remand that Employers Mutual of Wausau is to be reimbursed by SAIF for amounts paid to claimant for which Wausau was not responsible. We will first address the issue raised by SAIF.

SAIF is the aggravation insurer herein; Wausau the new injury insurer. Both initially denied claimant's claims on the basis of responsibility. An order designating a paying agent was issued November 16, 1978, pursuant to ORS 656.307, designating SAIF as the paying agent. Wausau thereafter amended its denial to include a denial of compensability, and not merely responsibility. In early January 1980, Wausau entered into a disputed claim settlement with claimant. Our Order on Review dated September 26, 1980 found that the disputed claim settlement was invalid. We went on to find that claimant had sustained a new injury, which was the responsibility of Wausau, and reversed the Referee's order finding SAIF responsible as the aggravation insurer. The Court of Appeals affirmed the Board's order insofar as it set aside the disputed

claim settlement, but found that claimant had sustained an aggravation of his prior injury for which SAIF was responsible, reversing the Board on this issue. Our Order on Remand directed SAIF to reimburse Wausau "for monies expended on claimant's claim for which it was not responsible."

SAIF's motion for reconsideration states:

> "Both employers denied responsibility in this case. A paying agent was appointed under ORS 656.307. That agent was SAIF. The only amounts paid by Wausau was [sic] under the disputed claim settlement. As such the payment was not made on the claim, was paid voluntarily by Wausau and was illegal. Wausau is not, therefore, entitled to reimbursement."

We agree with this statement to the extent that any amounts paid to claimant by Wausau pursuant to the disputed claim settlement are not SAIF's responsibility. Wausau has conceded that this is correct. Any compensation paid to claimant by Wausau, other than amounts paid pursuant to the invalid disputed claim settlement is now the responsibility of SAIF. No other result was intended by our Order on Remand, and this order serves as clarification of that order.

Claimant's request for reconsideration, which petitions the Board for an allowance of an attorney's fee, requests that the Board allow claimant's attorney a fee for services rendered at the hearing, Board and court levels. This Board is without jurisdiction to award an attorney's fee for services performed before the Court of Appeals, with one exception being those cases arising under the rule of Morris v. Denny's, 53 Or App 863 (1981). Kristie Paresi, 34 Van Natta 37 (1982). The Court of Appeals has recently decided that it will allow an attorney's fee for services performed in the lower tribunals when the court overturns a denial previously upheld. Hubble v. SAIF, 57 Or App 513 (1982). Apparently, no petition for attorney's fees was submitted to the Court of Appeals, as is customary.

The Referee awarded claimant's attorney $1,200 as a reasonable attorney's fee, payable by SAIF. On review the Board found Wausau responsible and ordered it to pay the $1,200 attorney's fee awarded by the Referee together with an additional $200 attorney's fee for services on Board review. By virtue of the Court of Appeals order finding SAIF responsible for payment of claimant's compensation, the $1,400 attorney's fee payable by the terms of the Board's Order on Review is now the responsibility of SAIF.

ORDER

On reconsideration of the Board's Order on Remand, the Board modifies its prior order. SAIF shall reimburse Employers Mutual of Wausau for compensation benefits paid to claimant pursuant to the Board's Order on Review, if any; and SAIF's obligation to reimburse Wausau shall not include any amounts paid by Wausau to claimant

under the terms of the Disputed Claimant Settlement which has been declared null and void. SAIF shall pay claimant's attorney the sum of $1,400 as a reasonable attorney's fee for services rendered at the hearing and Board levels.

Except as modified and clarified herein, the Board adheres to its prior Order on Remand.

LAWRENCE McLEES, Claimant
Malagon & Velure, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-02113
July 20, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requestes Board review of Referee Menashe's order which awarded claimant 67.5 degrees for 45 percent scheduled permanent partial disability for his right knee injury. The employer contends that the Referee erred in not applying ORS 656.222 to take into account claimant's previous disability awards from the Veterans' Administration for his knee and that the Referee's award was excessive.

Claimant originally injured his knee while in the military service and had received a 30 percent disability award from the Veterans' Administration for the original injury and subsequent aggravations. Claimant again reinjured his knee on April 6, 1977 when he slipped on a wet floor while working as a waxer for American Building Maintenance. Claimant has had a total of four surgeries on his right knee, two since the 1977 injury.

ORS 656.222 provides:

> "Should a further accident occur to a worker who is receiving compensation for a temporary disability, or who has been paid or awarded compensation for a permanent disability, his award of compensation for such further accident shall be made with regard to the combined effect of his injuries and his past receipt of money for such disabilities."

The term "compensation" is defined in ORS 656.005(9) as benfits provided to subject workers pursuant to the Oregon Worker's Compensation Law. Prior to the 1977 injury, claimant had not recevied any awards of compensation for his knee injury through the Oregon workers compensation system or through the workers compensation system of any other state.

In Harris v. SAIF, 55 Or App 158 (1981), the Court of Appeals indicated that a prior workers compenstation award from another

state may have to be considered in evaluating a new injury to the same part of the body. However, this is not the situation in the case at hand. Claimant's prior awards were from a federal agency created for the benefit of veterans injured in the military service. The purpose and functioning of that program are significantly different from a state workers compensation system.

A similar potential for double recovery exists with the federal Social Security Disability program. There, an offset has been specifically provided for by statute for permanent total disability awards. ORS 656.209. With respect to veterans' disability awards, the legislature has not chosen to enact such a provision.

We conclude, as did the Referee, that ORS 656.222 should not be applied to awards from the Veterans' Administration.

The second issue is whether or not the Referee's permanent partial disability award was excessive. Upon review of the medical evidence, we find the Referee's award to be correct.

ORDER

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

Claimant's attorney is awarded $450 as a reasonable attorney's fee for services rendered on Board review, to be paid by the employer.

MARVIN THORNTON, Claimant
Young, Horn et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-11391
July 20, 1982
Order Vacating Referee's Order, and Dismissing Request for Hearing

This claim involves a dispute over the distribution of the proceeds of a settlement of claimant's third party action. Such disputes are to be resolved by the Board in the first instance. ORS 656.593(3).

Claimant requested a hearing on this issue. The matter was submitted to the Referee based on stipulated facts and written argument. The Referee issued an order on November 16, 1981.

Issues arising under ORS 656.578 to 656.597 are not questions concerning a claim and, therefore, are not the proper subjects of a request for hearing pursuant to ORS 656.283. Accordingly, the Referee had no authority or jurisdiction to enter an order in this case. See Henry Kochen, 9 Van Natta 95 (1972).

Now that this matter is before the Board, the Board issues a separate Third Party Distribution Order this date.

ORDER

The Referee's order dated November 16, 1981 is vacated, and claimant's request for hearing is dismissed.

MARVIN THORNTON, Claimant
Young, Horn et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-11391
July 20, 1982
Third Party Distribution Order

This matter comes before the Board for resolution of a dispute as to what may be a just and proper distribution of the proceeds of a settlement of claimant's third party action, obtained with the approval of the paying agency pursuant to ORS 656.587. The grant of authority to the Board for resolution of this conflict is ORS 656.593(3).

Claimant contends that the statutory formula for distribution of the proceeds of a judgment obtained in a third party action, as set forth in ORS 656.593(1), does not apply to the proceeds of a settlement of a third party action, by virtue of the statutory language in ORS 656.593(3) that "the paying agency is authorized to accept such a share of the proceeds as may be just and proper" following a settlement of a third party action. Claimant contends that in the settlement of third party actions, it is just and proper for the paying agency to compromise its lien for claim expenditures in order to make an "equitable contribution" toward claimant's attorney's fees, which in turn allows the claimant to obtain a larger portion of the proceeds of the third party settlement. The insurer, in opposition, contends that pursuant to ORS 656.593(1)(c), it is entitled to reimbursement to the full extent of its lien.

ORS 656.593 provides in pertinent part:

> "(1) * * * The proceeds of any damages recovered from an employer or third person by the worker or beneficiaries shall be subject to a lien of the paying agency for its share of the proceeds as set forth in this section and the total proceeds shall be distributed as follows:
>
> "(a) Costs and attorney fees incurred shall be paid, such attorney fees in no event to exceed the advisory schedule of fees established by the Board for such actions.
>
> "(b) The worker or the beneficiaries of the worker shall receive at least 33-1/3 percent of the balance of such recovery. [This portion of the distribution formula was amended by 1981 Oregon Laws Chapter 540, Section 1. The provision in effect at the time this claim arose provided for 25 percent to the worker. See ORS 656.202(2).]
>
> "(c) The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for

compensation and other costs of the worker's claim under ORS 656.001 to 656.794. Such other costs include assessments for reserves in the Administrative Fund and any reimbursements made pursuant to ORS 656.728(3), but do not include any compensation which may become payable under ORS 656.273 or 656.278.

"(d) The balance of the recovery shall be paid to the worker or the beneficiaries of the worker forthwith. Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the Board.

"(2) The amount retained by the worker or the beneficiaries of the worker shall be in addition to the compensation or other benefits to which such worker or beneficiaries are entitled under ORS 656.001 to 656.794.

"(3) A claimant may settle any third party case with the approval of the paying agency, in which event the paying agency is authorized to accept such a share of the proceeds as may be just and proper and the worker or the beneficiaries of the worker shall receive the amount to which the worker would be entitled for a recovery under subsections (1) and (2) of this section. Any conflict as to what may be a just and proper distribution shall be resolved by the Board."

Claimant was compensably injured in February 1976 in a motor vehicle collision. Claimant elected to pursue a third party action in accordance with ORS 656.154 and 656.578. Claimant eventually entered into a settlement of this action for the sum of $80,000. At the time that claimant sought the workers compensation insurer's approval of the third party settlement, claimant also requested that the insurer reduce its lien in order to make an "equitable contribution" to the claimant's attorney's fees and costs which were incurred by claimant in pursuing the third party action. The compensation insurer approved the settlement but refused to reduce its lien. The settlement proceeds have been placed in trust for resolution of the distribution issue.

The insurer is claiming a lien of $34,052 against the proceeds of the third party settlement. The insurer makes no claim for reasonably expected future expenditures for compensation, but claims only reimbursement for expenditures incurred to date. No issue exists as to the actual expenditures incurred by the insurer in connection with this claim; the only issue is whether the insurer should be required to make an "equitable contribution" to the claimant's attorney's fees and costs and thereby compromise a portion of its lien.

Under the statutory scheme for distribution of a third party recovery, as set forth in above ORS 656.593(1), the total proceeds would be distributed as follows:

$80,000.00	Settlement Proceeds
- 26,666.00	Attorney's Fees and Costs
$53,334.00	Balance
- 13,335.00	25 Percent to Worker
$39,999.00	Balance
- 34,052.41	Employer's Lien
$ 5,946.59	Balance to Worker

We disagree with claimant's argument that ORS 656.593(3) should be interpreted to provide for any other distribution. Claimant's argument is based upon an analogy to Oregon cases dealing with an insurance company's right of subrogation, and decisions from other jurisdictions interpreting their third party recovery statutes.

We do not find the analogy to insurance subrogation law persuasive. Furthermore, the case law from other jurisdictions cited by claimant interpreted statutes which are significantly different from ORS 656.578 to 656.597; we thus do not find those cases persuasive.

Neither the California statute involved in Quinn v. State, 539 P2d 761 (1975), nor the New Mexico statute involved in Transport Indemnity Co. v. Garcia, 552 P2d 473 (1976), contained a specific distribution formula like that stated in ORS 656.593(1); rather, both of those statutes apparently merely provided for an equitable distribution of third party recoveries on a case-by-case basis. The Oregon legislature has chosen not to leave the question of what is an equitable distribution to ad hoc decision in individual cases; it has instead specified what it regards to be an equitable distribution of a third party judgment for all cases in ORS 659.593(1).

Claimant's ultimate position in this case is that the legislature used different wording in ORS 656.593(1), which involves distribution of a judgment, and ORS 656.593(3), which involves distribution of a settlement, and, therefore, the legislature must not have intended the ORS 656.593(1) formula to apply in the event of a settlement.

We agree with claimant up to a point. There are three parties necessary to effect the settlement of a third party action: the claimant, the third party tortfeasor or that party's insurer and the workers compensation insurer. See ORS 656.587. All three of those parties are permitted by ORS 656.593(3) to agree on any distribution of the settlement proceeds. Only if the three parties are unable to mutually resolve the question of distribution is the matter submitted to the Board under the last sentence of ORS 656.593(3): "Any conflict as to what may be a just and proper distribution shall be resolved by the Board."

Once such a disagreement is submitted to us, the question becomes: Given that the legislature has specifically stated what it regards to be an equitable distribution of a judgment in all cases, should we indulge in ad hoc analysis of what is an equitable distribution of a settlement in each case? We conclude that we should not and will not order distribution of a settlement in any manner other than the statutory formula applicable to distribution of judgments.

We so conclude because we cannot imagine any possible reason the legislature would have intended different results depending upon whether the third party action is settled or goes to judgment. As stated above, the statute applicable to judgments, ORS 656.593(1), is specific while the statute applicable to settlements, ORS 656.593(3), is general; and we think this difference is permissive authority for the parties involved in a third party settlement to agree to deviate from the literal formula in ORS 656.593(1). However, if the parties do not agree and the matter is submitted to the Board for resolution, the legislature could not possibly have intended that our resolution distribute a settlement differently than the statutory formula and/or an order of this Board would distribute a judgment.

Nor do we think we would be particularly able to make "equitable" distributions on an ad hoc basis. Claimant here argues that it would be more equitable to order a distribution that results in his receipt of a larger percentage of the third party recovery. In another case the workers compensation insurer could argue for a distribution that resulted in the worker's receipt of a smaller percentage of the third party recovery. If we permitted such arguments, in the long run the results would probably be random, standardless and thus inequitable.

Which brings us to a final consideration. It is the policy of the Board and, we believe, the policy of the legislature, to promote the pursuit of third party actions in order to obtain recovery from the ultimate wrongdoer. A large number of civil actions are settled. In order to encourage third party actions, it is, therefore, preferable to adopt a policy which facilitates - or at least does not retard - settlement of such actions. We believe that the doctrine of equitable apportionment of third party settlements would retard the settlement of third party actions by injecting significant uncertainty into the negotiation process. Under the statutory distribution formula, the parties generally know where they stand. If, instead, the claimant, claimant's attorney and workers compensation insurer knew only that each would receive that portion of the settlement that the current Board then regarded as equitable, settlement of a third party action would at least be more difficult, if not impossible.

For the foregoing reasons, we find that the distribution of the proceeds of the settlement obtained in claimant's third party action should be made according to the distribution formula set forth in ORS 656.593(1).

ORDER

The proceeds of claimant's third party recovery shall be distributed in accordance with ORS 656.593(1), with the paying agency being reimbursed for its claim expenditures to the full extent of its lien; i.e., $34,052.41.

DONALD YOUNG, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 82-00645
July 20, 1982
Third Party Distribution Order

This matter is before the Board for resolution of a dispute concerning the proper distribution of the proceeds of settlement of a third party action. ORS 656.593. The issue is whether the statutory distribution formula set forth in ORS 656.593(1), for distribution of the proceeds of a third party recovery obtained by a judgment is applicable to the proceeds of recovery obtained by settlement of a third party action. We have decided that it does. Marvin Thornton, WCB Case No. 80-11,391, 34 Van Natta 999 (decided this date).

ORDER

The proceeds of the settlement of claimant's third party action shall be distributed in accordance with ORS 656.593(1).

ROBERT W. AGGREY, Claimant
Carney, Probst et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05390
July 22, 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.

RICHARD G. KASPER, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10224, 81-01377 & 81-03850
July 22, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by 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.

KENNETH KIRK, Claimant
Wheelock, Neihaus et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 79-00095
July 22, 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.

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

WCB 81-05571 & 82-01405
July 22, 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.

JAY SYROP, Claimant
Robert Grant, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06781
July 22, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by 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.

RONALD D. BROWN, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
David Horne, Defense Attorney

WCB 81-05788 & 81-05789
July 23, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Nichols' order contending that the Referee erred: (1) in finding that claimant's skin condition was a compensable occupational disease and thus setting aside SAIF's denial; (2) in assessing a 25% penalty for failure to pay interim compensation within 14 days of notice of the claim; and (3) in awarding an attorney fee of $1,050 to claimant's attorney. We affirm on all points.

It is not completely clear which of several skin conditions claimant contends is compensable. The short record reflects he has been treated for perirectal abscesses, eczematous dermatitis, nodules of the scrotum and perineum, cysts and hemorrhoids. We understand the principal thrust of the claim and the denial to focus on the perirectal abscess condition. Claimant had previously suffered from the same problem from about 1972 to about 1977, but the condition was in a relatively quiescent stage from about 1977 to about 1980. Although the other evidence is inconclusive, we are persuaded by Dr. Keizer's deposition that claimant's work as a heavy equipment operator in the fall of 1980 was the major cause of an aggravation of his perirectal abscess condition resulting in the need for medical services and lost time. It follows that claimant has established the compensability of at least the perirectal abscess facet of his claim.

Although claimant left work in October of 1980, it was not until May of 1981 that he submitted a claim in the form of a letter from his attorney:

> "Demand is hereby made upon you to immediately make payment of time loss benefits to Mr. Brown for the period of time from October 18, 1980 to the present and to process this claim in accordance with the Workers Compensation Act."

There followed a period of some apparent confusion during which SAIF attempted to obtain more details from claimant's doctors, an effort that was apparently complicated by some confusion about whether claimant had given his doctors authority to release his medical information in the exact form the doctors desired. But see ORS 656.252(4) ("No person who reports medical information . . . in accordance with department rules shall incur any legal liability for the disclosure of such information.") and OAR 436-69-101(1) ("The act of the worker in applying for workers compensation benefits constitutes authorization for any physician, hospital, or other medical vendor to supply relevant information regarding the worker's occupational injury or illness to the insurer . . .").

In any event, SAIF did not deny the claim until July 6, 1981, not having paid any interim compensation since the claim was made in May of that year. SAIF argues it should not be penalized for not paying interim compensation pending denial, relying on Evelyn LaBella, 30 Van Natta 738 (1981).

In LaBella we stated:

> "The duty to pay interim compensation 'no later than the 14th day after the subject employer has notice or knowledge of the claim' within the meaning of ORS 656.262(4) only applies if the employer has effective notice or knowledge that the worker is, by reason of the alleged industrial injury or disease, unable to work. For most claimants, this presents no problem; they are working when they are injured and are unable to return to work due to the injury.
>
> "The claimant in this case is in a different situation. She last worked for Thriftway in 1973; last worked for Tradewell in 1976; last worked for Safeway in 1977; last worked for Cruse for Foods in 1978; left all of those jobs for reasons other than medically verified inability to work; and then made claims in 1979. In this situation, all of claimant's employers were entitled to some documentation that claimant would have been working or seeking work in 1979 but for her alleged occupational disease before they were under any duty to pay interim compensation.

> "Claimant did not supply any documentation. Claimant quotes selectively from Dr. Nag's June 29, 1979 report to the effect that 'she was unable to work since September of 1977.' However, the full sentence reads: 'She stated that she was working as a meat wrapper and her condition became worse and she was unable to work since September of 1977.' A doctor repeating a worker's story does not add anything to the worker's story in the sense of being any medical verification of that story." 30 Van Natta at 742-43.

If LaBella were the only precedent, the issue would be whether the original claim in this case - claimant's attorney's demand letter - conveyed effective notice that claimant was, by reason of the alleged compensable condition, unable to work. However, despite the fact that the LaBella case was itself affirmed by the Court of Appeals, 54 Or App 779 (1981), subsequent Court of Appeals decisions have repudiated the LaBella analysis.

In Likens v. SAIF, 56 Or App 498 (1982), the court held that a claimant need not prove entitlement to interim compensation. In Stone v. SAIF, 57 Or App 808 (1982), the court held that the legislature intended interim compensation solely as a penalty for an employer/insurer not taking any other action on a claim within 14 days, and thus interim compensation had to be paid to a claimant who had voluntarily retired from the labor force before making his claim. Neither Likens nor Stone mentioned Bell v. Hartman, 289 Or 447 (1980) or Langston v. K-Mart, 56 Or App 709 (1982), in which the appellate courts ruled that interim compensation need not be paid to a claimant who, it is subsequently established, was not a subject worker. Apparently the rule to be drawn from a synthesis of Likens, Stone, Bell and Langston is: there is no defense to nonpayment of interim compensation starting 14 days after notice or knowledge of a claim with the sole exception that interim compensation need not be paid to a nonsubject worker.

One would hope that the issue would not arise, but the reductio ad absurdum of the Likens and Stone approach would be payment of interim compensation to a claimant who is working at the time he or she makes a claim. More than half of the workers compensation claims made in Oregon are "medicals only" claims, and virtually all of those claims are made by workers who are actually working and earning wages at the time the claims are made. It has previously been understood that under ORS 656.262(6) the employer/insurer has 60 days to accept or deny such a claim without the need to pay any form of compensation in the interim. If, however, Likens and Stone require the payment of interim compensation to a "medicals only" claimant who is working and earning wages, a fundamental change has been effected in the Oregon workers compensation system, a change that it is hard to believe the legislature could have intended.

That portion of our LaBella decision requiring any form of documentation of inability to work before interim compensation is due cannot be reconciled with Likens and Stone and is, therefore,

overruled. Other than the nonsubject worker defense, the courts do not now recognize any exception to the duty to pay interim compensation. In this case, SAIF failed to pay interim compensation. The Referee properly penalized SAIF for that failure. See Zelda Bahler, 31 Van Natta 478 (1981).

Finally, SAIF challenges the Referee's award of a fee of $1,050 to claimant's attorney for prevailing on SAIF's denial. That fee is in about the middle of the range we recognized as presumptively reasonable in Clara M. Peoples, 31 Van Natta 134 (1981). Although the exhibits submitted for hearing and the hearing itself were on the modest side of average, claimant's attorney did attend and was an active participant at two separate depositions of two of claimant's doctors. We conclude that the attorney fee awarded by the Referee was appropriate and reasonable.

ORDER

The Referee's order dated October 29, 1981 is affirmed. Claimant's attorney is awarded $450 for services rendered on Board review, payable by the SAIF Corporation.

KENNETH CARTWRIGHT, Claimant
Rosenbaum & Simmons, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Donald Bourgeois, Defense Attorney
Richard Maizels, Defense Attorney

WCB 81-07841
July 23, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests Board review of Referee Neal's order which affirmed the September 15, 1981 denial issued by North Pacific Insurance, and the August 3, 1981 denial issued by the SAIF Corporation.

A summary of the complicated factual background which eventually culminated in the hearing will serve to put this case in perspective. Sometime in 1974, claimant became acquainted with James Clarke. Claimant at that time engaged in welding and machine work. Following a brief period of employment with Mr. Clarke, both parties apparently decided in 1975 to combine their assets and talents in a business venture. That oral agreement basically provided that claimant would contribute tools and equipment from his company to effect a merger with Mr. Clarke's company, Subterranean Incorporated. Claimant was to receive a 10% ownership interest in that company initially and 5% per year thereafter to a maximum of 49-1/2%. Whether or not claimant was required to reimburse Mr. Clarke for the additional 5% per year is a matter of dispute between the parties. Both parties seem to agree that they were engaging in business on the basis of a partnership relation.

Subterranean engaged primarily in well drilling operations wherever business beckoned. In 1976 property was purchased in Scappoose, Oregon in the company name and the mortgage was signed by both claimant and Mr. Clarke. Claimant moved his trailer onto the property and took up residence there. A machine shop was subsequently constructed on the property, for the purpose of servicing

the company's motor vehicles and drilling rigs, as well as fabrication of equipment necessary for the company's operations. Claimant managed the Scappoose shop, performed and oversaw work performed there, hired and fired employees and bid on drilling jobs for the company.

In 1977 claimant sustained an industrial injury to his back while performing work for Subterranean. The injury was diagnosed as a lumbosacral strain. The claim was accepted by North Pacific Insurance and compensation paid from October 30, 1977 until November 1, 1977. Sometime in 1976, the formerly amicable relations between claimant and Mr. Clarke began to deteriorate. Claimant contends that this was due to Mr. Clarke's failure to comply with the partnership "agreement," while Mr. Clarke states that the main reason was due to the inefficiency of the Scappoose shop which claimant was running. The relationship continued to deteriorate and in December 1980, although claimant denies it, a conversation took place between claimant and Mr. Clarke, following which Mr. Clarke assumed that the parties' business relations were at an end. Mr. Clarke thereafter did not pay claimant until February, at which time back checks were issued. On March 24, 1981 claimant filed a complaint in Multnomah County Circuit Court seeking specific performance of a contract to sell a business.

On April 18, 1981 claimant contends he sustained an industrial injury when he tripped over a piece of hose while working on one of Subterranean's drilling trucks, fell off the end of the truck and injured his back. The medical reports do indicate that something happened to claimant's back during that period of time. On April 27, 1981 claimant received written notice from Mr. Clarke indicating that his association with Subterranean was terminated.

The Referee, citing several past Board decisions, attempted to look to the reality of the parties' business arrangements rather than the legal designations of that relationship. The Referee found that the parties relationship was at least minimally a partnership prior to the December 1980 incident, and that claimant acted more in the capacity of a sole proprietor thereafter, up to and including the date upon which he suffered his alleged 1981 industrial accident. The Referee further found that claimant failed to sustain his burden of proof under ORS 656.128, and did not establish that the injury occurred during the course and scope of his employment with Subterranean, Inc. Additionally, claimant's credibility was found to be substantially less than that of the other witnesses, and Mr. Clarke's version of the facts was accepted. The Referee found surveillance film of the claimant inconsistent with claimant's exaggerated complaints concerning his physical conditions, and the Referee suspected that claimant filed his 1981 claim out of a revenge motive against Mr. Clarke over the breakup of the business.

Claimant in his brief has raised six issues for review by the Board: (1) Did claimant sustain an injury; (2) If so, was it in the course and scope of his employment with Subterranean, Inc.; (3) Was claimant an employee of Subterranean, Inc. on April 18, 1981; (4) Was claimant's partnership agreement with Subterranean,

Inc. preclusive of his claim; (5) Did claimant aggravate his 1977 injury; and (6) Did the Referee err in receiving into evidence Public Utility Commission records offered over claimant's objections?

With regard to claimant's first issue, we defer to the Referee's finding concerning claimant's lack of credibility. Claimant's testimony contained numerous evasions, and is inconsistent with other parts of the record. The surveillance films additionally weigh against claimant's credibility. The Referee determined that the claimant suffered some sort of incident which resulted in his hospitalization, but found that he failed to establish that it took place during the course and scope of his employment with Subterranean, Inc. This finding also disposes of the claimant's second issue.

Our agreement with the Referee concerning the first and second issues raised by the claimant technically also disposes of the third and fourth issues raised. In any event, we agree with the Referee that claimant was not an employee of Subterranean, Inc. at the time of his alleged injury, but was a partner or possibly a sole proprietor. Although the parties own beliefs concerning their legal relationship are not necessarily controlling, we believe that the evidence does establish a partnership relation, at least until December 1980, and subsequent to that something even less but certainly not an employer-employee relationship. Although claimant contends he was not terminated until receipt of the April 27, 1981 letter, the facts do not support his contention. Following the December incident, claimant received no further monies until he called Mr. Clarke in February. Mr. Clarke testified that the money sent at that time was for the purpose of allowing the claimant some initial capital in order for him to get started in business on his own. The evidence indicates that claimant in fact repaid Mr. Clarke a portion of that money, an action hardly supportive of his claim to be an employee of Subterranean, Inc. We conclude that, at least until December 1980, the parties intended to establish a partnership relation, conducted themselves as if such a relationship existed, apparently shared in the profits, and probably would have shared losses had any occurred. See Hayes v. Killinger, 235 Or 465 (1963).

ORS 656.027 provides that partners and sole proprietors are not subject to the Workers Compensation Act. ORS 656.128 provides that partners and sole proprietors may elect to have workers compensation coverage. Such optional coverage was provided by North Pacific Insurance until it was terminated by mutual agreement of claimant and Mr. Clarke, since claimant was "...doing the work on [his] own." Therefore, since there was a partnership or sole proprietor arrangement at the time of the claimant's alleged injury, with no election for coverage in effect at that time, claimant is not a subject employee under ORS 656.027.

On the issue concerning claimant's aggravation claim in relation to his 1977 injury, coverage for which was provided by North Pacific Insurance, we also agree with the Referee that claimant has submitted no evidence whatsoever that his 1981 condition has any relation to that injury. We also note that the evidence indicates that claimant sustained several nonemployment incidents following that injury for which he claimed and received payment by North Pacific Insurance, further straining his credibility.

Claimant's final issue concerns submission and acceptance at the hearing of certain Public Utility Commission documents presented and apparently prepared by Mr. Clarke. Claimant contends it was error for the Referee to admit the documents over his objection. We find it unnecessary to make a specific ruling on this issue. Even excluding the questioned documents, claimant has not established the compensability of this claim.

ORDER

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

HARLAN CRAWFORD, Claimant
Harold W. Adams, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-4722
July 23, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant seeks review of Referee Mannix's order which upheld SAIF's denial of compensability of the claim, and denied penalties and attorney's fees for unreasonable delay in denying the claim.

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

Claimant sustained a compensable low back strain in 1976. The injury was superimposed over congenital low back spinal conditions. Claimant's 1979 claim was presented at the hearing on a theory of an aggravation, or in the alternative, a claim for medical services. In closing argument, claimant's counsel for the first time argued an occupational disease theory. The Referee decided adversely to the claimant on all grounds. Claimant retained a different attorney on review. Claimant's new counsel withdrew the theories of aggravation and occupational disease and argued compensability on the sole basis that the claim was for medical services resulting from the 1976 injury.

As noted by the parties in their briefs, compensability boils down to resolving a difference of expert opinion between claimant's long-time treating chiropractor, Dr. Nicklia, and SAIF's consulting chiropractor. The Referee did not find Dr. Nicklia's opinion supporting compensability to be persuasive. Neither do we. Dr. Nicklia's reports do not reflect his awareness that claimant had pre-existing, non-compensable low back conditions, and he did not explain why the symptoms claimant was experiencing in 1979 were not as likely attributable to the natural progesssion of the congenital conditions rather than to the 1976 injury.

ORDER

The Referee's order dated January 26, 1982 is affirmed.

MARION L. ELLS, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-1587
July 23, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The claimant seeks Board review on Referee Leahy's order, as reissued, which granted claimant an award of 48 degrees for 15 percent unscheduled neck disability.

Claimant contends that he has not received the proper awards for a cervical sprain, left leg condition, and ptosis of the left upper eyelid. A further contention is that the claim was prematurely closed and that claimant is entitled to continuing compensation for temporary total disability until she was declared medically stationary. The appellant contends that this case should be remanded to the Referee for the taking of further evidence.

The conclusion reached by the Referee is affirmed. The extent of disability to claimant's upper eyelid and the issue of premature claim closure were never raised as issues before the Referee nor litigated at the time of the hearing. The Board has previously held, in the case of Robert Barnett, 31 Van Natta 172 (1981), and still holds that it will not remand a case to a Referee to merely admit medical reports which were obtained after the hearing, if the evidence could have been available at the time of the hearing. Furthermore, no case will be remanded for the purpose of raising new issues that could have been raised at the hearing.

ORDER

The order of the Referee, dated October 23, 1981, as reissued on December 31, 1981 is affirmed.

WILLIAM E. HOPSON, Claimant
Allen Murphy, Claimant's Attorney
Mitchell, Lang et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 77-05580 & 78-06309
July 23, 1982
Order of Dismissal

The employer has requested review of an order issued July 2, 1982 by the Presiding Referee of the Hearings Division. The Presiding Referee's order denied the employer's Motion to join SAIF as a party to these proceedings and ordered that the claim be set for hearing in due course.

The Presiding Referee's order is not a final order, and therefore it is not subject to review by the Board at this time. Accordingly, the employer's request for review must be dismissed.

ORDER

The employer's request for review is dismissed.

SCOTT O. LOFGREN, Claimant
Lewis, Todorovich et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-08744
July 23, 1982
Order on Review

Reviewed by Board Member Ferris & Barnes.

The employer seeks Board review of Referee Fink's order which found that claimant was entitled to an award of 25% unscheduled disablity rather than the 10% unscheduled disability that had been awarded by the Determination Order dated August 13, 1981.

The Referee's order does not mention any of the rules governing rating of disability OAR 436, Division 65, discussed below. Rather, the Referee's order suggests that the award of 25% unscheduled disability is at least consistent with, if not compelled by, Hawes v. SAIF, 6 Or App 136 (1977), and Muller v. Sears Roebuck & Co., 13 Or App 10 (1973).

Since the Hawes and Muller decisions, the legislature has amended ORS 656.726(3)(f) to provide that the Director of the Workers Compensation Department may adopt "general guidelines for the evaluation of permanent disabilities in accordance with existing law." In 1980, following the rulemaking procedures of the Administrative Procedures Act, the Director adopted such guidelines which are now found at OAR 438, Division 65.

These guidelines produce a different result than that reached by the Referee.

The objective physical findings changed somewhat with each doctor visit. We therefore use the most recent medical evidence for reaching a rating of claimant's impairment (+4 value). Claimant is 30 years old (-4 value; OAR 436-65-602) with a high school education and three years of college (-15 value; OAR 436-65-603). His work experience rating, based on the job he had when he was injured, is a +10 (OAR 436-65-604). Claimant is restricted to light-medium work (+8 value; OAR 436-65-605). Based on his education, past work experience and limitations, we find he is limited to an average of 70% of the general labor market (-25 value; OAR 436-65-608). We conclude, after combining the above factors, that claimant was properly compensated by the Determination Order which granted him 32° for 10% unscheduled disablity for his shoulder injury.

The Director's rules upon which the above analysis is based, were generally upheld in the face of a blunderbuss challenge in OSEA v. Workers Compensation Dept., 51 Or App 55 (1981); see also John Cameron, 34 Van Natta 211 (1982). OSEA and Cameron both recognize the key issue concerning the Director's rules is whether they are "in accordance with existing law" in their application in any given case.

Given the different results produced by the Referee's reliance on the older cases of Hawes (1971) and Muller (1973) and our reliance on the subsequently adopted rules of the Department, the question necessarily arises whether the Department's rules were consistent with existing law when adopted in 1980 as required by

ORS 656.726(3)(f). This presents the question of how to interpret Court of Appeals cases -- whether they are based on legal conclusions that would be part of the "law" with which Department rules must be consistent or whether they are only based on de novo factual findings that do not have the force or dignity of "law."

We previously discussed this same interpretation problem in Joe McKenzie, 31 Van Natta 101 (1981), modified on other grounds, 56 Or App 394 (1982), and Raymond Orsborn, WCB Case No. 81-03928 (April 30, 1982), 34 Van Natta 576. In McKenzie the Referee had interpreted Edwards v. SAIF, 30 Or App 21 (1977), as standing for the proposition that, as a matter of law, a temporal connection is insufficient to prove causation. In Orsborn the Referee had interpreted Barnhardt v. Louisiana Pacific Corp., 50 Or App 329 (1981), and Hampton v. SAIF, 23 Or App 74 (1975), as standing for the proposition that, as a matter of law, a claimant seeking permanent total disability need only seek work in the community in which he lives. In both McKenzie and Orsborn we disagreed with the Referee's interpretations of the prior Court of Appeals cases, finding in both contexts that the relevant language of the court cases had been in the nature of factual analysis on de novo review, not holdings of law.

We reach the same conclusion here. In Hawes and Muller the Court of Appeals granted/affirmed awards of 25% unscheduled disability based on its factual findings and its judgment based on the facts as found. Neither Hawes nor Muller contains anything that can be fairly interpreted as pronouncements concerning the law governing the rating of permanent disability; indeed, Hawes merely adopted the opinion of a trial judge, 6 Or App at 137, and Muller expressly declines to restate the relevant law, 13 Or App at 13. It is elementary that two different juries could arrive at different verdicts after hearing the same or substantially the same evidence. It would not seriously be suggested that the first verdict was a form of "law" binding on the second jury. We conclude that generally speaking -- and specifically in the cases of Hawes and Muller -- prior Court of Appeals decisions on extent of disability are more in the nature of prior jury verdicts and therefore not binding as a form of "law" in future cases.

It follows that there is no established conflict between the OAR 436, Division 65 standards set out above and "existing law" when those standards were adopted in 1979.

ORDER

The Referee's order dated November 12, 1981 is reversed. The Determination Order dated August 13, 1981 is reinstated and affirmed.

MAX MADDEN, Claimant
Malagon & Velure, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-3372
July 23, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF seeks Board review of Referee Mannix's order which ordered SAIF to pay all of claimant's pending medical bills except the fee of claimant's treating physician, imposed a 20% penalty for SAIF's unreasonable delay in paying a hospital bill, and awarded a $1500 attorney fee to claimant's attorney for services rendered because of SAIF's unreasonable conduct. Claimant cross-appeals, alleging that the Referee should have ordered payment of the treating physician's bill as well and should have imposed a penalty for the carrier's unreasonable delay in paying that bill.

In June, 1979, claimant injured his low back while stepping out of a vehicle. The claim was accepted by SAIF. Claimant's back pain increased substantially although he was to able to continue modified employment for a period of time. Claimant continued under the conservative treatment of Dr. Schachner who ultimately reported that claimant was medically stationary and needed to learn to live with the pain he was experiencing.

Claimant did not accept Dr. Schachner's conclusion and around October, 1979, began treating with Dr. Donald T. Smith. Dr. Smith identified a "cloudy" spot in claimant's myelogram, requested a blow-up of that spot, requested an electromyelogram, and concluded that claimant had a herniated disc at L 4-5. Dr. Smith notified SAIF in a report dated November 7, 1980, received by SAIF on November 14, 1980, that he was considering surgery. In a report dated November 20, 1980, received by SAIF on November 24, 1980, Dr. Smith recommended surgical removal of the herniated portion of the disc, but indicated that he was referring claimant to another physician for a second opinion. In a report dated November 14, 1980, received by SAIF on November 24, 1980, the consulting physician 'favored' a repeat myelogram but concurred with the need for surgery.

In a notice dated November 21, 1980, SAIF notified the claimant of an independent medical examination with Orthopedic Consultants scheduled for December 1, 1980. In a letter dated November 26, 1980, received by SAIF on December 2, 1980, Dr. Smith informed SAIF that surgery was scheduled for December 1, 1980.

The surgery was performed on December 1, 1980; claimant did not attend the Orthopedic Consultant's examination. In a report dated February 9, 1981, Dr. Norton, SAIF's medical consultant, reported Dr. Smith to the Workers Compensation Department's Medical Director for allegedly violating physicians' reporting requirments and depriving SAIF of its right to an independent evaluation of claimant prior to surgery.

Claimant requested a hearing on a number of issues, all of which were resolved prior to the hearing held on June 9, 1981, except the issue of entitlement to penalties and attorney fees for SAIF's unreasonable refusal, resistance, or delay in paying all

medical bills incurred for services rendered to claimant after he began treating with Dr. Smith, including the hospital bill arising from the back surgery, Dr. Smith's fees, and post-surgery physical therapy. The Referee ordered that SAIF pay the physical therapy bills but did not impose penalties for that bill because claimant failed to prove that the vendor had previously billed SAIF. The Referee ordered SAIF to pay the hospital bill and other bills associated with the surgery, except Dr. Smith's surgery fee. The Referee concluded that SAIF had a "colorable claim" against Dr. Smith, that SAIF had initiated a disciplinary proceeding against Dr. Smith pursuant to OAR 436-69-510 et seq., therefore, SAIF was justifed in withholding payment until resolution of that proceeding. The Referee ordered payment of all medical bills arising from the surgery, except those of Dr. Smith, and imposed penalties and attorney fees against SAIF for its unreasonable failure to pay the hospital bill.

We modify the Referee's decision. We conclude that SAIF should have been ordered to pay Dr. Smith's bill in addition to the other medical bills. We further conclude that no penalty is warranted with respect to the delay in paying the hospital bill because we believe the relevant administrative rules were ambiguous and that SAIF had a legitimate doubt as to its duty to pay under those rules.

We do not decide whether SAIF had a "colorable claim" against Dr. Smith. The issue is, assuming arguendo that SAIF reasonably believed it had a legitimate complaint against the treating physician, whether SAIF had the right to suspend payment of all medical bills arising from the allegedly unauthorized surgery pending resolution of the complaint.

With respect to the hospital bill, SAIF points out that the definition of "medical services" in the relevant administrative rules ("Medical Services", OAR Chap. 436, Division 69) includes hospital and other related services. SAIF reasons that therefore an allegation of misconduct against the physician who set in motion a series of medical services is adequate to suspend payment to all medical vendors down the line. SAIF contends that one of the purposes of the Medical Service rules is to minimize inappropriate medical care and unnecessary cost, and that in order to effectuate this purpose it is necessary to withhold payment of all bills arising from allegedly inappropriate medical care pending resolution of a complaint.

The administrative definition in the rule relied on by SAIF merely states the scope of the rule as applicable to all medical vendors, and does not support the proposition that an allegation against one vendor flows against all subsequent, related vendors. The Board believes that the carrier's need to police physician conduct does not extend to refusing or delaying payment otherwise due to medical vendors who are innocent by-standers to a dispute between the insurer and the physician. We see no reason to penalize one vendor for the alleged misconduct of another vendor.

We also conclude that SAIF should not have suspended payment of Dr. Smith's bill. In reaching this conclusion, we are aided by the amicus brief submitted at our request by the Workers Compensation Department. It is the Department's position that a discipli-

nary complaint under OAR 436-69-501 et seq. is in the nature of a civil penalty proceeding and is wholley separate from the claim of an injured worker. The Department submitted that under its rules filing a complaint against a medical vendor does not toll the insurer's duty to process the compensation claim of the vendor.

In accord with the position urged by the Department as drafters of the medical service rules, we conclude that SAIF had an obligation to pay Dr. Smith's bill pending resolution of its complaint against him.

However, we believe that SAIF had a legitimate doubt concerning the right to suspend payment of all medical bills arising from the surgery in question pending resolution of the complaint against Dr. Smith. Therefore, penalties are not justified merely for nonpayment of the medical bills.

ORDER

The Referee's order dated June 15, 1981 is modified. SAIF is ordered to pay the fees of Dr. Donald T. Smith. That portion of the Referee's order imposing a penalty based upon the hospital bill is reversed. The Referee's order otherwise is affirmed in all respects.

RICHARD PICK, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-08204
July 23, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated July 6, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

NORMAN C. STEWART, Claimant
Renwick & Bishop, Claimant's Attorneys
Roger Warren, Defense Attorney

WCB 79-08824
July 23, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer seeks Board review of Referee Fink's order that found that claimant was entitled to an award of 25% unscheduled disablity rather than the 5% unscheduled disability that had been awarded by the Determination Order dated August 10, 1979.

The Referee's order does not mention any of the rules governing rating of disability OAR 436, Part 65, discussed below. Rather, the Referee's order suggests that the award of 25% unscheduled disability is at least consistent with, if not compelled by, Hawes v. SAIF, 6 Or App 136 (1971), and Muller v. Sears Roebuck & Co., 13 Or App 10 (1973).

Since the Hawes and Muller decisions, the legislature has amended ORS 656.726(3)(f) to provide that the Director of the Workers Compensation Department may adopt "general guidelines for the evaluation of permanent disabilities in accordance with existing law." In 1980, following the rulemaking procedures of the Administrative Procedures Act, the Director adopted such guidelines which are now found at OAR 438, Division 65.

These guidelines produce a different result than that reached by the Referee.

Claimant's treating physician, Dr. Reinhart, fails to list objective findings, but indicates after each visit that claimant's condition is improving. The Orthopaedic Consultants rate claimant's disability as mild. Dr. Louis Fry, in December 1979, finds physical impairment of approximately 13%. Dr. Edward Rosenbaum, in October 1980, finds claimant has no residual effects from his injury. We conclude that a totality of the medical and lay evidence indicates claimant has impairment in the range of 5%. Claimant is 28 years old (-5 value; OAR 436-65-602) with a GED. At the time of the hearing he had completed 2-1/2 years of additional study at a community college. He anticipated achieving an associate degree in about six months. Recognizing that much of this study was vocationally oriented, we rate his education impact level at -7. (OAR 436-65-603). At the time of claimant's injury he was working as a cement yarder (SVP-2; 0 value; OAR 436-65-604). Claimant also has experience as a helicopter mechanic, service station attendant, and maintenance and apartment supervisor. Claimant is precluded from heavy labor, although the evidence indicates it is more probably due to his small stature rather than to any physical limitation. Resolving doubt in claimant's favor, we assign a +5 value for this limitation. (OAR 436-65-605). His mental capacity and emotional and psychological findings are average (OAR 436-65-606 and 607). Based on claimant's education, work background and limitation to medium work, we find he has 89% of the general labor market still open to him. (-25 value; OAR 436-65-608. Combining all the above factors we conclude that claimant was properly compensated by the 5% award granted by the Determination Order.

The Director's rules upon which the above analysis is based, were generally upheld in the face of a blunderbuss challenge in OSEA v. Workers Compensation Dept., 51 Or App 55 (1981); see also John Cameron, 34 Van Natta 211 (1982). OSEA and Cameron both recognize the key issue concerning the Director's rules is whether they are "in accordance with existing law" in their application in any given case.

Given the different results produced by the Referee's reliance on the older cases of Hawes (1971) and Muller (1973) and our reliance on the subsequently adopted rules of the Department, the question necessarily arises whether the Department's rules were consistent with existing law when adopted in 1980 as required by ORS 656.726(3)(f). This presents the question of how to interpret Court of Appeals cases -- whether they are based on legal conclusions that would be part of the "law" with which Department rules must be consistent with, or whether they are only based on de novo factual findings that do not have the force or dignity of "law."

We previously discussed this same interpretation problem in Joe McKenzie, 31 Van Natta 101 (1981), modified on other grounds, 56 Or App 394 (1982), and Raymond Orsborn, WCB Case No. 81-03928 (April 30, 1982), 34 Van Natta 576. In McKenzie the Referee had interpreted Edwards v. SAIF, 30 Or App 21 (1977), as standing for the proposition that, as a matter of law, a temporal connection is insufficient to prove causation. In Orsborn the Referee had interpreted Barnhardt v. Louisiana Pacific Corp., 50 Or App 329 (1981), and Hampton v. SAIF, 23 Or App 74 (1975), as standing for the proposition that, as a matter of law, a claimant seeking permanent total disability need only seek work in the community in which he lives. In both McKenzie and Orsborn we disagreed with the Referee's interpretations of the prior Court of Appeals cases, finding in both contexts that the relevant language of the court cases had been in the nature of factual analysis on de novo review, not holdings of law.

We reach the same conclusion here. In Hawes and Muller the Court of Appeals granted/affirmed awards of 25% unscheduled disability based on its factual findings and its judgment based on the facts as found. Neither Hawes nor Muller contains anything that can be fairly interpreted as pronouncements concerning the law governing the rating of permanent disability; indeed, Hawes merely adopted the opinion of a trial judge, 6 Or App at 137, and Muller expressly declines to restate the relevant law, 13 Or App at 13. It is elementary that two different juries could arrive at different verdicts after hearing the same or substantially the same evidence. It would not seriously be suggested that the first verdict was a form of "law" binding on the second jury. We conclude that generally speaking -- and specifically in the cases of Hawes and Muller -- prior Court of Appeals decisions on extent of disability are more in the nature of prior jury verdicts and therefore not binding as a form of "law" in future cases.

It follows that there is no established conflict between the OAR 436, Division 65 standards set out above and "existing law" when those standards were adopted.

ORDER

The Referee's order dated March 11, 1981 is reversed. The Determination Order dated August 10, 1979 is reinstated and affirmed.

CHARLES WATTENBARGER, Claimant
Brown, Burt et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-03922
July 23, 1982
Order on Reconsideration

The Board issued its Order on Review in the above entitled matter on June 30, 1982 wherein we affirmed the Referee's order finding claimant permanently and totally disabled and awarding claimant's attorney a fee of $800, payable by the insurer.

By letter dated July 9, 1982 claimant's attorney requested we reconsider the attorney fee granted to him and award him $2,000 for his services. Attorney fees awarded are governed by OAR 438, Division 47. Specifically, OAR 436-47-010(2) states that the amount of attorney fees shall be based on the efforts expended and the results obtained.

The effort expended by claimant's attorney was reflected in the impressive quality of the brief he submitted. We were also aware that claimant's attorney did not represent him at the hearing, but took over the representation at the Board level, and thus may have devoted more time to claimant's representation than might otherwise have been the case. For these reasons, we awarded an employer-paid attorney fee in excess of the maximum usually awarded based on informal guidelines that we try to apply to produce generally consistent attorney fee awards.

Claimant's attorney nevertheless argues that he is entitled to a minimum of $80 per hour. We rejected a similar contention in Norman Z. Anlauf, WCB Case No. 78-00431, 34 Van Natta 531 (April 30, 1982), because the contingent nature of attorneys fees in workers compensation can produce results that are both more than and less than a "normal" hourly rate:

> "The Board believes that many settlements and some Referee orders result in attorney fees that, being a standard percentage of increased compensation, work out to be remuneration for the attorney at the rate of at least several hundred dollars per
>
> billable hour. This is defended as inherent in a contingent fee system - high per-hour fees in successful cases are necessary because of no attorney fees in unsuccessful cases. This means that claimant's attorneys should be willing to take the bitter with the sweet; not having complained, in our experience, when the contingent fee system produces very generous remuneration, a claimant's attorney does not really have any equitable standing to protest when the contingent fee system produces less generous remuneration."

On reconsideration of the Order on Review dated June 30, 1982 the Board adheres thereo.

IT IS SO ORDERED.

JOHN R. DANIEL, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 80-11373
July 27, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The self-insured employer seeks Board review of those portions of Referee Baker's order that required payment of temporary total disability from October 2, 1980 through May 27, 1981, less actual earnings and unemployment compensation and assessed a penalty equal to 25% of the temporary total disability awarded.

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

After a period of recovery following surgery for claimant's compensable left knee injury, his treating physician, Dr. Keizer, submitted reports to the employer in July of 1980, chart notes from an October 1, 1980 examination and a Physician's Supplemental Report form dated October 10, 1980. These documents are far from clear. The July report predicts that claimant will be released for work "in the 2nd week of August." The October 1 chart note states: "[claimant] may have to be restricted to light to medium work but I would make no restrictions at this time." The October 10 report really compounds the confusion. In it Dr. Keizer checked a box indicating claimant was released to work effective October 2, 1980, but checked another box indicating that claimant was not medically stationary. It appears to us that Dr. Keizer initially checked the box indicating that claimant was released to modified work but then scratched that out, checked the released-to-regular-work box and penned in "may have to be restricted to light to medium work."

Perhaps illustrating the natural human tendency to hear what we want to hear, the employer interpreted these reports to mean that claimant was released to regular work and unilaterally terminated claimant's time loss compensation effective October 2, 1980.

There is a significant difference between situations in which time loss is to be terminated because an injured worker is released for regular work and situations in which time loss is to be terminated because a worker is medically stationary. The employer or insurer can unilaterally cease payment of temporary total disability benefits when a worker is released for regular work. ORS 656.268(2); see also ORS 656.325(5). When, instead, an injured worker is declared medically stationary, the employer or insurer must continue paying temporary total disability benefits thereafter until a Determination Order is issued by the Evaluation Division. Mark L. Side, 34 Van Natta 661 (1982).

Because the difference between whether the worker has been released to regular work (unilateral cecessation of time loss) and whether the worker has not been so released but is only medically stationary (continuation of time loss) can be so significant, we conclude the better policy position is that all doubt or ambiguity should be resolved in favor of concluding that the worker has not been released to regular work. As applied in this case, when the employer received the series of reports from Dr. Keizer between July and October of 1980, the situation was then simply too unclear for the employer to be justified in concluding that claimant had

been released for regular work without some further clarification from claimant's doctor.

ORDER

The Referee's order dated October 23, 1981 is affirmed. Claimant's attorney is awarded $300 for services rendered on Board review, payable by the employer.

MAXINE J. EVANS, Claimant
DeForest, Hansen et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-02390
July 27, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The employer seeks Board review and the claimant cross-requests review of Referee Danner's order, as amended, which set aside the Determination Order dated September 11, 1981 and reopened claimant's claim as of July 21, 1981 for payment of compensation for temporary total disability until closure; granted claimant's attorney an attorney's fee equal to 25% of the additional compensation for temporary total disability; granted claimant additional compensation equal to 25% of the amounts due her as of August 20, 1981 pursuant to ORS 656.262(8). The employer contends that claimant's claim was not prematurely closed and the issuance of the Determination Order was proper. Claimant contends that the attorney fee granted should not have been ordered paid out of claimant's compensation but rather should have been paid totally by the employer.

I

Claimant, 52 years of age, sustained a compensable injury on January 18, 1980 lifting two heavy speakers while employed by Montgomery Ward. The initial diagnosis was herniated disc at C6-7. Subsequently claimant was released to return to work on April 9, 1980 and on May 7, 1980 Dr. Weinman found her condition medically stationary. The claim was closed by a Determination Order dated June 24, 1980 granting compensation for time loss only.

By a report of October 27, 1980 Dr. Saez recommended hospitalization for conservative care. Claimant was hospitalized and underwent a myelogram which was normal. The employer's records indicate that compensation for temporary total disability was paid from October 28, 1980 through November 10, 1980. On November 11, 1980 claimant returned to work and worked through February 12, 1981. This was the last day she was gainfully employed.

By a report dated February 19, 1981 Dr. Dienel, a cardiologist, indicated claimant had complaints of chest pain and he recommended that she be taken off work for medical reasons, for two or three weeks. On March 2, 1981 Dr. Walters wrote on a prescription pad: "pt. is unable to work because of neck injury until released. Neurological consultation pending." On March 3, 1981 Dr. Yamodis diagnosed musculoskeletal condition and shingles. He noted that prior EMG's were normal. On April 23, 1981 Dr. Yamodis indicated he recommended a cervical collar for claimant. In June 1981 Dr.

Dienel indicated claimant had no heart problems, after an angiogram, and felt claimant's chest pain was related to the neck injury and stress and anxiety. On July 6, 1981 Dr. Yamodis reported his examination indicated no neurological deficit and the treatment provided was merely palliative. On July 21, 1981 Dr. Matthews reported a diagnosis of chronic cervical sprain superimposed on degenerative disc disease. He found no nerve root irritation. He found her condition "essentially stationary."

Based on this report the claim was closed on September 11, 1981 by a Determination Order granting compensation for temporary total disability from October 27, 1980 through July 2, 1981, less time worked and an award of 64° for 20% unscheduled neck disability.

On September 25, 1981 Dr. Walters reported to claimant's attorney that since July 1981 he was claimant's primary treating physician. In that report he stated:

> "It is my opinion that she has not been medically stationary during this period and that she has not been released for work.
>
> "The patient is still under my care and is currently receiving continuing treatment."

Based on this medical report the Referee found that the claim was prematurely closed and that claimant was entitled to continuing compensation for temporary total disability commencing July 21, 1981. We disagree and reverse.

Dr. Yamodis, who had been treating claimant primarily, by report of July 6, 1981, and Dr. Matthews, by report of July 21, 1981, indicated that the treatment being provided claimant was palliative in nature and that claimant's condition was medically stationary. Dr. Yamodis stated that claimant exhibited no neurological deficits, and stated that she was partially disabled "by her own complaints. . ." (Emphasis added), and that the length of time that this was estimated to continue would be better left to a panel examination which included a psychiatrist as a member. Dr. Yamodis further indicated that examination for permanency as a result of her injury was now called for and that further treatment recommended was palliative in nature and would remain so. We agree with the Referee, that although Dr. Yamodis does not state so in those exact words, his report indicates that the claimant is medically stationary.

Dr. Matthews, following an examination of the claimant on July 21, 1981, basically reaches the same conclusions as Dr. Yamodis. Dr. Matthews stated that the claimant had received maximum benefits from conservative treatment, that surgical intervention was not called for and that claimant was essentially medically stationary, although some gradual improvement could be expected over the years. Dr. Matthews found no orthopedic reason for any disability, but that due to her subjective complaints, that she was a poor candidate for anything other than light work.

Dr. Walters, who became claimant's primary physician in July 1981, authors the only medical opinion that claimant's condition was not medically stationary, and that claimant was receiving "continuing treatment." Dr. Walters provides no diagnosis, states no objective findings, does not take issue with or refute the conclusions of Drs. Yamodis and Matthews and provides no clues as to what his treatments are. In point of fact, there is not a single complete medical report in the record from Dr. Walters, although he claims to be the claimant's primary treating physician. His contribution to the record consists of a Physicians Initial Report of Work Injury, a supplemental report with boxes checked indicating claimant is not released to work and that she is still receiving treatments, prescription form note, various prescription records and the terse, conclusory letter of September 25, 1981, noted above, all of which provide little, if any, information concerning claimant's condition.

In addition to the deficiencies in Dr. Walters' report noted above, it would appear that the treatment he was continuing to provide claimant beyond July 21, 1981, the date her claim was closed by Determination Order, serves to support the conclusions of Drs. Yamodis and Matthews. Claimant testified:

> "Q. You are presently under Dr. Walters' care and you are receiving therapy now?
>
> "A. Yes.
>
> "Q. What kind of therapy are you receiving from Dr. Walters?
>
> "A. I go to therapy three times a week, and they're massaging me and using the heat. And they started traction, and the traction hurt me so bad they quit, so I went back to Dr. Walters that week and Dr. Walters said not to take the traction. Then Dr. Walters has got me this new collar that really helps.
>
> "Q. How many times a week did you go to therapy?
>
> "A. Three times."

It seems clear that the only treatment Dr. Walters provided the claimant was of a palliative nature, and not curative. As best as we can tell, this is the "treatment" he was referring to in his September 25, 1981 letter.

We conclude that the preponderance of the medical evidence indicates that claimant's condition was medically stationary at the time of the issuance of the Determination Order and that compensation for temporary total disability was properly terminated as of July 21, 1981. All diagnostic testing has been negative and all further treatment has been palliative in nature.

II

Claimant has cross-requested review on the issue of penalties and attorney fees. The Referee's order allowed claimant's attorney 25% of the additional temporary total disability payable by the order, not to exceed $500, and a further fee of $500 payable directly by the employer. Claimant's position, as we understand it, is that the employer should have been required to pay the entire attorney fee, and that no portion of it should have been payable out of the claimant's increased compensation.

ORS 656.262(8) provides that where the insurer or employer unreasonably delays or refuses to pay compensation, that it will be directly liable for up to 25% of the amounts then due, plus any attorney fees which may be assessed under ORS 656.382. The latter statute provides for insurer/employer responsibility for payment of an attorney fee for unreasonable resistance to payment of compensation, set by the Referee, Board or Court. The statutes do not provide that the attorney fee be in an amount of 25% of the amounts due. Since claimant's attorney was successful in prevailing at the hearing on the penalty issue, an attorney fee award payable by the employer was warranted under the statute.

Since claimant's attorney was also successful before the Referee in gaining an increase in compensation for the claimant, an attorney fee payable out of that increase was also proper. ORS 656.386(2).

III

Our conclusion regarding the premature closure issue requires us to address one additional matter. The Referee found that the issue of extent of disability did not have to be addressed since the result of his holding was a finding that claimant was not medically stationary. Since we have reversed the Referee on the premature closure issue, we now address the issue of extent of disability. The Determination Order of September 11, 1981 allowed claimant 20% unscheduled permanent partial disability for injury to the neck. Considering all the relevant physical and social/vocational factors as listed in OAR 436-65-600 et seq, we conclude that the Determination Order of September 11, 1981 should be affirmed.

ORDER

The Referee's order dated November 25, 1981 is affirmed in part and reversed in part. That portion of the order which set aside the Determination Order of September 11, 1981 as premature and ordered the claim reopened as of July 21, 1981 is reversed, and the Determination Order reinstated and affirmed. That portion of the order allowing claimant's attorney a fee of $500, payable out of the increase in compensation allowed by the Referee is also accordingly reversed. The remainder of the Referee's order is affirmed.

ROSEMARIE GUSTIN, Claimant
Pozzi, Wilson, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-11506
July 27, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant has requested review of Referee Williams' order denying "the relief which claimant seeks." Although we find it desirable to clarify exactly what relief the Referee's order denied, we agree with the Referee's conclusion.

Claimant sustained a compensable injury to her low back in February 1977. Her claim was closed in May 1980 by a Determination Order awarding her temporary total disability compensation and 10% unscheduled permanent partial disability. A stipulation dated July 28, 1980 awarded claimant an additional 13% unscheduled permanent disability for a total of 23% unscheduled permanent partial disability. In early September of 1980 claimant's back "went out" when she was getting up off a couch at home.

The present claim is one for time loss compensation for the period September 10, 1980 to October 28, 1980 based upon an alleged aggravation of claimant's compensable low back condition. No issue is involved concerning payment of medical services, inasmuch as all providers of medical services have been compensated for treatment rendered to claimant pursuant to ORS 656.245.

The first issue is whether claimant established that her back condition worsened after July 28, 1980. Comparing the pre-July 1980 reports with those generated after that date, see especially Exhibits 86, 88, 92 and 97, it would appear that the preponderance of evidence does not support a post-July 1980 worsening of claimant's low back condition. Claimant resists that conclusion by relying on two specific lines of evidence. First, Dr. Rademacher, comparing 1978 and 1980 x-rays, noted that the former showed "no disc space narrowing" while the latter showed "minimal disc space narrowing at L4-L5 and L5-S1." Second, although the reports from before the last award of compensation suggest some possible L4-5 involvement, possible L5-S1 involvement was mentioned for the first time after the last award of compensation.

Even if we were to find the evidence claimant relies upon to be more persuasive than the balance of the evidence suggesting no orthopedic or neurological change in claimant's condition, claimant would still confront the problem of establishing a causal link between her 1977 injury and her 1980 L5-S1 disc space narrowing. Claimant, of course, had the intervening injury (or incident) when getting off her couch at home in September of 1980. Neither the parties' arguments nor the evidence suggests any reason to conclude that claimant's back condition remained fully compensable after this noncompensable incident under the rule of Grable v. Weyerhaeuser, 291 Or 387 (1981). But even aside from Grable, we simply see no evidence causally linking claimant's L5-S1 disc space narrowing in 1980 to her industrial injury in 1977.

Claimant argues:

> "We have a record that shows an original compensable injury to the low back followed by numerous diagnostic evaluations revealing no changes at the L5-S1 level. This is

followed by an extreme exacerbation to the same part of the body and x-ray findings of disc space narrowing. The inference is obvious. . ."

We do not know how obvious it is, but we infer from the consistent failure to identify an L5-S1 defect for almost four years after the original injury, despite numerous diagnostic procedures, that the injury did not cause that defect.

Claimant also contends that her psychological condition worsened after the last award of compensation in July of 1980. Exhibits 42, 44, 45, 47, 49 and 50 document that claimant received some form of psychological treatment before that last award of compensation. Claimant relies upon the line of cases originating with Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972), in arguing that her psychological condition is compensable. We do not, however, understand that to be the issue. Claimant received psychological treatment in connection with her back injury claim. Claimant received a stipulated award of permanent disability that presumably took into account her psychological disability, if any. So far as we are aware, SAIF has never denied the psychological component of this claim, but has instead paid for all psychological treatment. Under all of these circumstances, we conclude that reliance on Patitucci and its progeny is misplaced; the issue here is not compensability, but rather whether claimant's psychological condition worsened in the few months following the July 1980 stipulated award of compensation.

Based on that understanding of the issue, there is simply no evidence that would support an affirmative answer.

ORDER

The Referee's order dated December 16, 1981, issued in lieu of the Referee's order dated November 5, 1981, is affirmed.

LYNN C. HALL, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02419
July 27, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee James' order which set aside its denial and remanded claimant's claim to it for acceptance and payment of compensation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 27, 1981 is affirmed. Claimant's attorney is awarded $400 for services rendered on Board review, payable by the SAIF Corporation.

(Dissent follows.)

CHAIRMAN BARNES DISSENTING:

This case is strikingly similar in all respects to Roy A. Fisher, 34 Van Natta 648 (1982), except that the Board reaches an inconsistent result.

In Fisher the claimant sustained an upper back/neck strain or sprain in 1979. The claimant then underwent surgery in 1981 for transposition of the ulnar nerve at the left elbow. The question was the compensability of the ulnar nerve condition. In Fisher we noted the ambiguity in the parties' positions and the evidence -- was the claimant contending that his 1979 back strain caused his 1981 ulnar nerve condition as a direct consequence of that injury, or instead was the claimant contending the ulnar nerve condition was compensable as an occupational disease under a chronic micro-trauma theory?

The same ambiguity in present in this record. In this case, the claimant's original injury was a cervical disc injury he sustained in 1977. The present proceeding arose on May 15, 1979 when claimant filed another claim that the parties have nominated an aggravation claim. In it, claimant contended "extension of previous neck injury got into both hands." Claimant's hand condition has been diagnosed as carpal tunnel syndrome and has been surgically corrected in separate operations on his right and left wrists.

Claimant's treating physician, Dr. Mason, supports both the consequence-of-injury and chronic-microtrauma/occupational-disease theories. The doctor reported on June 19, 1979: "It is my feeling that the carpal tunnel syndrome . . . is related to [claimant's] work as a trucker and not to any specific incident." Dr. Mason reported on January 15, 1981: "the carpal tunnels have been aggravated by his injury [in 1977]." Dr. Mason's reports, taking all positions, possibly illustrate the natural - and understandable - tendency of doctors to try to assist their patients in all ways they can.

In any event, the Referee's order in this case does not resolve the ambiguity about whether this case involves a 1977 cervical disc injury that caused bilateral carpal tunnel syndrome in 1979 or the chronic microtrauma of work as a truck driver that caused carpal tunnel syndrome. And by "adopting" the Referee's order, the Board majority also chooses to leave that ambiguity unresolved. I guess from the tenor of the Referee's order and guess from the discussion at the time of Board review that, at both levels, claimant's 1979 carpal tunnel syndrome has been found to have been caused by his 1977 neck injury.

If I have guessed correctly, part of our analysis in Fisher is directly applicable here:

> "Claimant's November 13, 1979 back strain did not cause or aggravate his ulnar palsy because so far as we know - and there is nothing to the contrary in this record - it is anatomically and physiologically impossible for a back strain to cause or aggravate ulnar palsy." 34 Van Natta at 649.

Likewise, in this case, so far as I know - and there is nothing to the contrary in the record - it is anatomically and physiologically impossible for a cervical disc injury to cause or aggravate bilateral carpal tunnel syndrome.

Our prior Fisher decision should be followed, or be distinguished or be overruled. It should not be ignored as the Board majority does. I respectfully dissent.

SUSAN K. SPRATT, Claimant
Bischoff, Murray et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08830
July 27, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation seeks Board review of Referee Wolff's order which set aside a Determination Order dated April 9, 1981, based upon a finding that claimant's claim arising out of a compensable injury sustained on February 4, 1981, was prematurely closed. The Referee ordered SAIF to pay claimant's attorney a reasonable attorney's fee of $850, payable in addition to and not out of claimant's award of compensation.

The sole issue raised by SAIF on review is the propriety of the Referee's award of an insurer-paid attorney's fee under the circumstances of this claim. We agree with SAIF's position and find that it was error for the Referee to allow an attorney's fee in addition to the compensation, rather than a fee payable out of claimant's compensation.

The issues at the hearing were framed in the alternative: claimant contended that either her claim was prematurely closed or, in the alternative, her condition had aggravated since the date of the Determination Order. SAIF had issued a denial of a purported aggravation claim, by denial letter of September 17, 1981, and claimant had then requested this hearing. When the hearing convened, it was clear from the medical evidence that claimant's condition had never been medically stationary. The Referee properly concluded that since the claim had been prematurely closed, the validity of claimant's aggravation claim was not an issue that could be reached.

It is clear from the transcript of the proceedings that claimant's attorney was aware of a distinct possibility that claimant might not have been entitled to any further temporary disability payments on a finding of premature closure, in view of the fact that her employment had been terminated in mid-June, 1981 for

reasons unrelated to her compensable injury. Accordingly, an attorney's fee allowed out of claimant's compensation could result in no attorney's fee at all. The Referee was also aware of this fact, and this apparently formed the basis of his allowance of an insurer-paid attorney's fee, rather than an allowance of a fee payable out of claimant's compensation.

Claimant's brief on review takes the position that since claimant's request for hearing arose out of the denial of a claim, ORS 656.386(1) requires that an insurer-paid attorney's fee be allowed. That statute provides in pertinent part:

> "* * * In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the board itself, then the referee or board shall allow a reasonable attorney fee. . . Attorney fees provided for in this section shall be paid by the insurer or self-insured employer."

While it is true that claimant requested a hearing based upon a denial issued by SAIF, it is equally clear that the denial issue was not resolved because of the Referee's finding that claimant's original claim was prematurely closed, which warranted setting aside the Determination Order. Claimant's attorney conceded this fact at the hearing. We are hard-pressed to understand claimant's argument that he is entitled to an attorney's fee for prevailing on a denied claim.

Although we appreciate the fact that, under the circumstances of this claim, claimant's attorney's remuneration is somewhat contingent, neither the Board nor the Referee is at liberty to create attorney's fee provisions out of whole cloth. Attorney fees are creatures of statute and may be awarded only when expressly authorized. Korter v. EBI Companies, Inc., 46 Or App 43, 52 (1980). We find that an allowance of an attorney's fee in this claim is governed by ORS 656.386(2) and OAR 438-47-030.

ORDER

The Referee's order dated December 14, 1981, is modified. In lieu of the Referee's allowance of an insurer-paid attorney's fee, claimant's attorney is allowed, as and for a reasonable attorney's fee, a sum equal to 25% of any additional temporary disability to which claimant may be entitled as a result of the Referee's order setting aside the April 9, 1981 Determination Order; not to exceed $750. The remainder of the Referee's order is affirmed.

JOEAN CISCO, Claimant
Malagon & Velure, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-1333
July 29, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer seeks Board review of Referee Baker's order which ordered it to pay certain medical bills, reimburse claimant for travel for medical treatment and awarded a penalty and attorney's fee.

Except as inconsistent with our findings herein, we adopt the Referee's statement of the facts.

We agree with the Referee that claimant's mileage to Dr. Rusch's office is compensable. Pyle v. SAIF, 55 Or App 965 (1982); Kenneth L. Holston, WCB Case No. 81-04016, 34 Van Natta 952 (July 6, 1982). Any other mileage relating to medical treatment which we find to be compensable herein is also compensable, provided that claimant previously has submitted a claim for such mileage. Mileage claimed for medical services we disallow, e.g. Dr. Tsai's January 6, 1981 consultation, is not reimburseable.

We disallow Dr. Tsai's medical bill for January 6, 1981 because we find that the consultation was for the purpose of litigation preparation and not treatment. Clara M. Peoples, 31 Van Natta 134, 1981); Richard Stinson, 29 Van Natta 469 (1980).

We allow the October, 1979 physical therapy bill, but disallow the December, 1979 and January, 1980 physical therapy bills. The administrative rule relating to physical therapy (at that time, OAR 656-69-310) does not require prior authorization but does require a physician's prescription. The claimant testified that she had an unsigned prescription from her then treating physician for the December and January sessions, but that prescription was not submitted as evidence, nor was a report procured from the physician attesting to the prescription. Therefore, the December, 1979 and January, 1980 physical therapy bills will not be allowed. However, the implication of Dr. Rusch's letter dated February 1, 1980 is that he authorized a number of physical therapy sessions which probably were rendered in October, therefore, we find the October, 1979 physical therapy bill to be compensable.

With respect to the emergency room bills, we agree with the employer that there must be some evidence relating the medical services to a compensable condition. Tension headaches are a common result of both compensable and non-compensable conditions or events, and, in the absence of medical evidence relating a headache to a compensable condition, we disallow the medical services claim therefor, specifically the January 30, 1980 Douglas Community Hospital bill and the November 14, 1980 Mercy Medical Center bill. By contrast, Exhibits 45 and 46 relate the right shoulder and neck pain claimant was experiencing to claimant's compensable right shoulder condition, therefore, we allow the April 30, 1980 Douglas Community Hospital bill and the June 10, 1980 Mercy Medical Center bill.

We agree with the Referee that claimant's visits to Dr. Donahoo were more likely than not for her right shoulder condition, and are compensable.

With respect to penalties, we agree with the employer that whether claimant was sued and her bank account garnisheed is irrelevant. Either the employer's conduct was unreasonable and subject to penalties, or it was not. The conduct complained of is the failure of the employer to pay or deny the medical bills as they were submitted. The employer concedes that it never formally denied the bills it did not pay. The employer demonstrated that with respect to the June 10, 1980 Mercy Medical Center, by copy of the letter to the Medical Center, claimant was notified that the employer was declining to pay the bill. The employer's justification for neither paying nor denying was that it was seeking clarification from the vendors concerning whether the medical services rendered were causally related to claimant's compensable conditions. We are not convinced that in every instance the employer did in fact seek clarification. In any event, while the employer may be justified in seeking clarification, its obligation is to accept or deny within 60 days after submission of a bill based upon the information then available to it. Penalties are warranted for any medical bills and transportation mileage which were not accepted or denied within 60 days after receipt of a bill or a claim from claimant. It should go without saying that the employer should not be penalized on account of bills it did not receive.

ORDER

The Referee's order dated January 15, 1982 is modified.

The Referee's order, to the extent that it requires payment of the following medical bills, is affirmed: the April 30, 1980 Douglas Community Hospital bill; the October, 1980 physical therapy bill from Mercy Medical Center; and bills arising from the October and November, 1980 visits to Dr. Donahoo.

The Referee's order, to the extent that it requires payment of the medical bills listed on page 13 of the employer's brief, other than those listed in the second paragraph of this order, is reversed. A copy of page 13 of the employer's brief is attached herein and, by reference, incorporated herein.

It is further ordered that the Referee's order is affirmed as to travel expense incurred by claimant with respect to any medical services ordered paid pursuant to the second paragraph of this order, and visits to Dr. Roy Rusch.

It is further ordered that the Referee's order is reversed as to travel reimbursement with respect to any medical services disallowed pursuant to the third paragraph of this order.

It is further ordered that the portion of the Referee's order relating to penalties is modified. The employer is assessed a penalty equal to 15% of all medical bills listed on Exhibit 69,

except the June 10, 1980 Mercy Medical Center bills, together with claimant's travel expenses for visits to Dr. Rusch. A copy of Exhibit 69 is attached hereto and by reference incorporated herein.

The Referee's order relating to attorney's fees is affirmed.

1981.

Of the above medical services claimant contends the following were compensable but not paid by the employer:

1. December 7 through December 22, 1979 cervical therapy services at Douglas Community Hospital, for $80.00 (Ex. 69).
2. January 10 through January 30, 1980 cervical therapy services at Douglas Community Hospital, for $120.00 (Ex. 69).
3. January 30, 1980 emergency room services at Douglas Community Hospital, for $57.00 (Ex. 69).
4. April 30, 1980 emergency room services at Douglas Community Hospital, for $45.00 (Ex. 69).
5. June 10, 1980 emergency rooms and pharmacy services at Mercy Medical Center, for $46.34 (Ex. 69).
6. September 15, 1980 for unknown services by Roseburg Anesthesiologists, for $143.50 (Tr. 60).
7. October, 1980 cervical therapy treatment at Mercy Medical Center, for $40.50 (Ex. 69).
8. October and November, 1980 visits to Dr. Donahoo, for $60 (Tr. 17).
9. November 14, 1980 emergency room services at Mercy Medical Center, for $54.23 (Ex. 69).
10. January, 1981 for x-rays at Corvallis Radiology, for $156.00 (Ex. 69).
11. January 6, 1981 visit with Dr. Tsai allegedly paid for by claimant (Tr. 9).

1. Douglas Community Hospital statement dated February 5, 1980, covering emergency room services on January 30, 1980, totaling $57.

2. Douglas Community Hospital dated May 4, 1980, for emergency room services on April 30, 1980, totaling $45.

3. Mercy Medical Center, Inc., billing dated June 15, 1980, for emergency rooms and the pharmacy services on June 10, 1980, in the amount of $46.34.

4. Mercy Medical Center dated November 21, 1980, for emergency room services on November 14, 1980, for "tension headache" in the amount of $54.23.

5. Corvallis Radiology for four chest X-rays, seven cervical spine X-rays and five lumbar sacral spine X-rays, totaling $156 ordered by Dr. Tsai. (We have never been provided with a copy of the radiologist's interpretation of those films.)

6. Douglas Community Hospital billing dated January 2, 1980, for cervical therapy services on December 7, 1979, through December 22, 1979, totaling $80.

7. Douglas Community Hospital billing dated February 1, 1980, for cervical therapy services on January 10, 1980, through January 30, 1980, in the amount of $140.

8. Mercy Medical Center billing dated November 5, 1980, for cervical therapy treatment in October 1980, totaling $40.50.

Ex. 69

GWENDOLYN CRIPPEN, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 78-02939
July 29, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Mongrain's orders that found her occupational disease claim was untimely filed. Claimant argues that the five year limitation of ultimate repose in ORS 656.807 is unconstitutional.

Prior appellate court cases leave it unclear whether there is any limitation of ultimate repose on the filing of an occupational disease claim. See Curtis Craig, WCB Case No. 77-01874, 34 Van Natta 971 (July 9, 1982). Claimant's argument, however, procedes on the premise that there is; so we join claimant in that assumption for purposes of this case.

The Referee's conclusion is consistent with Stone v. SAIF, 57 Or App 808 (1982).

ORDER

The Referee's orders dated November 3, 1980 and January 29, 1981 are affirmed.

DONALD M. EKLUND, Claimant
Beddoe & Whitlock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03607
July 29, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

SAIF Corporation has requested review of Referee Gemmell's order which awarded claimant a 10% unscheduled permanent partial disability for a compensable injury to his nose. SAIF asserts that claimant has not suffered any permanent disability as a result of the injury.

The Board affirms and adopts the Referee's order. No attorney fee will be awarded to claimant's attorney as no brief was filed.

ORDER

The Referee's order of November 19, 1981 is affirmed.

KEITH K. EVANS, Claimant
David Vandenberg, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorney

WCB 79-09040
July 29, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests Board review of Referee St. Martin's order which found the claimant entitled to benefits for permanent and total disability as of July 29, 1979, allowed the employer to receive a credit for an overpayment of time loss benefits from July 18, 1979 through September 12, 1979, allowed claimant's attorney a fee of $2,000 payable out of claimant's increased compensation and ordered the employer to pay for the expense of deposing Drs. Klump and Waller. The only issue presented for review is the propriety of the Referee's determination finding the claimant to be permanently and totally disabled.

On July 13, 1978 claimant, while working as a timber feller for Weyerhaeuser, tripped over a limb and fell, striking his arm and apparently his shoulder and neck. The diagnosis was contusion of the median and ulnar nerve. Soon after the fall, claimant began experiencing tingling in his left hand and forearm, along with pain and numbness. By August 1978 claimant was also noticing some difficulty coordinating his legs properly when walking. A myelogram on August 17, 1978 revealed multiple defects at C3-4, 4-5 and 5-6. Dr. Klump diagnosed cervical spondylosis with spinal cord and nerve root compromise. On September 19, 1978 Dr. Klump performed an anterior discectomy C5-6 and an anterior cervical fusion C5-6. This failed to relieve claimant's arm pain, however, and a spinal cord injury was suspected. A second myelogram was performed on February 14, 1979. A pressure deformity was noted at C3-4, 4-5 associated with spondylosis. On February 15, 1979 a cervical laminectomy at C3-4 and 5, and a foraminotomy at C4-5 and 5-6 left, were performed. Another myelogram performed on July 16, 1979 was interpreted as normal. On July 18, 1979 Dr. Klump felt that the claimant's condition could be termed stationary.

Claimant subsequently began attending the program at the Northwest Pain Center. A Determination Order issued on October 16, 1979 closing the claim with benefits for temporary total disability from July 14, 1978 through September 12, 1979 and allowing 20% unscheduled permanent disability for neck and shoulder and 10% scheduled disability for loss of the left arm. Claimant, however, continued to complain of substantial pain and by October 1980 Dr. Cramer at the Pain Center notes that claimant stated that he had little use of his left arm. At the time of the hearing claimant was 47 years old with a high school education and one or two semesters at Oregon State University, although he had been working as a timber feller for almost 20 years.

In finding the claimant permanently and totally disabled, the Referee relied on the opinion of Dr. Klump, claimant's treating physician. Dr. Klump felt that he could not relate claimant's leg involvement to the industrial injury, but that considering claimant's neck and arm pain, that claimant was permanently and totally disabled. Dr. Klump felt claimant's left arm was of no use and was the equivalent of an amputation but worse due to pain. The Referee found that claimant had sustained an unusual result from a cervical

fusion and laminectomy and that his pain syndrome and loss of use of the left arm combined to establish permanent and total disability. The Referee also relied in part on his assessment of the claimant's demeanor at the hearing. The Referee made no mention of ORS 656.206(3).

We find that the claimant has failed to establish entitlement to permanent and total disability. It does not appear that claimant is permanently and totally disabled from a medical standpoint. Dr. Klump stated in his letter of August 11, 1980 and in his deposition, that he felt claimant was permanently and totally disabled from earning a living, but gives little elaboration on his opinion. Although he rated the loss of function of claimant's left arm as total and noted claimant's apparent pain problems, he fails to explain why this renders claimant permanently and totally disabled. We believe that Dr. Klump's opinions on this issue suffer from a lack of detail, and from the fact that he appears to be giving an opinion based more on social/vocational factors rather than medical considerations, and we decline to substitute Dr. Klump's judgment regarding such matters for our own. The record does not convince us that claimant is, from a medical standpoint alone, permanently and totally disabled.

A second reason for our disagreement with the Referee's conclusion is based on a record which clearly establishes that claimant suffers from a severe lack of motivation to rehabilitate himself and has shown little interest in re-entering the labor market in any productive capacity. While undergoing evaluation prior to participation in the Pain Center program, Dr. Newman noted in his August 6, 1979 report that claimant had, "Poor motivation for retraining or return to employment." Dr. Yospe noted in his August 22, 1979 report that claimant exhibited little interest in the Pain Center's program and showed no real effort to bring about a change in his situation. Claimant's lack of interest in the Pain Center seemed incongruous with his statements concerning his pain. Dr. Yospe further noted that the indications were that claimant would be very passive about re-entering the labor market. In Dr. Seres' August 24, 1979 report he notes that claimant demonstrated little limitation of mobility or strength with his left hand when performing activities when he thought he was not being observed, and that he exhibited no interest in retraining or return to regular employment. Claimant was discharged from the Pain Center due to his lack of enthusiasim for further participation.

Following discharge from the Pain Center, claimant underwent vocational evaluation. The final conclusion contained in the closing report of June 16, 1980 was that claimant was capable of employment but that, "Until Mr. Evans has a realistic grasp of his physical and psychological situation, active employment or a program directed towards such, is seen as unrealistic at this time." Claimant returned for reevaluation at the Pain Center. Dr. Cramer noted in his October 15, 1980 report that claimant stated he would like someone to help him by stating that he was permanently and totally disabled.

The motivational aspect of permanent total disability cases has been translated by the legislature into the requirement of ORS

656.206(3), which requires that a claimant seeking benefits for permanent total disability establish that he is willing to seek regular and gainful employment, and that he has made reasonable efforts to obtain such employment. As we noted in Dixie Fitzpatrick, WCB Case No. 80-07316, 34 Van Natta 974 (July 9, 1982), an analysis of the cases decided by the courts under ORS 656.206(3) leads us to the conclusion that there is no sharp line of division between claimants that the courts consider so disabled that they are excused from the requirement to seek work, and those expected to do so despite their disabilities. In Fitzpatrick we concluded that without specific guidance, it was permissible for us to exercise our own judgment about whether claimant is subject to the seek-work requirement of the statute. We conclude that the claimant in his case was subject to that requirement. The fact that a claimant may have no training for a specific job, or that he did not feel he could find suitable employment, are not sufficient excuses to excuse a worker from the requirements of the statute. Potterf v. SAIF, 41 Or App 755 (1979), Waler v. SAIF, 42 Or App 133 (1979). In Audas v. SAIF, 43 Or App 813 (1979), a case factually similar to this case, the court affirmed the Board's refusal to allow the claimant permanent total disability for an arm and associated shoulder disability when he evidenced an unwillingness to attempt job training within his abilities. We concluded that the claimant in this case was not exempt from the requirement of ORS 656.206(3), has failed to make any effort in that direction, and, therefore, is not entitled to benefits for permanent and total disability, despite the physical impression that claimant made on the Referee. Cases of permanent total disability cannot be judged on appearance alone, as the legislature has made clear.

Our finding that claimant is not permanently and totally disabled requires us to determine the proper extent of claimant's disability. Based on Dr. Klump's statement concerning the loss of function of claimant's left arm attributable to his injury, we find claimant entitled to an award of 100% scheduled disability for loss of use of his left arm, and an additional 15% unscheduled disability for his neck and shoulder.

ORDER

The Referee's order dated April 9, 1981 is reversed. The October 16, 1979 Determination Order is affirmed with respect to its provision of temporary total disability benefits. Claimant is allowed an award equal to 100% scheduled disability for loss of use of the left arm, that being an increase of 90% over the October 16, 1979 Determination Order. Claimant is allowed an additional 15% unscheduled disability for neck and shoulder, over and above the 20% allowed by the October 16, 1979 Determination Order. Claimant's attorney is allowed a fee of 25% of the increased compensation over and above that allowed by the October 16, 1979 Determination Order, not to exceed $2,000. This fee is in lieu of and not in addition to the fee by the Referee.

YVONNE C. FISH, Claimant
Thomas Carter, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04749
July 29, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks review and claimant cross-requests review of Referee Foster's order which set aside SAIF's denial and reopened claimant's claim with compensation for temporary total disability commencing October 19, 1981 and until closure is authorized and found SAIF not responsible for claimant's low back condition. SAIF contends the Referee decided a collateral issue not raised or litigated at the hearing. Claimant contends that her low back condition is related to her industrial injury.

The sole issue should have been compensability of claimant's low back condition and treatment thereof. At the outset of the hearing claimant's attorney stated:

> "The only issue here is that they have denied responsibility for any continuing compensation for treatment of her low back. That's the only issue here that we requested a hearing on. That's the only thing before you at this point is that treatment for her low back."

The Referee responded:

> "All right, we'll restrict the issues to the extent of the denial of treatment of her low back."

The Referee then proceeded to affirm the denial of claimant's low back condition as a compensable consequence of the industrial injury, which was responsive to the issue framed; and to also set aside the SAIF denial and reopen claimant's claim effective October 19, 1981 for her condition related to her upper back, which was not responsive to the issue framed. This latter action was not a viable issue before the Referee. See Michael R. Petkovich, 34 Van Natta 98 (1982). Therefore, that portion of the Referee's order which reopened claimant's claim and commenced payment of compensation for temporary total disability is reversed.

We agree with the Referee that claimant has not established that SAIF's denial of responsibility for treatment of claimant's low back should be set aside.

ORDER

The Referee's order dated December 21, 1981 is reversed. SAIF's denial of responsibility regarding claimant's low back condition is affirmed.

ROBERT LUHRS, Claimant
Thomas J. Barnett, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04643
July 29, 1982
Order on Review

Reviewed by the Board en banc.

SAIF Corporation seeks review of Referee Pferdner's order which found claimant's occupational disease claim for a bilateral carpal tunnel syndrome compensable. The sole issue on review is the compensability of claimant's condition.

This claim involves a single claim filed against a single employer. The Referee found that the last injurious exposure rule was not applicable to the facts and circumstances of this case. We agree with that conclusion. The last injurious exposure rule is a rule of responsibility; it is not a rule of compensability. Evelyn M. LaBella, 30 Van Natta 738, 740 (1981), aff'd, 54 Or App 779 (1981).

The Supreme Court's most recent pronouncement concerning the last injurious exposure rule is found in Bracke v. Baza'r, Inc., 293 Or 239 (1982). As in Bracke, that rule comes into play in this case only because the employer contends in defense that a subsequent injurious exposure caused claimant's occupational disease.

The Bracke court reasoned that "employers have and may assert an interest in the consistent application of the last injurious exposure rules, either as to proof or liability, so as to assure that they are not assigned disproportionate shares of liability relative to other employers who provide working conditions which generate similar risk." 293 Or at 250. Footnote 5 of the court's opinion speculates about instances in which an employer might be able to use the last injurious exposure rule to shift "liability" to another employer. 293 Or at 250. It is not clear to us whether the court was using "liability" in the sense of "compensability" or in the sense of "responsibility," which are distinct concepts. In any event, we do not believe the Supreme Court intended to hold that an employer would be able to utilize the last injurious exposure rule to "defend" its interests when a single claim is filed against a single employer and the issue is compensability.

The rule of law to be applied in claims such as this, where a claimant has filed an occupational disease claim against a single employer, is the rule of James v. SAIF, 290 Or 343 (1981), and SAIF v. Gygi, 55 Or App 570 (1982): whether the claimant's work conditions, when compared to claimant's nonemployment exposure, are the major contributing cause of the claimant's condition. If the employer is able to produce evidence of a subsequent work exposure which may be a contributing cause of the worker's condition, it is appropriate to consider such evidence, together with evidence of possible nonindustrial exposure, in making the determination of whether the exposure at this employer's place of business was a major cause of claimant's condition.

Applying this rule to the facts of this case, we conclude that the Referee was correct in concluding that claimant sustained his burden of proving a compensable occupational disease claim.

We note in passing that the Referee's analysis made reference to the time of disability test as it relates to accidental injury claims. But see Clarice Banks, 34 Van Natta 689 (1982).

ORDER

The Referee's order dated November 24, 1981 is affirmed. Claimant's attorney is allowed $350 as and for a reasonable attorney's fee for services rendered on Board review.

WAYNE McADAMS, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03758
July 29, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation requests Board review of Referee Fink's order which set aside its denial of claimant's claim. The sole issue is compensability.

Claimant was employed by the Harris Pine Mills. On February 20, 1981, following his arrival at work, claimant was running a sanding machine when he was told to set up a drill. Moments later, claimant's co-workers found him lying on the concrete floor, with his hands still in his pockets. Claimant suffered a posterior skull fracture, right side, after striking his head on the floor when he landed. No one actually saw what happened to the claimant. There is general agreement throughout the record that there was no accident leading up to the event.

Dr. Franks, claimant's treating physician, determined that claimant suffered from a spontaneous fainting spell, but was unable to determine why claimant fainted, despite extensive testing. Dr. Franks stated in his February 20, 1981 report: "The etiology of the patient's fall is in question. It appears to have been associated with a syncopal type episode. . ." Dr. Franks, in his June 8, 1981 report further stated: "I don't know how it is work-related except that it happened at work." A claim was filed by claimant and was denied by the SAIF Corporation on April 13, 1981.

The Referee, in finding the claim compensable, relied on our order in Peter J. Russ, 33 Van Natta 509 (1981). In Russ, we concluded that an unexplained fall, which caused claimant injuries at work and during working hours was compensable. We noted that previous cases were somewhat confusing because they failed to adequately distinguish between unknown causation and idiopathic causation:

". . .an idiopathic fall is not compensable. Neither is a fall compensable where it is equally possible that the cause was idiopathic or work-related. Where, however, the evidence eliminates that possibility of idiopathic causation, it appears to be a question of first impression in Oregon whether a truly unexplained fall is compensable, notwithstanding our dicta in the Payne and Lundy cases." 33 Van Natta at 510.

We agree with SAIF that the Referee misapplied Russ. This is not a case involving a true unexplained fall. On the contrary, the cause of the claimant's fall is known. It is the result of a fainting spell, the specific cause of which is unknown, but the general cause of which appears to be personal to the claimant, which is the meaning of "idiopathic." It was therefore not an "unexplained fall."

The facts of this case are virtually indistinguishable from William A. Payne, 4 Van Natta 195 (1970), where the claimant, while in the course of his employment suffered a fainting spell of unknown etiology, and sustained injuries when he struck the floor. The Board in that case held that there was no causal connection between the claimant's work, his fall, and his injury, and therefore found the claim not compensable. We reach the same result in this case.

ORDER

The Referee's order dated December 17, 1981 is reversed. The April 13, 1981 denial issued by the SAIF Corporation is reinstated and affirmed.

GERALDINE MOORE, Claimant
Welch, Bruun et al., Claimant's Attorneys
Samuel Blair, Defense Attorney
Michael Hoffman, Defense Attorney

WCB 79-11081 & 80-00221
July 29, 1982
Order on Remand

On review of the Board's order dated February 23, 1981, the Court of Appeals reversed the Board's order and remanded for a determination of the extent of claimant's disability, and for an award of interim compensation, penalties and attorney fees.

The court found that claimant had sustained and proven a compensable aggravation of her right arm condition, for which she originally claimed compensation benefits in April, 1978. Based upon the record made before the Referee, it does not appear that claimant's condition is medically stationary; therefore, the Board is not able to rate the extent of claimant's permanent disability as directed by the court. See ORS 656.268. The Board will remand claimant's aggravation claim to the insurer for processing and payment of benefits, including submission of the claim for closure to the Evaluation Division when claimant's condition is medically stationary.

Claimant is entitled to interim compensation from January 28, 1980, the date of receipt of medical verification of claimant's inability to work due to her worsened condition, until March 20, 1980, the date of the insurer's denial. This is an award of interim compensation only and not a determination of claimant's entitlement to temporary total disability benefits. Since this claim will be processed to a Determination Order once claimant's condition is medically stationary, the evidence indicating that claimant was temporarily and totally disabled in October, 1979 will be considered by the Evaluation Division in determining the appropriate period of claimant's entitlement to temporary disability payments.

The insurer is liable for payment of a penalty for its failure to commence interim compensation payments and for its failure to accept or deny claimant's aggravation claim in a timely fashion. The appropriate period for calculation of the penalty is the period in which interim compensation should have been paid. We find that the insurer's unexplained inaction warrants imposition of the maximum penalty.

ORDER

The Board's order dated February 23, 1981 is vacated. Claimant's aggravation claim is remanded to Truckers Insurance Company for acceptance and payment of benefits according to law, and for submission to the Evaluation Division for closure when claimant's condition is medically stationary.

The insurer is ordered to pay claimant interim compensation for the period January 28, 1980 to March 20, 1980. The insurer is further ordered to pay claimant as and for a penalty for unreasonably delaying payment of interim compensation and unreasonably delaying acceptance or denial, a sum equal to 25% of the compensation due claimant for the period January 28, 1980 to March 20, 1980. Claimant's attorney is awarded $150 as and for a reasonable attorney's fee pursuant to ORS 656.382(1), payable by the insurer in addition to and not out of claimant's compensation.

VICTORIA K. NAPIER, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-06138
July 29, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests Board review of Referee Neal's order that set aside its denial, finding claimant's occupational disease claim for psychiatric disability to be compensable. SAIF argues the claim is not compensable. Claimant's brief raises an issue of entitlement to penalties that was not raised at the hearing and, therefore, cannot be considered. Mavis v. SAIF, 45 Or App 1059 (1980).

We note a procedural matter before discussing the merits. The hearing in this case originally convened on January 12, 1980. A continued hearing was held eighteen months later, on July 14, 1981. This unusual delay came about as follows. By a variety of

motions filed before the hearing originally convened in 1980, SAIF complained that claimant refused to submit to an independent medical examination, that is, an examination by a doctor selected by SAIF. Claimant's attorney took the position that claimant had no duty to submit to such an examination. A flurry of correspondence and legal arguments between the attorneys and the Referee ensued. Referee Neal ultimately ruled that claimant had to submit to an examination of a doctor of SAIF's choice, and that she would keep the record open until claimant did submit to such an examination.

We agree with the Referee's ruling and we applaud the remedy the Referee selected to enforce her ruling.

ORS 656.325(1) provides:

> "Any worker entitled to receive compensation under ORS 656.001 to 656.794 is required, if requested by the director, the insurer or self-insured employer, to submit to a medical examination at a time and from time to time at a place reasonably convenient for the worker and as may be provided by the rules of the director. . . If the worker refuses to submit to any such examination, or obstructs the same, the rights of the worker to compensation shall be suspended with the consent of the director until the examination has taken place, and no compensation shall be payable during or for account of such period."

The argument that claimant was not required to submit to an independent medical examination focuses on the first six words -- "any worker entitled to receive compensation." Since SAIF had denied claimant's claim, so the argument goes, she was not then entitled to receive compensation and, therefore, ORS 656.325(1) did not require her to submit to a medical examination.

We believe this argument is fallacious and amounts to unacceptable gamesmanship in a dispute resolution system with the declared objective of minimizing the adversary nature of workers compensation cases. See ORS 656.012(2)(b).

The Board expressed its understanding of ORS 656.325(1) in a 1970 administrative order:

> "The Board has been requested to make a policy decision concerning whether a claimant whose claim has been denied may be required to submit to a physical examination.
>
> "The general rule in Oregon applicable to personal injury litigation vests in the Court the power to order a physical examination upon request of the defendant. CARNINE v. TIBBETS, 158 Or 21.

"ORS 656.325(1) reads in part as follows:

'Any workman entitled to receive compensation under ORS 656.001 to 656.794 is required, if requested by the board, State Accident Insurance Fund or a direct responsibility employer, to submit himself for medical examination . . .'

"A claimant, in pursuing a workmen's compensation claim does so on the premise that he is entitled to compensation. If he is entitled to compensation he is required to submit to examination. A refusal to be examined is in irreconcilable conflict with his contention of entitlement to compensation.

"It is the order of the Board that the Board and its Hearing Officers have the same authority vested in Courts to order a claimant to submit to a physical examination and to suspend proceedings unless and until the claimant does so submit to examination. The cost of this examination shall be paid by the employer (or SAIF) as the case may be, and a copy of the doctor's report shall be made available to the claimant."

In addition, ORS 656.325(1) has to be interpreted together with the balance of ORS ch 656. As noted above, ORS 656.012(2)(b) states a goal of minimizing the adversary nature of workers compensation cases. ORS 656.726(5) refers to procedures "to expedite claim adjudication" and to "amicably dispose of controversies, if possible." And although ORS 656.252 involves somewhat different issues, subsection (1)(d) refers to the desirability of medical reports "to insure that payments of compensation be prompt and that all interested parties be given information necessary to the prompt determination of claims." Finally, and probably most importantly, the statute requires that hearings be conducted in a "manner that will achieve substantial justice." ORS 656.283(6). In all of counsel's arguments made to the Referee during the prolonged period of time while claimant's counsel was advising claimant not to submit to an independent medical examination, claimant's counsel never once indicated how a hearing could be expected to achieve substantial justice when one of the parties was denied access to the most relevant information, information about claimant's medical condition.

For all of these reasons, we adhere to the understanding of ORS 656.325(1) that the Board expressed twelve years ago.

Moreover, we now expand on one aspect of our 1970 administrative order. We there stated that Referees have the authority to suspend proceedings unless and until the claimant submits to an examination. We now think the preferable formulation is that Referees have the duty to suspend proceedings unless and until the claimant submits to an examination. We leave

to another day the question of whether the last sentence of ORS 656.325(1) -- referring to no right to compensation during a period of refusal to submit to an independent medical examination -- should be interpreted to provide that Referees or the Board can order nonpayment of compensation during such a period.

Turning to the merits, claimant contends that the major cause of her psychological condition diagnosed as depression was the stress and frustration of her job as a nurse. Claimant's treating psychiatrist, Dr. Eastman, so opines. SAIF's argument to the contrary relies on a long list of non-work-related, possible sources of stress and depression in claimant's life: her inability to have children; side effects of prescription medications she was taking for other reasons; an injury claimant's husband suffered; an injury claimant suffered in a 1979 motor vehicle accident; financial problems; marital conflict, apparently including a period of separation; the death of several relatives; and problems in claimant's relationships with her mother, sisters and grandfather.

Claimant left work because of her depression in June of 1980. Many of the non-work problems cited by SAIF preceded that date by many years and we thus find it hard to see any significant causal link between those problems and disability in 1980. Other non-work problems cited by SAIF present the "chicken and egg" issue typical in this kind of case. For example, was the stress claimant experienced because her husband was off work due to an injury after March of 1980 the cause of increased frustrations, etc., in connection with her employment that culminated in her leaving work in June, or instead were frustrations at work the cause of stress that was merely manifested in claimant's relationship with her injured husband? It is difficult to have much confidence about any answer to this kind of which-came-first causation question, especially for psychiatric conditions. But with as much confidence as is possible, we are persuaded the preponderance of the evidence establishes that claimant's work activities were the major cause of her psychiatric condition.

ORDER

The Referee's order dated July 20, 1981 is affirmed. Claimant's attorney is awarded $600 for services rendered on Board review, payable by the SAIF Corporation.

ROBERT H. NEW, Claimant
Tooze, Kerr et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08688 & 81-08689
July 29, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Braverman's order which granted claimant an additional award of 15% unscheduled permanent disability, for a total award of 25%, for claimant's low back condition. Claimant contends that he is permanently and totally disabled. The only issue on appeal is the extent of claimant's disability from two occupational injuries, one occurring on June 29, 1978 and the more recent one on June 18, 1980.

We conclude, as did the Referee, that claimant is not permanently and totally disabled. However, we find that the award granted by the Referee does not adequately compensate claimant. We adopt the facts as set forth in the Referee's order. We concur with the finding of claimant's treating physician, Dr. Achterman, that it is unlikely that claimant will ever be able to return to his previous employment as a cement truck driver and that claimant's impairment is in the moderate rather than mild range.

Dr. Achterman was provided with a detailed description of claimant's truck driving job and asked to explain what activities claimant would no longer be able to do. The job description requires the driver to lift three chutes separately, each weighing from 40 to 55 pounds, twice per delivery for an average of 25 times per day. He is occasionally required to push and pull the chute from one side to another while it is full of concrete. He is also required to climb 10 feet up a ladder on the rear of the truck twice per delivery for clean-up. But perhaps the most difficult aspect of the job for claimant is the jarring motion of the truck while driving over unimproved roads and on construction sites. The most recent, June 18, 1980, injury to claimant's back resulted from hitting a chuck hole while driving the cement truck. Dr. Achterman responded to claimant's employer on May 29, 1981, stating:

> "The factor most likely to cause him difficulty in his job is the jarring associated with the actual driving of the truck. I therefore feel that this patient should be assigned to the shortest round trips possible. Further, I do not think that he should be sent to a job where he is required to drive his truck over an unimproved road or for a long distance over some other form of unimproved surface."

On June 10, 1981 Dr. Achterman again wrote to claimant's employer stating:

> "I had the pleasure of examining Mr. New again today and find that his symptoms are increasingly severe."

* * * * *

> "I strongly suspect that this patient's disability is going to be chronic in nature and that it is unlikely that he is going to recover sufficiently to return to work.'

Claimant was examined on July 10, 1981, at the request of SAIF Corporation, by Orthopaedic Consultants. The results of the range of motion tests done during the exam indicate a significant loss of function. However, Orthopaedic Consultants termed his loss of function as "mild" but went on to say:

> "It is the opinion of the examiners that the patient's impairment is due to his two work injuries superimposed upon the mild degenerative disc disease or lumbar spondylosis that is present, which is not due to his employment. We do feel that the two injuries that he had did contribute to his disability. We do not feel that his employment is a significant factor in his disability. It is our opinion that both the injury of June 29, 1978 and that of June 18, 1980 are etiologically significant in his present minimal disability."

They also recommended that claimant "...not engage in any heavy lifting or prolonged repetitive lifting." But they stated that claimant could "...return to work at his old occupation on a limited basis."

It is difficult to understand the Consultants' conclusion that claimant's work was not a significant factor in claimant's disability when his latest injury occurred while performing a routine part of his job, i.e. driving. There is no indication that the Orthopaedic Consultants were funished with the detailed job description that was sent claimant's treating physician. This might explain the seemingly inconsistent statement that claimant could return to his old job, but could not do any heavy or repetitive lifting, when heavy and repetitive lifting are integral parts of his job.

Based on the medical evidence, we find claimant has suffered a 16% impairment. Under the guidelines set forth in OAR 436-65-60, et. seq., we rate the claimant's social vocational factors as follows. Claimant is 60 years old (+10 value). He has a seventh grade education (+15). The SVP for his job as a cement truck driver is 3 (+3). The restrictions placed on claimant's future work activities limit him to light duty jobs (+10). The psychological/emotional factors are not remarkable (0). A compilation of the above factors indicates claimant has only 12% of the general labor market still open to him (+2). After combining these values, the guidelines show claimant to be entitled to an award of 45% permanent partial disability.

ORDER

The Referee's order dated November 24, 1981 is modified.

Claimant is awarded 144 degrees for 45% unschduled permanent disability for his low back condition. This award is in lieu of that granted by the Referee and the Determination Order of August 28, 1981.

Claimant's attorney is allowed 25% of the additional compensation awarded by this order in addition to the attorney fee allowed by the Referee, the total attorney fee is allowed by both orders not to exceed $2,500.

The remainder of the Referee's order is affirmed.

WILMA H. RUFF, Claimant
Malagon & Velure, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-01986
July 29, 1982
Order on Review

Reviewed by the Board en banc.

SAIF has requested review of Referee Mannix's order which overturned SAIF's denial of compensation for claimant's right hip condition and imposed a penalty and an attorney's fee for SAIF's unreasonable resistance and delay in the payment of compensation. The only issue raised on review is the compensability of claimant's hip condition.

For the following reasons, we agree with and therefore affirm the Referee's finding of compensability.

Claimant underwent a total hip arthroplasty in December, 1973 due to severe degenerative arthritis of her right hip. Following this surgical procedure, claimant was able to pursue her normal activities without restriction, and she was without pain. After the surgery, claimant noticed that her right leg was a bit shorter than it had been, but it was not so much shorter than her left leg as to require the use of a lift device in the heel of her shoe.

In approximately January 1974 claimant went to work for this employer as a cook. During this time, claimant experienced no difficulties with her right hip, either at work or in her other daily activities.

In about February 1980 claimant first noticed some shortening of her right leg, without pain. She sought no medical attention, continued to work full time, and never experienced any pain.

In the course of her employment on July 15, 1980, claimant was carrying a heavy bucket of grease and when she set the bucket down she experienced severe pain in her right hip area. Claimant testified that it was necessary for her to catch her balance on a meat block and support herself for a few minutes until the pain went

away and she was able to resume an upright position. She continued to work that day and thereafter, for a period of four months, when she was hospitalized for surgical revision of her hip arthroplasty for insertion of a new cup in the hip joint.

After this incident in July, 1980, claimant experienced continued right hip pain which was particularly problematic in the execution of her employment duties, which included relatively heavy lifting. Claimant noticed that her right leg was even shorter than before, and she testified that after this incident it was necessary to place a heel lift in her shoe in order to compensate for the increasing shortness of that leg.

When the injury occurred, the incident, as well as the pain claimant experienced following the incident, was observed by a fellow worker who testified at the hearing, and who was found to be a credible witness by the Referee.

As indicated, claimant continued to work. She did not seek medical attention until October, 1980, when she went to see Dr. Sturges, the physician that had performed the arthroplasty in 1973. X-rays revealed that claimant had a loose cup in the right hip joint, the diagnosis being "failed total hip arthroplasty right hip with a loose cup."

Claimant was hospitalized in November, 1980, and Dr. Sturges performed a surgical revision of the total hip arthroplasty with reinsertion of a new cup.

Claimant filed an 801 form with the employer on October 31, 1980, designating July 15, 1980 as the date of injury. SAIF denied the claim on January 21, 1981, stating that "[i]t would appear that your current condition is a result of the natural progression of your previous total hip replacement", and that "[i]t would appear that the incident on or about July 15, 1980 merely brought on the pain symptoms of your condition."

There was evidence of one or two incidents occurring prior to the July 1980 incident which, SAIF argues, militates against a finding that the July 1980 incident was a material cause of claimant's need for surgical revision of her hip prosthesis.

The Referee found that in 1976 claimant had fallen and injured a rib on her right side with no injury to or pain in her hip. This finding is apparently based upon a chart note contained in Dr. Sturges' records, dated October 15, 1980. The record contains no other reference to an incident occurring in 1976. Claimant testified that in the year preceding the surgical revision of her hip arthroplasty, the surgery in question here, she had fallen in her bathtub at home, striking her ribs and her mid back, which resulted in a bruise on the left side of her torso. She was uncertain as to the exact date of this incident, testifying: "I suppose it was probably eight, nine months, year before that, before I had surgery. I just don't remember exactly when it was." She also testified that after the fall she went to see her family physician who diagnosed a bruise, which required no treatment. This incident did not cause claimant any further difficulties.

Whether claimant sustained one or two non-industrial accidents prior to the July 1980 incident at work, we find that she has satisfied her burden of proving that the July 1980 incident was a material contributing cause of the need for surgical revision of her hip arthroplasty.

Dr. Sturges reported to SAIF on October 30, 1980 that claimant had "worked loose a cup of her total hip arthroplasty, right. This episode started after lifting a heavy grease bucket while at work in July of 1980."

After the surgery was performed in November, 1980, Dr. Sturges reported in December, 1980, as follows:

> * * * It was noted that the cup was loose, had shown evidence of being loose for a considerable length of time with possible migration.
>
> * * *
>
> "The patient gives a history of having noted that her right leg was becoming a bit shorter over the past eight months, and that in July of 1980 she lifted a heavy grease bucket which caused considerable pain. Since that time she has been having increasing pain in her hip. She states that she had no pain prior to that incident, although the leg length discrepancy suggested that the cup was loose.
>
> "I believe the work related incident definitely initiated her symptoms which would have shown up sooner or later because of the loosening of the cup."

In a letter to claimant's attorney in April, 1981, Dr. Sturges reported: "I believe the episode in question did aggravate and initiate the symptoms which eventually lead to the revision of the total hip arthroplasty."

In a subsequent letter report to SAIF, Dr. Sturges, in response to specific questions, indicated that the loosening that developed in claimant's prosthesis occurs in at least ten percent of total hip replacements, usually in the first five years after surgery has been performed, and that the loosening can be aggravated by daily activities such as heavy lifting, getting in and out of chairs, bending down and picking up heavy objects and running. Dr. Sturges indicated that he was certain that claimant had experienced some loosening of the cup prior to the at-work incident in July 1980, and that, other than some shortening of her leg, it apparently had been asymptomatic, with the July 1980 incident causing the loose component to become symptomatic.

Dr. Sturges' reports and chart note constitute the only medical evidence in the record. While it is true that where the issue is medical causation, the treating physician's uncontroverted opinion may be sufficent, in and of itself, to establish the compensability of a claim, Christensen v. SAIF, 27 Or App 595, 599 (1976), we have previously indicated our belief that, as the finder of fact, we are not necessarily bound by the uncontroverted opinion of a medical witness but are free to find such opinion unpersuasive. Edwin A. Bolliger, 33 Van Natta 559 (1981); aff'd w/o op., 57 Or App _____ (July 14, 1982).

The issue is medical causation. Claimant must prove by a preponderance of the evidence that the July 1980 incident was a material contributing cause of claimant's need for surgery. Summit v. Weyerhaeuser Company, 25 Or App 851, 856 (1976); Olson v. SIAC, 222 Or 407, 414 (1960). In particular, claimant must prove that this incident materially contributed to the need for surgery and that the surgery was not necessitated merely because of the progressive deterioration of claimant's prosthesis, although this may also have been a contributing factor.

Although "material contributing cause" is the standard, little guidance is available in determining to what degree an industrial accident must contribute to a workers condition for the accident to rise to the level of materiality. It is clear that a material cause is one which has more than a minimal effect. Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972). Work activity need not be the sole or primary cause, but only the precipitating factor. Summit v. Weyerhaeuser Company, supra., 25 Or App 856.

In Lorentzen v. Compensation Department, 251 Or 92 (1968), the Supreme Court reasoned that a physician's failure to succinctly state that a worker's exertion was a "material factor" contributing to the rupture of an aneurysm would not prevent the physician's testimony, when viewed as a whole, from supplying the required evidence of medical causation. "Dr. Dow guarded his statements carefully and would not say that the exertion was a material factor

contributing to the rupture. However, his testimony that the exertion could have been 'the straw that broke the camel's back' and that it 'contributed to a degree' is a manner of expressing the materiality of the exertion as a contributing factor." 251 Or App at 97.

> If the contribution is minimal or de minimis, for example, if claimant would have become disabled by psychological developments at the same time, whether she was involved in an industrial accident or not, then the accident would not be deemed to have contributed to the disability." Patitucci v. Boise Cascade Corp., supra., 8 Or App at 507. (Emphasis supplied.)

In Patitucci, there was medical testimony that had it not been for the worker's industrial accident, she would have been able to continue to function in her employment for five or six more years.

The court was satisfied, in light of this evidence, that "but for" the accident, the claimant would have been able to continue as a secretary for "some period of time." The court concluded: "This supports the trial court's finding that the industrial accident was a contributing factor to the disability." 8 Or App at 508.

We hold that an industrial accident is a material contributing factor in causing a particular condition when, viewed in conjunction with other contributing causes, the industrial accident can be identified as a precipitating factor and one which caused the worker to become disabled (or die) or incur the need for medical services at some point in time earlier than what otherwise would have occurred in the absence of the industrial injury. Cf. Armstrong v. SIAC, 146 Or 569, 572 (1934). Furthermore, it is not essential, in order for the claimant to prove material contributing cause, that a physician use the magic words. It is sufficient if, when viewed as a whole, the physician's testimony or reported opinion provides the causal nexus. Cf. Lemons v. Compensation Department, 2 Or App 128, 131 (1970); Hutcheson v. Weyerhaeuser, 288 Or 51, 56 (1979).

Dr. Sturges reported that the July 1980 incident aggravated and initiated the symptoms -- i.e., pain and increasing shortening of claimant's right leg -- which eventually led to the need for revision of claimant's arthroplasty. He also reported his belief that this incident "definitely initiated her symptoms". Dr. Sturges is a California physician, and therefore, it is likely that he is not familiar with the terminology of Oregon's workers compensation system. Claimant's attorney attempted to cure any gaps in terminology by an October 1981 inquiry to the doctor, as follows: "[I]s it more likely than not that, on the occasion of the incident of July 15, 1980, the claimant's symptoms were caused by a further loosening of the cup component of her hip arthroplasty?" In a check-the-boxes response, Dr. Sturges indicated "Yes". We generally give little weight to such responses due to the fact that they are not accompanied by an explanation of the physician's conclusion. We have considered this "report", together with Dr. Sturges' other statements, in forming our conclusion.

Dr. Sturges' statements, and his findings on performing surgery, indicate that claimant's cup component had been loose for a "considerable length of time", most likely prior to the July 1980 incident at work. We have considered the possible applicability of Weller v. Union Carbide, 288 Or 27 (1979), and we find that, based on this record, Weller is inapplicable. See Lorena Iles, 30 Van Natta 666 (1981); Patricia L. Lewis, 34 Van Natta 202 (1982).

Symptoms of the cup loosening were increasing shortening of claimant's right leg and pain. Dr. Sturges reported that the history given by claimant was that she had noticed some shortening of her right leg prior to the July 1980 incident, but that she had been pain-free. Claimant's testimony was to the effect that the shortening of her right leg which she had experienced prior to the industrial incident, was noticeable immediately after her original surgery (the arthroplasty) and remained constant until the July 1980 incident, after which she noticed a markedly increasing short-

ness in that extremity, together with pain on exertion. The weight of the evidence is that, compared to the problems experienced by claimant after the July 1980 incident, claimant was relatively symptom free prior to that time.

Even if we found Weller applicable under the circumstances of this case, we would further find that, based upon the medical evidence, claimant has sustained her burden of proving that the industrial accident caused a worsening of the loosening in the cup component of her hip prosthesis. See Richard A. Davidson, 30 Van Natta 513 (1981).

Based upon the statements of Dr. Sturges bearing on the issue of medical causation; the evidence of a relative lack of symptomatology involving claimant's right hip condition prior to the industrial accident, compared to claimant's continuing pain and other related problems thereafter; as well as the description of the incident as recounted by claimant and corroborated by claimant's co-worker, we find that the evidence of compensability preponderates in favor of claimant. We therefore affirm the Referee's order that SAIF's denial be set aside.

ORDER

The Referee's order of January 15, 1982, ordering that SAIF's denial of claimant's right hip condition be set aside, is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee.

CHAIRMAN BARNES DISSENTING:

"Material contributing cause" is an often used term in the workers compensation system. This case offers an opportunity to consider the meaning of "material."

The facts are simple. Almost seven years after claimant had hip replacement surgery, she required another operation to replace the cup in her artificial hip joint. Of all the daily activities that caused wear and tear on her artificial joint over those seven years, the majority identifies one specific lifting incident in July of 1980 as a "material" cause of the need for hip revision surgery.

That conclusion has to be understood in context. I agree with the majority's observation that virtually all daily activities such as lifting, bending, getting in and out of chairs, etc., contributes toward the eventual breakdown of an artificial hip joint. Claimant obviously engaged in such daily activities before the July, 1980 at-work lifting incident. Indeed, in late 1979 or early 1980 claimant fell in her bathtub at home and the history subsequently taken by Dr. Sturges suggests the onset of noticeable leg shortening began about the time of the bathtub fall. Also, after the July, 1980 lifting incident claimant obviously continued to engage in daily activities that put stress on her artificial hip

joint up until the time of her surgery in November of that year. In this inevitable and gradual process of degeneration taking place in claimant's right hip, what enables the majority to assign a role of materiality to one specific incident over a seven year period?

Despite the importance of the concept of "material cause" in workers compensation cases, the adjective, "material," has never been meaningfully defined. We are told that material cause means something more than minimal cause, Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972), and something less than primary cause, Summit v. Weyerhaeuser Company, 25 Or App 851 (1976). But that necessarily leaves a very large range in which "material cause" is like the "reasonable person" test in negligence cases -- not a "rule" that produces automatic results as a potato sorter would, but rather a very general standard to guide judgement in individual cases. Cf. Rogers v. SAIF, 289 Or 633, 642 (1980): "Is the relationship between the injury and the employment sufficient that the injury should be compensable?"

I am not as confident as the majority apparently is that the exercise of judgment about "material" cause in individual cases can be aided by citation to prior appellate court decisions. The material-cause guideline is applicable to a wide variety of situations that arise in workers compensation; and even when similar situations arise, they arise on records containing different, often unique, information. As with juries called upon to apply a "reasonable person" standard, the best decisional methodology is a large dose of common sense.

My common sense, applied to the basically undisputed facts in this record, leads me to the judgment that claimant's single July, 1980 at-work incident was not a material cause of her need for hip revision surgery. The only medical evidence comes from Dr. Sturges, and he offers a variety of views. Dr. Sturges is consistent in stating that claimant's revision surgery was necessitated because of a loose cup, that such loosening of one of the components used in an arthroplasty is common, and that the shortening of claimant's right leg suggested a loosening of the cup in claimant's artificial right hip joint. Dr. Sturges' earlier reports, in apparent reliance on claimant's history of noticing right leg shortening throughout 1980, state that the loosening of the cup occurred prior to the July 15, 1980 lifting incident. Dr. Sturges also stated: "I believe the work related incident definitely initiated her symptoms which would have shown up sooner or later because of the loosening of the cup." Dr. Sturges' post-operative report states the cup showed evidence of being loose for "a considerable length of time with possible migration." Also, in a check-the-boxes report, Dr. Sturges states without explanation that the July 15, 1980 at-work incident caused "a further loosening of the cup component."

I conclude that claimant's artificial right hip began wearing out as soon as she first placed weight on it following her 1973 arthroplasty. Because of that gradual degeneration and the specific history of right leg shortening before the July 15 incident, I conclude that the cup component was loose before that incident. I conclude that all daily activities (lifting, bending, walking, etc.), both before and after July 15, both at-work and off-work,

contributed to the cup loosening as did the July 15 incident. It is my judgment that the specific July 15 incident was not a material cause of the cup loosening.

As best as I understand it, the majority's contrary conclusion is based largely on the fact that claimant experienced hip pain for the first time on July 15. The flaw in that analysis can be illustrated. If a person with an artificial hip joint entered a marathon race and experienced hip pain for the first time at milepost 15, it would not mean that the last stride taken materially caused the hip pain; it would only mean, in my opinion, that the last stride taken was the culmination of a process that had been underway since the race started, with each stride contributing about equally to the final result. The metaphore may seem silly, but in my judgment it captures the essence of what happened to this claimant in this case.

I would reverse the Referee's order and reinstate/affirm SAIF's denial. I therefore respectfully dissent.

JANIE SMITH, Claimant
Coons & Hall, Claimant's Attorneys
Gary Hull, Defense Attorney

WCB 81-03973
July 29, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant seeks Board review of Referee Nichols' order and Order on Reconsideration, which: (1) awarded claimant compensation for temporary total disability from January 24, 1980 through May 15, 1980 and from July 24, 1980 through August 6, 1980, and temporary partial disability from May 16, 1980 through July 25, 1980; (2) imposed a penalty of 25% of the temporary disability compensation which was due during the period January 24, 1980 through May 24, 1980; (3) awarded claimant 10% permanent partial disability for loss of her right foot; and (4) allowed the claimant's attorney a reasonable attorney's fee in an amount equal to 25% of the temporary disability compensation awarded to claimant.

Claimant makes the following contentions: (1) that she is entitled to temporary compensation for the period January 24, 1980 through October 13, 1980; (2) that a penalty should be imposed in an amount equivalent to 25% of the temporary compensation payable for that period, January 24, 1980 through October 13, 1980; (3) that claimant's attorney is entitled to an additional attorney's fee pursuant to ORS 656.382(1); and (4) that the permanent partial disability award granted by the Referee is inadequate.

We agree with the Referee's analysis and conclusion on the issue of the extent of claimant's scheduled permanent partial disability, and we, therefore, affirm and adopt that portion of her orders. We disagree with the Referee's order on the issues of the period during which temporary disability benefits should have been paid (although we agree with the Referee's conclusion concerning the period for which claimant was entitled to temporary disability benefits), the penalty and ORS 656.382(1) attorney's fee, and, we therefore modify those portions of the orders.

This claim arises out of an original injury which occurred in 1976. Claimant was injured when a forklift ran over her right foot, as a result of which she sustained a fracture of the bones in her foot. The claim was accepted as a disabling injury and was closed in March 1977 by a Determination Order awarding claimant temporary disability benefits only.

In January 1980, due to steadily increasing pain in her foot, claimant sought medical treatment and was examined by Dr. David Fredstrom. He found an apparent nonunion of the bones of claimant's right foot, indicating on a physician's report form that this condition was a result of claimant's industrial injury, that it prevented her return to regular employment and that the date of first treatment was January 24, 1980. This Form 827 is dated February 15, 1980, and it contains the insurer's date stamp which is difficult to discern; however, the stamp does appear to indicate a received date of April 9, 1980.

Dr. Fredstrom referred claimant for examination to Dr. Michael Mahoney, who, by report dated February 1, 1980, informed the insurer that claimant's right foot required surgery, and he requested authorization therefor. This narrative report was apparently received by the insurer on February 19, 1980. Dr. Mahoney's report and recommendations were corroborated by a consultation provided by Dr. James M. Sulkosky, which was reported to the insurer by letter of March 7, 1980, received by the insurer March 17, 1980.

In March 1980 Dr. Mahoney performed surgery, and in May he felt the claimant was capable of performing sedentary work. It was not until August 6, 1980, however, that Dr. Mahoney found claimant medically stationary. During the period May 16, 1980 to July 23, 1980 claimant performed volunteer services for Deschutes County, which she was required to do in order to receive Welfare benefits. She was not paid actual wages for her labor; but performance of these services was a condition of continued receipt of her $243 per month Welfare grant.

As a result of Dr. Mahoney's closing exam in August 1980, a Determination Order issued October 13, 1980, which allowed the claimant temporary total disability from March 11, 1980 through May 14, 1980.

During the entire period of time related above, from January 24, 1980, when claimant first sought treatment, until October 13, 1980, when her claim was closed, she received no temporary disability benefits, nor was she ever notified of the insurer's decision to accept or deny her claim for reopening. After issuance of the Determination Order, under cover of a letter dated October 15, 1980, from the insurer, claimant was provided a check for the temporary total disability compensation awarded by the Determination Order and the 5% scheduled award also granted.

I

The physicians' reports indicate that the Referee properly concluded that claimant's entitlement to temporary disability benefits commenced January 24, 1980. We also agree with the Referee's award of temporary partial disability benefits for the period May

1980 through July 1980, when claimant performed light duty activities in order to maintain her Welfare grant. Claimant was found to be medically stationary as of August 6, 1980, and so her actual entitlement to temporary disability benefits was correctly computed by the Referee. However, as discussed more fully below, we find that the insurer is obligated to pay claimant additional benefits equivalent to the temporary disability benefits she would have received for the period August 6, 1980, until the date of the Determination Order, October 13, 1980.

II

The Referee imposed a penalty based upon the compensation that was due commencing with January 24, 1980. The Referee apparently based this upon Dr. Fredstrom's Form 827, indicating that claimant's initial treatment with him was on that date. That is not a sufficient basis for imposition of a penalty for that period of time, in view of the fact that his report is dated February 15, 1980, and further that this report apparently was not received by the insurer until sometime in April, 1980. See Silsby v. SAIF, 39 Or App 555 (1979). There is no evidence as to whether or when this report might have been previously received by the employer and perhaps subsequently conveyed to the insurer. See ORS 656.273(6). It is clear, however, that as of February 19, 1980, upon receipt of Dr. Mahoney's report, the insurer was on notice that claimant was experiencing increased pain, which was constant, and which severely limited her ability to walk or bear weight. In view of this report from Dr. Mahoney, which requested authorization for surgery, we find this letter sufficient notice to satisfy the requirements of Silsby v. SAIF, supra, for purposes of imposition of a penalty for failure to commence payment of interim compensation.

The proper period for imposition of a penalty is February 19, 1980 through August 6, 1980, the date claimant was medically stationary. The insurer will be ordered to pay a penalty equal to 25% of all temporary compensation due claimant for that period, for their unexplained failure to pay claimant any compensation benefits during that period of time.

If the insurer had been paying claimant temporary disability compensation in accordance with its legal obligations, it would have been required to continue such payments beyond the date that claimant was medically stationary, up to and including the date that the Determination Order was issued, October 13, 1980. Mark L. Side, 34 Van Natta 661 (1982). Once a Determination Order assigns a medically stationary date, the insurer is entitled to claim an offset for the temporary disability compensation paid thereafter. When the insurer fails to pay temporary disability compensation, pending issuance of a Determination Order, the rule in Mark L. Side is applied:

> "When an employer has illegally terminated temporary total disability payments and a subsequent Determination Order or litigation order awards or increases permanent disability, the employer will be ordered to

> pay all time loss due and will be prohibited from taking a setoff of that time loss against the worker's permanent disability award." (Emphasis in original.)

In this case the insurer did not have an opportunity to unilaterally suspend time loss payments due to the fact that they had never commenced such payments. We find Mark L. Side applicable to the facts and circumstances of this claim; therefore, the insurer will be required to pay the claimant the temporary disability compensation which she was entitled to receive during the period in question, and the insurer will be prohibited from claiming this amount as an overpayment, as and for a penalty.

III

The Referee refrained from awarding claimant's attorney an attorney's fee pursuant to ORS 656.382(1) in reliance upon Zelda M. Bahler, 31 Van Natta 139 (1981), 33 Van Natta 478 (1981):

> "(1) In cases in which there is an unreasonable refusal to pay compensation (which is a rather small minority of the cases), an ORS 656.382(1) separate award of carrier-paid attorney fees is mandatory. In such cases the claimant has had to secure legal representation to obtain that which was his due and which was unreasonably withheld. The carrier must thus pay for claimant's legal representation.
>
> "(2) In cases in which there is an unreasonable delay in paying compensation (which accounts for the vast majority of the cases), an ORS 656.382(1) separate award of carrier-paid attorney fees is discretionary. In such cases the claimant has received that which was his due, albeit untimely. In this context, carrier-paid attorney fees are not for essential legal representation but only an indirect penalty for the carrier's inadequate claims processing. The discretion to impose ORS 656.382(1) attorney fees should be guided by this purpose of such fees.
>
> "(3) Discretion should be further guided as follows: If delayed payment of compensation is the sole or principal issue, ORS 656.382(1) fees should generally be assessed. If delayed payment of compensation is a secondary or minor issue and the claimant's attorney is otherwise reasonably compensated by fees awarded on the principal issue(s), ORS 656.382(12) fees should generally not be assessed." 33 Van Natta at 481.

The Referee relied upon paragraph (3) as set forth above, concluding that the penalty issue was a secondary issue, and that the major issues were time loss and extent of disability.

We find that the facts and circumstances of this claim justify a finding that the insurer's failure to pay claimant any temporary compensation amounted to, not simply unreasonable delay, but, rather, unreasonable refusal. The court in Williams v. SAIF, 31 Or App 1301 (1977), interpreted the term "unreasonable resistance" as used in ORS 656.382 to include "situations where the insurer is clearly obliged to pay but defers doing so without good cause." 31 Or App at 1307. We find this language offers some guidance in the interpretation of our opinion in Bahler, when we may be called upon to determine whether, in a particular case, the insurer's conduct should be classified as refusal, as opposed to delay.

Since we find that this insurer's conduct amounted to an unreasonable refusal to pay compensation to which claimant was clearly entitled, it follows that claimant's attorney is entitled to a reasonable attorney's fee, pursuant to ORS 656.382(1) and Bahler.

ORDER

The Referee's order dated November 17, 1981, and Order on Reconsideration of January 5, 1982, are modified. The insurer shall pay to claimant a penalty in an amount equal to 25% of the temporary disability compensation due claimant for the period February 19, 1980 through August 6, 1980. The insurer shall pay to claimant that amount of temporary disability compensation she should have received during the period August 6, 1980 through October 13, 1980, and the insurer is prohibited from offsetting that amount of compensation against any award of permanent disability claimant is receiving or receives in the future. Claimant's attorney is allowed $750 as a reasonable attorney's fee pursuant to ORS 656.382(1), payable by the insurer in addition to and not out of claimant's compensation.

The remainder of the Referee's orders are affirmed.

WILLIAM WEBB, Claimant
Coons & Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Robert Smjkal, Attorney

WCB 81-06377
July 29, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The claimant seeks Board review and the SAIF Corporation cross requests review of Referee Howell's order which (1) did not disturb the April 22, 1981 Proposed and Final Order finding Wocat Incorporated to be a non-complying employer; (2) affirmed SAIF's Notice of Claim Closure of June 5, 1981; (3) affirmed SAIF's denial of claimant's claim for aggravation; (4) denied claimant's request for permanent partial disability; and (5) granted claimant 10% as and for a penalty on all compensation due to him between January 5, 1981 and June 5, 1981.

We affirm and adopt the Referee's order with one minor correction. In granting claimant a penalty of 10% on all compensation for temporary total disability due him between January 5, 1981 and June 5, 1981, the date should be corrected to read June 3, 1981.

ORDER

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

WARREN AMREIN, Claimant
Sid Brockley, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-00219, 81-01375 & 81-01376
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer seeks Board review of that portion of Referee Braverman's order which found it responsible for claimant's November 1980 surgery. It contends that the condition necessitating surgery was the result of an earlier industrial injury and thus the responsibility of SAIF Corporation. Claimant cross-appeals on the issue of extent of permanent disability resulting from his August 20, 1980 injury.

Claimant has suffered several twisting injuries to his left knee over the years. The most notable industrial injuries occurred in February of 1973, November of 1974, September of 1975 and August of 1980. All claims were accepted. Claimant received compensation for 5% loss of the left leg for the February 1973 injury and compensation for 20% loss of the left leg for the November 1974 injury. The major issue in this case involves surgery performed in November 1980 for the removal of loose bodies from the knee. The Referee, using the "last injurious exposure rule," found the employer on the risk at the time of the August 1980 injury (Tri-Met) to be responsible for the surgery.

A recent Board case has addressed this same issue from a slightly different angle. In Roger Ballinger, 34 Van Natta 732 (1982), we stated:

> ". . . if the more recent injury resulted in permanent disability, then '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.'"

In the instant case, it could be disputed that claimant did not suffer any permanent disability as a result of the August 1980 knee sprain. However, Ballinger goes on to discuss this type of case.

> "Our analysis of Crosby in Faulk and Schmidt highlighted the fact that the most recent injury in all three cases caused permanent disability as one of the reasons the insurer on the risk at that time should be responsible for future medical care and other compensation. We concluded in Faulk: '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 [most recent] injury.' 34 Van Natta at 110. The facts of the present case persuade us that the presence or absence of permanent disability resulting from the most recent injury should not be controlling

in the resolution of responsibility issues that subsequently arise."

Ballinger determined that in these cases the burden is on the most recent insurer to show that the necessary medical care (in this case the November 1980 surgery) involves a "separate and distinct part of the body than was involved in the most recent injury." We conclude that based on the above, Tri-Met (the insurer at the time of claimant's August 1980 injury) is responsible for the November 1980 surgery.

We note the Referee rescinded Tri-Met's denial which he said denied that claimant suffered a new injury on August 20, 1980. However, the August 20 injury was accepted by Tri-Met as a non-disabling claim and has never been denied. The November 1980 denial was for the purpose of denying responsibility for the November 1980 surgery.

Claimant cross-appeals on the issue of his extent of permanent disability. The Referee determined that claimant was adequately compensated by the Determination Orders issued in 1974 and 1976. He felt claimant was "doing very well considering the surgery (November 1980) that he has had and I think his loss of function cannot be rated in excess of 25 percent."

We generally agree with the Referee's observation, but we fail to see how any extent-of-disability issue is ripe for adjudication at this time. The time for appeal from the Determination Order issued on the February 1973 and the original Determination Order issued on the November 1974 injury, the two Determination Orders that awarded permanent disability, has long since passed. The 1974 claim was reopened for reasons unrelated to the issues in this case and again closed by Determination Order dated June 3, 1981; however, claimant's requests for hearing that gave rise to this proceeding were filed before the June 3, 1981 Determination Order was issued. That Determination Order was mentioned once at the hearing, and it may be that the parties and Referee regarded claimant's requests for hearing as de facto amended to include an appeal from the June 3, 1981 Determination Order. If so, we conclude there is no evidence to support an increase of claimant's permanent disability award due to the 1974 injury.

If claimant has greater leg disability than the 25% previously awarded, it is because of the condition of his knee after the November 1980 surgery. By virtue of this order, claimant's claim for his August 1980 knee injury is reopened. Under ORS 656.268, the question of greater permanent disability should be addressed at the time of claim closure.

ORDER

The Referee's order dated January 29, 1982 is affirmed as corrected.

The June 3, 1981 Determination Order is affirmed.

The February 27, 1981 denial issued by SAIF Corporation is affirmed.

The November 14, 1980 denial of Tri-Met is reversed and claimant's claim is remanded to it for acceptance and payment of compensation commencing the date claimant was hospitalized in November 1980 and until closed under ORS 656.268.

SAIF is entitled to reimbursement by Tri-Met of all monies paid in response to the March 25, 1981 .307 order.

Claimant's attorney is entitled to the $950 attorney fee granted by the Referee. No fee is due on Board review.

THOMAS BARKVED, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-03610
July 30, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The employer seeks Board review of Referee Pferdner's order which set aside its denial of claimant's aggravation claim.

The claimant, presently 53 years of age, on Social Security and fully retired, worked for the employer for 23 years. Over the years he sustained numerous industrial low back injuries commencing in 1957 and including July 1974, April 1977, January 11, 1979 (which is the claim before us on aggravation), January 21, 1980 and April 11, 1980. Claimant has also been involved in three noncompensable automobile accidents. In May of 1980 claimant terminated his employment and retired.

The aggravation claim presented was for an alleged worsened condition requiring medical service in 1981 and which claimant relates to the January 11, 1979 injury.

Claimant was involved in an automobile accident in late December of 1980 or early January of 1981. Claimant testified he hurt his back getting out of a recliner in about February of 1981. He sought medical treatment from a chiropractor, Dr. Platt, on March 5, 1981. On August 5, 1981 Dr. Robinson examined claimant and reported that old x-rays revealed severe degenerative arthritis. It was Dr. Robinson's diagnosis that claimant was suffering from severe degenerative arthritis superimposed on chronic lumbar strain of many years duration. Dr. Robinson stated:

> "The back injury that he received in January, 1979 was just another injury superimposed on many injuries from which he recovered just about as usual. In my opinion, his need for chiropractic treatment is not related to the back injury of January, 1979 but it is an overall picture of problems that have been present for a number of years."

Another chiropractor, Dr. Gatterman, examined claimant and on August 19, 1981 reported his opinion: ". . .that any discomfort that he is presently experiencing is atributable [sic] to his motor vehicle accident of two months ago." Claimant's testimony was that in June 1981 he was rear-ended by a flatbed truck and medical treatment was sought. Dr. Platt, claimant's treating chiropractor, was deposed and testified that when he examined claimant in March 1981 he did not know about the automobile accident of late 1980 or early 1981. He did indicate that the car accident in June 1981 did injure claimant's back and did require his treatment.

The question presented is whether claimant's need for medical treatment in 1981 is attributable to his 1979 industrial injury. We find the weight of the evidence is to the contrary.

The evidence indicates claimant had an automobile accident in late 1980 or early 1981 and also claimant testified that he hurt his back getting out of a recliner shortly before he saw Dr. Platt. Claimant also had an automobile accident in June 1981. The testimony of the claimant indicates that certain activities cause his back pain to flare-up and require periodic chiropractic treatments, which is quite understandable in a 63-year-old person with severe degenerative arthritis.

Turning to the medical evidence Drs. Robinson and Gatterman unequivocally find claimant's 1981 condition is unrelated to his 1979 industrial injury. Dr. Platt disagrees but, as he indicated in his deposition, he was unaware of the automobile accident prior to his examination. It is also clear from the evidence that claimant had two sequential back injuries after the January 11, 1979 claim. We conclude that the opinions of Drs. Robinson and Gatterman are far more reasonable and persuasive than that of Dr. Platt.

ORDER

The Referee's order dated December 23, 1981 is reversed. The denial of the employer/insurer is affirmed.

DWIGHT BATTLES, Claimant
Robert Nelson, Claimant's Attorney
Rankin, McMurry et al., Defense Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-07764 & 80-04732
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer, Georgia Pacific Corporation, requests review of Referee Knapp's order which set aside its denial of claimant's claim for aggravation of his 1975 industrial injury and sustained In-Mar Sales' denial of claimant's alternative new injury claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 22, 1982 is affirmed. No attorney fee will be awarded to claimant's attorney as no brief was filed.

MERLE COOPER, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10464
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation seeks Board review of Referee Knapp's order which granted claimant an award of 35% loss of the left arm. SAIF contends that the award granted by the Referee is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 12, 1982 is affirmed. No attorney fee will be awarded to claimant's attorney as no brief was filed.

KATHIE L. CROSS, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys

WCB 81-04930
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Pferdner's order entered in this enforcement proceeding requiring it to comply with Referee Neal's previous order of March 11, 1981, as amended on March 27, 1981. The principal issue involves the amount of a set-off contemplated by Referee Neal's orders. In this proceeding Referee Pferdner set $97.16 as the amount that the insurer could setoff against the additional compensation awarded by Referee Neal's previous orders. Referee Pferdner also imposed penalties and attorney fees for not having previously complied with Referee Neal's orders.

Referee Neal's March 11, 1981 order stated:

> "IT IS THEREFORE ORDERED that claimant be paid additional time loss through November 28, 1980.
>
> "IT IS ALSO ORDERED that claimant be paid an additional permanent disability award of 30° for an additional 20% loss of her left leg.
>
> "IT IS FINALLY ORDERED that claimant's attorney be paid 25% of the additional compensation granted by this Order."

Referee Neal's March 27, 1981 amended order stated:

"The Opinion and Order issued March 11, 1981, is amended in the Order section to allow the carrier to take an offset against the additional compensation granted by the Order of earnings claimant made while on time loss." (Emphasis added.)

The dispute centers on the emphasized portion of the amended order. The insurer argues that "earnings claimant made while on time loss" applies to the period between March 3, 1980 and October 24, 1980, the period of time loss awarded by the November 21, 1980 Determination Order, and the period between October 24, 1980 and November 28, 1980, the period of additional time loss awarded by Referee Neal's original order. Claimant argues that "earnings claimant made while on time loss" applies only to the latter period, October 24, 1980 to November 28, 1980, of additional time loss awarded by Referee Neal.

It would appear from the recent number of cases involving interpretation of prior litigation orders that this agency should be doing a better job of more clearly and specifically indicating exactly what relief is granted after a hearing or on Board review. See Frank R. Gonzales, 34 Van Natta 551 (1982); Lewis Twist, 34 Van Natta 52, 34 Van Natta 290 (1982); Albert Nelson, WCB Case No. 81-06031, 34 Van Natta 1077 (decided this date).

In any event, we think the insurer's interpretation of "earnings claimant made while on time loss" is more consistent with the plain meaning of those words. We conclude, however, that prior litigation orders should generally be interpreted in context with what was litigated at that time. In this regard, one of our observations in Lewis Twist, supra, is applicable: "The side that asserts the affirmative defenses of res judicata or collateral estoppel has the burden of proving what was previously litigated." 34 Van Natta at 293. While we are not certain whether the present setoff problem is in the nature of an "affirmative defense" or where the "burden of proof" lies, we believe that Referee Neal's prior orders are sufficiently ambiguous that somebody had some obligation to furnish something from the prior proceeding to aid in interpretation of those orders. Since the disputed language is in an amended order presumably issued in response to a motion for reconsideration, possibly just a copy of that motion would have gone a long way toward resolving the dispute. There is, however, nothing in the present record from the prior proceeding before Referee Neal except her March 11 and March 27, 1981 orders. Under these circumstances, we find no comfortable basis for adopting a different interpretation of these orders than did Referee Pferdner in this proceeding.

Regardless of the interpretation problem, Referee Neal's prior orders clearly contemplated some form of setoff. That is to say, under either interpretation of Referee Neal's orders discussed above, the insurer needed information on "earnings claimant made" in order to calculate her net benefits. The insurer wrote claimant on April 2, 1981, within a few days of Referee Neal's March 27, 1981 amended order, asking for this information. From the comments

of counsel in the course of this hearing, we find that there were several follow-up phone conversations in which the insurer or its attorney sought this same information. The first response to these inquiries was a statement of claimant's counsel at the hearing before Referee Pferdner that claimant earned $97.16 between October 24, 1980 and November 28, 1980.

Claimant argues she had no duty to furnish this information any sooner, despite it being clear that even under claimant's interpretation of Referee Neal's orders the insurer was entitled to setoff this amount. The insurer argues it is hardly fair to penalize it when claimant withholds the information necessary for it to calculate claimant's ultimate entitlement to benefits. We agree with the insurer. In Frank R. Gonzales, supra, we stated that, although it is primarily the duty of an employer or insurer to ascertain a claimant's entitlement to compensation,

> "We think the claimant bears some responsibility to clearly identify what periods of time loss are claimed. The claimant obviously is in a superior position to know when he is working, when he is not working, when he was hospitalized, etc. . . We conclude that claimant's failure to so cooperate is relevant to the degre of unreasonableness of the employer's action or inaction and thus relevant to the amount of any penalty assessed." 34 Van Natta at 554.

See also Jeri Putman, 34 Van Natta 744, 745 (1982):

> "There is no explanation in the record of why claimant herself, once she became aware of the situation, did not request Dr. Smith to furnish SAIF with the necessary information. A claimant also has certain duties when a claim for compensation is made."

The claimant in this case was obviously in a superior position to know her income during any and all of the periods of possible setoff contemplated by Referee Neal's orders. The insurer had to have that information to comply with Referee Neal's orders under any possible interpretation of those orders. Claimant offers no explanation for her refusal to supply that information until the day of the hearing before Referee Pferdner other than the claim that she had no duty to cooperate with the insurer. Since we reject that reasoning, we conclude that the penalty imposed by Referee Pferdner in this case cannot be sustained.

The attorney fee awarded by Referee Pferdner will be affirmed for the reasons stated in Mary Lou Claypool, WCB Case No. 81-04210, 34 Van Natta 943 (July 6, 1982).

ORDER

The Referee's order dated December 29, 1981 is modified. Those portions that assessed penalties for noncompliance with Referee Neal's prior orders are reversed. The remainder of the Referee's order is affirmed.

OSCAR DREW, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Paul Roess, Defense Attorney

WCB 81-02811
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer seeks Board review of Referee Seifert's order which set aside its denial of claimant's aggravation claim. The central issue is whether claimant proved a causal link between his 1978 injury and his 1981 knee condition.

An industrial accident in March of 1978 resulted primarily in injuries to claimant's back and right shoulder. The 801 form claimant executed at that time also referred to left knee involvement.

At the first medical examination of March 31, 1978 Dr. Lindsay recorded no history of claimant making any complaint about his knee. The only mention of any knee pain between the injury and early 1981 was recorded at the time of Dr. Lindsay's examination of June 6, 1979.

Dr. Lindsay referred claimant to Dr. Bert, whose examination focused primarily on claimant's back and shoulder problems. Dr. Bert reported, however, in connection with that July 1978 examination:

> "He denies any numbness in either leg. . . He walks well. Heel-toe walking is done normally. . . Deep tendon reflexes of knee and ankle are brisk and equal."

In September of 1980 claimant had a hearing on the extent of his disability from his 1978 injury. The Referee's decision from that hearing is an exhibit in this case. It reflects that claimant was contending he was permanently and totally disabled and that the evidence then before the Referee in that earlier proceeding included references to claimant's left knee having been injured in the 1978 accident.

In 1981 Dr. Bert diagnosed a torn medial meniscus and surgically repaired it. Dr. Bert has offered a variety of opinions in a series of reports. "It is, of course, impossible in retrospect to date a time when this cartilage tear occurred." Immediately after surgery, Dr. Bert's "final diagnosis" was "degenerative tear" of the meniscus. Six months after surgery Dr. Bert opined, "The condition I discovered at the time of surgery in his knee . . . was definitely the result of trauma." Dr. Bert's final report states:

> "I really feel it is impossible to state a percentage of trauma vs degeneration as an etiology process. Once a small tear is initiated the tearing process generally does continue with everyday activities and it is possible that this could have happened in Mr. Drew's case."

On this record we are not persuaded that claimant's 1981 knee condition has been proven to be a compensable consequence of his 1978 accident for several reasons: (1) Dr. Bert's 1981 reports are inconclusive, if not contradictory, and hardly rise to the level of a reasonable medical probability; (2) to the extent that Dr. Bert theorizes that a 1978 trauma played some role in claimant's torn meniscus discovered in 1981, it seems to us that such a theory is inconsistent with Dr. Bert's own findings on examination in 1978 quoted above; and (3) if claimant's knee bothered him constantly after the 1978 accident, as he testified at this hearing, we would have expected this fact to be developed more fully both in the medical record and at the September 1980 hearing at which claimant contended he was permanently and totally disabled because of the 1978 accident.

ORDER

The Referee's orders dated November 4, 1981 and November 16, 1981 are reversed. The SAIF Corporation's denial dated April 7, 1981 is reinstated and affirmed.

LEWIS H. FREEMAN, Claimant
Bischoff, Murray et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-11638
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Howell's order which awarded him an additional 5% unscheduled permanent partial disability because of his 1977 back/neck injury and 73.5° additional right arm disability because of the same injury. Claimant contends he is permanently and totally disabled. The self-insured employer cross-requests review, contending that the Referee's permanent partial disability awards were excessive.

We affirm and adopt the Referee's order with the following qualification. The Referee's emphasis was on the seek-work requirement of ORS 656.206(3). While we agree with the Referee's analysis of that statute, our own emphasis is on the fact that claimant's compensable disability following his 1977 back strain is not so severe as to warrant an award of permanent total disability and specifically does not include his subsequently diagnosed emphysema, which did not prevent claimant from working in the woods until the time of his 1977 back strain injury. See Emmons v. SAIF, 34 Or App 603 (1978).

ORDER

The Referee's order dated September 29, 1981, issued in lieu of the Referee's order dated September 3, 1981, is affirmed.

PAUL S. GILL, Claimant
Hugh Cole, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-09492 & 81-08254
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The insurer for the last employer seeks Board review of that portion of Referee McCullough's order which assigned to it responsibility for claimant's surgery and resulting time loss. The sole issue is insurer responsibility.

We adopt the facts as set forth in the Referee's order, and adopt his conclusions subject to the following comments.

In January, 1981, claimant had wrist fusion surgery. The surgery was necessitated by degenerative arthritis of the wrist. The arthritic condition, in turn, was caused by a series of wrist fractures claimant sustained between 1975 and 1980. The dispute here was between the employer at the time claimant sustained a fractured wrist in April, 1979, and the employer at the time claimant again fractured his wrist in June, 1980. Claimant's treating physician testified the 1975 fracture was the precipitating factor in the onset of the arthritis, but that each of the successive fractures contributed equally to the development of the extent of arthritis that ultimately required surgery in 1981.

But for two additional factors, we would have no difficulty assigning responsibility to the insurer on the risk at the time of the last injury. The medical evidence established that arthritis is a condition that takes years to develop, and that surgery was first mentioned as a possibility less than three months after the last injury. The insurer on the risk at the time of the last injury argues that while the most recent fracture may have contributed to the development of the arthritic condition which ultimately required surgery, given the time frame, the contribution from the last injury was de minimus, therefore, the employer/insurer at the time of the last injury should not be held responsible.

The Board previously has considered similar contentions and rejected them. Where there are multiple prior compensable injuries to the same body part, responsibility for subsequent medical servcies and time loss will be assigned to the employer/insurer on the risk at the time of the last injury to that body part. Roger Ballinger, 34 Van Natta 732 (1982). It follows that the Referee correctly assigned responsibility to EBI Companies, Inc., the insurer for the employer for whom claimant was working when he last fractured his wrist.

ORDER

The Referee's order dated November 5, 1981 is affirmed. Claimant's attorney is awarded $350 for services rendered on Board review, payable by EBI.

AVERY L. GRAVES, Claimant
Tom Hanlon, Claimant's Attorney
Ridgway K. Foley, Jr., Defense Attorney

WCB 80-10364 & 81-01316
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self insured employer requests review of that portion of Referee Menashe's order that set aside its denial of claimant's occupational disease claim for his low back condition. The employer raises issues of both compensability and responsibility. The employer's former insurer, EBI Companies, challenges that portion of Referee Menashe's order that set aside its denial of claimant's aggravation claim for his knee condition. The only issue raised by EBI in regard to the knee condition is responsibility.

Claimant compensably injured his knee in 1974 while EBI was furnishing workers compensation insurance for this employer. He returned to a light duty position with this employer in August of 1979, the employer having changed to being self insured in the interval. In July and August of 1980, claimant made claims for a back condition and worsening of his knee condition.

The knee claim is the easier of the two. EBI contends that claim should be found to be the responsibility of the self insured employer on a new injury theory. The employer argues the Referee properly assigned responsibility to EBI on an aggravation theory. As best we can tell, neither the employer nor EBI contend that claimant's knee condition is not compensable.

We affirm and adopt those portions of the Referee's order finding EBI responsible for claimant's knee condition. Also, our analysis of the medical evidence as it relates to claimant's back claim highlights additional reasons why we do not think claimant suffered a new knee injury after August of 1979.

Claimant's back claim is more complex because there are three possibilities: (1) the claim is not compensable; (2) the claim is compensable and the responsibility of EBI on an aggravation theory, i.e., that claimant's knee disability caused the onset of back disability; or (3) the claim is compensable and the responsibility of the self insured employer on an occupational disease theory, i.e., that claimant's work activities after August, 1979 were the major cause of his 1980 back condition. See SAIF v. Gygi, 55 Or App 570 (1982).

Some support for each of these theories can be found in the medical evidence, that is, the reports of Drs. Swanson, Fagan and McLaughlin. In weighing the medical evidence, however, we are struck more by what is not there than what is there.

Claimant worked at a light duty job for less than a year before reporting back problems to Dr. Swanson on July 16, 1980. During the same period of time, specifically between January and July of 1980, claimant cut, loaded, hauled and apparently unloaded

four cords of firewood. None of the medical reports reflect any appreciation of the light nature of claimant's job or the limited duration of that job before the onset of claimant's back symptoms in the summer of 1980; none of the medical reports reflect any appreciation of claimant's off-work activities, such as those with firewood.

Claimant, of course, has the burden of proving the compensability of his back claim. We are not persuaded he has sustained it in this case because we find the medical evidence contradictory and conclusory and, more importantly, because none of it appears to be based on a complete understanding either of claimant's work or non-work activities.

ORDER

The Referee's order dated September 24, 1981 is modified. That portion that set aside the denial of claimant's back claim issued by Warrenton Lumber Co. on November 11, 1980 is reversed and that denial is reinstated and affirmed. The remainder of the Referee's order is affirmed.

RAYMOND C. KEEN, Claimant
Coons & Hall, Claimant's Attorneys
Helm & Valentine, Defense Attorneys
Carl Davis, Attorney
David L. Jensen, Attorney

WCB 80-11125
July 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant seeks Board review of Referee Wolff's order which found claimant was not a subject employe at the time of his injury on September 27, 1980 and affirmed the SAIF Corporation's denial.

After de novo review, we affirm the conclusion reached by the Referee. Although it can arguably be said that claimant was a subject employe when he was transporting butane bottles for Mr. Kasch, claimant has failed to show that he was injured in the course and scope of his employment.

So far as penalties and fees are concerned, we refer claimant's attorney to a letter written by himself to the Referee, dated December 17, 1981, which states:

> "I withdraw my request for penalties and fees against the SAIF Corporation and in any subsequent review of this matter I will not make requests for penalties and fees against the SAIF Corporation."

ORDER

The Referee's order dated December 15, 1981 is affirmed.

MICHAEL T. KINSEY, Claimant
Peter Baer, Claimant's Attorney
Steven Joseph, Defense Attorney
Carl M. Davis, Attorney

WCB 81-04362 & 81-01408
July 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant seeks review of Referee Braverman's order which upheld SAIF's denial of claimant's claim. The Referee found that claimant failed to prove that he was doing any work on the date of the alleged injury. The Referee further found that even if claimant was working that day for the alleged employer, it was in the role of an independent contractor, not as an employe. The Referee further found that claimant failed to give notice of his claim in a timely fashion, that the employer was prejudiced by the late filing, and that claimant failed to prove good cause for the late filing. Lastly, the Referee found that even if all the above facts were proved, claimant failed to prove a worsening of his pre-existing condition as required by Weller v. Union Carbide Co., 288 Or 27 (1979).

We affirm the Referee's order on the basis that claimant failed to file his claim in a timely fashion or prove good cause for failure to do so, and that SAIF and the employer were prejudiced thereby.

It is apparent from the record that the effects of claimant's alcoholism during the relevant time period renders his testimony by and large useless. However, medical evidence indicates that claimant received medical care for a back condition on September 29, 1979 and for a period thereafter. We find it more likely than not that claimant sustained a back injury while working on a job in some capacity connected with the alleged employer, Bill Kasch Roofing. We find it more likely than not that the relationship between claimant and the alleged employer was an employer/employe one, and not an independent contractor. The alleged employer furnished the materials, the equipment and a helper. Claimant was paid based upon an hourly rate for his labor. The employer may well have procured claimant's signature to a statement that claimant was a contractor and was responsible for his own workers compensation coverage. However, the alleged employer had the right to exert control over how the job was done. We believe that an employer/employe relationship existed. See ORS 656.029, enacted in July 1979 but which did not become effective until January 1980, which would have resulted, under the facts of this case had the statute been applicable, in claimant being declared a subject worker of the employer herein.

We also find it more likely than not that claimant sustained a worsening of his pre-existing back condition. His treating physician reported that when claimant was hospitalized in September, 1979, he possibly had a herniated disc. The physician in a subsequent report gave his opinion that claimant probably had sustained a temporary worsening of his degenerative disc disease.

However, we concur with the Referee that claimant failed to satisfy the notice requirements of ORS 656.265. Claimant testified that at the time he was hospitalized for his back condition in September, 1979, he filled out a form which he understood to be a workers compensation claim form. However, there was no evidence that SAIF ever received that form, that form was not introduced into evidence, and claimant's memory is so impaired concerning events at that time that we cannot rely on his word. Claimant subsequently filled out a number of 801 forms alleging various dates for the injury. Considering claimant's condition and circumstances between the injury and the time he filled out the forms, we are not concerned about the fact that different dates were alleged, but we are very concerned about the fact that no verified filing of an 801 or any other notice took place until July, 1980, some 10 months after the injury. Claimant may have informed orally the employer soon after the incident that he had back pain, but by his own testimony, claimant did not clearly connect the back pain with any work activity. Claimant has failed to establish good cause for the late filing, and, considering the lack of record-keeping and the memories of the parties, SAIF and the alleged employer were prejudiced by the delay in filing.

ORDER

The Board affirms the order of the Referee affirming SAIF's denial of March 16, 1981.

DEBRA L. McBRIDE, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03230
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The claimant requests review of Referee St. Martin's order which upheld the SAIF Corporation's denial of her claim for injuries sustained in a lunch-time automobile accident on the ground that claimant's injuries did not arise out of and in the scope of her employment.

We affirm and adopt the Referee's order with the additional observation that the arguments for compensability in this case are even weaker than the unsuccessful arguments for compensability were in Rhoda Mae Collier, 30 Van Natta 591 (1981), aff'd without opinion, 54 Or App 779 (1981).

ORDER

The Referee's order dated December 31, 1981 is affirmed.

LAWRENCE McLEES, Claimant
Malagon & Velure, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-02113
July 30, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated July 20, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

DALIA MESA, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Bullivant, Wright et al., Defense Attorneys

WCB 81-00393
July 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The claimant seeks Board review and the employer cross requests review of Referee Shebley's order which granted claimant 52.5° for 35% loss of the left forearm in lieu of the Determination Order's award of 10% and allowed the insurer to deduct excess time loss paid to claimant in the amount of $2,018.99 from the increased compensation granted.

The claimant contends that the insurer is not entitled to unilaterally withhold amounts due for compensation for temporary total disability in recouping overpayments from past compensation for temporary total disability. The employer cross appeals contending the award granted was excessive in that the Referee should not have factored in claimant's functional overlay.

The facts as recited by the Referee are adopted as our own. On the issue of the increased award of permanent partial disability, we reverse. At the time of claim closure Dr. Thomas rated claimant's loss of function of her left forearm at 10% and that award was granted to claimant by the Determination Order of November 7, 1979. Dr. Button in August 1980 felt that the award of 10% was reasonable. The Referee noted that several physicians found emotional or functional elements, and the Referee concluded, ". . . the significant restrictions she has in the use of that member, albeit largely the result of functional overlay, persuades me that the prior award of compensation does not adequately compensate claimant for the permanent loss of use or function of her left forearm." He granted her 35% loss of the left forearm in lieu of the Determination Order's award.

Although functional overlay is documented in the record by several physicians (not, however, by any psychiatrist), the record is still devoid of proof that the condition was caused or aggravated by the injury or that such condition is permanent. Therefore, the functional overlay element should not have been considered in this case. Based on the medical opinion evidence of claimant's loss of use of that member, we find that the 10% granted by the Determination Order was proper. Our decision on the extent of disability issue makes the allowance of offset moot.

The evidence of record indicates that the insurer deducted 25% of the previous temporary total disability overpayments from claimant's most recent compensation for temporary total disability utilizing OAR 436-54-320(1)(a). The claimant, on appeal, contends this action and the Referee's concurrence in this action is in error on two points: (1) The Administrative Rule became effective January 11, 1980 and claimant's injury occurred in 1977, and (2) the particular rule cited is in violation of the statute and, therefore, void.

We dealt with this issue in the case of Telphen Knickerbocker, 33 Van Natta 568 (1981), and hold that the insurer's action was proper.

ORDER

The Referee's order dated November 30, 1981 is modified. The Determination Order dated November 7, 1979 is affirmed. The remainder of the Referee's order is affirmed.

NANCY MILLER, Claimant
Michael S. Mitchell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-08456
July 30, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Presiding Referee Daughtry's Order of Dismissal.

A September 17, 1979 letter from claimant's Washington attorney was treated as a request for hearing. About twenty months later, on July 8, 1981, the Presiding Referee issued an Order to Show Cause directing claimant to show cause why her hearing request "should not be dismissed as abandoned." That order recites service on the claimant in care of her Washington attorney (the only address that the Hearings Division had ever been furnished for claimant) and separate service directly on claimant's Washington attorney. Neither copy of the Order to Show Cause was returned undelivered.

On April 15, 1982 the Presiding Referee entered an Order of Dismissal on the ground that there had been no response to the Order to Show Cause.

We agree with the Presiding Referee that 31 months of inaction following a hearing request and nine months of inaction following an Order to Show Cause is a sufficient basis upon which to infer that this case should be dismissed as abandoned.

ORDER

The Presiding Referee's order dated April 15, 1981 is affirmed.

EDWARD MORGAN, Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-00373
July 30, 1982
Interim Order of Remand

Claimant requests review of Referee Leahy's order which denied claimant all relief sought, meaning primarily that Referee Leahy upheld the SAIF Corporation's denial of claimant's aggravation claim.

In the course of treatment for his May 1975 compensable back injury, claimant underwent a myelogram in June of 1975. In September 1979 one doctor diagnosed that claimant was suffering from arachnoiditis, and opined that claimant's 1975 myelogram caused the arachnoiditis. Claimant's aggravation claim now stands or falls on the question of the accuracy of the arachnoiditis diagnosis and whether that condition is causally related to the treatment of claimant's back injury. See Donald P. Neal, 34 Van Natta 237 (1982).

With the issues thus refined, we find we are unable to review this case at this time because of an ambiguity about what comprises the evidentiary record. The hearing was held August 6, 1980 and the record was left open at that time. SAIF submitted an August 15, 1980 report from Dr. Seres that is in the record as Exhibit 69, and an August 21, 1980 report from Dr. Norton that is in the record as Exhibit 70. Claimant submitted an August 25, 1980 report from Dr. Hoos that is in the record as Exhibit 78, and some information from a Veterans Administration Medical Center that is in the record as Exhibit 79. As best as we can tell, the Referee did admit the post-hearing exhibits offered by claimant, 78 and 79, but did not admit the post-hearing exhibits offered by SAIF, 69 and 70; however, the record does not contain any specific ruling by the Referee on admissibility of any of these exhibits, and there is no apparent reason why claimant's post-hearing exhibits would have been admitted while SAIF's post-hearing exhibits would not have been admitted.

This case is of obvious importance to the parties. If claimant can prove he suffers from arachnoiditis and that it is causally related to his 1975 injury or myelogram, there is a distinct possibility that he is now entitled to compensation for permanent total disability. It is thus important to us that there be no confusion about what is and what is not part of the evidentiary record. Cf. Brown v. SAIF, 51 Or App 389 (1981). We find it necessary to remand to the Referee for clarification.

Referee Leahy is instructed to enter a supplemental order on remand indicating which exhibits are admitted and which exhibits are not admitted, with particular attention to Exhibits 69, 70, 78 and 79. The Referee is instructed to specify the basis for the exlusion of any exhibits. In this regard, we are not impressed with claimant's counsel's objection to Exhibit 69 and 70 as stated in his letters that now appear in the record as Exhibits 73, 75 and 77; it may have been a mistake to leave the record open for any post-hearing exhibits but, once having done so, we regard the search for the truth to be more important than the tactics of the

parties. Referee Leahy's supplemental order shall be entered within 30 days from the date of this order, and copies shall be sent to the parties and the Board.

The Board will retain jurisdiction over this case. Once the Referee publishes his supplemental order, the parties may have 10 days in which to file supplemental briefs before the Board. We will then procede with our review of this case.

IT IS SO ORDERED.

ALBERT NELSON, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06031
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation seeks Board review of Referee McCullough's order which directed it to pay claimant benefits for temporary total disability from October 16, 1980 through July 27, 1981.

This is another case in which an ambiguity in a prior order has created another hearing request. See Frank R. Gonzales, 34 Van Natta 551 (1982); Lewis Twist, 34 Van Natta 52, 34 Van Natta 290 (1982); Kathie L. Cross, WCB Case No. 81-04930, 34 Van Natta 1064 (decided this date). In WCB Case No. 80-09749 Referee Mannix previously set aside SAIF's denial of claimant's aggravation claim, ordered payment of interim compensation from August 29 to September 14, 1980 and from October 1 to October 15, 1980 and remanded the aggravation claim to SAIF "for the provision of appropriate compensation." SAIF then deemed it "appropriate" to pay claimant no additional time loss other than the interim compensation specifically ordered by Referee Mannix. The effect of Referee McCullough's order in this enforcement proceeding was to find that it was "appropriate," indeed, legally required, that SAIF pay compensation for temporary total disability until claimant's aggravation claim was closed by Determination Order in July of 1981.

We are not certain what relief SAIF seeks on review. Its opening brief seems to argue for reversal of Referee McCullough's order, i.e., a finding that claimant was not entitled to the temporary total disability ordered paid by Referee McCullough. We disagree. Mark L. Side, 34 Van Natta 661 (1982). SAIF's reply brief shifts the emphasis, claiming a setoff for the October 1980 to July 1981 time loss should claimant obtain any increase in compensation in future proceedings. On this point, Referee McCullough stated:

> "If at a future hearing it is determined that claimant was medically stationary at some time prior to the date of the Determination Order, then SAIF would be entitled to claim a credit for temporary disability benefits paid between the established medically stationary date and the date of the Determination Order."

SAIF presents no persuasive argument for now being granted greater relief than that which the Referee assumed could be granted in the future; indeed, the Referee's analysis may be more generous to SAIF than it should be under our subsequent Side decision.

ORDER

The Referee's order dated January 14, 1982 is affirmed. Claimant's attorney is awarded $250 for services rendered on Board review, payable by the SAIF Corporation.

PATRICIA R. NELSON, Claimant
Allen & Vick, Claimant's Attorneys
Miller, Nash et al., Defense Attorneys

WCB 81-1037
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer seeks Board revew of Referee Foster's order which increased claimant's unscheduled permanent partial disability award from the 5% awarded by Determination Order to 25%.

The ultimate issue is the extent of claimant's permanent disability. The important subsidiary issues are, to what extent should an insurer/employer be responsible for the disabling effects of the non-compensable condition of obesity when it interferes with recovery from a compensable injury, and, which party has the burden of proving that the non-compensable condition either does or does not retard recovery.

Claimant, age 28 at the time of the injury, sustained a muscular strain in June of 1979 when, in the course of her employment at a convalescent center, she attempted to grab a patient who fell while being moved from a wheelchair to bed. Claimant is 5'4" in height. At the time she began working and at the time of the injury claimant weighed about 300 pounds. Claimant's physicians initially believed that claimant would recover completely from the injury. During the two years following the injury, claimant attempted a return to work for this employer and another employer as a medication nurse's aid. Such work did not require heavy lifting but did require the claimant to be on her feet for the greater part of the day. Both attempts at work failed because the physical activity increased claimant's low back pain to the point that it became disabling. Claimant's overall weight plus its distribution results in almost any prolonged physical activity exacerbating the muscle strain and prevents recovery from the injury.

The medical evidence establishes that if claimant would lose 100 to 130 pounds, she would become substantially asymptomatic. Within a short time after her injury, claimant was advised that her weight was interfering with her recovery from the injury. Claimant began dieting and lost but then regained 15 pounds. Around July, 1980, claimant was refered to Dr. Bouma, an endocrinologist, for testing to determine if there was a medical reason for her inability to lose weight. No report from that

physician appears in the record, but a chart note from the files of claimant's treating internist, Dr. Lautenbach, indicates that Dr. Bouma found claimant to be "euthyroid, noncushingoid, non-diabetic". Around November, 1980, Dr. Lautenbach placed claimant on a diet consisting of a 1,000 calories per day plus an appetite suppressent medication, to be taken one month on, one month off, to avoid addiction. By February, 1981 claimant had lost 37 pounds and was down to 266 pounds. Around February, 1981, claimant began participation in a Weight Watchers program. At the time of the hearing, claimant testified that her weight had stabilized in the range of 261 to 268 pounds. In July, 1981, Dr. Lautenbach signed a statement prepared by the insurer attesting that at some point claimant had "lost her enthusiam" for further dieting, that she ceased losing weight, that claimant's weight problem was not caused by involuntary factors and that weight loss was entirely a matter of will power and desire.

Notwithstanding some arthritic spurring and her weight, prior to the 1979 injury claimant had no problems with her back even though her employment history included working as a waitress, farm worker, and cannery worker. The Determination Order awarded claimant 30% unscheduled disability taking into consideration claimant's obesity, but went on to reduce the actual award to 5% because the Evaluation Division believed that 25% of claimant's disability was attributable to obesity, which was within her power to control, and only 5% was attributable to the compensable injury. The evidence indicates that due to her injury and obesity claimant does have significant impairment of her physical capabilities, but that with the prescribed weight loss claimant would retain only minimal impairment attributable to the 1979 back injury.

The Referee ruled that claimant is only required to make "an effort" to lose weight and that the evidence here is that claimant did, in fact, make an effort to lose weight. The Referee apparently believed that some of claimant's disability was due to weight that she could lose, and he reduced an award that he said otherwise would have been "in excess of 30%" to 25%. The insurer asserts that ORS 656.325(4) and OAR 436-54-281(7) require claimant's award of permanent partial disability to be reduced to zero for her failure to follow medical advice from her treating physician to lose significant amounts of weight, regardless of her efforts to comply. The insurer further asserts that the only valid reason for failure to lose weight would be medically verified physical inability to lose weight, and that the medical evidence here is that claimant's inability to lose weight is a matter of will power and desire. The claimant argues that "the employer takes the worker as he finds him," points out that claimant weighed 300 pounds when she was hired and when she was injured, and concludes that benefits may be reduced only if claimant refuses to follow medically prescribed steps to lose weight. The insurer counters that we should infer from the evidence that the claimant was not credible when she testified concerning her efforts to lose weight, and that if the doctors said dieting would accomplish significant weight loss but in fact she did not lose weight, therefore, claimant must have refused to follow medical advice.

Resolution of the parties' contentions requires a discussion of two fundamental but potentially inconsistent principles of workers compensation law. The first is that the employer takes the worker as he finds him; the second is that an injured worker has a duty to mitigate his or her damages. The principle that the employer takes the worker as he finds him is recognized in that a worker is entitled to compensation for the disabling effects of a pre-existing, nonindustrial condition, provided that the pre-existing condition and work activity combined to produce temporary or permanent disability or required medical services, and the work activity were a material contributing cause. Hoffman v. Bumble Bee Company, 15 Or App 253 (1973). The principle that an injured party has a duty to mitigate damages is recognized in that a worker is not entitled to an award of permanent disability to the extent that the worker unreasonably refuses treatment for a pre-existing condition where such treatment would reduce the extent of disability of the compensable condition. Brecht v. SAIF, 12 Or App 615 (1973); Wilson v. Gilchrist Lumber Co., 6 Or App 104 (1971).

Applying these principles to the rating of disability of compensable injuries affected by obesity we conclude that: (1) A worker is entitled to compensation when work activity interacts with obesity to cause an injury which results in permanent disability, provided that work activity was a material contributing cause of the injury; but (2) a worker is not entitled to compensation for disability attributable to obesity to the extent that (a) the evidence establishes that weight loss would reduce or eliminate the degree of disability, and (b) it is within the voluntary control of the worker to follow such medical advice and lose weight, and (c) the worker has not made a reasonable effort to follow such medical advice. We further conclude that, where a case involves the rating of disability and the issue is raised, the burden of proof is on the claimant to show that he or she did not unreasonably fail to follow the medical advice to lose weight.

Our conclusions are not based on ORS 656.325 per se. None of the provisions of ORS 656.325 directly pertain to the issue in this case. Subsections (1) and (2) of that statute authorize suspension or reduction of temporary disability payments under various circumstances. Subsections (3) and (4) presume that a claimant has received an award of permanent disability. The issue here is rating of extent of permanent disability. We understand ORS 656.325 to be an application to specific circumstances of the general principles, applicable to the circumstances of this case, that an injured party has a duty to mitigate damages and that the worker's compensation system is generally not liable for pre-existing, nonindustrial conditions.

Applyling these principles to this case, no one disputes that claimant's original back injury was compensable even though her obesity may have been a contributing factor in the causation of the injury. However, the evidence establishes that claimant's obesity has and continues to prevent her back strain from healing. The evidence also establishes that claimant is aware that her weight is retarding her recovery and that her treating physicians have repeatedly advised her that the only hope of recovery is to lose significant amounts of weight. It is also clear that claimant has been instructed to lose weight by restricting her caloric

intake, taking medication, and exercising. Lastly, it is clear that claimant has failed to achieve the extent of weight loss recommended by her physicians.

Other matters are less well established. There is some medical evidence that claimant's obesity is not due to medical or physical factors, and that her inability to lose weight is purely a matter of lack of will power. There also is evidence that during the first 12 months or so after the injury claimant's efforts at weight loss were not very significant, and that at some point between February and July, 1981, claimant "lost her enthusiasm" for continued dieting. On the other hand, there is evidence that at least for a period of five to six months claimant restricted her caloric intake, exercised, and took her medication. Medical reports confirm that claimant, in fact, achieved 30-40% of the prescribed weight loss, which she has sustained over an additional four to five month period. Because of the weight loss claimant did achieve, particularly while she was on medication, we decline to find, as the insurer urges, that claimant "refused" to follow her physician's advice. The difficult question is whether claimant proved by a preponderance of the evidence that she made a reasonable effort to comply with the prescribed weight loss regimen but failed to lose weight for reasons beyond her control.

Considering the factors suggested in Clemons v. Roseburg Lumber Co., 34 Or App 135 (1978), we note that dieting undoubtedly involves some discomfort, but no real pain, that the risk of harm is insignificant if nonexistent, and that the likelihood is great of significant improvement in claimant's condition. We note that claimant excused her failure to exercise more on the ground that non-aquatic exercise exacerbated her back pain and swimming was out of the question because of claimant's fear of water (although she apparently enjoys boating). We conclude that although claimant made some effort to lose weight, considering all the factors, it was not a reasonable effort. Accordingly, in the rating of claimant's permanent disability, we will disregard that portion of claimant's impairment due to her obesity. We believe that the preponderance of the evidence establishes that even with significant weight loss, claimant would have some residual impairment attributable to her industrial injury. We can do no better at estimating the degree of residual impairment than the Evaluation Division, therefore, we reinstate the award of the Determination Order

ORDER

The Referee's order dated July 29, 1981 is reversed and the Determination Order dated January 20, 1981, is reinstated and affirmed.

STEVEN A. NICHOLS, Claimant
Claudia Browne, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06099
July 30, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Presiding Referee Daughtry's Order of Dismissal.

Claimant's June 29, 1981 letter was treated as a request for hearing. (Claimant's brief erroneously recited that his employer requested the hearing.)

On December 10, 1981 the Presiding Referee issued an Order to Show Cause directing claimant to show cause why his hearing request "should not be dismissed as abandoned." By affidavit claimant apparently admits that he received this order, but contends that on an unspecified date, while it was still unopened for an unspecified reason, it fell behind a piece of furniture where it was discovered in May of 1982.

On February 9, 1982 the SAIF Corporation moved for an Order of Dismissal on the ground that there had been no response to the Order to Show Cause. That motion recites service on claimant at the only address that we have ever been furnished, although claimant's affidavit recites having moved at some unspecified date, apparently in May. Claimant's affidavit does not comment on receipt or nonreceipt of SAIF's motion.

The Presiding Referee's Order of Dismissal was entered on April 22, 1982. We agree with the Presiding Referee that over 10 months of inaction, during which claimant failed to respond to all letters and orders from the Hearings Division, is a sufficient basis upon which to infer that this case should be dismissed as abandoned.

ORDER

The Presiding Referee's order dated April 22, 1982 is affirmed.

EVALD NIELSEN, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06562 & 81-03312
July 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation seeks Board review of Referee Shebley's order which remanded claimant's claim for a shoulder condition to it for acceptance and payment of compensation to which he is entitled. SAIF contends that claimant's shoulder condition is either the responsibility of Coastal Trailer Repairs or that it is not compensable.

We accept as our own the Referee's recitation of the facts. For purposes of this order we will list pertinent findings of fact.

(1) Claimant sustained a compensable injury to his back on July 25, 1979 (Hoffman Construction, insured by SAIF) and a compensable left leg injury on May 19, 1980 (Coastal Trailer Repairs, insured by Tobin, Crawford and Mikolavich, Inc.). His current claim is for a left shoulder disability which we find was contributed to by both injuries.

(2) Claimant had shoulder complaints after the first injury, although seemingly insignificant. Dr. Gambee's chart notes did not mention any shoulder complaints until April 1980. The shoulder condition did not become disabling until after the second injury.

(3) While hospitalized for the leg condition in May 1980 claimant's complaints about shoulder pain increased. Surgery was performed in May 1981.

(4) Some dispute arises when considering how claimant fell in May 1980. He claims he used his left hand and arm to cushion his fall. He testified to problems in his left hand which were attended to at the hospital. The only evidence to the contrary is a barely-decipherable hospital form which states: "Betadine soak to hand R." Coastal Trailer Repairs attempts to submit to the Board the same form with additional information on it. We cannot consider this information based on Robert Barnett, 31 Van Natta 172 (1981). We are persuaded the May 1980 injury affected claimant's shoulder in some way.

(5) The preponderance of the medical evidence indicates that claimant's shoulder condition is compensable. Speculation of an underlying condition was not developed enough to be convincing. The sole remaining issue is which insurer is responsible for the condition.

The Referee assigned responsibility to the first injury (SAIF) based on the fact that the second injury did not materially worsen the left shoulder condition. The Referee was persuaded by the reports of Dr. Gambee, claimant's treating physician, and Dr. Mathiesen. He felt the reports of Drs. Short and Norton were based

on an incomplete history and the fact that they did not examine claimant also made their opinions less persuasive. We find the medical experts are somewhat at a loss to unequivocally determine which insurer should be responsible. Dr. Mathieson failed to mention the second injury at all, which gives his opinion very little weight. Dr. Gambee seems to assume that because claimant complained of shoulder problems prior to the second injury, then the insurer at risk at the time of the first injury should assume responsibility. He felt the first injury caused the shoulder problems, therefore, SAIF should pay.

Legally, we refer to the rationale in Roger Ballinger, WCB Case Nos. 80-08724 and 80-09824 (June 15, 1982). In that case we stated that when the same body part is involved in prior compensable injuries (in this case, the left shoulder), then the insurer on the risk at the time of the most recent injury is responsible for future medical care and other compensation unless that insurer can prove the medical care involves a separate and distinct part of the body. We conclude that this line of reasoning should be used in this case. The Referee's order should be reversed and Coastal Trailer Repairs, by its insurer Tobin, Crawford and Mikolavich, Inc., should assume responsibility for claimant's left shoulder condition.

ORDER

The Referee's order dated December 23, 1981 is reversed.

The denial issued by Tobin, Crawford and Mikolavich, Inc. on July 1, 1981 is reversed and claimant's claim for a shoulder condition is remanded to it for acceptance and payment of compensation to which claimant is entitled.

The July 1, 1981 denial issued by the SAIF Corporation is affirmed.

Tobin, Crawford and Mikolavich, Inc. shall reimburse SAIF for any monies SAIF paid in this claim as a result of the Referee's order. The attorney fee granted by the Board is also Tobin, Crawford and Mikolavich, Inc.'s responsibility.

Claimant's attorney is entitled to an attorney's fee for his services at Board review in the amount of $400, payable by Tobin, Crawford and Mikolavich, Inc.

KEITH L. PERIMAN, Claimant
Wade P. Bettis, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03606
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation seeks Board review of Referee Fink's order which set aside SAIF's denial and remanded claimant's knee injury claim for acceptance.

The facts are not seriously disputed. Claimant was employed as a ski instructor. He was paid an hourly rate for the approximately one to two hours a day he was actually teaching. The balance of each day he was generally expected to be present on the employer's premises wearing a distinctive ski jacket that identified him as an instructor. During these nonteaching hours, claimant performed a general "public relations" function for the employer. Claimant and the other instructors were permitted to ski on the employer's premises for free while wearing their distinctive jackets. A lift ticket would otherwise cost $12 per day.

While practicing skiing over moguls, claimant fell and injured his right knee. He was not teaching a class at that time. He was, instead, practicing for a test he intended to take to be certified at the next higher level of ski instructor.

The issue is whether claimant's injury arose out of and in the course of his employment.

SAIF's brief contains an impressive summary and analysis of the law in this area. However, we think there is one Achilles' heel in SAIF's analysis. SAIF argues: "There has never been a case in Oregon wherein compensation was granted to a claimant found to be not working at the time of the injury." It may depend on the definition of "working," but we think SAIF's argument is inconsistent with Edwin T. Bosworth, 33 Van Natta 487 (1981), and Michael J. King, 34 Van Natta 153 (1982).

In Bosworth, the claimant was employed in a cabinet shop. His employer permitted him to build a stereo cabinet for himself, i.e., a personal project during working hours, in exchange for claimant having managed the business in the employer's absence. Claimant was injured while working on his personal project.

In King, the claimant was employed in an automobile body shop. His employer permitted all employes to use the employer's tools and premises to work on one car per year as a personal project. Claimant was injured while working on such a personal project.

In both Bosworth and King we concluded the claims were compensable, finding in both cases that the injury-producing activity, albeit personal, was: (1) functionally, a negotiated element of the employment; (2) of some benefit to the employer; and (3) contemplated by the employer. We find the same analysis is applicable in this case.

Indeed, the value of claimant's free use of the ski facilities was an even more central element of his employment than the fringe benefits involved in Bosworth and King. Claimant's greatest monthly salary as a ski instructor in 1979 was $233. The value of free use of the employer's facilities, that would otherwise have cost $12 per day, exceeded claimant's salary. It was certainly contemplated by the employer that claimant would be on the ski slopes as much as possible when not actually teaching classes and the employer derived some benefit from claimant's presence in a distinctive employe's "uniform." While the result would probably be different if the claimant had been injured off the employer's premises, see Haugen v. SAIF, 37 Or App 601 (1978), we conclude that the Referee properly found the claim in this case to be compensable.

ORDER

The Referee's order dated December 9, 1981 is affirmed. Claimant's attorney is awarded $500 for services rendered on Board review, payable by the SAIF Corporation.

BORDY PURIFOY, Claimant
Charles Paulson, Claimant's Attorney
Noreen Saltveit, Defense Attorney

WCB 81-09206
July 30, 1982
Order of Remand

The Referee issued an order herein on June 21, 1982. Claimant filed a timely request for review. The Referee subsequently informed the Board and the parties that, in order to cure an oversight on his part, it might be appropriate to remand this claim to the Referee for further consideration. The parties have indicated to the Board that they have no objection.

Now, therefore, this claim will be remanded to the Referee for further consideration.

IT IS SO ORDERED.

JANET S. ROBB, Claimant
Galton, Popick et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-00914
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Wolff's order that sustained the SAIF Corporation's denial of her occupational disease claim for a psychological condition. In addition to contending that her claim is compensable, claimant argues that interim compensation should be paid from the date of disability rather than the date of the employer's notice or knowledge of her claim.

We affirm and adopt that portion of the Referee's order finding the claim to be not compensable and upholding SAIF's denial.

We have previously ruled that interim compensation, which is due and payable regardless of whether a claim is found compensable, need only be paid from the date of notice/knowledge to date of denial; but if the claim is found compensable then compensation for temporary total disability must be paid back to the date of disability. Donald Wischnofske, 32 Van Natta 136 (1981); 34 Van Natta 664 (1982). The most recent case at the Court of Appeals level, Stone v. SAIF, 57 Or App 808 (1982), is consistent with our analysis in Wischnofske. See also Kosanke v. SAIF, 39 Or App 555 (1979); Silsby v. SAIF, 39 Or App 555 (1979).

Claimant cites prior Court of Appeals cases that, according to claimant, are inconsistent with Wischnofske and thus, by parity of reasoning, inconsistent with Stone, Kosanke and Silsby. If there are disparate results at the Court of Appeals level, as claimant seems to argue, we think it follows that we can resolve the question presented on what we believe to be the better policy basis. And, as explained more fully in Wischnofske, we think the better policy is that interim compensation is only due from the date of notice or knowledge of a claim, not from the (frequently earlier) date of alleged disability.

ORDER

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

PAUL G. RUSTAN, Claimant
Lynch & Siel, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-3101
July 30, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant seeks Board review of Referee Howell's order which affirmed the Determination Order award of 30 degrees for 20 percent loss of the right leg. Claimant contends this award is inadequate.

Dr. Mueller, claimant's treating physician, stated:

> ". . . The permanency that has been described is due to the recent tear of the medial meniscus. Some of his complaints probably are due also to underlying degenerative joint disease, but it is impossible to tell which ones are due to the recent injury and what complaints are due to aggravation of underlying osteoarthrosis. One would assume that the recent injury has had an effect on the underlying arthritic condition, and probably has hastened the advancement of the arthritic condition.
>
> "I have no recent information as to whether he has lost any further weight. The old injury of the left knee complicates recovery of the right knee injury because he cannot fully depend on the impaired left knee, and therefore, protecting and developing the right knee. . ."

There is little doubt that claimant's left knee condition, the degenerative joint disease in the right knee and his obesity are contributing to his disability in the right knee. We conclude claimant is entitled to increased compensation for the first two of these conditions. However, we do not feel the insurer should assume responsibility for disability attributable to claimant's obesity. Claimant apparently has lost about 30 pounds between the date of the injury and the hearing (a period of over 20 months). We have previously determined that the burden is on the claimant to show he has made a reasonable effort to reduce his disability by losing weight. Patricia Nelson, WCB Case No. 81-01037 (decided this date). This claimant has failed to do. 34 Van Natta 1078 (1982)

We conclude claimant would be more properly compensated with an award equal to 45 degrees for 30 percent loss of the right leg (knee).

ORDER

The Referee's order dated December 29, 1981 is reversed.

Claimant is hereby granted compensation equal to 45 degrees for 30 percent loss of the right leg (knee). This award is in lieu of that granted by the Determination Order.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25 percent of the increased compensation awarded by this order, payable out of said compensation as paid, not to exceed $3,000.

DONALD E. STEERE, Claimant
Cynthia Barrett, Claimant's Attorney
Rankin, McMurry et al., Defense Attorneys

WCB 81-1687
July 30, 1982
Order on Review

Reviewed by Board members Barnes and Ferris.

Claimant seeks review of Referee Fink's order which upheld the insurer's denial of compensability of claimant's heart condition and pulmonary edema. The issue is whether either condition is compensable.

We affirm and adopt the Referee's Opinion and Order, subject to the following comment. On Board review claimant contends that even if claimant's pre-existing heart condition is not compensable under SAIF v. Gygi, 55 Or App 570 (1982), (we agree with the Referee that it is not) claimant's work activity on the day in question was a material contributing cause of pulmonary edema, which was the immediate precipitating cause of claimant's hospitalization. We tend to think that in this case pulmonary edema was more of a symptom of claimant's cardiomyopathy rather than a separate condition. In any event, the evidence is that the edema started and progressively worsened during claimant's days off, and that, probably, he would have been hospitalized anyway, regardless of whether he went to work.

ORDER

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

VIRGINIA M. STONE, Claimant
D. Keith Swanson, Claimant's Attorneys
Gary Jones, Defense Attorney
Keith Skelton, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01414 & 81-00053
July 30, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests Board review of Referee Seifert's order which upheld two denials: a denial issued by Liberty Mutual Insurance Company, dated December 2, 1980, in behalf of J. C. Penney Company; and a denial issued by the SAIF Corporation, dated June 26, 1981, on behalf of Young and Malstrom Legal Process Service Companies. The Referee found that claimant had not proven a compensable claim against either employer.

Claimant was employed with J. C. Penney Company from August 2, 1961 to October 1, 1978. In July 1978 claimant filed a claim with J. C. Penney for a condition of the right hand, particularly her right thumb and index finger. Diagnosis was degenerative arthrosis involving the base of claimant's thumb. The condition was accepted by J. C. Penney's insurer, Liberty Mutual. The claim was subsequently closed by Determination Order dated November 1, 1978, awarding claimant temporary total disability only.

Claimant went to work for Young and Malstrom in January of 1980. In October of 1980 she returned to her treating physician complaining of increased symptoms in her right thumb and arm, spreading to her shoulder. Claimant submitted an aggravation claim to Liberty Mutual, advising that it had been necessary for her to terminate her most recent employment due to the condition of her hand and requesting that her claim be reopened. Liberty Mutual issued a denial, referring claimant to her "most previous employer for [her] current condition." Claimant thereafter filed a Form 801 with Young and Malstrom, in which she indicated that the date of injury or diagnosis of an occupational disease was April 26, 1978. SAIF issued a denial on the ground that claimant was not a subject employe of this employer on April 26, 1978.

The Referee concluded that neither employer was responsible for payment of benefits to claimant due to the fact that claimant had not established the compensability of her claim. He arrived at this conclusion by analyzing the evidence in light of appellate and Board decisions interpreting the law applicable to occupational disease claims, James v. SAIF, 290 Or 343 (1981), and claims for aggravation of a pre-existing condition, Weller v. Union Carbide, 288 Or 27 (1979).

The Referee's analysis may have been proper as it relates to claimant's claim against her later employer, Young and Malstrom; however, we do not believe that the Referee properly analyzed the claimant's entitlement to benefits as it relates to an alleged worsening of her 1978 claim with J. C. Penney. We need not decide what the proper analysis may be, however, due to the fact that on review, claimant has conceded that the Referee properly found that she has not sustained an aggravation of her right hand condition. Claimant's sole request for relief is a request for medical benefits pursuant to ORS 656.245, for which, claimant contends, one or the other employer is responsible.

Based upon our review of the record, we are satisfied that claimant has proven entitlement to the claimed medical services, and that payment of this compensation is the responsibility of J. C. Penney Company and its insurer, Liberty Mutual.

ORDER

The Referee's order dated December 16, 1981 is reversed in part. The denial issued by Liberty Mutual Insurance Company, dated December 2, 1980 is hereby set aside, and claimant's claim for medical services pursuant to ORS 656.245 is remanded to that insurer. The remainder of the Referee's order is affirmed.

Claimant's attorneys are awarded $1,000 as and for a reasonable attorney's fee, payable by Liberty Mutual Insurance Company for services rendered before the Referee and the Board.

WARD K. STRAUSER, Claimant
Gary Jones, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00354
July 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation seeks Board review of Referee Nichols' order that set aside its denials of claimant's claim for the condition of his feet. The Referee decided several other issues but they all depend for present purposes on the validity of SAIF's denials.

Claimant was employed as a counselor at MacLaren School. He suffers from fairly severe diabetes mellitus, first diagnosed in the mid 1960's. In May and June of 1978 he accompanied a group from MacLaren to a work project in eastern Oregon. While there, claimant developed an infection and then gangrene of the right foot and, apparently, an ulcer on the left foot. Since mid-1978 claimant has suffered chronic ulcerations, infection, gangrene and osteomyelitis in both feet and has undergone several surgical procedures to treat those conditions.

It is unusually obscure what is being claimed and the theory therefor, and what is being denied and theory therefor. The Referee's order seems to regard all of claimant's problems in both feet as the direct result of an "injury" sustained in eastern Oregon in 1978. Claimant's brief relies in part on that theory. Perplexingly, however, claimant himself testified at the hearing that he suffered no specific trauma on that project in 1978. Even more confusing is the fact that claimant's original 1978 claim was for a blister on his right foot, but subsequent treatment has involved both feet. Perhaps trying to fill this gap, claimant also relies on law and theory relevant to occupational disease claims.

Equally perplexing, SAIF initially accepted claimant's 1978 claim and processed it to Determination Order dated June 18, 1980. SAIF then denied aggravation reopening on December 10, 1980, although what this denial was a response to is not clear. SAIF issued another denial on September 15, 1981. It referred to a prior "denial for a diabetic condition" and advised "of this formal denial of your left foot condition."

Despite this procedural maze, we understand the current issue to boil down to: Given that all doctors involved in claimant's treatment over the past four years have said that his diabetes plays some role in his problems with his feet, has claimant established his foot condition is compensable under any theory beyond the date of SAIF's first denial? We conclude he has not.

We do not think it is necessary - or perhaps even possible on this record - to address the accidental injury versus occupational disease distinction. Compare Valtinson v. SAIF, 56 Or App 184 (1982), with O'Neal v. Sisters of Providence, 22 Or App 9 (1975); see generally Clarice Banks, 34 Van Natta 689 (1982).

If the relevant doctrines are those applicable to injury claims, we do not think claimant has established the continuing compensability of his foot conditions because: (1) we have no reason to doubt claimant's testimony that he suffered no injury in 1978; (2) no doctor opines that all of claimant's problems in both feet can be causally traced to a 1978 "injury" to either foot or both feet; and (3) even if a doctor did offer such an opinion, on this record we would find it inherently incredible.

If the relevant doctrines are those applicable to occupational disease claims, claimant must prove that his work activity was the major cause of his foot condition. SAIF v. Gygi, 55 Or App 570 (1982). At times claimant seems to argue that his standing and walking at work, both on the eastern Oregon project in 1978 and after returning to work since then, is the major cause of his foot condition. We are not persuaded. In William C. Schneider, 34 Van Natta 520 (1982), we rejected a similar claim - that a pharmacist's foot condition had been caused by prolonged standing at work. In Schneider, we said:

> "This case is akin to Ilene Stevenson, 34 Van Natta 192 (1982), and Norman L. Hickman, 32 Van Natta 123 (1981). In Stevenson, the claim was that prolonged sitting at work caused thrombophlebitis in claimant's leg. In Hickman the claim was that prolonged talking at work caused a vocal cord ulcer. Both claims were rejected. Sitting, talking and, as in this case, weightbearing on the legs and feet are ubiquitous parts of daily living. This is not to say that claims based on such activities cannot be compensable; however, it would be exceptional that it could be proven that such claims were caused by circumstances to which a claimant was not ordinarily exposed except in actual employment."

There is nothing exceptional in this case. To the extent that standing, walking, etc., contributed to claimant's foot conditions, such causation was a circumstance to which claimant was ordinarily exposed in both working and nonworking contexts.

Regardless of the relevant doctrines, the ultimate issue in this case is the relationship between claimant's diabetes and his foot condition. We are persuaded by Dr. Norton's analysis:

> "This claimant's chronic ulceration, infection, gangrene and osteomyelitis is directly the result of the primary problem, diabetes.
>
> "As indicated by the attending doctor, diabetics have micro-vascular problems and, in addition, may have neuropathy also in association with these chronic ulcer problems. These ulcerations develop with or without antecedent trauma. Most of the ulcers are due to ischemia from the shoe which causes pressure that is not experienced well by the individual, and not tolerated by the poor circulation. The first appearance of the ulcer is usually that of a blister. Any kind of standing or sitting is more prone to result in foot problems than is lying down with the feet at the horizontal level or slightly elevated. . . . [Claimant] is being treated primarily for an underlying condition of diabetes with its predictable complications that are following the normal behavior of the disease process. The surgical treatment is for the treatment of that underlying disease process and its complications. The prognosis for success of the surgery is poor as is implied by the attending doctor. The overall prognosis is that the claimant will eventually undergo amputation of his lower extremeties."

ORDER

The Referee's order dated November 14, 1981 is reversed. The SAIF Corporation's denials dated December 10, 1980 and September 15, 1981 are reinstated and affirmed.

LESLIE M. SULLIVAN, Claimant
Bloom, Ruben et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-02620
July 30, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant has requested review of Referee Menashe's order which awarded claimant 10% unscheduled permanent partial disability. The principal issue involves the redetermination of a worker's permanent disability pursuant to ORS 656.268(5), upon completion of an authorized training program.

Claimant was originally injured in September 1977. Her claim was closed by a Determination Order in March 1978 which awarded her no permanent disability. A Referee's order in July 1978 awarded claimant 10% unscheduled permanent partial disability, which was affirmed by the Board on review. Claimant subsequently completed an authorized vocational rehabilitation program, and in March 1980 the Evaluation Division issued a Redetermination Order which awarded temporary total disabilty and "0 percent unscheduled disability." The Determination Order stated, "This award is in lieu of, and not in addition to, that granted by Opinion and Order dated July 25, 1978."

Claimant's attorney corresponded with the Evaluation Division, requesting an explanation of the authority for the Division's reduction of claimant's permanent disability award. The then assistant administrator responded: "As applied to this claim, this means that Miss Sullivan's underlying, preexisting developmental anomalies may create compensable temporary disability when symptomatic, but do not represent permanent residuals from her September 1977 strain. A second basis for the Order was Miss Sullivan's completed rehabilitation course which, as contemplated by ORS 656.268(1), was designed to enhance her earning capacity."

Pursuant to claimant's request for hearing, Referee Mensahe awarded claimant 10% unscheduled permanent partial disability, in effect reinstating the award granted by the prior 1978 Referee's order. Referee Menahse did not allow or award an attorney's fee

to claimant's attorney because his order represented a reinstatement of the previous order, and, therefore, no additional compensa- was due claimant from which an attorney's fee could be allowed.

Claimant assigns as error the Referee's assessment of the extent of her permanent disability and the failure to allow an attorney's fee. While we agree that there was no basis for an allowance of an attorney's fee because this proceeding before the Referee did not result in claimant being awarded any additional compensability, we find that claimant is entitled to an additional award of permanent disability; therefore, claimant's attorney will be allowed an attorney's fee payable out of this award of additional compensation.

Contrary to the statement of the Evaluation Division's then assistant administrator, we find that claimant does suffer from permanent residuals as a result of her industrial injury. Although the Evaluation Division has the authority to reduce or eliminate a

prior award of permanent disability upon completion of an authorized training program, the Division's Redetermination Order in this claim reflects an error in the exercise of that authority. Even after completion of her authorized training program, claimant still suffers a significant loss of earning capacity. Based upon our application of the guidelines contained in OAR 436-65-600, et seq., we find claimant is entitled to an award of 25% unscheduled permanent partial disability. Claimant has previously been compensated for 10% unscheduled permanent disability; therefore, she is now entitled to receive an additional 15%. Claimant's attorney shall be allowed 25% of the additional compensation awarded claimant. OAR 438-47-040.

ORDER

The Referee's order dated March 30, 1982 is modified. Claimant is awarded compensation for 25% unscheduled permanent partial disability, which award is in lieu of and not in addition to all prior awards. Claimant's attorney is allowed 25% of the increased compensation granted by this order, not to exceed $3,000, payable out of and not in addition to claimant's award of compensation.

BARBARA WASSON, Claimant
Allen & Vick, Claimant's Attorneys
James Larson, Defense Attorney

WCB 81-00035
July 30, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Nichols' orders which set aside its denial of claimant's claim and awarded an insurer-paid attorney fee. SAIF argues its denial should be sustained and that the Referee lacked authority to award attorney fees under the circumstances of this case or, alternatively, that the fee awarded was excessive. Claimant cross-appeals on the attorney fee issue.

We find the facts to be as follows:

(1) Claimant, as part of her work for the Bend School District, went to the home of Larry Scoles, a student, on October 20, 1980. At that home claimant was exposed to some virus, probably chicken pox.

(2) Claimant subsequently became ill noticing symptoms about October 24, and was unable to work between October 24 and January 5, 1981.

(3) As of October of 1980, claimant had numerous food and pollen allergies, although some of the specific allergies were not identified until the spring of the following year.

(4) Claimant's illness between October 1980 and January 1981 was either a viral infection or an aggravation of her preexisting allergy condition because of viral exposure or a combination of both. Claimant's treating physician, Dr. Cutter, has suggested all three possibilities, ultimately testifying at the hearing, "I don't think anybody could answer that question," i.e., the question of whether claimant actually had a viral infection or only an aggravated allergic reaction because of exposure to virus.

A compensable occupational disease is defined as:

> "Any disease or infection which arises out of and in the scope of employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein." ORS 656.802(1)(a).

The statutory test is in the conjunctive: (1) disease arising out of and in the scope of employment; and (2) disease a worker is not ordinarily exposed to except in employment.

Looking at the first prong, all possible theories to support the conclusion that claimant proved a compensable occupational disease (see finding #4) depend upon a single factual common denominator -- exposure to virus that caused her disability. We do believe that claimant proved a work-connected exposure to a virus in the Scoles home (see finding #1), but do not believe that she proved that particular virus or that particular exposure caused her disability. We are more persuaded by Dr. Johnson's analysis:

> "If Mrs. Wasson did have a viral infection during the months of November and December, 1980, it would be impossible to state where she might have obtained it. She is at no more risk to obtain a viral infection from her work than she is from the community at large. In order to be able to state that the patient had obtained her viral infection from the Scoles residence, it would be necessary to have viral titers both from the Scoles and from the patient documenting that the infection was the same. Because of the ubiquitousness of viral infections at any one time in any community it is impossible to say where the patient may have contracted any such infection.
>
> "In summary, from the records available to me I am not able to establish that the patient had a viral infection, although it is possible. If she did have a viral infection, it is not possible to say where she may have contracted it. It is safe to say, however, that the patient was at no more risk for viral infection from her work than she was for viral infection from the community at large."

The second requirement of ORS 656.802(1)(a) -- not ordinarily exposed except in employment -- has been the subject of considerable recent judicial construction. See James v. SAIF, 290 Or 343 (1981); SAIF v. Gygi, 55 Or App 570 (1982). However, we find the plain meaning of the statute combined with Dr. Johnson's observation about "the ubiquitousness of viral infections" sufficient to conclude that, even if claimant had proven the virus from the Scoles home caused her disability, she still would not have satisfied the second half of ORS 656.802(1)(a).

Our conclusion that claimant had not proven a compensable occupational disease makes it unnecessary to reach the attorney fee issues raised by the parties.

ORDER

The Referee's order dated January 11, 1982 is reversed. The SAIF Corporation's denial dated December 18, 1980 is reinstated and affirmed.

BOARD MEMBER LEWIS DISSENTING:

I would respectfully dissent and affirm the Referee's Opinion and Order, awarding an attorney's fee of $350 for services at the Board level.

JOHN FLETCHER, Claimant
Dan O'Leary, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-03554 & 81-10669
August 4, 1982
Order of Remand

SAIF Corporation has requested review and claimant has cross-requested review of the Referee's July 12, 1982 order. It has come to the attention of the Board that this case should be remanded to the Referee for further proceedings, after which either party may renew its request for Board review.

ORDER

This case is remanded to the Referee for further proceedings.

JOHN M. HANSON, Claimant
S. David Eves, Claimant's Attorney
James Larson, Defense Attorney
Steven Reinisch, Defense Attorney

WCB 81-07947 & 81-03784
August 4, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant requests review of Referee Howell's order which awarded an additional 15% unscheduled permanent disability over the 15% awarded by the Determination Order for claimant's low back condition and which made no award of permanent disability for claimant's neck injury. Claimant contends that he is entitled to a greater award for his low back condition and that he does have some permanent disability from his neck injury.

We affirm and adopt the Referee's order with one exception. We do not believe that claimant has shown that he has suffered permanent impairment as a result of his neck injury. His ability to return to unrestricted heavy labor with apparently little or no discomfort following his neck injury leads us to the conclusion that there was no permanent damage to his neck from the injury and any problems he is now experiencing are most likely attributable to his preexisting cervical osteoarthritis.

ORDER

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

ORVILLA HUTCHESON, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-08307
August 4, 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.

RALPH S. MADRIL, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys
Roger R. Warren, Defense Attorney

WCB 78-05798 & 79-08024
August 4, 1982
Order on Remand

This case is again before the Board on remand from the Court of Appeals for clarification of our Order on Review dated May 7, 1981.

Specifically, the court's instructions were stated as follows:

> "Remanded to the Board with instructions to clarify whether the award of 25 percent unscheduled low back disability was made with regard to the combined effect of claimant's injuries and his past receipt of money for such disabilities." 57 Or App 398, 403 (1982).

The answer is: The Board's award of 25 percent unscheduled low back disability in this case was not made with regard to the combined effect of claimant's injuries and his past receipt of money for such disabilities.

IT IS SO ORDERED.

WILLIAM M. SABO, Claimant
Robert E. Martin, Claimant's Attorney

WCB 80-08444
August 4, 1982
Order Denying Motion for Dismissal

On or about April 11, 1982, claimant filed a Request for Review of the Referee's order herein. Thereafter, the insurer moved the Board for an order dismissing claimant's Request for Review on the grounds and for the reason that claimant did not serve a copy thereof on all parties within 30 days of the date of the Referee's order.

For the reasons set forth in Michael J. King, 33 Van Natta 636 (1981) and Barbara Rupp, 30 Van Natta 556 (1981) the Motion is denied.

ORDER

The insurer's Motion to Dismiss claimant's Request for Review is denied.

RICHARD D. TURPIN, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03349
August 4, 1982
Order on Reconsideration

Claimant's attorney has moved for reconsideration of the attorney fee awarded in our Order on Review dated July 14, 1982. Having considered the motion, we agree with claimant's attorney that the fee awarded was unreasonably low.

ORDER

The Board's Order on Review dated July 14, 1982 is modified to provide that the SAIF Corporation shall pay claimant's attorney a reasonable attorney's fee of $475 for services rendered on Board review.

BERNARD HEIDELBERG, Claimant
Goldberg & Mechanic, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-09927
August 6, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Leahy's order which upheld the SAIF Corporation's October 28, 1980 denial of claimant's aggravation claim. The only issue is the compensability of that aggravation claim.

Claimant's original industrial injury occurred on August 11, 1977 when he fell down some stairs while working as a painter. Following a prior hearing on November 3, 1978, Referee Mongrain found the claimant to be suffering from a multitude of problems, including chronic alcoholism, emotional difficulties, degenerative disc disease and a heart condition. Further evidence from this hearing indicates claimant suffers from hepatitis and a bullet lodged near his spine from a gunshot wound. Although finding the claimant of questionable credibility, Referee Mongrain concluded that claimant was entitled to an award of 30% unscheduled disability for the injury to his back.

Immediately following the prior hearing, claimant moved to Mississippi. He was incarcerated in the Jones County Jail for a felony conviction. Claimant served 14 months in jail in Mississippi and was subsequently incarcerated at the Oregon State Penitentiary until his release in January of 1981.

Claimant contends that on August 25, 1980, while in jail in Mississippi, he suffered an aggravation of his previous industrial back injury.

Referee Leahy found in this proceeding that the claimant had, at different times, given different versions of the circumstances surrounding his alleged aggravation. The first version was given to Deputy Pete Rose, Chief Deputy of the Jones County Jail, while he was transporting claimant to the Mississippi State Hospital. Deputy Rose's testimony was taken by conference call. He testified that claimant had told him simply that his old back injury had worsened to the point where treatment was necessary. A second version is reported by Dr. Diaz, who initially treated claimant. Dr. Diaz indicates that claimant had stated that he injured his back while lifting a fellow prisoner. Although claimant contends in his brief that this was simply a misstatement by Dr. Diaz due to his inability to communicate in English, Deputy Rose testified that Dr. Diaz's English was good, and that he had no trouble communicating with him. Following his return to Oregon, claimant was examined by Dr. Becker, who reports that claimant twisted his back while climbing some stairs in August 1980. In the SAIF investigative report of January 21, 1981, claimant indicates that he arose from bed at 4:30 a.m. and felt a sudden severe pain in his lower back, although the hospital records indicate that claimant was admitted to the hospital at 3:40 a.m. At the hearing claimant testified that a group of prisoners had set fire to some mattresses on the morning of August 25, 1980, awakening the claimant, causing him to suffer back pain when he rolled out of bed.

Understandably, the Referee found the claimant to be so lacking in credibility that he could not determine if claimant suffered a compensable aggravation of his previous industrial injury.

The claimant contends that the evidence indicates that he did not injure his back in an incident involving the lifting of a fellow prisoner and that since the factual basis of SAIF's denial is undermined, that the denial must be overturned. The claimant misconstrues his burden of proof. The burden of proof is on the claimant, to establish by a preponderance of evidence the compensability of his claim. Ruitta v. Mayflower Farms, Inc., 19 Or App 278 (1974). Even if the claimant did not injure his back lifting a fellow prisoner, this does not automatically mean that the claimant has established at the hearing that his claim is compensable. Claimant may have aggravated or injured his back in any of a variety of ways, and due to claimant's unreliability we are unable to determine that he has established his claim is compensable. Even though prior criminal convictions do not foreclose a finding that a workers compensation claimant is credible, Condon v. City of Portland, 52 Or App 1043 (1981), the bewildering variety of versions of the "accident" in Mississippi leave us unpersuaded as to all versions.

ORDER

The Referee's order dated April 14, 1981 is affirmed.

DENNIS H. LESLIE, Claimant
Robert Gardner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06984
August 6, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Nichols' order and order on reconsideration which granted claimant an award of 35% unscheduled permanent partial disability, that being an increase of 5% over the June 5, 1978 Determination Order and the January 18, 1979 stipulation which together granted claimant an award of 30% unscheduled disability. The Referee's original order also granted SAIF authority to offset an apparent overpayment of temporary total disability compensation against the increased permanent disability granted by her order. The Referee's order on reconsideration deleted that portion of her original order which granted SAIF authority to take the offset.

Claimant first contends that his permanent disability is greater than that which was allowed by the Referee. Taking into consideration claimant's physical impairment, and the relevant social/vocational factors found in OAR 436-65-600 et seq., we find that the claimant has been properly compensated by his award of 35% unscheduled permanent partial disability.

Claimant contends for his second issue that SAIF should not be allowed to take an offset of its alleged overpayment of temporary total disability benefits. We are unable to determine just what claimant hopes to gain by raising this issue. Pursuant to a motion by claimant's counsel, it was requested that the Referee reconsider her order and delete that portion of her order granting SAIF authority to take the offset, as that issue had not been before her at the hearing. On January 5, 1982, the Referee's order on reconsideration issued, granting claimant's request and deleting that portion of her order. Claimant has been granted the relief which he sought with regard to that issue. Therefore, he is not aggrieved by the Referee's order and there is nothing for us to review on this issue.

ORDER

The Referee's orders dated December 14, 1981 and January 5, 1982 are affirmed.

MARIA MERCED, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-00551
August 6, 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.

RICHARD R. MILLER, Claimant
Richard Nesting, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 80-00986
August 6, 1982
Order Vacating Order of Dismissal

Claimant's attorney has filed a petition to vacate the Order of Dismissal and to reinstate his request for Board review. Claimant's request for Board review was dismissed for the reason that claimant had not timely filed an Appellant's brief and had not prosecuted his appeal in a timely manner. Upon reconsideration the Board has agreed to vacate its prior Order of Dismissal.

IT IS THEREFORE ORDERED that the Order of Dismissal be vacated and Appellant has ten 10 days from the date hereof to file claimant's brief. The Respondent shall have 20 days from receipt of Appellant's brief within which to file Respondent's brief.

JOHN J. O'HALLORAN, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB n/a
August 6, 1982
Third Party Distribution Order

This matter is before the Board on SAIF Corporation's application for an order distributing the proceeds of a third party recovery obtained by claimant. ORS 656.593.

Claimant was injured in May 1979 while working on a construction site in Portland. He was struck in the head by a large piece of wood that was dropped from two floors above him. After the injury, he experienced recurring headaches, persistent left tinnitus and hearing loss in both ears, greater on the left.

Claimant elected to pursue a third party action pursuant to ORS 656.154 and 656.578. Claimant filed his Notice of Election with SAIF in June of 1979. Thereafter, in July 1979, January 1980, and June 1980, SAIF provided claimant's attorney with information regarding SAIF's claim expenditures. In June 1980 SAIF advised that the total costs paid as of that date were $9,724.76.

In the meantime, claimant's claim was closed by a Determination Order issued in June of 1980, which awarded claimant compensation for temporary total disability only. Claimant thereafter requested a hearing on the issue of the extent of his permanent disability.

In October of 1981 claimant's attorney forwarded to SAIF a trust account check in the amount of $9,774.76 designating it as repayment of SAIF's lien in full. SAIF thereafter tendered to claimant and his attorney a release agreement which, by its terms, would allow claimant to retain the net balance of the third party recovery, see ORS 656.593(1)(d), upon agreement that this balance would serve as a credit against all future claim costs for which SAIF would otherwise be responsible. The agreement also contained a provision for dismissal of claimant's request for hearing concerning the permanent disability awarded by the June, 1980 Determination Order.

Claimant's attorney returned this agreement to SAIF under cover of a letter indicating that the balance of the recovery that SAIF might claim for future expenditures, if any, had already been distributed to claimant. SAIF then requested the Board's intervention in making a proper distribution of the proceeds of the third party action.

This dispute involves two issues. The first concerns the extent of SAIF's lien, particularly SAIF's claim for reasonably to be expected future expenditures. SAIF claims the entire balance of the proceeds for such expenditures; claimant contends that SAIF has made no showing that there will be any such expenditures, and that SAIF's conduct during the history of this claim is inconsistent with its present contention that there will be future claim costs. The other issue concerns the respective rights and duties of the industrial insurer and the claimant and claimant's attorney, when there has been a third party recovery obtained by a judgment, in effecting a distribution of the proceeds.

We will address the latter issue first. ORS 656.593 contains the formula for distribution of the proceeds of a third party recovery. After claimant has recouped the costs of the litigation, including attorney's fees, and has received a percentage of the proceeds, the paying agency is entitled to "be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation. . . ." ORS 656.593(1)(c).

When a third party action has been resolved by settlement, the three parties to the settlement -- the claimant, the industrial insurer and the third party tortfeasor or insurer -- necessarily will have been negotiating the amount of the settlement, including the industrial insurer's claim for future expenditures. See ORS 656.587. Often the three parties will be able to agree upon a reasonable settlement of the claimant's third party action, but the claimant and the industrial insurer will be unable to agree upon the proper distribution of the proceeds of the recovery due to some dispute concerning the extent of the industrial insurer's lien. Under those circumstances it is not uncommon for the parties to make a partial distribution of the proceeds and place the remaining balance in trust, with a further distribution to be made upon resolution of the dispute by the Board. We recognize that the negotiations that ensue between the industrial insurer and the claimant concerning the distribution of the third party proceeds, prior to a final resolution of the third party action, have a definite bearing upon the claimant's decision to proceed to trial in the third party action or settle with the third party or third party insurer. The claimant's decision to

proceed to trial or settle the third party action does not affect the manner in which the proceeds of the recovery, however obtained, are distributed. See Marvin Thornton, WCB Case No. 80-11391, 34 Van Natta 999 (July 20, 1982).

When a third party recovery is instead obtained by judgment, the claimant and his attorney are the first to know that the third party action has been resolved. It is incumbent upon the claimant at that stage to advise the industrial insurer of that fact. Upon resolution of the third party action, claimant's attorney cannot simply forward a check to the insurer in an amount previously designated by the insurer as the amount of its expenditures, without first making some inquiry as to the amount of the insurer's current claim costs, and any possible claim for future claim expenditures. Making a distribution in a manner done by claimant's attorney in this case, without advising the industrial insurer of the final disposition of the third party action, defeats the purpose of the statutes providing for the worker's election and notice of the election to the industrial insurer. It is then incumbent upon both parties to begin or resume negotiations concerning the extent of the industrial insurer's lien for claim expenditures, including any claim for future expenditures. It is the industrial insurer's obligation to determine whether it will incur any future expenditures, Robert A. Parker, 32 Van Natta 259 (1981); and to establish the amount of its claim for future expenditures to a reasonable certainty. LeRoy R. Schlect, 32 Van Natta 261 (1981). As we have previously ruled, it is improper for the industrial insurer to accept payment for its current expenditures and expect the claimant to waive the right to receipt of further compensation benefits upon claimant's acceptance of the net balance of the recovery. Robert A. Parker, supra.

In summary, upon resolution of a third party action, claimant or claimant's attorney must advise the industrial insurer of the disposition, including the amount of the recovery, and no distribution of the proceeds should be made until the insurer has been allowed a reasonable opportunity to present its claim against the proceeds of the recovery. It is the obligation of the industrial insurer to promptly determine and inform the claimant of the extent of its lien for claim expenditures, including reasonably to be anticipated future claim costs. Since most disputes about the proper distribution of the proceeds concern the extent of the insurer's lien, the Board encourages partial distribution pursuant to subsections (a) and (b) of ORS 656.593(1) pending resolution of the disputed issues by the Board.

Turning to the extent of the insurer's lien in this case, it is apparent that SAIF has been reimbursed for the expenses it has actually incurred, and the only dispute concerns the extent of its lien for future claim costs, if any. SAIF has not submitted any information supporting a claim for future medical expenditures. The only information submitted bears upon a possible award of permanent disability for a binaural neuro-sensory hearing loss and tinnitus. Claimant has appealed the Determination Order, claiming permanent disability arising out of this injury. No hearing has yet been held.

SAIF has submitted an October 10, 1980 letter report of Dr. Korn, addressed to claimant's attorney, in which Dr. Korn reports hearing loss and tinnitus resulting from claimant's May 1979 injury. He states that the hearing loss and tinnitus is permanent and that it cannot be medically or surgically corrected. This report is scanty regarding the extent of claimant's hearing loss, although the doctor indicates that in reading to claimant from a standard PB work list, claimant missed 11% of the words in the left ear and scored 100% on the right.

Claimant sustained a second industrial injury to his head in December 1979 and thereafter continued to experience symptoms similar to those arising out of the May 1979 injury. In order to determine whether claimant has sustained any permanent disability arising out of the May 1979 injury, which involves the third party dispute before us, we have consulted the agency's files in WCB No. 80-05999 (May 1979 injury) and WCB No. 81-08748 (December 1979 injury).

Dr. Korn's October 1980 letter report indicates that claimant will sustain some hearing loss and tinnitus on a permanent basis due to his May 1979 injury. That report does not, however, assist us in determining the extent of this hearing loss, or whether the tinnitus will impair claimant's earning capacity. The aforementioned agency files contain an auditory assessment conducted by Dr. Wilson at the request of Dr. Korn. It indicates a very slight loss of hearing in claimant's left ear and no loss of hearing in claimant's right ear; however, the report is dated October 7, 1980, and there is no indication whether the hearing loss reflected by this test is attributable to claimant's May 1979 injury or December 1979 injury.

Although SAIF has established a reasonable probability that claimant will suffer some permanent impairment as a result of the injury, we are unable to determine the extent of the impairment. Accordingly, SAIF has failed to establish to a reasonable certainty what its future claim expenditures will be in relation to this claim. SAIF's claim for reasonably to be expected future expenditures must be denied. Cf. Larry Campuzano, 34 Van Natta 773 (1982).

ORDER

Claimant shall retain the balance of the proceeds of his third party recovery, $5,798.89, and SAIF's claim for anticipated future expenditures is denied.

MARVIN SWARTOUT, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05506
August 6, 1982
Order on Reconsideration

The Board issued its Order on Review herein on July 14, 1982, affirming and adopting the Referee's order which found claimant to be permanently and totally disabled. Claimant's attorney thereafter requested the Board to reconsider that portion of the order awarding counsel $300 as and for a reasonable attorney's fee for services rendered on Board review.

Counsel estimates that his office expended approximately ten hours in preparing claimant's brief, and that $85 per hour is a reasonable fee. Counsel requests an award of a fee not less than $850. While we agree that counsel is entitled to an additional award, we are not prepared to award him the fee he has requested. See Charles Wattenbarger, WCB Case No. 80-03922, 34 Van Natta 1019 (July 23, 1982).

ORDER

On reconsideration of the Board's Order on Review dated July 14, 1982, the Board modifies its order. Claimant's attorney is awarded $600 as and for a reasonable attorney's fee for services rendered on Board review. This award is in lieu of, and not in addition to, the attorney's fee awarded by the Board's Order on Review. Except as modified, the Board adheres to its former order.

NEILA R. BURGESS, Claimant
Peter E. Baer, Claimant's Attorney
Moscato & Meyers, Defense Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-07209 & 81-10727
August 11, 1982
Order Denying Motion to Dismiss

The employer has moved to dismiss claimant's request for review of the Referee's June 17, 1982 order, on the grounds that the request for review was not filed with the Board until July 21, 1982, and is, therefore, not timely.

Although claimant's request for review was received at the Board's office on that date, claimant has satisfied ORS 656.289(3) by mailing the request for review in a timely fashion. See OAR 436-83-700(2). The claimant's request for review is postmarked July 16, 1982, and is therefore timely.

ORDER

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

JACK G. MONROE, Claimant
Jeff Gerner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10527
August 11, 1982
Order on Review

Reviewed by The Board en banc.

Claimant has requested review of Referee Mannix's order which upheld SAIF's denial of claimant's claim for compensation related to a carpal tunnel condition, allegedly arising out of claimant's March 24, 1976 industrial injury; and refused to award any additional permanent disability beyond that granted by the April 23, 1981 Determination Order, which awarded claimant 25% unscheduled permanent disability.

We affirm and adopt that portion of the Referee's order relating to the denial of claimant's carpal tunnel condition. We affirm and adopt the Referee's order as it relates to the issue of extent of claimant's permanent disabillity, with the following additional comment.

The Referee's evaluation of the extent of claimant's permanent disability incorporated consideration of "physical impairment, age, education, intelligence, training, work experience, motivation and similar factors." The Referee found claimant to be minimally motivated.

The parties are commended for their thorough consideration of the pertinent factors to be considered in the evaluation of permanent partial disability, pursuant to the Department's guidelines in OAR 436-65-600, et. seq. Our application of the guidelines, as applied to the evidence in this case, leads to the conclusion that the Referee was correct in his assessment of claimant's permanent disability.

We disagree with both parties concerning the proper application of the departmental rule concerning "emotional and psychological findings", OAR 436-65-607, which we consider to be the administrative rule that includes consideration of a worker's motivation. See Danny H. Sackett, WCB Case No. 81-05350, 34 Van Natta 1107 (decided this date).

Both parties appear to agree that a negative value should be assigned to this factor, the only issue being to what extent. The evidence tending to indicate that this might be justified is related to claimant's drinking problem and his participation in an authorized training program, from which he apparently attempted to remove himself. We do not find claimant's drinking problem to have any bearing upon either his inability or unwillingness to adjust to the results of his injury; and there are other possible explanations for claimant's attempt to terminate his training program, such as his inability to cope with the academic requirements. Accordingly, we find that neither subsection (6) nor subsection (4) of OAR 436-65-607 apply to the facts and circumstances presented by this record, and that it is appropriate to assign a zero value to this factor inasmuch as claimant has demonstrated an average adjustment to the results of this injury. OAR 436-65-607(5).

ORDER

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

DANNY SACKETT, Claimant
Malagon & Velure, Claimant's Attorneys
Wiswall, Svoboda et al., Defense Attorneys
Paul Roess, Defense Attorney

WCB 81-05350
August 11, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Mannix's order, which awarded claimant 56° (17.5%) unscheduled permanent partial disability for injury to claimant's low back, in addition to the 32° (10%) awarded by a May 27, 1981 Determination Order. The issues raised by claimant are: (1) premature closure; and (2) extent of disability. Claimant contends the Referee's award is inadequate.

In evaluating the extent of claimant's permanent partial disability, the Referee considered claimant's "low level of responsibility and low level of motivation" as factors. Claimant objects to the Referee's inclusion of a motivation facter in the evaluation of claimant's permanent disability. The employer and the SAIF Corporation contend that in the evaluation of a worker's permanent partial disability, motivation is a factor to be considered.

Our research reveals no Oregon appellate decision directly considering the issue of whether or not motivation is a factor to be considered in evaluating the extent of a worker's permanent partial disability. There are a number of decisions in which the court seems to indicate some reliance on motivation as a factor in evaluating permanent partial disability, in particular Dittrich v. Pacific NW Bell, 25 Or App 831, 836 (1976). See also Thorp v. Willamette Industries, 26 Or App 823, 825 (1976); Plane v. SAIF, 23 Or App 191, 196 (1975); Chapin v. Bate Plywood Co., 9 Or App 634, 636 (1972). Cf. Frantz v. SAIF, 30 Or App 927, 929 (1977).

Motivation has always been an element of proof in a worker's claim for permanent total disability status, other than claims in which the worker was able to make a prima facie showing of total disability based upon medical evidence alone. See Wilson v. Weyerhaeuser, 30 Or App 403 (1977); Deaton v. SAIF, 13 Or App 298, 304 (1973).

Prior to the Supreme Court's decision in Ryf v. Hoffman Construction Co., 254 Or 624 (1970), permanent partial disability was measured entirely by loss of bodily function. In Ryf the court considered the worker's comparative earnings before and after the injury in arriving at a determination of the worker's unscheduled permanent partial disability, holding that "[a]ctual earnings are important but not the sole basis for measuring earning capacity." 254 Or at 633. Justice Sloan dissented, arguing that the majority had placed undue emphasis upon the claimant's immediate loss of earnings in arriving at a disability determination. The dissent discusses the legislative history of the permanent partial disability statutes. 254 Or at 636-637. The dissent noted an earlier decision in which the court stated without explanation that "the loss of capacity to earn is the basis upon which compensation should be based." Lindeman v. SIAC, 183 Or 245, 250 (1948). Referring to a commentary stated in the then current Oregon State Bar publication Workmen Compensation

Practice in Oregon (1968), to the effect that "hearing officers under the new Act are interpreting the Lindeman and [Kajundzich v. SIAC, 164 Or 510 (1940)] cases to mean that in scheduled injury cases a man's earning capacity before the injury is not considered in arriving at the disability evaluation, whereas in unscheduled injury cases the workman's earning capacity, if impaired, is considered," the dissent expressed bewilderment as to what change in the 1965 revision of the workers compensation law warranted such a departure from the former test of loss of bodily function.

> "If there is justification for adopting the distinction made by the hearing officers between scheduled and non-scheduled injuries in arriving at the extent of disability, there should, at least, be some explanation as to why the 'new act' requires the change. It should also be explained why the new formula provides a more accurate and uniform measurement of disability than the long standing test previously used. The answer is not to be found in the statutes and an unexplained assumption is not enough." 254 Or at 638-639.

A majority of the court later followed the suggestion made in the Ryf dissent in Surratt v. Gunderson Bros., 259 Or 65 (1971). The court in Surratt began its analysis of the proper measurement of unscheduled permanent partial disability by analogizing to permanent total disability.

> "By statute, Oregon has recognized that disability under the Act and physical impairment were not, for all purposes, equivalent. ORS 656.206(1)(a) is as follows:
>
> > "'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.' [Emphasis in original.]
>
> "In considering what is suitable employment, it must have been intended that there be taken into consideration factors other than physical impairment. [Emphasis in original.] What is suitable for two individuals with exactly the same physical impairment may be, and probably is,

entirely different. If matters other than physical impairment are proper in considering permanent total disability, there would seem to be no reason why the same factors should not be taken into consideration in determining the extent of permanent partial disability, in the absence of statutory admonition to the contrary." 259 Or at 68-69. (Emphasis supplied.)

The court concluded its analysis as follows:

> "We see no specific evidence in this case that the Court of Appeals did or did not use loss of earning capacity as the test. In any event, such loss is the test of the extent of unscheduled disability, but this does not mean that physical impairment or any other matter relevant to the issue of his earning ability should not be taken into consideration. It was impossible in Ryf, on any logical basis, to consider subsequent earnings except on the basis that loss of earning capacity was the proper test. This necessarily meant that any other facts relevant to earning capacity, such as intelligence quotient, education, training ability, etc., could also be considered." 259 Or at 77-78.

ORS 656.214(5) is the statute governing and defining unscheduled permanent partial disability. It provides in pertinent part:

> "In all cases of injury resulting in permanent partial disability, other than those described in subsections (2) to (4) of this section, the criteria for rating of disability shall be the permanent loss of earning capacity due to the compensable injury. Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience. The number of degrees of disability shall be a maximum of 320 degrees determined by the extent of the disability compared to the worker before such injury and without such disability."

The second sentence of the quoted portion of this statute was added by a 1979 amendment. 1979 Oregon Laws, Chapter 839, § 27.

We do not deem the five factors included in the statute as exclusive. By the use of the phrase "such factors as", the 1979 amendment must have contemplated that there would be other relevant factors to be considered in determining impairment of any

individual worker's earning capacity. This conclusion is supported by the Supreme Court's reasoning in Suratt wherein the court used such phrases as "any other matter relevant to the issue" and "any other facts relevant to earning capacity." 259 Or at 78.

As previously noted, motivation has historically been a factor in determining whether certain claimants are permanently and totally disabled. The motivation factor was incorporated in the permanent total statute by 1977 Oregon Laws, Chapter 430, § 1:

> "The worker has the burden of proving permanent total disability status and must establish that the worker is willing to seek regular gainful employment and that the worker has made reasonable efforts to obtain such employment." ORS 656.206(3).

It may be significant that when the legislature amended ORS 656.214 in 1979, no reference was made to ORS 656.206(3), and motivation was not included as a factor to be considered. We are not persuaded, however, that the Legislative Assembly directly considered the relevance of motivation in evaluating permanent partial disability in 1977 or 1979.

Our review of the relevant statutory and case law leads us to the conclusion that a worker's age, education, training, skills and work experience are not the sole factors that may be considered in evaluating impairment of earning capacity, and that it may be appropriate to consider evidence of a worker's motivation or lack thereof in determining an appropriate award of unscheduled permanent partial disability.

The guidelines for rating unscheduled permanent disability promulgated by the Workers Compensation Department, OAR 436-65-600 et seq., include a factor designated "Emotional and Psychological Findings." OAR 436-65-607. The rule provides:

> "(1) A psychological or emotional condition may contribute to incapacity to perform in an occupational setting. Such mental conditions may range in severity from psychopathological response such as chronic depression, to self-pity, malaise or lack of interest in appropriate vocational adjustments.
>
> "(2) If caused by the injury, mental or emotional conditions may themselves constitute a disability. If so, they are rated as an impairment of the whole person pursuant to Section 65-665 below, and are not considered in this Section.
>
> "(3) The range of impact for the emotional and psychological factor is valued from -25 to +15.
>
> "(4) Workers emotionally or psychologically unable to adjust to the results of their injuries receive a value up to +15.

"(5) Workers demonstrating an average adjustment to the results of their injuries receive a value of zero.

"(6) Workers demonstrating an unwillingness to adjust to the results of their injuries receive a value up to -25."

We interpret this rule generally to include the concept of motivation as that term has previously been used in the appellate court opinions. On the one hand, it is a manifestation of the general doctrine that injured workers have some duty to try to "mitigate their damages." Cf. ORS 656.325. Conversely, it is an application of the principal that "a broken body can cause a broken spirit," Wilson v. Weyerhaeuser, 30 Or App at 412, to the evaluation of permanent partial disability.

We do not believe, however, that the administrative rule goes so far as ORS 656.206(3) and imposes any specific seek-work requirement in permanent partial disability cases. Rather, we deem the proper approach to be that evidence of motivation, or seeking work, or not seeking work or any of the other factors in OAR 436-65-607, when offered, is to be included with all other evidence relevant to a particular worker's loss of earning capacity.

In applying OAR 436-65-607 in the evaluation of permanent partial disability, this Board has found that in most cases there is little, if any, evidence justifying assignment of any value other than zero for this factor. It has been and remains our policy that inability to adjust to the results of an injury, OAR 436-65-607(4), and unwillingness to adjust to the results of an injury, 436-65-607(6), must be clearly documented in the record, preferably by professionals in the field, in order to warrant the assignment of any value to this factor, in evaluating the possible relationship to the impairment of a particular worker's earning capacity.

Applying this "motivation factor" to the facts of this case, we disagree with the Referee's conclusion that this claimant's motivation or lack of motivation is sufficiently significant to enter into the calculation of extent of disability. The Referee found that claimant had a "low level of responsibility" as reflected in his failure to keep certain medical appointments; and that claimant had been "sitting back and waiting for the Vocational Rehabilitation people to do something." These are the only two factors which could have some bearing upon the extent of this claimant's permanent partial disability, in terms of his motivation or lack of motivation to reduce his disability or return to work. We do not deem this evidence as warranting anything more or less than a value of zero pursuant to the Department's rule. This worker has demonstrated nothing more or less than "an average adjustment to the results of [his injury]." OAR 436-65-607(5). Accordingly, no value should be assigned this factor.

In evaluating the remaining factors to be considered according to the guidelines, we find that claimant has been properly compensated by the award of an additional 24° of permanent partial disability allowed by the Referee, and we therefore affirm the Referee's finding on the issue of extent of claimant's permanent partial disability.

ORDER

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

DONNA F. VOLLMER (ABEGO), Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-6546
August 11, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer seeks review of Referee Daron's order which reversed it's denial of compensability of claimant's thoracic outlet compression syndrome. The insurer's sole argument is that claimant failed to satisfy the "major contributing cause" test of James v. SAIF, 290 Or 343 (1980) and SAIF v. Gygi, 55 Or App 570 (1981).

We adopt the Referee's statement of the facts and affirm his order, with the following comments.

The Referee's finding of compensability was based primarily on the testimony of Dr. Donald F. Gaiser, a Board certified vascular surgeon with substantial experience treating thoracic outlet compression syndrome cases. A fair summation of Dr. Gaiser's testimony is that he believed that claimant's work activity (repetitively lifting 30 to 50 pound laundry bags over her head during a period of approximately 14 months) developed claimant's shoulder muscles to the point that the major blood vessels going to and from the left arm were impinged, resulting in shoulder and arm pain, arm weakness, and other symptoms.

The insurer complains that Dr. Gaiser failed to consider claimant's off-the-job activities in ascertaining the cause of claimant's condition, therefore claimant failed to show that her work activities were the major contributing cause. The major contributing cause standard contemplates the existence of non-industrial activities substantially similar to the work activity allegedly responsible for a worker's condition. SAIF v. Gygi, supra, 55 Or App at 574. The insurer urges us to infer from certain facts that claimant engaged in "numerous activities substantially similar to lifting laundry bags". The facts referred to are that claimant is 24 years old, married, has a child approximately four years of age, and, after onset of the condition, experienced shoulder pain while bending over a sink and driving a car.

We decline to infer from such sketchy facts that claimant engaged in activities substantially similar to repetitively lifting heavy laundry bags. Although the insurer cross-examined claimant and had ample opportunity to elicit information concerning claimant's off-the-job activities, the record is simply devoid of any such evidence during the developmental period of the thoracic outlet compression condition, which was, apparently, July to December 1980.

Claimant has proven by a preponderance of the evidence the compensability of her thoracic outlet compression syndrome.

ORDER

The Referee's order dated December 11, 1981 is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee for his services on Board review, in addition to attorney's fees awarded by the Referee, to be paid by the insurer in addition to and not out of any compensation due claimant.

RANDALL A. BURRIS, Claimant
Joel B. Reeder, Claimant's Attorney
Allan de Schweinitz, Defense Attorney

WCB 81-08146
August 12, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Brown's order that sustained the employer's denial of claimant's occupational disease claim apparently predicated on the theory that claimant's exposure to antifreeze working as a mechanic-welder was the major cause of his allergy to mercaptobenzoehiazole, which is found in a number of products including some brands of antifreeze.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 5, 1982 is affirmed.

HUGH B. MAINE, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 80-09279
August 12, 1982
Order on Review

Reviewed by the Board en banc.

The claimant requests Board review of Referee McCullough's order which awarded 48° (15%) unscheduled permanent partial disability for claimant's right shoulder. Claimant contends that he is permanently and totally disabled.

We agree with the Referee that the medical evidence does not support the claimant's contention that he is permanently and totally disabled. His treating physician, Dr. Holbert, reported on September 8, 1980 that claimant achieved a satisfactory result from his November 7, 1979 right shoulder rotator cuff repair. Residuals were described as "some limitation of motion, some discomfort, and some weakness." Claimant had active abduction and flexion to 130° (above shoulder level). He could place his right hand to the mid line of his back at the belt line, but could not place it up further between the shoulder blades. There was some crepitation in the shoulder joint with rotation. He had "good strength" in the right shoulder against counter resistance, but it was not equivalent to the left.

At the hearing, claimant testified that he was unable to raise his right arm above shoulder level. He stated he can only pick up 10 to 20 pounds from the ground and cannot raise that weight above chest level. He feels he has lost a great deal of strength in his right arm. Claimant's ranch hand, Brennan Enos, corroborated claimant's testimony. Enos testified every time claimant "gets any kind of a weight in his arm and he tries to lift it, it gives him pain and it fails him, yes, it just quits."

Claimant has had wide experience in the logging industry. Although he testified that he could not perform any of the jobs he has held in the past, we agree with the Referee that claimant has not sufficiently demonstrated that he could not perform jobs such as operating a front end loader or yarder. Rather, the slow job market and other medical problems unrelated to the shoulder injury seem to be factors in claimant's minimal efforts to find work since Dr. Holbert released him to return to regular work in February, 1980.

Although we find that claimant is not permanently and totally disabled, we find that application of OAR 436-65-600 et seq. to the facts of this case produce a greater permanent disability award than that awarded by the Referee.

We assign a 10% impairment (+10) for claimant's loss of strength and limited range of motion in his right shoulder. Claimant is 62 years of age (+10) and is just short of an eighth grade education (+15). The work experience impact factor is +3. This number is arrived at by taking the SVP (specific vocational preparation) entry from the Dictionary of Occupational Titles computer printout assigned to the job claimant held at the time he was injured (barker operator, DOT 663.682-010).

The adaptability impact factor is +5. At the time of his injury, claimant had been able to perform medium work [barker operator and front end loader are assigned a strength (STR) factor of 3 which signifies medium work], but is now limited to lighter work.

Mental and emotional findings are unremarkable. Their impact is 0.

The labor market impact factor is +1. This is based on claimant's RFC (residual functional capacity) as light, claimant's highest SVP level as 6 (yarder operator, DOT 921.663-066), and claimant's GED (general educational development) level as 2 (formal education and DOT computer printout). Taking this RFC, SVP and GED, the Evaluation Division's charts show that 15% of Oregon employment is available to claimant, resulting in the impact factor of +1.

Using the combining formula (A% + B% (100% - A%)), the disability percentage is 38%. This is rounded to the nearest 5% to produce 40% or 128° permanent partial disability compensation.

ORDER

The Referee's order dated January 11, 1982 is modified. Claimant is awarded 128° (40%) for unscheduled permanent partial disability compensation in lieu of the Referee's award.

Claimant's attorney is allowed 25% of the increased compensation granted by this order for a reasonable fee, the total fee allowed by the Referee's order and this order not to exceed $3,000.

CHAIRMAN BARNES CONCURRING:

I agree with the Board's order and write separately to emphasize a point that is an important point in my opinion.

The Referee correctly pointed out that Dr. Holbert, who performed claimant's right rotator cuff surgery, reported very little impairment following recovery from that surgery. Claimant's testimony, on the other hand, paints a picture of much more severe right shoulder disability. I conclude that the truth of the matter probably lies somewhere between Dr. Holbert's sanguine opinion and claimant's bleak testimony, that is, about 10% permanent impairment.

The point I want to emphasize is that the Department's rules, OAR 436, Division 65, can produce very different results for workers with the same or similar physical impairment. Two factors that can significantly influence the ultimate result are age and education. For claimants who are relatively young and relatively educated, the Department's rules result in unscheduled permanent disability awards that are generally lower than has been the "norm" in the past. See e.g. Scott O. Lofgren, WCB Case No. 81-08744, 34 Van Natta 1012 (July 23, 1982), and Norman C. Stewart, WCB Case No. 79-08824, 34 Van Natta 1017 (July 23, 1982), both of which involved claimants in their 20's with some college education. For claimants

who are relatively old and relatively uneducated, the Department's rules result in unscheduled permanent disability awards that are generally higher than the "norm" in the past. In this case, for example, claimant's age (62) and claimant's education (less than eighth grade) result in the maximum possible positive values under OAR 436-65-602 and 436-65-603. Thus, even though claimant's physical impairment is only at the top of the minimal range, I agree that the other relevant factors produce an award of 40% unscheduled disability.

I add these thoughts to emphasize that the prior "norms" should not be followed when inconsistent with the Department's rules and to point out the potentially significant difference from prior "norms" that the rules, especially those on age and education, can produce.

KATHERINE SANGSTER, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03348
August 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.

DEAN PLANQUE, Claimant
Bottini & Bottini, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-1379
August 13, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Gemmell's order which upheld the SAIF Corporation's February 2, 1981 denial and the January 28, 1981 Determination Order, which allowed claimant temporary total disability benefits only.

Claimant was originally injured on December 20, 1979 when he dislocated his right shoulder while employed as a sheetrocker. Dr. Thompson diagnosed a chronic subluxating right shoulder, and, on April 3, 1980 performed a Putti-Platt capsulorrhaphy. Dr. Thompson placed claimant in a shoulder immobilizer and noted in his chart notes that he related to claimant that the prognosis was that there was a 90% chance that he would not suffer a recurrence.

Claimant returned to Dr. Thompson on April 18, 1980, about two weeks subsequent to his surgery, stating that he had broken his shoulder immobilizer. Testimony at the hearing indicated that claimant had decided to go fishing for sturgeon in the Clackamas River near Gladstone. In the process, claimant slid down the side of the river bank and caused his immobilized right arm to come free from the brace. This stress produced bleeding at the site of his surgical incision, from which the stitches had yet to be removed.

In his January 19, 1981 report, Dr. Thompson states that claimant was continuing to suffer from some difficulty with his right shoulder, and requested authorization for re-exploratory surgery on that shoulder. On January 28, 1981, a Determination Order issued allowing claimant temporary total disability benefits from January 7, 1980 through December 19, 1980. No permanent disability was awarded. On February 2, 1981, SAIF issued a denial of responsibility for Dr. Thompson's proposed surgery.

The Referee, relying on Christensen v. SAIF, 27 Or App 595 (1976), stated that once the work connected character of an injury has been established, its subsequent progression remains compensable so long as a worsening is not shown to have been produced by an independent non-industrial cause. The Referee found the need for re-exploration of the shoulder to be due to the claimant's fall down the river bank. As such, the Referee found the proposed surgery to be not compensable.

The claimant contends that Grable v. Weyerhaeuser, 291 Or 387 (1981), decided subsequent to the issuance of the Referee's order in this case, warrants a finding of compensability. In Grable, the court found that the Christensen test was not in conflict with the test of Lemons v. Compensation Department, 2 Or App 128 (1970), which states that the claimant must establish the original injury as a material contributing cause of his worsened condition. This is the basic test adopted by the Grable court. It was specifically stated that compensability of a worsened condition following an off-the-job injury could be determined equally well under either the Christensen test or the Lemons test. Grable, 291 Or App 400. We therefore conclude that if the Referee correctly applied the test of Christensen, and found the claimant's condition to be not compensable, it necessarily follows that his claim is not compensable under Grable.

The difficult and central issue of this case lies in attempting to determine what type of activity on the part of the claimant, which results in an off-the-job injury to the same part of the body as the original industrial injury, will relieve the industrial insurer of responsibility for that worsened condition. Claimant urges that the rule stated in 1 Larson's Workmen's Compensation Law 3-358, § 13 (1978), stands for the proposition that compensability may only be cut off by an independent intervening cause attributable to a claimant's own intentional conduct, and that the claimant's own contributory negligence is not an intervening cause preventing continuing compensability. We find this interpretation to be somewhat overbroad.

Part of Larson's explanation of his position is as follows:

> "[Benefits should be awarded] if the triggering episode is some nonemployment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances." 1 Larson's Workmen's Compensation Law 3-353, § 13.11.

As an example of "exertion that is unreasonable in the circumstances," Larson hypothesizes a claimant whose arm was broken in a compensable accident and who, while his arm is still healing, refractures his arm in the process of beating his wife. Had it not been for the weakness due to the industrial injury, this hypothetical claimant would have been able to beat his wife without further arm injury. Despite the contribution of the prior industrial injury, Larson offers this example to illustrate the point that subsequent off-work injuries can arise from the claimant's own unreasonable activities and thus no longer be the responsibility of the industrial insurer. Larson, supra, 3-363.

Wood v. SAIF, 30 Or App 1103 (1977), addressed similar considerations. In Wood the court refused to adopt all of Larson's theories upon which claimant here relies. The court instead ruled that a worker's condition remains compensable if he or she sustains new injuries outside the time and place of employment that are a natural and direct consequence of the primary compensable injury.

We do not find Grable, Wood or Larson's analysis completely controlling, although they all point toward the conclusion we here adopt. We believe that actions of the claimant, after an industrial injury, that produce further injury can be so unreasonable as to become an independent, intervening cause, breaking the chain of causation from the original compensable injury. We avoid the question argued by the parties of whether the claimant's subsequent conduct was intentional or negligent; we look only to the question of whether the claimant's subsequent off-work injury producing activity or exertion was reasonable or unreasonable under all of the circumstances.

Applying this standard to the facts of this case, we find that the claimant's activity in going sturgeon fishing two weeks after undergoing shoulder surgery, while his arm was still immobilized, with the stitches remaining in the incision, to have been patently unreasonable under the circumstances. In one report after another, Dr. Thompson indicates that it is his opinion that the fall down the bank damaged and compromised the previous surgical repair, and that he would have expected recovery otherwise. That being the case, we find that the claimant has failed to establish the original compensable injury as a material contributing cause of his worsened condition.

ORDER

The Referee's Order dated May 20, 1981 is affirmed.

RICHARD L. McBEE, Claimant
Douglas S. Hess, Claimant's Attorney
E. Kimbark MacColl, Defense Attorney
Richard L. Lang, Defense Attorney

WCB 81-04135, 81-08956 & 81-02132
August 17, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests review of Referee Braverman's order which upheld both insurers' denials of the compensability of claimant's headaches, memory loss and visual problems.

We believe that claimant's claim for his January 15, 1981 injury, when a falling box hit him in the forehead, should have been accepted as a nondisabling, "medicals only" claim. However, the parties have not raised that as an issue and we cannot consider issues not raised. Brooks v. D & R Timber, 55 Or App 688 (1982). On the issue as framed by the parties -- whether claimant's headaches, memory loss and visual problems are causally related to the January, 1981 head injury or a prior 1977 injury -- we affirm and adopt the Referee's order.

ORDER

The Referee's order dated January 21, 1982 is affirmed.

ELLEN K. CALDER, Claimant
Acker, Underwood et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-07090
August 17, 1982
Order Denying Remand

Claimant has moved the Board for an order remanding this claim to the Referee for further evidence taking. ORS 656.295(5). Claimant's motion is stated in the alternative to a request that on the review the Board consider this evidence, which was not made a part of the record before the Referee. Absent stipulation of the parties, the Board is without authority to consider additional evidence.

Claimant's motion to remand is denied. Robert A. Barnett, 31 Van Natta 172 (1981).

IT IS SO ORDERED.

KIMBERLY GLAHN, Claimant
Jack Ofelt, Jr., Claimant's Attorney
Frank Vizzini, Defense Attorney

WCB 80-10469
August 17, 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.

STANLEY R. KILMINSTER, Claimant
Michael B. Dye, Claimant's Attorney
Cheney & Kelley, Defense Attorneys

WCB 81-02599
August 17, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests review of Referee Williams' order which affirmed the March 9, 1981 Determination Order which awarded claimant no additional compensation for permanent disability beyond the 10% shoulder award previously granted. Claimant contends this award does not adequately compensate him for his loss of wage earning capacity due to his shoulder injury.

We accept the facts as recited in the Referee's order as our own.

The medical consensus suggests to us that claimant's shoulder impairment is more serious than the 10% award would indicate. The Orthopaedic Consultants have stated that claimant could be gainfully employed if he could be placed at bench work where he did not have to use his arms high overhead. They felt his loss of function due to the injury was in the mildly moderate range. Claimant's treating physician, Dr. Schilbach, has restricted claimant from overhead lifting, lifting over 20 pounds, continuous lifting and continuous work with his arms outstretched. Dr. Pasquesi, upon whom the Referee relied, felt claimant's impairment was equal to 20% of a right upper extremity.

Claimant is 40 years old with an eighth grade education. His work experience includes that of a meat packer, a logger and an automotive repairman. His activities have been restricted somewhat, as noted earlier. Claimant is precluded from performing the meat packer job. Considering OAR 436-65-600 et seq, we conclude claimant would be more properly compensated with an award equal to 80° for 25% unscheduled disability for his shoulder injury. The insurer is entitled to an offset against this award of compensation, as recognized by the Referee.

ORDER

The Referee's order dated January 8, 1982 is reversed.

Claimant is awarded compensation equal to 80° for 25% unscheduled disability for his shoulder injury. This award is in lieu of that claimant has already been granted.

Claimant's attorney is allowed as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, not to exceed $3,000.

LOIS J. LUND, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-09995
August 17, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests Board review of Referee Leahy's order which set aside its denial of claimant's back condition claim which was apparently asserted on an occupational disease theory, although that is not clear because claimant has filed no brief in defense of the Referee's order.

Before making her claim in late 1980, claimant had a 15 to 20 year history of various back problems. The limited medical evidence refers to prior polio, some form of prior right shoulder/upper back/neck condition that led to surgery, prior arthritic change in the spine, back complaints following an at-home injury in early 1979 and back injuries in prior automobile accidents. It is apparently claimant's theory that her work as a secretary, either the stress associated with her job or some problem with the height of her typing chair, caused a compensable worsening of her preexisting back conditions.

We find no medical evidence that claimant's work activities actually worsened her preexisting condition within the meaning of Weller v. Union Carbide, 288 Or 27 (1979). The only relevant evidence is to the contrary, specifically the opinion expressed by Dr. Zeller on October 17, 1981 that claimant's secretarial work resulted "in symptoms of the preexisting, underlying condition without worsening of the preexisting, underlying condition."

Moreover, even if there were a Weller worsening, there is insufficient persuasive evidence that claimant's work activities were the major cause of her disability within the meaning of SAIF v. Gygi, 55 Or App 570 (1982). The opinion on causation that is most favorable to claimant's position is that expressed by Dr. Gatterman in his undated report received by SAIF in April of 1981. Dr. Gatterman stated:

> "It is my opinion a combination of factors lead to the severe back pain of Ms. Lund:
>
> "1. Previous injury and polio (i.e. weakened muscles), initiating the degenerative processes in the cervical spine and thoracic spine predisposing these areas to further irritation.
>
> "2. Postural stress in the form of accentuated kyphotic spine, accentuated lower cervical lordosis.
>
> "3. The elevated secretarial chair which forced Ms. Lund to increase her thoracic kyphosis even more and bend forward even more in order to type.

"4. The increased work load experienced after the departure of the first secretary.

"5. The continued stress of having a husband out of work, moving to a new location, and financial considerations."

The balance of the medical evidence suggests even less possibility of work related causation than does Dr. Gatterman. Considering all the evidence, we conclude that claimant did not establish that work was the major cause of her back disability after October of 1980.

ORDER

The Referee's order dated November 20, 1981 is reversed. The SAIF Corporation's denial dated October 29, 1980 is reinstated and affirmed.

PHILLIP D. MOYER, Claimant
Galton, Popick & Scott, Claimant's Attorneys
Jerald Keene, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00375 & 81-01858
August 17, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of that portion of Referee Peterson's order which assessed a penalty against it and ordered it to pay claimant's attorney a fee of $1,100. The brief of EBI Companies raises the additional issue of insurer responsibility; EBI contends that SAIF should be responsible for claimant's current condition on an aggravation theory, contrary to the Referee's finding that EBI was responsible on a new injury theory.

We completely agree with the Referee's conclusions on both issues and generally agree with the Referee's analysis.

In awarding claimant's attorney a fee for services on review, we have applied the rationale previously expressed in Rick A. Rabern, WCB No. 78-10069 (March 4, 1981 and March 13, 1981), in addition to considering the usual relevant factors.

ORDER

The Referee's order dated December 8, 1981 is affirmed. Claimant's attorney is awarded $750 for services rendered on this Board review, payable by the SAIF Corporation.

VIRGINIA M. STONE, Claimant
D. Keith Swanson, Claimant's Attorney
Gary Jones, Defense Attorney
Keith Skelton, Defense Attorney

WCB 81-01414 & 81-00053
August 17, 1982
Order on Reconsideration

The insurer has requested reconsideration of the Board's Order on Review dated July 30, 1982.

The request is granted. On reconsideration, the Board adheres to its former order.

IT IS SO ORDERED.

KENNETH E. AWMILLER, Claimant
Derrick E. McGavic, Claimant's Attorney
Bullivant, Wright et al., Defense Attorneys

WCB 80-11632
August 18, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer requests review of those portions of Referee Baker's order that awarded claimant compensation for temporary total disability from August 25, 1980 to February 6, 1981 and a penalty and attorney fee because the employer had unilaterally terminated claimant's time loss on the earlier date.

We agree with the Referee's conclusions. The employer terminated claimant's time loss because it believed claimant had been released to "regular work" within the meaning of ORS 656.268(2). The parties argue at length about the meaning of that statutory phrase. We, however, see the issue as primarily factual. At the time of claimant's "release," what he was "released" to was at best ambiguous and we have recently ruled "the better policy position is that all doubt or ambiguity should be resolved in favor of concluding that the worker has not been released to regular work." John R. Daniel, WCB Case No. 80-11373, 34 Van Natta 1020 (July 27, 1982).

ORDER

The Referee's order dated May 20, 1981 is affirmed. Claimant's attorney is awarded $450 for services rendered on Board review, payable by the employer.

GEORGE M. FRABEL, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-03800
August 18, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer requests Board review of Referee St. Martin's order which found the claimant to be permanently and totally disabled as of November 3, 1981, the date of the hearing. The only issue is the extent of claimant's disability.

Claimant injured his lower back while on the job as a plumber's assistant in November, 1979. His condition was diagnosed as lumbosacral strain superimposed on degenerative osteoarthritis. All treatment has been conservative with no surgical procedures recommended.

Claimant treated with Dr. Schultheis, an osteopath. The information provided by Dr. Schultheis consists mainly of brief chart notes and conclusory letters stating his opinion that claimant is unemployable. Claimant has also been treating regularly with Dr. Borman, also an osteopath. Although agreeing with Dr. Schultheis' diagnosis, Dr. Borman's reports evidence a rather marked disagreement from Dr. Schultheis' opinion with regard to the extent of claimant's disability. Numerous reports from Dr. Borman track the course of the conservative treatment being received by the claimant. In his reports of November 21, 1979 and December 6, 1979, Dr. Borman indicated his optimism that claimant would be able to resume full work duties within a short time. Subsequent reports from Dr. Borman continue to exhibit this same optimism upon continual improvement of claimant's condition, along with his opinion that claimant's residuals from the injury were minimal. Upon examination by the Orthopaedic Consultants on February 16, 1981, claimant's condition was found to be stationary, although return to his previous employment with or without limitations was not advised. It was suggested that an alternative vocation be considered and that the loss of function would be rated as moderately severe, with that portion of impairment due to the injury rated as mild. Dr. Schultheis concurred with the Orthopaedic Consultants' report in all respects other than the recommendation portion of the report, stating that he felt claimant to be permanently and totally disabled.

Claim closure occurred on April 14, 1981, with a Determination Order allowing claimant benefits for temporary total disability and 35% unscheduled permanent partial disability for the low back.

The Referee found, based on claimant's age, education, physical condition, intelligence, adaptability and lack of transferable skills, that claimant was permanently and totally disabled. We disagree.

We find that the weight of the medical evidence indicates that claimant is not permanently and totally disabled. The only physician to find claimant to be so disabled was Dr. Schultheis. We find little basis for giving Dr. Schultheis' opinion greater weight than Dr. Borman's contrary opinion. Dr. Borman examined and

treated claimant on a regular basis following the November, 1979 injury. His opinion of claimant's employability is also supported by the Orthopaedic Consultants who extensively examined claimant on two occasions. Moreover, based on his report of December 1, 1980, it would appear that Dr. Schultheis' opinion concerning the extent of claimant's disability was based, at least in part, on statements made by claimant to the effect that he was unable to return to work. We, therefore, find that the preponderance of the medical evidence indicates that claimant is not permanently and totally disabled.

In finding claimant permanently and totally disabled, the Referee stated: "His [claimant's] credible testimony and that of his wife was necessary in order to prove permanent total status. . ." It seems clear from this statement and the remainder of the Referee's order that his finding of permanent total disability was based in large part on the claimant's testimony with regard to his physical condition. While we agree with the Referee's finding that the claimant was a credible witness, we do note that despite the claimant's testimony concerning his condition, there is little medical evidence that comports with his view of his physical condition. This is further borne out by reference to the reports from the vocational assessments that claimant underwent. We would also note that following his injury in 1979, claimant returned to his previous job for a period of nearly seven months, digging ditches and putting in water pipes.

With regard to the "seek work" requirement of ORS 656.206(3), we note that claimant has attempted to find and return to employment. These attempts at work, however, were at jobs that were clearly not within the physical restrictions suggested by the medical reports. In June, 1981, claimant attempted to work for D & S Fencing, not a job which could be considered light employment. The second position involved work as a cleanup man for a drywall firm. Again, not a suitable position considering claimant's physical restrictions. Claimant's inability to adequately perform at the attempted employments is not necessarily reflective of inability to perform at a more suitable occupation, within his physical capabilities, of the type noted by Dr. Borman, the Orthopaedic Consultants and the various vocational experts. The statute requires "reasonable" efforts to obtain work. We believe that this requires an attempt to obtain suitable employment, within an individual's capacity.

We are not convinced that the preponderance of the evidence establishes that claimant would be unable to sell his services in a hypothetically normal labor market. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Utilizing the guidelines for the rating of unscheduled permanent partial disability, OAR 436-65-600 et seq, giving appropriate consideration to claimant's physical impairment and the social/vocational restrictions from which he suffers, we conclude that an award of 65% unscheduled permanent disability serves to adequately compensate claimant for his loss of wage earning capacity arising from his 1979 industrial injury.

ORDER

The Referee's order dated December 30, 1981 is modified. Claimant is granted an award of 208° for 65% unscheduled permanent partial disability. This award is in lieu of all prior awards. Claimant's attorney's fee is ordered to be adjusted accordingly.

BEVERLY J. HANNA, Claimant
Galton, Popick et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03776
August 18, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

SAIF Corporation and claimant both seek review of Referee Shebley's order which remanded claimant's claim for stress reaction to SAIF for acceptance and payment of compensation and assessed a penalty against SAIF for its delayed payment of compensation and late denial. SAIF contends that both of these conclusions should be reversed. Claimant asks for an attorney fee on the penalty and an additional amount for the length of the case.

After de novo review, the Board affirms the Referee with respect to his decision on the compensability of claimant's claim. We also concur with his stand on the attorney fee/penalty issue. We do find, however, that claimant's argument concerning the inadequacy of the attorney fee for his services in this case is well taken. Based on our expertise resulting from reviewing numerous cases of this type, we conclude claimant's attorney is entitled to an additional $700.

ORDER

The Referee's order dated December 17, 1981 is modified.

The attorney's fee awarded by the Referee is increased to $1,800. This fee is for services rendered at the Hearings level and is in lieu of the fee awarded by the Referee.

The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded $500 as a reasonable attorney's fee for services rendered on Board review.

NORMAN S. HARWELL, Claimant
J. David Kryger, Claimant's Attorney
Steven Reinisch, Defense Attorney

WCB 79-08902 & 80-03265
August 18, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer seeks Board review of Referee McCullough's order which granted claimant an award of 60% unscheduled disability. The employer contends that the award granted by the Referee is excessive.

Claimant had a prior back injury in 1974 and another in June, 1978. Claimant went to work for this employer operating a balewaggon. The injury before us occurred in September 2, 1978 and was again to his low back. The claim was subsequently closed on December 11, 1979 with compensation for time loss only.

The medical opinion evidence is as follows:

1. Dr. Hoda examined on January 24, 1980 and found full range of motion of the lumbar spine; neurological examination was within normal limits; X-rays were normal. Dr. Hoda diagnosed lumbar strain, chronic.

2. Dr. Tsai examined claimant on October 30, 1980 and found claimant suffering from chronic lumbar sprain. Dr. Tsai opined:

> "I have reason to believe that his condition is permanent and certainly he will not be able to return to work in the capacity of manual labor requiring constant heavy weight-bearing, twisting, stooping, bending and working overhead in a continued state of ambulation..."

3. Claimant was examined by the Orthopaedic Consultants on January 5, 1981 and they found claimant had good posture, weight-bearing was equal with no limp or list. Claimant could bend forward to place his palms on the floor with his knees straight. Other movements, backwards, sideways and rotation were 100% of normal. They found his condition medically stationary but found him precluded from his previous occupation. They recommended lighter employment and vocational rehabilitation. The total loss of function of the lumbar spine was minimal and they concluded:

> "In our opinion, this man's continuing subjective complaints have been magnified to a great extent as a result of the prolonged administrative confusion which has occurred in this instance".

All treatment rendered on this claim has been conservative with no hospitalizations or surgeries. Claimant is 38 years of age with a high school education and two years of college. Based on the evidence presented it is hard to understand the Referee's excessive award.

Based on the guidelines set forth in OAR 436-65-600 et seq., we find based on the objective physical findings that claimant has a 5% impairment rating. Claimant is 38 years of age (0 value), with a high school education and two years of college (-10 value). Claimant's injury occurred while employed as a baleswaggon operator (SVP 4, impact +3). He is now restricted to light work whereas his previous work was classified as (medium +10 value). Combining claimant's education, work background and limitations, claimant has at least 54% of the labor market still open to him (-25 value). After combing all of the above factors based on the above cited guidelines we conclude claimant would be adequately compensated for his loss of wage earning capacity due to this injury by an award of 48° for 15% unscheduled disability.

ORDER

The Referee's order dated October 20, 1981 is modified. Claimant is hereby granted an award of 48° for 15% unscheduled disability. This award in in lieu of all prior awards.

DOROTHA LORRAINE OYLER, Claimant
Hayner, Waring et al., Claimant's Attorneys
Paul Roess, Defense Attorney

WCB 80-06185
August 18, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The employer and its insurer, the SAIF Corporation, request review of Referee Mannix's order which set aside the April 18, 1980 Determination Order as premature, remanding the claim to SAIF for processing, and ordered SAIF to pay a 25% penalty to the claimant for unreasonable refusal, resistance and delay in the provision of compensation for prematurely submitting the claim for closure and failing to timely reopen the claim.

The employer contends that the Referee erred in finding the claim to have been prematurely closed by the April 18, 1980 Determination Order, and that claimant's carpal tunnel syndrome is not compensable as either an accidental injury or an occupational disease.

We accept the facts as recited by the Referee and adopt them as our own.

The employer argues that submission of the claim for closure in April, 1980 was supported by Dr. Stainsby's chart notes relating his findings following an examination of claimant on March 21, 1980, and that the Referee erred in relying on Dr. Harper's subsequent reports. We agree with the employer that the Referee erred in finding the claim to have been prematurely closed for a reason other than interpretation of the various medical reports contained in the record.

We conclude that the Referee's finding that this claim was prematurely closed was gratuitous. Claimant's request for hearing set forth the issues for consideration by the Referee as being: temporary total and permanent disability, penalties and attorney fees and the denial of January 12, 1981. At the hearing itself, the claim was litigated as being either an aggravation of claimant's previous claim of September 5, 1979 or, alternatively, a new injury or exposure occurring in 1980 following claimant's return to employment. There was never any indication by counsel that premature closure of the claim was an issue.

In Larsen v. Taylor & Company, 56 Or App 404 (1982), the court stated that it was proper for the Board to reach issues not raised by the parties when the determination of the issue raised, necessarily requires determination of an issue not raised. In Neely v. SAIF, 43 Or App 319 (1979), the court held that the Board had the authority under its power of de novo review to reach issues not presented to it for review by the parties. The court cautioned, however, that "fundamental fairness" dictated that there must be evidence concerning that issue in the record, or that the matter would have to be remanded for development and submission of evidence concerning that issue. One exception to this rule relates to attorney fees. See Brooks v. D & R Timber, 55 Or App 688 (1982), and Moe v. Ceiling Systems, 44 Or App 429 (1980).

Were this a situation where it would have been necessary for the Referee to reach the issue of premature closure in order for him to determine the issue of the compensability of claimant's 1980 claim for aggravation or new injury, we would have no concerns regarding the propriety of such action, assuming of course that evidence was presented on that issue. But that was not the case. It was clearly not necessary for the Referee to make a finding with regard to premature closure in this case. The only issue was the compensability of claimant's 1980 aggravation/new injury claim and related satellite issues involving penalties and attorney fees.

The Board had previously stated that "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 issues not raised." Michael R. Petkovich, 34 Van Natta 98 (1982). This policy was reiterated in Marlene L. Knight, 34 Van Natta 278 (1982), and we again reiterate it here. The Referee's finding that claimant's claim was prematurely closed was not an issue before him, was not necessary for determination of the issues raised and was not necessary in order to achieve substantial justice. That finding is reversed.

Since the Referee determined that claimant's 1979 claim was prematurely closed, and that claimant was not medically stationary, he found it unnecessary to determine the issue of aggravation/new injury with regard to the 1980 claim. Since we have reversed the Referee's finding with regard to premature closure, we will now proceed to determine if claimant has established her 1980 claim as being compensable, and if so, whether it is an aggravation of her injury/exposure, or the result of a new industrial incident or exposure. We are in full agreement with the Referee as to the compensability of claimant's carpal tunnel syndrome, and determine her 1980 claim to be an aggravation of her previous industrial injury or exposure. Claimant is therefore entitled to no benefits for temporary total disability until the proper date for claim reopening, September 24, 1980. The balance of the Referee's order is affirmed in all respects.

ORDER

The Referee's order dated June 29, 1982 is affirmed in part and reversed in part. Those portions of the order setting aside the April 18, 1980 Determination Order as premature and ordering SAIF to pay claimant temporary total disability benefits, less time worked, as if the claim had never been closed are reversed.

Claimant's claim is ordered accepted on an aggravation basis beginning on September 24, 1980 and the claim remanded to SAIF for the provision of appropriate medical benefits and the payment of temporary total disability compensation beginning on September 24, 1980, until the claimant is released to return to her regular work or closure occurs pursuant to ORS 656.268.

The balance of the Referee's order is affirmed.

WILLIAM M. STILL, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-01909 & 80-03041
August 18, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

All three parties to this proceeding, the claimant, the insurer on the risk at the time of the first injury and the self-insured employer on the risk at the time of a subsequent injurious exposure all seek review of Referee Daron's order which: (1) found that the subsequent exposure was a new injury and assigned responsibility for the claim to the self-insured employer; (2) ordered the employer to partially reimburse the insurer for temporary total disability paid pursuant to an order designating paying agent under ORS 656.307; and (3) set aside a Determination Order which had awarded temporary total disability and an additional 5% permanent partial disability, an increase over a prior stipulated award of 15% permanent disability.

The brief of employer Peter Kiewit & Sons contains a good summary of the parties' contentions, which we paraphrase here. The claimant is dissatisfied because he was awarded no additional benefits and the Referee held he should not have received as much as he got through the Determination Order. The self-insured employer is dissatisfied because it was held responsible for the subsequent injurious exposure and ordered to reimburse SAIF Corporation for time loss payments. SAIF is dissatisfied because the Referee did not order the employer to totally reimburse SAIF. Thus, the issues are aggravation or new injury, extent of entitlement to temporary total disability, extent of entitlement to permanent partial disability and the propriety of an adjustment between the insurer on the risk at the time of the first injury and the employer on the risk at the time of the second incident.

We agree that claimant sustained a new injury and, therefore, affirm the assignment of responsibility to the self-insured employer. With respect to claimant's entitlement to disability payments we disagree with the Referee and find that claimant is entitled to an award of temporary total disability and increased permanent partial disability. We believe that SAIF is not entitled to reimbursement for temporary disability payments made for the period November 29, 1979 through December 14, 1979, but is entitled to reimbursement for time loss disability payments made thereafter.

We adopt the Referee's statement and findings of fact, subject to the following two exceptions. The Referee found that claimant quit work or was terminated for reasons other than the inability to work due to back pain. For the reason set forth below, we arrive at a different conclusion. The Referee also felt that claimant did not have anything more than a nondisabling claim. We find that claimant, for a period of time, was temporarily and totally disabled, and that he sustained additional permanent impairment as a result of the 1979 work exposures.

I.

We agree with the Referee that the 1979 incidents were new injuries and not just aggravations of the 1978 injury. As a result of the 1978 injuries, claimant was released to work subject to a 25 pound lifting restriction. His job (highway construction flagger) required him at times to lift objects in excess of that amount, e.g., a 70-80 pound generator and a 35 pound piece of plyboard. Claimant's treating physician testified that claimant probably sustained actual tissue damage as a result of these exertions. Under the last injurious exposure rule, although the previous injury undoubtedly contributed to claimant's condition after the 1979 injuries, the exposure in 1979 contributed at least slightly to claimant's condition. The Referee properly assigned responsibility to the party on the risk at that time, self-insured employer Peter Kiewit & Sons.

II.

With respect to claimant's entitlement to temporary disability benefits, our disagreement with the Referee's conclusion rests on a difference of opinion concerning one essential point. The Referee found that claimant either quit or was terminated on December 14, 1979 for reasons other than inability to work due to back pain. Although the evidence is somewhat unclear, we are satisfied that claimant quit work or was terminated because of increased pain resulting from the two lifting incidents, together with the employer's continued expectation that claimant should lift objects in excess of 25 pounds, notwithstanding lifting restrictions imposed by claimant's treating physician.

The Referee reasoned that since claimant's treating physician released him back to work within a few days after the last injury subject to the same lifting restrictions (25 pounds), therefore, claimant sustained no increased disability. This line of reasoning overlooks the fact that one requirement of the flagger position, and the employer's expectation, was that the person employed in that position would be willing and able to lift objects at times greatly in excess of 25 lbs. Claimant attempted a return to work as a flagger and experienced disabling pain in the course of performing the work. The law does not require a person to work, even if the person is mechanically able to do so, with pain that severe. A worker is entitled to temporary total disability notwithstanding a release to modified work if the requirments of the job to which the person would return exceed the restrictions imposed by the modified work release. Hedlund v. SAIF, 55 Or App 313 (1981). Claimant is entitled to temporary total disability, less any time worked, for the period December 15, 1979, the day after his last day of work, through September 10, 1980, the date he was found medically stationary.

III.

The Referee also found that the second injury did not result in any disability in addition to that for which claimant had already been compensated. Again, the Referee's finding seems to be based on the assumption that since claimant was released to work with the same restrictions he had before, therefore, there must have been no increased impairment. Scrutiny of the medical

evidence reveals a definite deterioration in claimant's condition between the medically stationary date following his first injury and the medically stationary date following the 1979 injuries: in 1979, shortly before the second injurious exposure, claimant had a full range of motion in flexion, lateral bending, and rotation, and had the ability to squat and rise normally. By February, 1981, the date of the last medical report giving objective findings, claimant had lost the ability to bend backwards entirely, had lost 75% of the ability to bend laterally and rotate and was able to squat and rise at 50% of normal.

We are satisfied that claimant has increased impairment arising from the 1979 injuries for which he was not compensated by the stipulation signed prior to that date. Applying the disability rating guidelines of OAR 436-65-600 et seq., and considering claimant's age (52 years), the fact that he is virtually illiterate, completed at most the fourth grade, is dull-normal in intelligence, and has a work history of medium to heavy labor, we believe that claimant is entitled to an additional award of 35% permanent disability. In making this award we have considered the 15% permanent disability award for claimant's low back condition previously received pursuant to the stipulation.

IV.

The employer argues that it should not be required to reimburse SAIF for time loss payments made pursuant to a .307 order because the medical evidence indicates that claimant was not disabled as a result of either the November 26, 1979 incident or the December 14, 1979 incident. This contention is based on the false assumption, already belabored here, that the work available to claimant at Peter Kiewit & Sons was within the lifting restrictions of his modified work release. Since claimant either quit work or was terminated on December 14, 1979, because that work caused disabling pain, he is entitled to time loss from that day on until closure under ORS 656.268. In fact, SAIF paid time loss for the period December 9, 1979 through December 14, 1979 as well. The employer should not be liable to reimburse SAIF for time loss paid by SAIF for a period during which claimant was working, but is liable for time loss paid beginning December 15, 1979. Accordingly, we modifiy that portion of the Referee's order.

ORDER

The Referee's order dated September 25, 1981 is affirmed in part, reversed in part and modified in part.

That portion of the order remanding the claim to Peter Kiewit & Sons is affirmed. That portion of the order requiring Peter Kiewit & Sons to reimburse SAIF is modified to require reimbursement for the temporary total disability paid for the period between December 15, 1979 through September 10, 1980, inclusive.

That portion of the order setting aside the Determination Order dated October 17, 1980 is reversed. Claimant is awarded temporary total disability for the period December 15, 1979 through September 10, 1980, inclusive. Claimant is further

awarded an additional 35% unscheduled permanent partial disability for his back condition, payable by Peter Kiewit & Sons, in addition to and not in lieu of any prior awards.

Claimant's attorney is awarded as a reasonable attorney's fee, 25% of the increased permanent partial disability awarded by this order.

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

TOM E. THOMAS, Claimant
Coons & Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03319
August 18, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests Board review of Referee McCullough's order dated November 27, 1981. SAIF contends: (1) that the Referee erred in applying the standard of proof for injuries rather than applying the standard of proof for occupational diseases; and (2) that the Referee erred in finding that claimant had carried his burden of proof in establishing a causal relationship between his employment as a service station attendant and his herniated cervical disc at C6-7.

Claimant began working as a service station attendant on September 22, 1980. A large majority of his work involved pumping gas. Otherwise, his work activities included car service such as changing the oil, lubrication jobs, tuneups and tire changing. There is no evidence of a specific incident either on or off the job, that precipitated claimant's neck condition. Rather, he started noticing soreness in the left shoulder area sometime in November, 1980. His symptoms gradually got worse with pain radiating into the left arm. Finally, in early January, 1981, he sought medical treatment for his condition and it was ultimately diagnosed as a herniated disc at C6-7. Claimant filed a claim on January 8, 1981 and underwent a cervical laminectomy on January 21, 1981.

The gradual development of claimant's cervical disc herniation, with no specific precipitating event identified, leads us to find that claimant's condition is more aptly characterized as a disease, rather than an injury. See Clarice Banks, 34 Van Natta 689 (1982). An occupational disease is compensable if it arises out of and in the scope of employment, and if there exist employment conditions "To which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment. . . ." ORS 656.802(a). SAIF v. Gygi, 55 Or App 570 (1982), which was decided after the hearing in this claim, held that a disease is compensable if the employment conditions are the major contributing cause of the disease.

It is to the Referee's credit that, although his order issued prior to the Gygi decision, his conclusion was based upon a finding of major cause. We agree with the Referee that, based upon claimant's testimony and the opinion of Dr. Golden, claimant's treating neurosurgeon, claimant's work activities were the major contributing cause of his herniated cervical disc. A review of claimant's off-the-job activities show only mild activity which would contribute, if at all, in minor part, to the development of his herniated disc.

We note in passing that had we characterized claimant's condition as the result of an injury rather than a disease, the standard of proof would have been whether claimant's employment was a material contrubting cause of the injury. Our finding that the claimant has shown his employment to be the major contributing cause of his condition necessarily includes a finding that he has proven the employment to be a material cause. Thus, claimant has met his burden on both theories of compensability.

ORDER

The Referee's order dated November 27, 1981 is affirmed with one qualification: The claim is remanded to the SAIF Corporation for acceptance as an occupational disease rather than as an accidental injury.

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

WARD K. STRAUSER, Claimant
Gary Jones, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00354
August 20, 1982
Order on Reconsideration

The Board issued its Order on Review in the above entitled matter on July 30, 1982 wherein we reversed the Referee's order and reinstated and affirmed the SAIF denials of December 10, 1980 and September 15, 1981.

By letter dated August 16, 1982 claimant's attorney submitted a Motion for Reconsideration with an attached medical report of Dr. Simmons dated July 30, 1982. By letter of August 17, 1982, SAIF's legal counsel objected to the submission of the medical report by claimant's attorney.

The Motion to Reconsider on the basis of a new medical report is denied. Robert Barnett, 31 Van Natta 172 (1981).

IT IS SO ORDERED.

CLINTON D. ASHLEY, Claimant
Coons & Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-09654
August 23, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests Board review of Referee McCullough's order which awarded claimant three additional days of time loss and otherwise affirmed the March 23, 1981 Determination Order which did not award any permanent disability.

Claimant argues he is entitled to an award for permanent partial disability. We affirm and adopt that portion of the Referee's order finding to the contrary.

The Referee awarded additional temporary total disability benefits for the period from July 22 through July 25, 1980; claimant argues we should award additional time loss for July 26 and 27, 1980. Claimant's position may well be technically correct. However, we note that, after the record had been kept open for six months for additional evidence that was never submitted, counsel made closing arguments to the Referee by telephone conference call. The Referee's order states:

> "Counsel for the parties agreed during the January 22, 1982 telephone conference call that claimant is due temporary total disability benefits from July 22, 1980 through July 25, 1980. . ."

The contents of that telephone conference call is not part of the record before us, but claimant does not dispute the Referee's description of what was "agreed" at that time. In other words, it would appear that claimant is now asserting before us a claim for relief greater than that he asserted before the Referee. We conclude it would not be fair to anybody, least of all the Referee, to modify his order under these circumstances.

ORDER

The Referee's order dated January 29, 1982 is affirmed.

LOREN D. BOWMAN, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08165
August 23, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation seeks Board review of Referre Foster's order which granted claimant compensation for 25% unscheduled disability for an injury to his low back. SAIF contends this award is excessive.

We accept the facts as recited by the Referee in his order. However, consideration of these facts in light of CAR 436-65-600 et seq., would indicate the Referee's award was high. Claimant's physical impairment, if any, is minimal. The objective range of motion findings are normal. He has been restricted from his regular work at the mill and he should limit somewhat his heavy lifting, twisting and bending. It has been recommended that he not lift over 40 pounds. Claimant is 29 years old (-4 value) with a ninth grade education (+7 value). Claimant's job at the time of the injury (trimmer helper) has an SVP of 2 (0 value). He is restricted to medium work (+5 value). Considering his education, past work experience and present restrictions, it is apparent that claimant has 51% of the general labor market still open to him (-25 value).

We conclude that claimant would be more properly compensated for his injury of November 24, 1980 with an award equal to 32° for 10% unscheduled disability. Part of the Referee's analysis that led him to a different result included reliance on "the labor market being what it is in Oregon." This analysis was erroneous. The issue is claimant's earning capacity in a hypothetically normal labor market and unscheduled disability is not greater in economically bad times, just as it is not less in economically good times.

ORDER

The Referee's order dated March 29, 1982 is modified.

Claimant is granted compensation equal to 32° for 10% unscheduled disability for his low back condition. This award is in lieu of that granted by the Referee.

The claimant's attorney's fee should be adjusted accordingly.

ALFREDO FERNANDEZ, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04478
August 23, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Pferdner's order that affirmed the October 31, 1980 Determination Order, thereby finding that claimant was properly compensated for his right wrist industrial injury by an award of 22.5° for 15% loss of the right forearm. The only issue is extent of disability.

Claimant first argues that the Referee was incorrect in according a "presumption of validity" to the contested Determination Order. While the Referee did refer to such a presumption, it is not completely clear to us what role it played in the Referee's analysis. In any event, based on a Board order issued after the Referee's decision in this case, claimant is correct in his contention that there is no "presumption" that a Determination Order is substantively correct. Michiel M. Harth, 34 Van Natta 703 (1982).

On the merits, claimant contends he is entitled to an award for 40% loss of the right forearm. However, claimant cites no provision of OAR 436, Division 65 in support of that assertion, and we perceive no basis for an increased award. Applying the relevant standards in OAR 436-65-502(1) and (3) to the loss-of-dorsiflexion and loss-of-palmar-flexion findings in Dr. Gripekoven's October 6, 1980 report, the 15% award in the challenged Determination Order appears to be correct. There is no other medical evidence in this record.

ORDER

The Referee's order dated January 6, 1982 is affirmed.

WILMA FORNEY, Claimant
Evohl F. Malagon, Claimant's Attorney
Ridgway K. Foley, Defense Attorney

WCB 80-07538
August 23, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The claimant requests review of Referee Baker's order which approved the employer's action recovering an overpayment of permanent partial disability paid to the claimant by offsetting the overpayment against temporary total disability benefits payable to the claimant on an aggravation claim ordered accepted by a Referee at a prior hearing.

Claimant contends that the insurer may not unilaterally take an overpayment credit without authorization for such action, and that the Referee erred in applying OAR 436-54-320 retroactively. We have previously addressed and answered these arguments adversely to the claimant's position in Telphen Knickerbocker, 33 Van Natta 568 (1981). The Board therefore affirms and adopts the order of the Referee.

ORDER

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

GERALD U. NUSOM, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04739
August 23, 1982
Order of Dismissal

Claimant has moved to dismiss SAIF Corporation's request for review on the grounds that the request is not timely.

The Referee's original order issued August 27, 1981. That order involved two cases: WCB Case No. 81-04739 (SAIF Claim No. D 493616); and WCB Case No. 81-00300 (SAIF Claim No. D 467329). Reconsideration was requested, and the Referee reopened the record by order dated September 10, 1981. The Referee then issued an amended order dated October 22, 1981. Reconsideration was again requested, and the Referee again reopened the record by order dated November 19, 1981. This order reopening the record contained both WCB numbers but referred to only SAIF claim number D 493616. On January 29, 1982, the Referee issued an amended order, which contained both WCB numbers but only the single claim number, D 467329.

Neither party requested review of the Referee's decision in WCB Case No. 81-00300 (SAIF Claim No. D 467329). SAIF requested review of the Referee's decision in WCB Case No. 81-04739 (SAIF Claim No. D 493616). The request for review was received by the Board July 16, 1982, and was postmarked the preceding day.

In response to claimant's motion to dismiss, SAIF apparently takes the position that because the Referee's January 29, 1982 amended order did not refer to SAIF's Claim No. D 493616 (the claim in which SAIF now seeks review), the Referee's order did not dispose of the issues in that claim and there is no final order involving SAIF Claim No. D 493616.

Each of the Referee's orders disposed of the issues pending before the Referee in both cases. Although it is unfortunate that one of the claim numbers was omitted from the caption in the Referee's final order, both WCB numbers did appear. The failure to include SAIF Claim No. D 493616 in the Referee's final order does not affect the finality of the Referee's decision in that claim. SAIF's failure to request review in a timely fashion is the result of an internal problem which could possibly be resolved by a cross-referencing of claims which have been consolidated for hearing or Board review. Unfortunately for SAIF, the Referee's order became final 30 days after January 29, 1982, inasmuch as neither party requested review within that period.

ORDER

SAIF's request for review is dismissed as untimely.

WILLIAM PATTERSON, Claimant
Bischoff, Murray et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-00133
August 23, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee McCullough's order which set aside its denial of claimant's claim. The sole issue is compensability. We reverse and reinstate the denial.

SAIF's brief contains an excellent summary of the, mostly undisputed, facts and we borrow generously from it.

Claimant was hospitalized from October 25, 1979 to October 29, 1979 for chest pain, shortness of breath, and nausea. Claimant alleges that his work stress aggravated his preexisting psychological condition and thus caused his hospitalization.

Claimant went to work for Lane County School District #19 in the fall of 1978 as a bus driver and maintenance person. His supervisor, Ms. Winsted, made comments to and reprimanded claimant at various times, beginning in the spring of 1979 and continuing through October, 1979. Specifically, in the spring of 1979, claimant drove a busload of baseball players to California, and received a complimentary letter from the team's coach. Ms. Winsted made what claimant considered "downgrading" and "demeaning" remarks to the effect that he must have babysat the team in order to receive such a letter. In September, 1979, shortly after he began driving school buses again following the summer vacation, Ms. Winsted accused claimant of allowing a child to enter a private car after leaving the bus, apparently in violation of the parents' wishes. Claimant felt that this was an arbitrary and capricious accusation since the activity occurred when a substitute driver was driving the bus and it was not claimant who allowed the incident to happen. A few days later, claimant was accused of failing to pick up two children at a bus stop. He responded that he did not see any children to be picked up at that stop. Claimant felt that the reprimand "wasn't fair," and that Ms. Winsted thought he was lying.

In the early part of October, 1979, claimant was having trouble with frequency of urination and parked near a restroom. Ms. Winsted told him that he would have to park some distance away and walk back to the restroom. Claimant felt that other bus drivers were accorded the privilege of using the restroom near the bus stop and that claimant was being singled out for different treatment. Also in early October, Ms. Winsted changed claimant's bus route, and told him he would no longer be able to assist a school principal with some retarded children. The next morning, he drove his new route. When he returned, Ms. Winsted told him that the principal was unhappy with him because he had not come that day to help with the retarded children. Claimant could not understand why Ms. Winsted would express a complaint when she was the one who had changed his duties.

On October 23, 1979, claimant discovered that his driver's license had expired, reported to Ms. Winsted, and was severely criticized. On October 24, he failed a driving test. Ms. Winsted

then informed claimant that he would have to be retrained. On October 25, 1979 Ms. Winsted informed claimant that he would not be paid during his retraining period, and that the personnel director wanted him fired. On that same day claimant attempted to retake the driving test, in the course of which he experienced the episode of chest pain, shortness of breath, and nausea for which he was hospitalized.

Numerous tests were conducted to determine whether claimant had suffered some type of heart attack. The medical consensus seems to be that claimant's condition on October 25, 1979 was attributable primarily, if not exclusively, to claimant's emotional condition rather than any physical cause. Claimant has other emotional disorders which involve emotional stress manifested by physical symptoms. Claimant's treating physician opined that although claimant's work activities, particularly the events surrounding claimant's expired driver's license worsened his phychological conditions. SAIF's examining psychiatrist concluded that claimant's work stress was only one of many factors involved in his hospitalization and that:

> "[T]here is no basis for assigning any greater causation to his work environment than to the non-vocational stressors in his life in the production of his [psychiatric disorder]."

In his order, the Referee indicated that claimant's claim could be characterized as an injury or as a disease, but that the claim more closely fit the test of an injury. He applied the material contributing cause test and found the claim compensable. However, he also stated that even if the claim were considered to be an occupational disease, claimant had satisfied the standard set forth in James v. SAIF, 290 Or 343 (1981). In their briefs before the Board, the parties discuss at length whether the claim should be construed as an injury or disease claim. We find it unnecessary to reach that issue because we believe that the claim is barred under the rationale of Henry McGarrah, 33 Van Natta 584A (1981), wherein we held:

> "An adverse psychological reaction to normal and reasonable supervision is not within the scope of employment when the precipitating event (supervision) occurred because the employee was not functioning within the scope of employment." 33 Van Natta at 584D.

If the various confrontations between claimant and Ms. Winsted happened in the manner described by claimant, we concede that Ms. Winsted may not have been an ideal supervisor. However, we cannot say that her conduct toward claimant was outside the bounds of normal and reasonable supervision. More importantly, by allowing his driver's license to expire, claimant had placed himself outside the scope of his employment because he knew, or should have known, that as a bus driver he had to maintain a valid driver's license. Ms. Winsted's handling of this particular incident was well within the bounds of normal and reasonable supervision. Considering the record as a whole, we believe that McGarrah is applicable to this case and renders this claim noncompensable.

ORDER

The Referee's order dated August 25, 1981 is reversed. SAIF Corporation's denial dated December 21, 1979 is reinstated and affirmed.

FLORA PELCHA, Claimant
Evohl Malagon, Claimant's Attorney
William M. Beers, Defense Attorney

WCB 80-08480
August 23, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer and its insurer request review of Referee McCullough's order which set aside the September 10, 1980 Determination Order as premature, ordered benefits for temporary total disability to be paid from the date it had been terminated until March 1, 1981, assessed a 25% penalty against the insurer for submitting the claim for closure prematurely and awarded claimant's attorney an $800 attorney fee, payable by the insurer.

The relevant facts may be briefly summarized. Claimant was injured on August 1, 1974 when she was struck by a metal bar in the area near her right shoulder. Claimant has not worked since 1974 and her claim remained in open status until issuance of the 1980 Determination Order. Claimant was examined by Dr. Smith who performed a cervical myelogram on October 12, 1979. Dr. Smith reported the myelogram to have revealed a definite nerve root defect and changes that could suggest either spondylosis or a discrete herniated disc. He felt that claimant's condition was not medically stationary, and that surgical exploration was advisable. At the request of the insurer, claimant was examined by the Orthopaedic Consultants who suggested surgery be deferred. On July 1, 1980, claimant was examined a second time by the Orthopaedic Consultants who then found her condition to be medically stationary. The insurer then requested the Evaluation Division to close the claim by Determination Order, and the Evaluation Division did so on September 10, 1980.

Claimant was admitted to the hospital on March 1, 1981 and surgery was performed. The claim was reopened as of the date of hospital admission.

The Referee concluded that the report of the Orthopaedic Consultants was entitled to no weight as it was based on improper information. He then set aside the Determination Order, which was issued based on that report, as being premature, and ordered the claim to be reopened as of the date of its improper closure. Additionally, the Referee assessed a 25% penalty against the insurer, and ordered it to pay claimant's attorney fee, in the sum of $800. The appellants acquiesce in the Referee's determination that the claim was prematurely closed, but argue for reversal of those portions of the Referee's order granting claimant a penalty and an attorney fee in addition to and not out of the increased compensation.

The Referee allowed claimant a penalty and attorney fee based on ORS 656.262(9). In doing so, he stated:

> "In most cases a carrier's reliance on a particular medical report in seeking claim closure would not be considered unreasonable, although closure based upon such report might subsequently be determined to have been erroneous. *** Given the patent invalidity of Orthopaedic Consultants' conclusion, and in the face of Dr. Smith's previous recommendation of surgery, the insurance carrier had no reasonable basis in August 1980 for seeking claim closure..."

Penalties and attorney fees can be awarded only when expressly authorized by statute. Brown v. EBI Companies, 289 Or 905 (1980); Morgan v. Stimson Lumber Co., 288 Or 595 (1980). The relevant statutes make entitlement to penalties dependant upon unreasonable delay, refusal or resistance in the payment of compensation. ORS 656.262(9),656.382(1). We believe the threshhold question that needs to be resolved before considering the issue of unreasonableness, is whether submitting a claim for closure prematurely can ever be a form of delay, refusal or resistance within the meaning of the relevant penalty statutes.

Other statutes govern the process of claim closure. ORS 656.268(2) provides in part:

> "When the injured worker's condition resulting from a disabling injury has become medically stationary, ... the insurer or self-insured employer shall so notify the Evaluation Division... and request the claim be examined and further compensation, if any, be determined." (Emphasis Added.)

ORS 656.268(4) provides in part:

> "Within 10 working days after the Evaluation Division receives the medical and vocational reports relating to a disabling injury, the claim shall be examined and further compensation including permanent disability award, if any, determined under the director's supervision. If necessary the Evaluation Division may require additional or other information with respect to the claim, and may postpone the determination for not more than 60 additional days."

As is apparent, once it appears that a worker suffering from a disabling injury has become medically stationary, the employer or insurer must then notify the Evaluation Division and submit all medical/vocational reports along with its request for claim closure. The insurer does not make the decision to close a claim that involves permanent disability. The Evaluation Division makes that decision. And if the Evaluation Division is not satisfied with the reports submitted, it has authority to request additional information under ORS 656.268(4).

No appellate court case has directly considered whether or why the penalty statutes that apply to misconduct by the employer or insurer can or should be extended to a situation in which a mistake is made by the Evaluation Division. However, this situation is somewhat analogous to that in Barrett v. Coast Range Plywood, 56 Or App 371 (1982). In Barrett the claimant was successful in setting aside an order of the Department suspending his compensation benefits for failure to submit to an independent medical examination at the insurer's request. Although it was found that the insurer failed to comply with the proper procedural rules relative to a request for suspension of compensation, the referee, the Board, and the Court refused to allow penalties and attorney's fees. The Court noted that the Worker's Compensation Department, acting through the Compliance Division, must consent to the suspension of compensation payments prior to actual suspension by the insurer. The Court stated:

> "It is clear from a reading of the request that it [the insurer] 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.... 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(9) or ORS 656.382..." 56 Or App at 377.

In other words, any delay or resistance in the payment of compensation in Barrett was because of an administrative order entered by a regulatory agency, not due to any action or inaction by the employer/insurer for which it was solely accountable. By parity of reasoning in this case, any delay or resistance in the payment of compensation was also due to an administrative order entered by a regulatory agency, and not because of action or inaction by the employer/insurer for which it was solely accountable.

The Board has previously analyzed this issue in similar terms. In Hazel M. Briggs, 11 Van Natta 289 (1974), the claimant appealed the Referee's order finding that the insurer had prematurely submitted the claim for closure, but refusing to allow penalties and attorney's fees for such action. We stated,

> "the statute empowers only the ... Evaluation Division, to effect claim closure. The knowledge or motivation of Traveler's Insurance Company and-or Safeway Stores cannot legally be considered the cause of claimant's premature claim closure. The premature closure occurred

because the Evaluation Division failed to develop the full record needed in the face of the conflicting medical reports from Dr. Pasquesi and Dr. Burget." 11 Van Natta at 290

In Eddie Robinson, 19 Van Natta 144 (1976), the issue was again premature claim closure and penalties and attorney's fees for the insurer's action in so submitting the claim. The Referee concluded, with Board approval, that penalties and attorney fees could not be assessed, absent fraud or misrepresentation.

Since Robinson was decided, ORS 656.268(2) has been amended to require the employer or insurer when requesting claim closure to submit all medical and vocational reports. We think that the fraud, misrepresentation, etc., contemplated by Robinson as the only possible basis for a penalty for premature closure would include failure to submit all reports.

Claimant argues that Brown v. Jeld-Wen Inc., 52 Or App 191 (1981), stands for the proposition that penalties and attorney's fees may be awarded in a case of premature claim closure. We disagree. In that case the employer had been advised on January 18, 1979 by Dr. Campagna that the claim could be closed as of December 8, 1978. The employer submitted the claim for closure based on that report. On January 22, and February 2, 1979, Dr. Campagna notified the employer that claimant was experiencing continued problems and that rehospitalization was scheduled on February 4, 1979. On February 8, 1979, a Determination Order issued closing the claim. The Referee's determination that the claim was prematurely closed was affirmed by the Court, as was his award of penalties and attorney fees. Although it is somewhat unclear, it appears that the Referee's allowance of penalties and attorney fees was not based on the employer's act of submitting the claim for closure prematurely. The Court stated: "Finding that the February, 1979 closure was premature, the referee ordered the claim reopened. The referee also determined the employer's denial of reopening was arbitary and improper. 52 Or App at 195-96. "(Emphasis Added.) It therefore does not appear that penalties and attorney fees were assessed against the employer for its action in prematurely submitting the claim for closure, but for its unreasonable denial of the request to reopen the claim.

From a policy standpoint, it appears somewhat anomolous to penalize an insurer or self-insured employer for failing to submit a claim for closure and unilateraly terminating time loss benefits if the claimant has only reached a medically stationary point, and not returned to or been released to return to his regular work, Mark L. Side, 34 Van Natta 661 (1982); and also impose a penalty for attempting to comply with that legal requirement even though prematurely. We therefore conclude that the proper rule to apply in this type of situation is as follows: In a case involving a claim closed under ORS 656.268, the action of the employer or insurer in submitting the claim for closure is not an action that can possibly subject the employer or insurer to penalties and/or attorney fees under ORS 656.262(9) and/or ORS 656.382(1) in the absense of fraud or misrepresentation, such as failure to supply the Evaluation Division with all medical and/or vocational reports.

That being the case, those portions of the Referee's order assessing penalties and attorney fees against the insurer in this case are reversed. Claimant's attorney is entitled to a fee payable out of the claimant's increased compensation, and not a fee in addition to compensation. ORS 656.386(2); OAR 438-47-030.

ORDER

The Referee's order dated July 30, 1981 is affirmed in part and reversed in part. Those portions of the order granting claimant a 25% penalty and allowing claimant's attorney an insurer paid attorney fee of $800 are reversed. The remainder of the Referee's order is affirmed. Claimant's attorney is allowed an attorney fee equal to 25% of the claimant's increased compensation granted by the Referee, not to exceed $750.

MATTHEW SAMPSON, Claimant
Cash Perrine, Claimant's Attorney
James Larson, Defense Attorney

WCB 81-08496
August 23, 1982
Order Denying Motion to Dismiss

SAIF Corporation has moved to dismiss claimant's request for review of the Referee's order dated June 2, 1982, on the grounds that neither SAIF nor its counsel were ever served with a copy of claimant's request for review, and the further grounds that claimant's request for review was not filed with the Board in a timely fashion.

The Board has previously held that failure to serve a copy of a request for review on all parties within 30 days of the date of the Referee's order does not make a request for review untimely if the request is filed with the Board within the 30 day period. Michael J. King, 33 Van Natta 636 (1981); Barbara Rupp, 30 Van Natta 556 (1981). The Board's reasoning in King logically requires the same result where, as here, a party requesting review fails not only to serve a copy of the request within 30 days, but fails to serve a copy of the request at all:

> "Given the Board's almost instantaneous response to a request for review with an acknowledgement being sent to all parties, the parties' interest in knowledge of finality can be further compromised for a few more days if knowledge of the request for review comes from the Board rather than from the requestor." 33 Van Natta at 637.

As to SAIF's second contention that claimant's request was not filed with the Board in a timely fashion, although the acknowledgement served on the parties by the Board indicates that claimant's request for review was received by the Board on July 6, 1982, date of receipt is not controlling for purposes of the timeliness of a request for review. The 30 days of ORS 656.289(3) is satisfied when the request for review is mailed to the Board. OAR 436-83-700(2). Accordingly, postmark controls. The postmark

on the envelope containing claimant's request for review, which is part of the Board's records, indicates that claimant mailed his request for review July 2, 1982, which is within 30 days of the Referee's order. Therefore, claimant's request for review was timely.

ORDER

SAIF's motion to dismiss claimant's request for review is denied.

MARY V. SCHOLL, Claimant
Howard Hedrick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01500
August 23, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests Board review of Referee Neal's order which granted claimant an award of permanent total disability effective May 12, 1981.

Claimant, 64 years of age, sustained a compensable industrial injury on March 9, 1977 while employed as a kitchen assistant when she injured her low back trying to get a stuck pan out of the oven. The initial diagnosis was acute lumbar strain. On July 29, 1977 Dr. Johnson performed a lumbar laminectomy L4-5 bilaterally and nerve root compression surgery. The medical reports from 1977-78 all refer to claimant suffering from spinal stenosis, degenerative disc disease and degenerative spondylolisthesis. The implication is that claimant's July, 1977 surgery was occasioned by these pre-existing conditions. In any event, no report explains how claimant's March, 1977 back sprain may have contributed to her degenerative back conditions. The claim was initially closed by a Determination Order of June 8, 1978 which granted claimant an award of 10% unscheduled disability.

In 1978 Dr. Thompson became claimant's treating physician and performed another myelogram, which was very similar to the earlier myelogram which led to the prior surgery. Dr. Thompson recommended further surgery, to be performed after claimant lost weight. On September 25, 1979 Dr. Pasquesi examined claimant and found she had severe degenerative changes of the lumbar spine. Indeed, again, the emphasis in all reports is on claimant's degenerative diseases, primarily spinal stenosis rather than the March, 1977 back strain.

A second Determination Order was issued on October 23, 1979 granting an additional award of 25%. By a stipulation of the parties dated February 29, 1980 claimant was granted an additional 5% for a total award of 40% unscheduled disability.

In April of 1980 Dr. Thompson said claimant lost 29 pounds and was now a candidate for surgery. On June 4, 1980 claimant was hospitalized and underwent a laminectomy at L4-5. In November, 1980 claimant was examined by the Orthopaedic Consultants who found her condition was medically stationary. Total loss of function was rated as moderate.

On December 8, 1980 the disputed Determination Order issued granting claimant compensation for temporary total disability only.

The Referee found claimant had made reasonable efforts to obtain employment and had, therefore, satisfied the provisions of ORS 656.206(3), and concluded claimant was permanently and totally disabled. We disagree and modify that award.

The preponderance of the medical evidence is that claimant's impairment is moderate and that she is now precluded from her regular occupation. Claimant decided that she wanted to be a teacher's aide and submitted applications. She was offered a teacher's aide position but Dr. Thompson told her she could not do that job. Claimant testified that she felt that she was capable of performing that work. Dr. Thompson's contrary opinion is not explained in the record.

Claimant has a high school education but very few years of actual employment. Before her marriage in 1939, she was a seamstress for approximately three years and in the 1960's she sold jewelry and Avon products. Claimant has not been employed since the 1977 injury. Claimant's only attempts at finding employment are as a teacher's aide and these attempts have been sporadic.

The medical evidence indicates that claimant's condition before the surgery in June, 1980 and after she became stationary, has been substantially the same. Claimant's complaints are the same and the physical findings much the same. We conclude on the basis of the medical evidence provided that claimant is physically capable of gainful employment but has not had, nor sought, vocational rehabilitation or job placement services. We conclude claimant is not permanently and totally disabled.

We think the most significant facts in this case are: (1) in February of 1980 claimant was willing to and did stipulate that her permanent disability was 40%; (2) her claim was thereafter reopened for a repeat laminectomy, which produced some initial improvement in claimant's condition but ultimately no significant change for better or worse, i.e., claimant's condition stabilized after the June 1980 surgery at basically the same level it had been when the February, 1980 stipulation was executed; (3) we fail to see on this record how all of claimant's current back disability can possibly be related to her 1977 back strain; and (4) claimant's seek-work efforts have been minimal, not reasonable as required by ORS 656.206(3).

We find, pursuant to the guidelines set forth in OAR 436-65-500 et seq., that claimant would be adequately compensated for her loss of wage earning capacity due to this injury by an award of 65% unscheduled disability.

ORDER

The Referee's order dated October 14, 1981 is modified.

Claimant is hereby granted an award of 208° for 65% unscheduled disability. This award is in lieu of all prior awards.

Claimant's attorney is allowed 25% of the increase granted by this order over the award granted by the December 8, 1980 Determination Order as and for a reasonable attorney's fee, not to exceed $2,000. This is in lieu of the attorney's fee allowed by the Referee.

DELMAR HERRON, Claimant
Allan Coons, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-11267 & 82-00170
August 25, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

SAIF Corporation and claimant request Board review of Referee Danner's order which found that claimant's claim for a lumbar strain sustained on August 21, 1981 was prematurely closed, that it should remain in open status, but that claimant's preexisting spondylolisthesis condition was not compensable, either as an aggravation of the August 21, 1981 injury or as an occupational disease. SAIF contends claimant's lumbar strain condition has resolved and the claim was properly closed by the December 11, 1981 Determination Order. Claimant contends that his spondylolisthesis condition cannot be separated from the lumbar strain, and that it was aggravated by the injury.

The Board affirms and adopts the order of the Referee. Claimant continues to be entitled to compensation for all treatment due to the residuals of the lumbar strain which has been superimposed on spondylolisthesis. However, the spondylolisthesis condition is not compensable.

ORDER

The Referee's order dated April 5, 1982 is affirmed. No attorney's fee is awarded.

ELLEN P. CANNON, Claimant
David Blunt, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05235
August 26, 1982
Order of Dismissal

SAIF Corporation has moved to dismiss claimant's request for review as untimely.

The Referee issued his order on May 6, 1982. Claimant thereafter requested reconsideration. Although claimant's request for reconsideration was filed with the Referee in a timely fashion, having been received June 7, 1982, the Referee's order was not abated. Accordingly, the 30-day period for requesting review expired, and the Referee lost jurisdiction of the claim prior to entry of his June 15, 1982 Order Denying Motion for Reconsideration. Claimant's request for review, postmarked July 14, 1982, is, therefore, untimely.

ORDER

Claimant's request for review is dismissed as untimely.

BONNIE B. CAVE, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06836
August 26, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests Board review of Referee Howell's order which granted claimant compensation for 30% unscheduled low back disability and 15% unscheduled upper back, neck, shoulder and arm disability. Claimant contends this award is inadequate.

After reviewing the evidence in light of the guidelines set forth in OAR 436-65-600 et seq., we conclude that the award granted by the Referee was proper, if not slightly high. Because the insurer did not request that the award be lowered, we will not disturb it. We know of no reason to separate the awards as the Referee did, and for future reference claimant shall be considered to have 45% unscheduled disability resulting from his injury of September 14, 1978.

ORDER

The Referee's order dated February 22, 1982 is affirmed, subject to the foregoing comment.

GLENN S. CHURCH, Claimant
Kafoury & Hagen, Claimant's Attorneys
David Horne, Defense Attorney
Breathouwer & Gilman, Defense Attorneys

WCB 81-00905 & 81-00906
August 26, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Don Hall Laboratories and its insurer, Mission Insurance Company, request Board review of Referee Pferdner's order which set aside their denial of claimant's claim that had been asserted on a new injury theory and affirmed the denial of Kit Manufacturing Company and its insurer, Employers of Wausau, which had denied claimant's alternative claim that had been asserted on an aggravation theory. Don Hall and Mission argue that Kit Manufacturing and Wausau should be found responsible.

Claimant sustained a compensable back injury while working for Kit Manufacturing in September of 1977. That injury led to low back surgery at the L4-5 level. Claimant subsequently began working for Don Hall and sustained a compensable injury in that employment when he was struck in the low back by a falling pallet on August 5, 1980. Don Hall apparently accepted and processed claimant's claim for the August 1980 injury.

In December of 1980 claimant had another low back operation, an exploratory laminectomy and fusion from L4 to the sacrum. The question is responsibility for this surgery: Don Hall/Mission contends that Kit Manufacturing/Wausau should be found responsible because the 1980 surgery constitutes an aggravation of claimant's 1977 claim rather than a consequence of his 1980 claim.

We find the medical evidence unusually inconclusive. Both Mission and Wausau can point to portions of the medical evidence that support their respective positions, and each presents cogent challenges to the evidence that supports the other. Under these circumstances, we rely primarily on the claimant's testimony. Claimant testified that he was relatively symptom free following his surgery after his 1977 claim and that, after being struck on the back following his 1980 injury, his symptoms increased significantly.

Considering this evidence in light of the considerations identified in Roger Ballinger, 34 Van Natta 732 (1982), we agree with the Referee's conclusion that claimant's 1980 surgery is properly the responsibility of Don Hall Laboratories and Mission Insurance Company as a compensable consequence of claimant's new injury of August 5, 1980.

ORDER

The Referee's order dated December 29, 1981 is affirmed. Claimant's attorney is awarded $100 for services rendered on Board review, payable by Mission Insurance Company.

STEPHEN R. EARLY, Claimant
Kennedy, Bowles et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-02043
August 26, 1982
Order of Abatement

Both claimant and the employer have moved for reconsideration of our Order on Review dated July 30, 1982.

In order to allow sufficient time for reconsideration, that order is abated. In addition: (1) Claimant's motion for reconsideration is accepted as his opening brief; (2) the employer shall file a brief in response within 20 days of the date of this order; (3) claimant shall file a reply brief within 30 days of the date of this order; and (4) no extensions of time will be granted absent extraordinary circumstances.

IT IS SO ORDERED.

RAY D. GEIGLE, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-03406 & 80-06587
August 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 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.

WILLIAM L. JAMES, Claimant
Marsh & McLennan, Attorneys
Rankin, McMurry et al., Defense Attorneys

WCB 81-07218
August 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.

THOMAS R. KNOWLES, Claimant
Coons & McKeown, Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 81-07622
August 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.

OLIVE B. LYONS, Claimant
Richard Carlson, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 80-06327
August 26, 1982
Order on Remand

On review of the Board's Order dated August 24, 1981 the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated January 26, 1981.

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

IT IS SO ORDERED.

ROCKY MASTERFIELD, Claimant
Malagon & Velure, Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 81-06108
August 26, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests Board review of Referee Nichols' order which affirmed the insurer's denial dated June 17, 1981. The issue is whether claimant's back strain was a material cause of damage to Harrington rods that had been inserted in his back following a prior, noncompensable automobile accident.

Claimant may be correct in his assertion that we may infer causation in the absence of medical opinion evidence. See Volk v. Birdseye Division, 16 Or App 349 (1974). However, this case does not involve an absence of medical evidence; instead, the only medical opinion rendered is adverse to claimant's position. Under these circumstances, we decline to draw the inference that may be permitted by Volk.

ORDER

The Referee's order dated March 24, 1982 is affirmed.

ROCKY R. SULLIVAN, Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06919
August 26, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests Board review of Referee Leahy's order which affirmed the SAIF Corporation's denial of compensability of claimant's right hip condition. This is a claim involving no time loss and only the payment of medical services.

Claimant, 26 years of age, was driving an 80,000 pound truck when, on May 20, 1980, it flipped on its right side and slid approximately 96 feet before stopping. Claimant was wearing a seat belt and his initial complaint was injury to the right side of his head. The cab, hood and sheet metal part of the truck was totally destroyed.

Claimant was taken by ambulance to the hospital where a small hematoma of the right temporal area was diagnosed. The claim was accepted as non-disabling.

Although claimant did not lose time from work for medical reasons, he was off work for two weeks while the accident was being investigated. Two days after the injury claimant appeared at the employer's premises and complained of being stiff and sore. Two weeks after the injury claimant noted pain in his right hip. He sought no medical treatment, however, until January 9, 1981.

Mr. Loe, the night dispatcher and a friend of claimant's, testified at the hearing that claimant complained to him of right hip pain. He observed claimant limping after the accident, and in July 1980 claimant complained daily about his hip condition. Despite his complaints of pain, claimant continued working until he quit to take a better job in Oklahoma.

In a report of June 1, 1981 Dr. Heusch stated, "I do feel that his present symptomatology of right hip pain is secondary to the accident that occurred while he was driving [sic] truck approximately one year ago." This is the only medical report addressing the issue of causation in the record.

The Referee made a finding that claimant was credible but then concluded, ". . .I cannot find the hip pain medical bills compensable where the treating doctor is unable to diagnose a causal connection between the original injury and the later pain. (Ex. 15.)" Exhibit 15 is a medical report from Dr. Heusch dated May 3, 1981 and in that report Dr. Heusch does not even address the causal relationship question. However, he does affirmatively address that issue in his June 1, 1981 report, as indicated above.

Based upon the credible lay testimony which supports claimant's contention, the Referee's finding that claimant was himself credible, and the medical opinion of Dr. Heusch, we conclude claimant has carried his burden of proving that his right hip was injured at the time of his industrial injury.

ORDER

The Referee's order dated March 26, 1982 is reversed.

The claim for a right hip condition is remanded to SAIF for payment of the medical services claimed.

Claimant's attorney is granted, as and for a reasonable attorney's fee for his services at the hearing and before this Board, the sum of $1,000, payable by SAIF.

DAVID F. TANKERSLEY, Claimant
Malagon & Velure, Claimant's Attorneys
Foss, Whitty et al., Defense Attorneys

WCB 80-11462
August 26, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests Board review of Referee Foster's order which upheld the SAIF Corporation's denial of his claim.

Claimant sustained a right leg fracture when he fell while leaving a party he had attended with co-workers. The Referee rejected claimant's alternative arguments: (1) that the party was sufficiently work connected that the leg fracture should be compensable as arising out of and in the course of employment; and (2) that claimant's prior 1976 compensable right leg injury was a material contributing cause of his worsened condition after the more recent fracture within the meaning of Grable v. Weyerhaeuser Company, 291 Or 387 (1981).

We affirm and adopt the Referee's order with the additional comment that the Court of Appeals' subsequent decision in Richmond v. SAIF, 58 Or App 354 (1982), appears to be some additional support for the Referee's finding regarding work connectedness.

ORDER

The Referee's order dated March 16, 1982 is affirmed.

DALE DONALDSON, Claimant
D. Keith Swanson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04675
August 27, 1982
Order on Review

Reviewed by Board en banc.

The SAIF Corporation requests review of Referee Foster's order that set aside its denial of claimant's claim for his back injury allegedly sustained in a unwitnessed accident. The issue of compensability depends in turn on the issue of the credibility of the witnesses who testified at the hearing.

The Referee at least implicitly found claimant, and presumably claimant's witnesses, credible. In the overwhelming majority of cases we defer to the findings of the Referees regarding credibility. Deference is not, however, absolute. See Richard A. Fastner, 33 Van Natta 662 (1981) (claimant found credible despite contrary finding by the Referee); Karen K. Kephart, 34 Van Natta 707 (1982) (claimant found not credible despite contrary finding by the Referee). In the Castner and Kephart cases we noted that the Referee's advantage in seeing the witnesses can in some cases be less significant than our advantage in having a complete transcript.

In any event, we understand the issue in this and in all credibility cases to be: Giving due deference to the Referee's advantage in seeing the witnesses, can we honestly say we are persuaded by the evidence offered by the side with the burden of proof? See Magee v. SAIF, 48 Or App 439 (1980); Bicknell v. SAIF, 8 Or App 567 (1972).

We are not persuaded by the claimant's evidence in this case. The numerous inconsistencies and contradictions in claimant's evidence are well-cataloged in SAIF's briefs; we see no point in repeating it all here and, instead, adopt by reference the analysis in SAIF's briefs, subject to highlighting a few facets of it.

Larry Young testified about a conversation he had with claimant about a week before the alleged industrial injury in which claimant, according to Young, said he had recently injured his back at home. Neither the Referee nor the dissent suggests any reason for disbelieving Mr. Young's testimony. And in order to rule in claimant's favor, it is necessary to affirmatively reject Mr. Young's testimony because if that testimony and claimant's evidence are equally believable, then claimant has not sustained the burden of persuasion.

In a possible effort to undermine Mr. Young's testimony, claimant called two witnesses who said they had been with claimant in Troutdale the day before the alleged injury and claimant displayed no symptoms of a prior back injury at that time. SAIF in turn attempted to undermine that evidence by showing that claimant's work as a truck driver required him to keep a log that recorded his location every few hours; that the law requires the log to be kept accurately; and that claimant's log for the days in question show that he was not and could not have been in Troutdale as claimed. Claimant's argument to explain this discrepancy boils

down to an admission that he falsified the log he was required to maintain accurately. While a witness proven false in part is only to be distrusted, not necessarily disbelieved, ORS 10.095(3), considering all the discrepancies in the record, we are simply not persuaded that claimant's alleged industrial back injury occurred as claimed.

ORDER

The Referee's order dated February 23, 1982 is reversed. The SAIF Corporation's denial dated May 5, 1981 is reinstated and affirmed.

BOARD MEMBER LEWIS DISSENTING:

I respectfully dissent from the majority opinion. The claimant's testimony at the hearing explained the discrepancy regarding his truck log to my satisfaction. I therefore feel that it does not detract from his credibility as it relates to the circumstances of his injury. The Referee saw and heard the claimant and found him believable; so do I. I would affirm the Referee's order and award an attorney's fee of $600 for Board review.

DANNY J. JONES, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05187
August 27, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The claimant requests review of Referee Leahy's order which upheld the SAIF Corporation's denial of claimant's claim. The issue is compensability.

The claimant contends that his claim is compensable as he went from 1972 to the back "injury" of March 27, 1981 without seeking medical attention for his preexisting symptomatic back condition, relying on Clayton Automotive v. Stayton Auto Supply, 54 Or App 980 (1981) to support his argument. SAIF responds that the opinions of Drs. Hazel and Norton are more persuasive and that the March, 1981 incident only created symptoms of claimant's underlying degenerative disease.

We agree with SAIF and also believe this case falls directly within the test set forth by the Supreme Court in Weller v. Union Carbide, 288 Or 27 (1979).

ORDER

The Referee's order dated February 12, 1982 is affirmed.

LETTY M. LOUDAN, Claimant
Guy B. Greco, Claimant's Attorney
Macdonald, McCallister et al., Defense Attorneys

WCB 80-06674
August 27, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests Board review, and the claimant cross-requests review of Referee Williams' order which awarded claimant an additional 25% scheduled disability for loss of use of her left hand and 30% unscheduled permanent partial disability for permanent worsening of her depressive neurosis and reflex sympathetic dsytrophy. SAIF contends claimant has failed to establish entitlement to any award for permanent disability while claimant argues that the Referee's awards were inadequate.

Claimant is a 53 year old widow who worked for McRae & Sons at the time of her disability. Her work consisted of operating various small machines used in the manufacture of paint brush handles. Claimant began experiencing pain in her left arm while at work sometime in early 1979. Claimant had received a previous award of 5% permanent partial disability for a laceration injury to her left hand in 1974. The current claim was processed and a Determination Order issued on July 7, 1980 allowing claimant benefits for temporary total disability only.

Claimant has been examined by many physicians throughout the history of this claim. The diagnoses are as varied as the doctors are numerous. Dr. Rosenbaum, a neurologist, diagnosed mild left ulnar neuropathy. Dr. McLaughlin, an orthopedic hand surgeon, originally suspected carpal tunnel syndrome, but was unable to give a specific diagnosis. Dr. Stolzberg, a psychiatrist, found chronic personality disorder, with features of chronic anxiety depression, low initiative and dependency, tending toward entrenchment in disability situations. Dr. Stephen Stolzberg, also a neurologist, found a minimal vasospastic phenomenon, but was of the opinion that claimant's hand difficulties were to a large extent "embellishments" and suggested she return to work. Dr. Knox, another neurologist, had various diagnoses, including: atypical thoracic outlet syndrome with multiple mononeuropathies, multiple traumatic neuropathies, a superimposed passive dependent personality trait disorder, and chronic disorder of the left extremity, etiology unknown. Dr. Knox later diagnosed C7-C8-T1 radiculopathy with active denervation and segmented muscular debility. Dr. Hunt, an orthopedic surgeon, enthusiastically concluded that claimant suffered from reflex sympathetic dystrophy (RSD). Dr. McLaughlin later offered another diagnosis of conversion hysteria related to cervical arthritis. Dr. Heusch, an osteopath, diagnosed possible carpal tunnel or compression syndrome. Dr. Barr, an osteopath, agreed with Dr. Heusch.

The Referee found the claimant to be a poor historian, the reasons for which were unclear, although he noted that claimant had an underlying psychological condition for which she had been receiving treatment with psychotherapeutic drugs for almost 20 years. The Referee also noted that prior to claimant's 1979 difficulties, she was prone to substantial absenteeism from her job, at times exceeding 50% of the work month, and that the death of her

husband in 1978 caused her to suffer additional difficulties with feelings of frustration and inadequacy. Claimant's work activities were noted to have not involved a very high degree of effort. Nevertheless, the Referee concluded that claimant had established her left hand disability as being work related, and found her loss of function to be equal to 25%. He additionally chose to accept Dr. Hunt's diagnosis of reflex sympathetic dystrophy, and found a permanent worsening of her underlying psychological condition. Apparently the Referee found these conditions to be separate and distinct from claimant's hand impairment, and based his award of 30% unscheduled permanent partial disability on those two conditions.

With regard to the Referee's conclusion that claimant has established the loss of function of her left hand as being work related, we agree. Although all doctors who have examined the claimant agree that the objective findings relative to her left extremity are very minimal, Dr. Much, Dr. Knox and Dr. Hunt all attribute claimant's loss of function to her work activities. We also agree with the amount of the Referee's scheduled disability award.

Although we agree with the Referee that claimant's loss of function is work related, we are unwilling to accept his finding that claimant's condition is properly diagnosed as RSD. In view of the fact that there have been multiple diagnoses from a plethora of well-qualified and competent physicians, we find no comfortable basis for selecting any one diagnosis over another. In point of fact, Dr. Hunt's diagnosis of RSD is specifically rejected by Dr. McLaughlin, and ruled out by Dr. Knox in his October 16, 1980 report. Following a series of x-rays of claimant's forearms, Dr. Hunt himself seemed to question his diagnosis. We, find it unnecessary to select one diagnosis over another. Whatever condition from which claimant suffers, we find that she has sustained a 25% loss of function of her left hand.

With regard to the Referee's conclusion that claimant is entitled to an award of 30% unscheduled permanent partial disability, we disagree. Even assuming the Referee was correct in finding that RSD is the proper diagnosis of claimant's condition, a separate unscheduled award for that condition is not warranted. If we understand Dr. Hunt correctly, RSD involves some form of initial trauma, with resultant abnormal autonomic reflex to the pain of the trauma which persists long after the injury has healed. The persistence and progression of the condition is suspected to be due, at least in part, to an underlying personality disorder, predisposing an individual to the development of the problem. If the claimant does suffer from RSD, a conclusion we are unwilling to make on this record, she would only be entitled to a scheduled award for loss of function of the hand, since that appears to be the only disability she has suffered as a result of it.

The next question is whether or not claimant is entitled to an award of unscheduled disability for a permanent worsening of her underlying psychological condition. We conclude she is not. The fact that claimant suffers from a preexisting underlying psychological condition, unrelated to her job, is the one diagnosis that every physician examining the claimant does seem to

agree upon. It appears that, whatever the proper diagnosis for the claimant's left hand condition is, her underlying psychological condition is an inseparable component of that condition. Dr. Straumfjord, a psychiatrist, seems to best sum this up in his August 27, 1981 report, where he states:

> "It is my opinion that Mrs. Loudan's depression results from her dependency, the loss of the husband who took care of her and is aggravated by her physical complaints and her inability to work. Her depression aggravates her physical discomfort and her physical discomfort and experienced disability further reinforces her depression."

Although it does appear that the physical difficulty claimant suffered at work, resulted in an aggravation of her underlying psychological condition, it also appears that the only permanency which the claimant suffered as a result of this is the partial loss of function of her left hand. In Joseph Needham, 34 Van Natta 63 (1982), we stated:

> "The Referee properly treated the psychological component of claimant's hand injury as a scheduled injury. . . That psychological condition manifested itself only in relation to claimant's hand disability. There is no basis for an additional unscheduled award." 34 Van Natta at 63.

In Julia I. Hicks, 33 Van Natta 497 (1981), aff'd without opinion, 57 Or App 838 (1982), the Board reversed the Referee's award of unscheduled disability where the facts indicated that the psychological condition which claimant developed following a scheduled injury only manifested itself in relation to his injured extremity, for which claimant received a scheduled award.

The same is basically true in this case. The evidence indicates that any worsening of claimant's underlying psychological condition is manifested only in her left hand, for which she is compensated by an appropriate scheduled award. There is, therefore, no basis for an award of unscheduled permanent disability.

ORDER

The Referee's order dated December 23, 1981 is affirmed in part and reversed in part. That portion of the order allowing claimant 30% unscheduled permanent partial disability is reversed. The balance of the order is affirmed.

RONALD E. ROGERS, Claimant
Noreen Saltveit, Claimant's Attorney
Keith D. Skelton, Defense Attorney
Shelley K. Bushman, Defense Attorney

WCB 81-08370
August 27, 1982
Order Awarding Attorney Fees

The claimant appealed from the Referee's order which denied an aggravation claim for a 1979 industrial injury but ordered Liberty Mutual, as carrier of the 1968 injury, to pay medical benefits pursuant to ORS 656.245. The Board affirmed the Referee's order.

By a letter and affidavit of August 17, 1982 claimant's attorney informed the Board that she was petitioning for attorney fees at the hearing level as the Referee found for claimant on medical benefits but overlooked granting her a reasonable attorney fee.

We agree with claimant's attorney that she is entitled to an attorney fee for overturning a denial of medical benefits. Therefore claimant's attorney is hereby granted a reasonable attorney fee, payable by Liberty Mutual, in the sum of $750 for representation at the hearing level.

IT IS SO ORDERED.

MARVIN A. SONDROL, Claimant
Glen McClendon, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 81-04204
August 27, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant seeks Board review of Referee Neal's order which affirmed the February 23, 1981 denial (date of injury January 30, 1981 when GAB was on the risk) and the March 5, 1981 denial (date of injury March 28, 1980 when SAIF Corporation was on the risk) due to claimant's untimely appeal of both. Claimant contends the appeal of the March denial was timely and he has shown good cause for his untimely appeal of the February denial. He contends his condition in January 1981 is compensable either as an aggravation of an earlier injury or as a new injury.

We accept the facts as stated by the Referee. We agree with her that claimant has failed to show good cause why his request for hearing on the February 23, 1981 denial was untimely. However, claimant's request for hearing on the March 5, 1981 denial (post-marked May 4, 1981) was timely. This denial was the result of a claim for aggravation benefits from an injury sustained on March 28, 1980. We are persuaded by the record that claimant's condition is the result of a new injury sustained on January 30, 1981 which occurred while stacking pallets for eight hours. We accept claimant's explanation for the employer's worksheet which seemed to indicate he was not stacking pallets as he stated in his history. However, claimant failed to request a hearing within 60 days of the denial issued by GAB (insurer at the time of the injury on January 30, 1981) and failed to show good cause for this "oversight." The denials must be affirmed.

ORDER

The Referee's order dated December 11, 1981 is affirmed, albeit for different reasons.

The February 23, 1981 and March 5, 1981 denials are affirmed.

DANIEL L. WARREN, Claimant
David Dorman, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys
Minturn et al., Defense Attorneys

WCB 81-02844 & 81-05358
August 27, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests Board review of Referee McCullough's order which sustained separate denials issued by the Insurance Company of North America and the SAIF Corporation. Claimant's claim against INA was based on a theory that his 1981 left knee condition was an aggravation of his 1974 claim for which INA was responsible; the Referee found there was no persuasive medical evidence that linked the latter to the former. Claimant's claim against SAIF was based on a new injury theory; the Referee sustained SAIF's denial of it primarily on credibility grounds.

We affirm and adopt the Referee's order. Claimant's brief on Board review raises a novel theory predicated on Grable v. Weyerhaeuser Co., 291 Or 387 (1981), that does not appear to have been raised before the Referee. Because we are concerned that all parties have not had notice and an opportunity to present relevant evidence, we decline to reach the Grable argument claimant now asserts.

ORDER

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

JESSE J. AMMONS, Claimant
Dennis Henninger, Claimant's Attorney
Wolf, Griffith et al., Defense Attorney

WCB 81-06876
August 30, 1982
Order on Review

Reviewed by the Board en banc.

The insurer requests review of Referee Pferdner's order that found "claimant has never filed an aggravation claim nor has one ever been filed on his behalf by any physician" but then proceeded to rule as if an aggravation claim had been filed, finding that claimant had not proven his physical condition worsened since the last award of compensation but that clamant had proven his psychological condition had worsened and was causally related to his 1979 low back injury.

We agree with the Referee that there is no aggravation claim in this record. We, therefore, fail to see any foundation for the Referee's or our own jurisdiction. The statute authorizing a hearing request "on any question concerning a claim," ORS 656.283(1), qualifies that right by saying it is "subject to ORS 656.319." The latter statute provides time limits on the right to request a hearing; within 60 days of a denial of a claim, or within 180 days

with good cause; or within one year of a Determination Order. An aggravation claim is treated the same as an original claim for purposes of these time limits. See ORS 656.273(6). Not having made any aggravation claim, claimant certainly could not and did not show there was any denial of an aggravation claim. Nor was the request for hearing of July 27, 1981 filed within one year of the Determination Order dated September 4, 1979.

The Referee's order suggests he had jurisdiction under Vandehey v. Pumilite Glass & Building Co., 35 Or App 187 (1978), and Smith v. Amalgamated Sugar Co., 25 OR App 243 (1976). We find nothing in those cases that expands this agency's jurisdiction, which we understand to be statutory. Moreover, although Vandehey does expand the issues that can be considered when there is otherwise proper jurisdiction, we have recently concluded that the Vandehey holding has been displaced by a subsequent statutory amendment and Supreme Court decision. Harold Metler, 34 Van Natta 710 (1982). See also Syphers v. K-W Logging, Inc., 51 Or App 769 (1981).

Alternatively, if we have jurisdiction, we affirm and adopt that portion of the Referee's order that found claimant's physical condition had not worsened since the last award of compensation and reverse that portion that found claimant's psychological condition had worsened. The medical opinions on claimant's psychological condition come from Dr. Smith, who generally opines that claimant's condition worsened due to the 1979 back injury, and Dr. Parvaresh, who specifically opines that claimant's condition has not worsened and is not causally related to the 1979 injury. Dr. Smith's opinion is the more conclusory of the two. We believe it is especially significant that Dr. Smith's opinion expressly disavows any reliance on claimant's pre-1979 medical history, in contrast to Dr. Parvaresh's analysis which takes into consideration claimant's pre-1979 history. We are more persuaded on this record by Dr. Parvaresh.

Dr. Parvaresh used some language in his report to which claimant takes strong exception. We understand this language merely to be the doctor's way of trying to explain his opinion to factfinders without medical training and not in any way a personal attack on the claimant.

The September 4, 1979 Determination Order recognizes that claimant has some permanent disability as a result of his March, 1979 back injury. He is entitled to continuing medical treatment for his continuing symptoms. ORS 656.245. But we find no basis for claim reopening.

Finally, we join the Referee in urging that claimant be provided vocational rehabilitation since his life's work has consisted of heavy labor and he is now precluded from heavy labor due to his compensable injury.

ORDER

The Referee's order dated December 18, 1981 is vacated and claimant's request for hearing is dismissed due to lack of jurisdiction.

Alternatively, the Referee's order dated December 18, 1981 is affirmed in part and reversed in part. Those portions that ordered claim reopening on the basis of a worsening of claimant's psychological condition are reversed. The balance of the Referee's order is affirmed.

BOARD MEMBER LEWIS DISSENTING:

The majority has found that neither the Referee nor this Board has jurisdiction to consider whether claimant is suffering from worsened conditions due to his compensable injury because the record neither shows that an aggravation claim was made nor that one was denied. Further, though the majority found that we lack jurisdiction to consider the facts of this case, they proceeded to find that claimant's psychological disorder is not related to his compensable back injury, and that the back injury had not worsened.

ORS 656.273(3) provides: "A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation." On June 3, 1981 claimant was examined by Dr. Francis Nash, neurologist. Dr. Nash's June 3 report pointed out muscle spasms, near-absent right ankle reflex and diminished right hamstring musculature. The previous medical report from Dr. Walter Smith, orthopedic surgeon, on December 14, 1979 had shown no referred leg pain nor any associated sensory or motor disturbances. Dr. Nash made an appointment at the Good Samaritan Hospital for claimant to undergo a CT scan. This report alone showed that claimant's back injury has worsened.

On June 24, 1981, after reviewing Dr. Smith's x-rays and the CT scan, Dr. Nash recommended that claimant should be kept under neurological observation for surgery consideration and that, meanwhile, the claimant ". . . should have the benefit of a general medical examination and psychological testing."

These reports were addressed to claimant's attorney, but their content seems to have been conveyed to the insurer because, on July 1, 1981, claimant's attorney wrote a letter requesting a hearing on the insurer's failure to accept and pay benefits on the aggravation claim within 14 days of notice. I note the date stamp dated June 17, 1981 on Dr. Nash's June 3, 1981 report. The stamp says "WORK COMP.," but is neither the Compliance Division's nor Hearings Division's stamp. I gather, then, that the stamp was that of the Workers Compensation claims department of the insurer. If that assumption is so, that would mean the insurer received Dr. Nash's report and would explain why the insurer never raised the issue that an aggravation claim had not been made.

With respect to the denial of that claim, I found that the cover letter of the hearing request stated in part, "The insurer has advised that they will deny the claim based on what they understand the pending orthopedic examine [sic] results will be." This statement by the claimant indicates that he felt that his claim had been denied. As the majority knows, there are claims in which an insurer never denies the claim and does not act on it one

way or another. If a claimant's right to a hearing depended on receipt of a "proper" denial, these claims could never be brought to hearing. Though this denial appears to have been an oral statement to the claimant, I believe it is sufficient to show that the claimant believed that his claim was denied.

Although dated July 1, the hearing request and cover letter were not sent to the Hearings Division until the end of July. They are date stamped July 27, 1981.

All of these facts taken together indicate to me that the insurer was well aware of the claim before it, that representations were made to the claimant that additional benefits would not be forthcoming, and that these events occurred before the July 27, 1981 hearing request. At hearing, the case was argued on the merits as a denied aggravation claim. Neither at hearing nor on review has the insurer raised the issue of an insufficient aggravation claim, nor have they contended that they did not deny the claim. The effect of finding so now will only cause another aggravation claim to be made, another denial to issue, and another hearing to be held on identical issues.

I conclude that we do have jurisdiction to hear the merits of this case.

The majority agreed with the Referee that the back injury had not worsened, but disagreed that the psychological disorder is compensable. I agree with the Referee that claimant's psychological disorder is compensable. However, I further find that compensation for that disorder necessarily includes compensation for claimant's increased physical complaints. This is true because claimant's psychological disorder is described as a psychophysiologic musculoskeletal disorder manifested by back and lower extremity pain and weakness with overt anxiety and depression. Though the doctors may not agree that there is an objective basis for the increased complaints, the record shows there is a psychosomatic basis for his symptoms that was caused in major part by his back injury and resulting inability to return to his usual work.

On June 24, 1981 Dr. Nash recommended that claimant be given psychological testing.

On July 29, 1981 Dr. Nash reported that, based on his examination and x-ray finding, claimant's condition had deteriorated since September 4, 1979 (the last arrangement of compensation). He found that claimant's subjective complaints had worsened and that he had objective neurological findings which included an absent right ankle reflex as well as diminished power of the right hamstring musculature. Claimant did not have these findings when examined by Dr. Walter Smith in December 1979.

On August 4, 1981 Orthopaedic Consultants reported its findings from the July 16, 1981 examination. They noted the claimant was constantly fidgeting and jerking about and, at times, was in a very highly tense and anxious condition. He exhibited grotesque mannerisms and cried out with severe pain at various times. ". . .He walks with the left leg thrown into about 45° to 50° of internal rotation so that he nearly trips over it and also

throws the left leg into a hyperextension so that it is largely in a back-knee position. As he walks along, he throws himself about and it is difficult for him to keep his balance. Everything he does is performed in a shaky, guarded fashion."

Claimant was "more or less flopping about" while the doctors were measuring the lumbosacral range of motion. Examination of his legs showed inconsistent findings of weakness, sciatic nerve impairment and decreased sensation. The doctors concluded:

> "Recommendations: Since his initial examination in this office on July 30, 1979 the patient's condition has deteriorated remarkably from a psychosomatic standpoint. Many of the grotesque movements were not reported before. We do not feel that this is really on an organic basis but largely on a psychosomatic basis.
>
> "In our opinion this man is badly in need of a psychiatric consultation and evaluation and probably some form of treatment.
>
> "With regard to today's examination, one cannot come to any real conclusions concerning his loss of function since it is so outstandingly masked by the whole psychosomatic picture. Basically speaking, we would say that his impairment is about the same as when previously seen, from a neurologic and orthopedic standpoint.
>
> In our opinion, this would be the last person on earth upon which an operative approach to his problem should be considered. Since he cannot read or write and considering his present condition, rehabilitation would appear to be an impossibility."

On August 28, 1981, Dr. Rogers Smith saw the claimant for psychiatric evaluation. He interviewed the claimant for two hours on the topics of family, marital, education, vocational, military and past and present medical history. Unlike the majority, I do not understand Dr. Smith to have expressly disallowed consideration of claimant's pre-injury medical history in arriving at his diagnosis. He diagnosed that:

> ". . . [I]n addition to his orthopedic problems, this man has a psychophysiologic musculoskeletal disorder, manifested by back and lower extremity pain and weakness with overt anxiety and depression also. An excellent worker, valued by his employer in jobs requiring physical strength and skill, he now sees himself as unable to do those things he knows, and because of his illiterate state, he is unable to be retrained or educated.

"It is my further opinion that the cause of this mental disorder was his back injury of March 1979.

"He is deserving of a treatment and rehabilitation program under the direction of a psychiatrist."

On October 7, 1981 the claimant was given a psychiatric examination by Dr. Guy Parvaresh at the insurer's request. Dr. Parvaresh noted claimant's odd walking and limping behavior with low back and leg pain and weakness. He also noted claimant's age of 58, that he had worked as a cowboy, goldminer, railroad lineman and mechanic, that he had not worked since his March 1979 injury, that he has no education and is illiterate, that he has a long-standing dependency on alcohol and that he has been separated from his wife since 1976. Dr. Parvaresh did not find him to be clinically depressed but did find him to have a chronic anxiety neurosis. He did not know if the anxiety had developed since the accident, but he thought it medically improbable that it had. He believed claimant's greatest problem to be the aging process in that ". . . individuals like him who have truly no social or emotional roots, not much close, interpersonal relationship, years of moving from one place to another and changing jobs and drinking reach a personal understanding that they are no longer self-sufficient, and it is too difficult for them to compete in the job market." He stated that claimant needs to understand ". . . what his limitations are in terms of future employment."

Claimant's last employer, who knew him for a number of years, testified that claimant was a good, dependable, hard-headed worker who would work 16 hours a day if asked to. He had kept contact with claimant subsequent to the accident. He stated that claimant's mental attitude has gotten a lot worse and that he has been very upset ". . . because he can't get his back fixed and he wants to get his back fixed so he can go back to work." He has noticed claimant dragging his foot at an odd angle and that he jerks and shakes.

I agree with Referee Pferdner that the psychiatric opinions can be reconciled as showing claimant having a situational reaction resulting from his compensable injury, his illiteracy and his age. As the order stated:

"There is an abundance of evidence that claimant now manifests substantial psychological or psychiatric symptoms, and it is the opinion of the Referee the increased manifestations reflect claimant's reaction to the predicament in which he finds himself; i.e., inability to work at any of his prior occupations because of his compensable injury and the seemingly insurmountable problem of obtaining retraining for lighter work because of his illiteracy and his age. It is, therefore, the opinion of the Referee that Dr. Rogers J. Smith is more likely to be correct than is Dr. Guy A. Parvaresh and that claimant's

claim should be reopened for psychiatric treatment with consideration for vocational rehabilitation or job placement."

As stated earlier, it is my opinion that the reopening for psychiatric treatment necessarily includes treatment and reevaluation of the physical manifestations. Therefore, I would affirm the Referee's order that requires reopening of the claim, but would add that the reopening necessarily includes the physical manifestations.

MARQUETTA G. DAY, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06456
August 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests Board review of Referee Seifert's order which denied SAIF's motion to dismiss claimant's request for hearing and remanded the claim to SAIF for "action" pursuant to ORS 656.268.

Claimant, a dryer feeder at Glendale Plywood, gradually began experiencing pain and numbness in both arms in 1978. On October 26, 1978 claimant filed a claim alleging a cervical injury. Bilateral carpal tunnel syndrome was diagnosed. SAIF accepted the claim and provided the claimant with appropriate medical benefits and time loss compensation. Claimant was eventually found to be medically stationary on November 5, 1979. SAIF accordingly submitted the claim for closure, and a Determination Order issued on December 5, 1979 allowing claimant benefits for temporary total disability and 10% permanent partial disability for loss of the right forearm and 5% for loss of the left forearm.

On December 14, 1979 Dr. Emori submitted a report to SAIF in which he stated that he felt claimant's carpal tunnel problems were related to rheumatoid arthritis, and not her work. Based on Dr. Emori's report, SAIF issued a letter of denial on January 14, 1980. Claimant requested a hearing, which was held on January 21, 1981 before Referee Daron. Referee Daron reversed SAIF's denial and ordered:

"Claimant's claim for bilateral carpal tunnel syndrome resulting from compensable injuries from her employment at Glendale Plywood Company is remanded to the SAIF Corporation for reacceptance of her claim and for payment of all worker's compensation benefits to which she is entitled including, but not limited to, medical services which have not yet been provided or paid for and the permanent partial disability awards previously granted to her."

Following Referee Daron's decision, SAIF submitted a form 1502 to the Workers Compensation Department, commenting that the form was being submitted for administrative purposes since the claim had been closed by Determination Order previously, that SAIF had received no medical reports since that time, and that the Referee's order only related to acceptance of the claim. On June 3, 1981 SAIF sent letters to Drs. Emori and Saez, and the Rogue Valley Memorial Hospital requesting submission of any unpaid medical bills for payment. On June 25, 1981 SAIF wrote to claimant's former attorney, indicating that the Determination Order's award was paid and that although the Referee's order remanded the claim for acceptance, that the claim had already been processed to closure and that nothing remained for SAIF to do other than to pay the attorney fee. SAIF indicated that, if the claimant felt the need for additional treatment, medical reports to that effect would be necessary.

On July 15, 1981 claimant's present attorney filed a request for hearing alleging failure on the part of SAIF to comply with Referee Daron's order in not resubmitting the claim for closure. Referee Seifert, relying on Brown v. Balzar Machinery Co., 20 Or App 144 (1975), ruled:

> "Where a claim is reopened, a claimant is entitled to claim closure pursuant to ORS 656.268. . . . Notwithstanding that a determination of disability had been made in the instant case, the claimant is entitled to closure pursuant to ORS 656.268 once the claim is reopened."

Claimant contends that the language of Referee Daron's order required SAIF to reopen the claim, and to submit the claim to the Evaluation Division for closure once again, pursuant to ORS 656.268, and that by failing to do so, SAIF is in defiance of that Referee's order. SAIF contends that Referee Daron's order did not order the claim reopened, but only accepted, that SAIF had already paid everything relating to the claim prior to the hearing, and that there was nothing to do or pay under Referee Daron's order other than claimant's attorney's fee. SAIF argues that under these circumstances it was not required to reopen the claim and resubmit it for closure. We agree with SAIF.

It is evident from Referee Daron's order that the only issue before him was the compensability of claimant's carpal tunnel syndrome. Referee Daron framed the issue as follows: "Was claimant's carpal tunnel syndrome, * * * a compensable injury resulting from claimant's work activities . . .?" There was no question concerning aggravation and no issue was raised with regard to the December 5, 1979 Determination Order concerning either extent of disability or premature claim closure. Claimant does not take issue with SAIF's assertion that it paid claimant everything that it was ordered to pay under Referee Daron's order. It is difficult to perceive just what claimant hoped to gain at the hearing before Referee Seifert. The claim had been previously accepted and processed to closure. Claimant had received all benefits which she claimed prior to this hearing before Referee Seifert. Referee

Daron's prior order merely served to reestablish the compensability of the claim. He ordered the claim accepted and remanded it to SAIF for payment of benefits including, but not limited to, benefits unpaid under the previous Determination Order, and medical services. Referee Daron did not order the claim processed under ORS 656.268 and did not expressly or impliedly order the claim reopened, as there was no such issue before him. Indeed, such an act would have been a nullity since the claim had been fully and completely processed.

All benefits which the claimant requested have been paid, and her claim is in an accepted status. Referee Seifert's reliance on Brown is misplaced as that case is factually distinguishable from the present case. Referee Daron's order did not order the claim reopened, but reaccepted, and an order of reacceptance is not to be confused with or equated to an order to reopen a claim.

ORDER

The Referee's order dated March 12, 1982 is reversed.

NORMAN R. DeWITTE, JR., Claimant
John Unwin, Attorney

Claim # CV-0141300
August 30, 1982
Order--Crime Victims Act

Reviewed by Board Members Ferris and Barnes.

Claimant, pursuant to ORS 147.155, by letter of March 24, 1982, requested a hearing before the Workers Compensation Board, appealing the Order on Reconsideration issued by the Department of Justice, Crime Victims Compensation Fund. The hearing was subsequently waived by both parties, and the matter was submitted based upon the record.

The Department's unchallenged findings of fact established the following. The claimant was an innocent victim of an unprovoked criminal assault by gun in Bend on November 17, 1981. Claimant suffered serious injury (gunshot wound to the face), necessitating extensive medical care and treatment. Claimant's assailant was apprehended, tried by jury and convicted of first degree assault. On the date of the injury, claimant was receiving $42.00 per week in unemployment compensation benefits, and such benefits were interrupted by the injury because of claimant's resulting inability to work. Claimant was disqualified from public welfare assistance benefits.

The Department found that claimant met the requirements of ORS 147.005 to 147.365, that claimant was eligible for $42.00 per week in time loss benefits for the period of his disability and for medical benefits not exceeding a maximum amount of $10,000, and that he was eligible for a waiver of the statutory $250 deductible. By letter of February 24, 1982 the claimant requested reconsideration of that portion of the order which found him entitled to benefits equal to $42.00 per week. Claimant argued that although he was unemployed at the time of his injury, he was

scheduled to be rehired by his former employer in November 1981 to work on the employer's Sun River project. Claimant submitted a letter from his former employer dated February 26, 1982 that stated various problems necessitating claimant's layoff in October 1981, but that it was the employer's intention to reemploy the claimant in November of 1981. On reconsideration, the Department found that as late as November 17, 1981, claimant had not been rehired, and there was no evidence that he would have returned to work had it been available.

ORS 147.035(1)(a)(B) provides that compensable losses include: "Loss of earnings, not exceeding $200 per week up to a maximum of $10,000" (emphasis added). We do not interpret the words "loss of earnings" in that statute to necessarily mean that the only compensation a crime victim is entitled to receive is the compensation he was receiving on the date of the crime. Under the proper circumstances and given the proper evidentiary support, we believe a claimant may establish entitlement to compensation beyond that which he was receiving at the time of his injury.

Absent compelling circumstances, however, we see no reason to depart from the general concept of allowing benefits in an amount equal to that which the claimant was receiving on the date of his injury, limited by the statutory maximums. In this case, as already noted, it was November 17, 1981 when the claimant was injured, and he still had not been reemployed. There is nothing in the employer's letter to indicate that the project for which he intended to rehire the claimant was ever reactivated following its supposedly temporary termination. There is no certain date given by the employer of the initial rehire date in order to allow for the proper calculation of benefits were it found that claimant was so entitled. Under the circumstances, we conclude that provision of benefits beyond that which claimant was receiving on the date of his injury would be speculative based on the evidence submitted.

ORDER

The order of the Department of Justice dated January 15, 1982 and Order on Reconsideration dated March 18, 1982 are affirmed.

DICK HAYNES, Claimant
Cowling, Heysell et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10241
August 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation seeks Board review of Referee Mongrain's order which granted claimant compensation for 17 1/2% loss of the right forearm (wrist). SAIF contends the 5% award granted by the most recent Determination Order should be affirmed.

SAIF argues two major points in its briefs. It first contends that, based on Olive B. Lyons, 23 Van Natta 188 (1981), "reliance on a claimant's testimony is not permissible unless the record contains medical evidence to support some permanent impairment." The Lyons case has since been reversed by the Court of Appeals, 56 Or App 594 (1982). Also, claimant's treating physician does indicate that there is some permanent impairment in claimant's wrist, although apparently minimal.

SAIF also argues that the Referee failed to show that the Evaluator's Worksheet was in error. We have previously rejected that line of reasoning. See Michiel Harth, 34 Van Natta 703 (1982). In connection with this point, SAIF indicated the Referee should have used the guidelines in OAR 436-65-600. We have considered claimant's complaints in light of those guidelines and would conclude that the Referee's award, although slightly high, is appropriate.

ORDER

The Referee's order dated March 19, 1982 is affirmed.

Claimant's attorney is awarded $150 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

MARLENE K. HEDGES, Claimant
Zafiratos & Roman, Claimant's Attorneys
Macdonald et al., Defense Attorneys

WCB 81-08013
August 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee James' order that affirmed the Determination Order dated July 20, 1981.

The only issue raised before the Referee was extent of permanent disability. The Referee concluded that claimant had not proven any permanent disability as a result of her March 24, 1980 industrial left foot and ankle injury. The only issue raised before the Board is extent of temporary total disability. We will generally not consider issues that were not raised before the Referee. See Russell v. A & D Terminals, 50 Or App 27 (1981).

ORDER

The Referee's order dated March 12, 1982 is affirmed.

WILLIAM HUGHES, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02959
August 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation requests review of Referee Seifert's order which remanded claimant's claim to it for payment of compensation and treatment from October 7, 1981 until termination pursuant to ORS 656.268. SAIF contends the fusion performed in November 1981 was not necessary and reasonable in the treatment of claimant's back condition.

The medical evidence in this case is divided. Drs. Fagan, Smith, Berkeley and Cherry recommended claimant undergo a back fusion. The Orthopaedic Consultants and Dr. Holland, a psychiatrist, disagreed. We are not persuaded that every avenue of conservative treatment had been tried in an effort to avoid a fifth surgical procedure. The option presented by claimant at the hearing seemed most feasible. Claimant agreed to attend the Pain Clinic if SAIF, after completion of the program, would act according to the Pain Clinic's recommendation regarding future surgery. SAIF would not agree. Based on the record before us, we agree with the Referee that claimant's fusion performed on November 5, 1981 should be SAIF's responsibility.

ORDER

The Referee's order dated January 13, 1982 is affirmed. Claimant's attorney is awarded $500 as and for a reasonable attorney's fee, payable by SAIF.

LARRY F. JONES, Claimant
Olson, Hittle et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-05467
August 30, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The employer requests Board review of Referee Johnson's order which granted claimant an award of 112° for 35% unscheduled low back disability. The employer contends that the award granted is excessive.

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

We agree with the employer that the award granted is excessive. Claimant is 39 years of age with a high school education. The medical evidence is silent on impairment of function. It is quite clear, however, that claimant now has work restrictions which preclude any form of heavy manual labor. Claimant is capable of performing work that does not require the strenuous use of his back.

Based on the record before us and utilizing the guidelines set forth in OAR 436-65-500 et seq., we conclude that claimant would be adequately compensated for his loss of wage earning capacity by an award of 25% unscheduled disability.

ORDER

The Referee's order dated April 22, 1982 is modified. Claimant is hereby granted an award of 80° for 25% unscheduled low back disability. This award is in lieu of all prior awards. Claimant's attorney fee is adjusted accordingly.

WILLIAM W. McKENNEY, Claimant
Merten & Saltveit, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-11397, 80-11444 & 80-01533
August 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests Board review of that portion of Referee Pferdner's Order on Remand which found claimant had failed to prove an aggravation of his April 9, 1976 injury and that he was not entitled to penalties and attorney fees for unreasonable resistance to the payment of compensation. Claimant contends that his current condition is the result of an aggravation of his April 9, 1976 injury or, in the alternative, that he is suffering from an occupational disease. He also seeks penalties and attorney fees.

We agree with the Referee on the aggravation and occupational disease issues. The issue of penalties was not discussed by the Referee. Claimant contends that he was entitled to interim compensation as a result of any one of several medical reports submitted to SAIF in October and December, 1980. None of these reports, however, advise that claimant should not work due to compensable conditions. In fact, the stronger implication in those reports is that claimant was still working and continued working until he was hospitalized on January 22, 1981. The denial was then issued on February 2, and no compensation was due under the law.

ORDER

The Referee's order dated January 27, 1982 is affirmed.

NORMAN MEYER, Claimant
J. Bradford Shiley, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 81-05329
August 30, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Neal's order which affirmed the employer's May 21, 1982 denial of claimant's aggravation claim.

The only issue is whether the claimant has established that his industrial back injury of January 7, 1980 was the material contributing cause of his aggravation of May, 1981, which occurred during a vigorous off-the-job game of racquet ball. Accordingly,

Grable v. Weyerhaeuser, 291 Or 387 (1981), is the controlling law. In Dean Planque, WCB No. 81-01379, 34 Van Natta 1116 (August 13, 1982), we interpreted Grable and related case law to stand for the proposition that off-the-job activities on the part of a claimant which result in further injury to the same portion of the body as the original industrial injury become an independent, intervening cause, breaking the chain of causation from the original compensable injury, if the activities can be characterized as unreasonable under the circumstances.

Would it be reasonable for a person who has sustained a back injury, and who is still suffering symptoms from that injury, to engage in vigorous physical activity which involved his back, such as a game of racquet ball? We think not. Alternatively, we agree with the Referee's analysis, that claimant has failed to establish from a medical standpoint, that his original injury remained the material contributing cause of his worsened condition.

ORDER

The Referee's order dated April 13, 1982 is affirmed.

RICHARD D. MINSHALL, Claimant WCB 81-04498
Richardson, Murphy et al., Claimant's Attorneys August 30, 1982
SAIF Corp Legal, Defense Attorney Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests Board review of Referee Leahy's order which upheld the SAIF Corporation's denial of his aggravation claim.

The facts are rather simple. Claimant sustained a compensable lumbosacral sprain in April of 1977. That claim was closed in April of 1978 by Determination Order that awarded 32° for 10% unscheduled permanent partial disability. Over the next few years claimant performed fairly heavy work on a ranch he operated in Goldendale, Washington. In March of 1981 claimant was examined by Dr. Parsons who reported that claimant may have a possible protruded lumbar disc. Even though this diagnosis has not been confirmed, Dr. Parsons opines that claimant's suspected disc problem is causally related to claimant's 1977 industrial injury.

Dr. Parsons offers little in the way of explanation to support his opinion. Claimant argues that Dr. Parsons' opinion should nevertheless be found persuasive because there is no history of any additional back injury after 1977. We confronted a similar question in Richard R. Miller, 34 Van Natta 514 (1982):

"The flaw, as we see it, is that neither Dr. Shaw, nor the claimant nor the Referee ever defined what was meant by new 'injury.' The Court of Appeals has twice recently ruled that the act of driving a bus or van without any accident or other identifiable trauma can cause a disc herniation. Valtinson v. SAIF, 54 Or App 503 (1981); Hamel v. SAIF, 54 Or App 503 (1981). In Hamel the court quoted from a doctor's report:

> '. . . ruptured discs are known to occur in people who have no good history of trauma, that is injury. The simple act of turning over in bed or bending over to pick up a handkerchief off the floor might well result in a herniated disc.' 54 Or App at 506.

and concluded 'relatively minor activity can trigger the herniation of a vertebral disc.' 54 Or App at 508. Indeed, one of the possible causes of disc herniation suggested by Dr. Shaw in this case is coughing from a respiratory infection claimant suffered following his January, 1980 surgery.

"Dr. Shaw, claimant and the Referee not having defined 'injury,' we assume they were using the term in the ordinary sense of an identifiable trauma. Vertebral discs can herniate without identifiable trauma, as the Court of Appeals concluded happened in Valtinson and Hamel. For this reason, claimant's reliance on the lack of any 'injury' between January, 1980 and June, 1981 means little or nothing."

The same analysis is applicable in this case. Vertebral discs can herniate without identifiable trauma and, therefore, claimant's reliance on the lack of any new back "injury" between April of 1977 and March of 1981 means little or nothing. Indeed, this is even more true here than it was in Miller because of the longer interval involved and the heavy nature of claimant's ranching work during that interval.

For all of these reasons, we are not persuaded by Dr. Parsons' opinion.

ORDER

The Referee's order dated February 12, 1982 is affirmed.

TIMOTHY J. PURDUE, Claimant
Malagon & Velure, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-02185
August 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant seeks review of Referee Shebley's order which affirmed the date set by Determination Order for closure, awarded 10% unscheduled permanent disability, and allowed an offset against the permanent disability award for the temporary disability paid to claimant after the closure date.

The issues are premature closure, or in the alternative, extent of permanent disability. Claimant argues that he was not medically stationary on the date found by the Determination Order and affirmed by the Referee, and that he is entitled to a greater award of disability than that awarded by the Referee. Although the insurer did not cross-request review, in its brief the insurer seems to argue that claimant is not entitled to any award of permanent disability whatsoever. We find it unnecessary to address the issue of extent of disability because we conclude that the Referee erred in finding that claimant was medically stationary.

We adopt the Referee's statement of facts as our own. In summary, those facts are that in 1975 while working for the employer's predecessor in interest, claimant developed an allergy to the glue used in veneer manufacture. In 1979, after becoming re-employed pulling green chain for the employer, claimant's allergy became symptomatic again. Claimant filed a claim for compensation benefits indicating an onset date of August 24, 1979. The insurer accepted the claim. Apparently claimant continued working for a while, only taking off as much time as necessary during a period in which physicians were attempting to determine the substances which precipitated the allergic reaction. Eventually claimant was off work for a couple of months and then made trial attempts to return to work. Claimant was ultimately advised by his physician not to return to the lumber mill because of his hypersensitivity to a variety of substances used there. The claim was submitted for closure. The Evaluation Division issued a Determination Order dated February 27, 1980, awarding time loss from August 26, 1979 through November 14, 1979.

As noted by the Referee, on the critical issues of whether and when claimant was medically stationary, and extent of permanent impairment, there is a dearth of evidence in the record. One doctor checked a box on a form indicating that claimant will have permanent impairment. This physician neither explained that conclusion in any way nor rated extent of impairment, perhaps appropriately since, on that same form, he indicates that claimant is not medically stationary. Another doctor indicates in his report that claimant will not have any permanent impairment, but states that claimant should not return to the lumber mill and should retrain for another type of work. In that same report, however, the doctor indicates that claimant is disabled for a period of ten days to two weeks and that claimant is not medically stationary. Perhaps the greatest mystery in this case is the medically stationary date selected by the Evaluation Division -- November 14, 1979 -- since claimant's doctor examined him on November 15, 1979 and specifically found claimant not to be medically stationary at that time.

From this morass of inconsistent information the Referee apparently inferred claimant was medically stationary on November 14, 1979, for lack of a better date. He reasoned that claimant had failed to prove entitlement to further time loss, therefore had failed to prove that he was not medically stationary. We believe this somewhat misstates the law. Under ORS 656.268 a claim may be submitted for closure only when the claimant has become medically stationary. In this case, the only medical report indicating that claimant is medically stationary, contradictorily, also indicates that claimant is in need of further treatment and will be disabled for a period of ten days to two weeks. Under these circumstances the claim was submitted for closure prematurely.

Where premature closure is the issue, it is not necessary for the claimant to prove when he did become medically stationary, merely that he was not medically stationary prior to the time the claim, in fact, was closed. Berliner v. Weyerhaeuser Co., 54 Or App 624 (1981), Austin v. SAIF, 48 Or App 7, 12 (1980). If it appears from the record that at some subsequent time the claimant became stationary, it is appropriate for the Referee to establish the medically stationary date and rate extent of impairment. Where such evidence is not in the record, the remedy is to remand the case for further processing in accordance with ORS 656.268.

If all we had before us was a physician's report simply stating that claimant was not medically stationary with no explanation, we might agree that claimant had failed to discharge his burden of proving premature closure. Austin v. SAIF, supra. However, here we have the report of a physician who examined and treated claimant in January, 1980 for the same condition. It may be that claimant was stationary at that time and was merely evidencing what has become a chronic condition, Harmon v. SAIF, 54 Or App 121 (1981), but under this record we are satisfied that in November, 1979, claimant was not medically stationary.

In light of our disposition of this case, we do not address when claimant's entitlement to time loss ceased, whether there is an overpayment of time loss, or the extent of claimant's permanent disability. Hopefully, a remand of the case will result in obtaining more consistent and cogent medical reports.

ORDER

The Referee's order dated March 11, 1982 is reversed. The Determination Order dated February 27, 1980 is set aside. Claimant's claim is remanded to the insurer for further processing and payment of compensation in accordance with law until closure under ORS 656.268. Claimant's attorney is awarded as and for an attorney's fee 25% of any additional temporary total disability paid to claimant, up to $1200, for his services at the hearing and before the Board.

RANDALL W. ROSS, Claimant
Malagon & Velure, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-06189
August 30, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests Board review of that portion of Referee Howell's order which failed to grant him compensation for permanent disability resulting from his allergic reaction.

Claimant has an accepted claim as a result of his allergic reaction to fiberglass. When he works with fiberglass he has symptoms of hives, muscle ache, tightness in the throat and swollen lips. He is asymptomatic as long as he avoids contact with fiberglass. The issue is whether claimant has sustained any permanent disability or loss of wage earning capacity.

The medical evidence is not clear on this issue. Dr. Jacobson indicated that claimant had no permanent impairment "other than that he may possibly redevelop symptoms upon re-exposure." He did, however, recommend claimant return to modified work in order to avoid fiberglass insulating materials. We find claimant is precluded from a definite, although small, portion of the labor market. He has shown a loss of wage earning capacity caused by the need to avoid fiberglass materials. Claimant is entitled to a minimal award of permanent partial disability.

ORDER

The Referee's order dated January 29, 1982 is modified. Claimant is hereby granted compensation equal to 16° for 5% unscheduled disability as a result of his allergic reaction.

Claimant's attorney is allowed a fee equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

MICHAEL STAHR, Claimant
Charles Paulson, Claimant's Attorney
Moscato & Meyers, Defense Attorneys

WCB 81-04523
August 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

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

After de novo review, the Board affirms the conclusion reached by the Referee. Claimant's right knee condition is the result of a flare-up of symptoms of a previously asymptomatic underlying condition. We are persuaded that claimant's work on November 17, 1980 caused the flare-up. We find that the exposure on November 17, takes the form of an injury based on Valtinson v. SAIF, 56 Or App 184 (1982). Claimant must merely show his work activity was a material contributing cause of his condition. This he has successfully done.

ORDER

The Referee's order dated February 17, 1982 is affirmed. Claimant's attorney is awarded $350 as and for a reasonable attorney's fee, payable by the insurer.

JAMES R. ALLISON, SR., Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05265
August 31, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation seeks Board review of Referee Pferdner's order which granted claimant an award of permanent total disability effective April 3, 1981.

Claimant has been employed as a construction carpenter for many years. On March 26, 1979 he injured his shoulders when the wind caught a sheet of plywood he was carrying, throwing him into a pile of lumber where he landed on the tip of his right shoulder. Claimant was seen by three doctors and initially treated conservatively. On June 1, 1979, Dr. Sulkosky, who became his treating doctor, performed one-inch resection surgery of the distal right clavicle. After recovery from that operation, Dr. Sulkosky felt claimant would not be able to return to the carpentry trade.

In October 1979 claimant was evaluated at the Callahan Center. They found considerable functional overlay with an overprotective attitude. Despite claimant's testimony at the hearing that he could not read or write, the Center found claimant had a reading vocabulary at the 7.2 grade level and a reading comprehensive score at the 5.2 grade level.

An arthrogram was performed and suggested that claimant had a rotator cuff tear. Claimant initially declined any surgical intervention. The claim was closed on May 13, 1980 with an award of 67.2° for 35% loss of the right arm (shoulder).

On October 8, 1980 claimant underwent repair of the torn rotator cuff.

On April 2, 1981 Dr. Sulkosky performed a closing examination. He indicated that subjectively claimant was completely disabled. The physical examination showed that claimant retained right shoulder flexion of 75° and abduction of 50° and active external rotation of 30°. The elbow had full range of motion. The doctor declared claimant medically stationary with disability in the moderate to severe category. Based on this examination, the claim was again closed by a Determination Order of May 14, 1981 with an award of 112° for 35% unscheduled right shoulder disability.

The claimant testified to significant disability and inability to use his right shoulder. We find, as did the Referee, that claimant's testimony of his limitations far exceed those reported by his treating physician.

The Referee concluded that claimant was permanently and totally disabled and stated:

> "Although there might be a field of endeavor in which claimant could find gainful and suitable employment were it not for the recession, numerous areas of endeavor are precluded because the market for one-armed workers is limited in the best of times. In view of the prevalent economic climate the Referee is unable to perceive any possibility of claimant obtaining suitable, gainful employment in the foreseeable future. . . ."

The Referee was in error in basing any award for a worker's loss of wage earning capacity on the economic stability or instability of the market place. A claimant must demonstrate his inability to sell his or her services on a regular basis in a "hypothetically normal labor market." Wilson v. Weyerhaeuser, 30 Or App 403, 408 (1977).

We conclude that claimant has not proven an entitlement to an award of permanent total disability. The objective medical findings standing alone do not warrant such a finding nor do they indicate a disability so severe as to justify an award of permanent total disability when considered together with the relevant social/vocational factors.

Based on the medical evidence, claimant's testimony which is supported by the medical evidence and the guidelines set forth in OAR 436-65-600 et seq., we conclude claimant has sustained a loss of wage earning capacity of 60% unscheduled disability.

ORDER

The Referee's order dated February 18, 1981 is modified.

Claimant is hereby granted an award of 192° for 60% unscheduled right shoulder disability. This award is in lieu of all prior awards.

Claimant's attorney's fee should be adjusted accordingly.

THOMAS BARONE, Claimant
Malagon & Velure, Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-05962
August 31, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer seeks Board review of that portion of Referee Johnson's order which granted claimant compensation for 80% unscheduled disability for an injury to his low back. The employer contends this award is excessive. The sole issue is claimant's extent of permanent disability.

We accept the facts as recited by the Referee.

Using the guidelines in OAR 436-65-600 et seq. we reach a different conclusion than did the Referee. Claimant's impairment has

been rated as mildly moderate to moderate. The most current objective findings (range of motion) would indicate a 17% rating. Considering claimant's surgery and complaints of constant pain in his back and leg, together with numbness and tingling in both legs, we reach an impairment factor of 35%. Claimant is 43 years old (+2 value) with a tenth grade education (+5 value). His job at the time of injury (laborer, cleaning boilers, etc.) has an SVP of 2 (0 value). He is restricted to light or sedentary work (+10 value). Claimant has a varied work background in steel work, welding, construction, truck driving, printing and auto mechanics. Considering his education, past work experience and restriction to light work, we determine claimant has 25% of the general labor market still open to him. A more appropriate award for claimant's loss of wage earning capacity would be 144° for 45% unscheduled disability for injury to his low back.

ORDER

The Referee's order dated February 10, 1982 is modified.

Claimant is granted compensation equal to 144° for 45% unscheduled disability for injury to his low back. This is in lieu of that granted by the Referee.

Claimant's attorney's fee should be adjusted accordingly.

ARMANDO BOLLETIO, Claimant
Olson, Hittle, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-00557
August 31, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The claimant seeks Board review of Referee Foster's order which granted claimant an award of 80° for 25% unscheduled low back disability.

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

Based on the medical and lay testimony, we find the Referee's award of 25% unscheduled disability is inadequate. Based on the medical evidence, the facts of this case and utilizing the guidelines set forth in OAR 436-65-600, et seq., we find claimant has suffered a 15% impairment. Claimant is 51 years of age (+8 value). He has an eighth grade education (+10 value). The SVP for his job as an aluminum sider is 4 (+3). Work restrictions now placed on claimant limit his physical capacity to sedentary work (+10). Claimant's I.Q. is average (0). The psychological/emotional findings are unremarkable. The labor market findings indicate that claimant's highest GED level is 3 and SVP is 7. Based on claimant's education, work background and limitation of sedentary work, we find he has 7% of the general labor market open to him (+9). Combining all the above factors, we conclude that claimant is entitled to 45% unscheduled disability.

ORDER

The Referee's order dated January 8, 1982 is modified. Claimant is granted an award of 144° for 45% unscheduled low back disability. This award is in lieu of all prior awards.

Claimant's attorney is awarded as a reasonable attorney fee a sum equal to 25% of the increased compensation granted by this order, not to exceed a total of $3,000, under the Referee's order and this order.

JUDITH H. BOOZE, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05930
August 31, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant seeks Board review of Referee Wilson's order which granted her compensation for 15% unscheduled disability and denied her request for additional time loss benefits. Claimant contends she is entitled to compensation for temporary total disability from June 22, 1981 through December 10, 1981 and an additional award for permanent partial disability.

We accept the facts as recited by the Referee.

Claimant was injured while working as a bus driver on December 4, 1978. The most recent Determination Order, dated June 10, 1981, found her condition was medically stationary on May 4, 1981. The medical evidence convincingly supports this date. Claimant then saw Dr. Satyanarayan once in June and once in July of 1981. He referred her to the Physical Therapy Department for instruction in relaxation techniques, balanced activity, rest regimen and exercise. Dr. Satyanarayan indicated claimant should not return to bus driving, but did not indicate that claimant could not work or that she was not medically stationary. Claimant's objective findings had not changed since the last closure. Dr. Satyanarayan finally determined she was medically stationary on December 10, 1981, after not having seen her since July of that year. The sole purpose for claimant's December 1981 visit to Dr. Satyanarayan was to get a report from him in anticipation of the pending hearing. Claimant has failed to show entitlement to compensation for temporary total disability from June 22, 1981 through December 10, 1981.

Claimant contends that because she is precluded from her former job as a bus driver, the award of 15% unscheduled disability granted by the Referee is inadequate. Claimant would have us believe that she also cannot return to cannery work or restaurant kitchen work. We are not persuaded. Claimant's objective physical findings are minimal, if any. We are persuaded, as was the Referee, that her complaints are real and disabling. However, they are minimal. She is 42 years old with a tenth grade education. Her work background is varied; in addition to the above, she has also done retail sales work. Most of her work background is in light to sedentary type jobs. Based on the guidelines in OAR 436-65-600 et seq., we concur with the 15% award granted by the Referee.

ORDER

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

KELLY P. BRITT, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Vincent A. Deguc, Defense Attorney

WCB 81-03458 & 81-04587
August 31, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of Referee Fink's order that awarded claimant compensation for temporary total disability between August 28, 1980 and April 14, 1981. This claim was processed by SAIF because claimant's employer was noncomplying. Because the noncomplying employer requested a hearing to contest compensability, the Referee also awarded claimant's attorney a fee payable by SAIF and collectable from the noncomplying employer.

SAIF challenges the Referee's awards of both time loss benefits and attorney fees.

We affirm and adopt that portion of the Referee's order on the temporary total disability issue. See also William Bunce, 31 Van Natta 546 (1981).

There are two components to the attorney fee issue, authority to award fees at all and reasonableness of amount. We previously addressed at least part of the authority problem in Mary E. Smotherman, 22 Van Natta 182 (1977): If it was not explicit in Smotherman, we now make it explicit that when a noncomplying employer requests a hearing on the compensability issue, then the claimant's attorney is entitled to be awarded an attorney fee payable in the first instance by the SAIF Corporation and ultimately collectable from the noncomplying employer.

In this case, the noncomplying employer withdrew the issue of compensability at the end of the hearing. This did not alter the Referee's authority to award a fee to claimant's attorney. See Edward M. Anheluk, 34 Van Natta 205 (1982).

Turning to the question of whether the $400 fee was excessive, despite some doubt created by a comment made by claimant's counsel at the beginning of the hearing, we find the amount to have been reasonable under all the circumstances.

ORDER

The Referee's order dated January 11, 1982 is affirmed. Claimant's attorney is awarded $500 for services rendered on Board review, payable by the SAIF Corporation and collectable from the noncomplying employer.

CLYDE V. BRUMMELL, Claimant
Richard A. Sly, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-05494, 78-09428, 79-06809 & 80-03709
August 31, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review and the SAIF Corporation cross requests review of Referee Fink's order that upheld SAIF's denial of claimant's occupational disease claim, granted claimant 15% unscheduled permanent partial disability on account of his 1979 back injury, granted claimant 30% loss of his right foot on account of his 1973 injury and concluded that claimant was not permanently and totally disabled from the combined effects of all compensable injuries and conditions.

We affirm and adopt those portions of the Referee's order rejecting claimant's argument that he is totally disabled, rating the extent of claimant's permanent partial unscheduled disability and upholding SAIF's denial of claimant's occupational disease claim.

On the issue of the extent of claimant's right foot disability, nothing in the medical evidence remotely suggests greater disability than the 10% loss of a foot awarded by the Determination Order dated July 5, 1978. And, as the Referee apparently did, we reject claimant's testimony as any persuasive basis upon which to base an award of greater disability. In awarding 30% foot disability, however, the Referee relied upon the testimony of claimant's wife and son that claimant experienced problems going up or down a ladder or jumping in and out of ditches, as well as "the law of Boyce v. Sambo's Restaurant," 44 Or App 305 (1980).

It is difficult to review the Referee's decision because the Referee did not explain what he regarded "the law of Boyce" to be. Since the facts giving rise to the Boyce decision, the Workers Compensation Department has adopted new administrative rules governing the rating of permanent disability. OAR 436, Division 65. Specifically, OAR 436-65-545 and OAR 436-65-548 now contain the standards relevant to determining disability of a foot/ankle. They are basically "mechanical impairment" standards adapted largely from the American Medical Association's Guides to the Evaluation of Permanent Impairment (1977), pp. 30-32. Boyce, however, states that "loss of use" within the meaning of ORS 656.214(1)(a) "does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration." 44 Or App at 308. Other than this definition by negation, Boyce does not elaborate on the statutory language, "loss of use."

We have never regarded the Department's rules on rating disability as the first, last and only word for each and every case, but we have always tried to specifically identify other factors that we have taken into consideration in rating disability. See e.g., Charles Hanscom, 34 Van Natta 34 (1982). We will proceed on that understanding of the interplay between the Department's rules and the Boyce analysis. The Department's "mechanical impairment" rules are relevant and should be considered in all cases; and, in any case in which a Referee or

the Board finds a "loss of use" not adequately covered by the Department's rules, that extra-rule factor should be specifically identified in the Referee's or Board's order. Hazel Ray, 34 Van Natta 1193 WCB Case No. 81-06183 (decided this date), illustrates application of this methodology.

Applying that understanding in this case, nothing in the record, the Referee's order or claimant's brief on Board review identifies any factor that suggests to us that claimant's right foot disability exceeds the 10% awarded by the July 5, 1978 Determination Order.

ORDER

The Referee's order dated October 22, 1981 is affirmed in part and reversed in part. That portion that awarded claimant 40.5° for 30% loss of his right foot is reversed and in lieu thereof the Determination Order dated July 5, 1978 is reinstated and affirmed. The attorney fee allowed claimant's attorney by the Referee should be adjusted accordingly. The remainder of the Referee's order is affirmed.

GEORGE B. CORDER, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
David Horne, Defense Attorney
Gary D. Hull, Defense Attorney

WCB 81-03644
August 31, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Industrial Indemnity requests Board review of Referee Mulder's order which found that claimant's occupational disease claim was compensable and the responsibility of Industrial Indemnity. This insurer contends that claimant's degenerative disc disease is not compensable at all and, alternatively, that Employer's Insurance of Wausau should be found to be the responsible insurer. We find the compensability issue dispositive and, therefore, do not reach the responsibility issue.

Two doctors have expressed opinions on the work-relatedness of claimant's disease. Their opinions are at opposite and extreme ends of the spectrum; we are not completely persuaded by either of them.

Dr. McMillian, a family practitioner and claimant's treating physician for about 18 years, feels that claimant's work activity was a material contributing cause of his disc disease. Dr. McMillian acknowledged the role that heredity, aging and everyday living can play in the causation of this type of degenerative disease. We infer that Dr. McMillian's experience in this area is limited because he refers patients with back problems to a specialist.

Dr. Rosenbaum, a rheumatologist, has the greater expertise. He attributes most, if not all, of claimant's degenerative disc disease to the natural aging process. Dr. Rosenbaum feels that, if it was a factor at all, claimant's work activity could have slowed down the progression of the disease.

The controlling criteria is whether claimant's work activity was the major cause of his disease. SAIF v. Gygi, 55 Or App 570 (1982). Dr. Rosenbaum finds no causal connection between claimant's work activity and his disease. Dr. McMillian finds only that claimant's work activity was a material cause of his disease. Even if we were completely persuaded by Dr. McMillian's opinion, claimant has not sustained the burden of proof required by Gygi.

ORDER

The Referee's order dated February 26, 1982 is reversed. Claimant's claim for occupational disease while working for Mayflower Farms is not compensable as to either Industrial Indemnity or Employer's Insurance of Wausau.

VICTOR F. KAUFMAN, Claimant
Welch, Bruun, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-2214
August 31, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Mannix's order which reversed its denial of claimant's psychological condition claim and awarded penalties and attorney's fees for failure to accept or deny the claim within 60 days or pay interim compensation within 14 days. Claimant cross-appeals the failure of the Referee to impose additional penalties for the insurer's unreasonable denial and for the failure to furnish a report as required by OAR 436-83-400(3).

The issues are compensability, and entitlement to penalties and attorney's fees on various grounds. We affirm the finding of compensability, modify the award of penalties and affirm the award of attorney fees related to the penalties.

Claimant was 55 years of age and had been a school teacher for 15 years at the time of the precipitating incident herein. In April, 1980, unknown to claimant at the time, one or two of his students allegedly smoked marijuana in his classroom. Several days later claimant was confronted by school officials regarding this incident. Claimant thought the incident was one that could happen to any teacher; the school officials thought claimant had been negligent. Claimant became very upset. Subsequently, the School Board placed a written reprimand in claimant's file and a "plan of assistance" was implemented whereby claimant was required to submit reports, have his classroom activities observed, and participate in frequent evaluation sessions. Participation in the evaluation sessions and preparation of the reports took up substantial portions of his regular teaching hours, interfered with his normal free periods for class preparation, and resulted in claimant devoting subtantially more time to his employment duties. Claimant took offense at these measures and instituted grievance procedures.

Claimant continued to teach for the remainder of the 1979-1980 school year and signed a contract for the 1980-1981 school year. The hearings on the grievance procedures were postponed until the fall term of the 1980-1981 school year. Those hearings culminated in a December 2, 1980 proceeding in which it was ordered that the letter of reprimand be removed from his file and the "plan of assistance" discontinued. The parties characterized the proceeding as having "exonerated" claimant.

Claimant is affected by a psychological condition diagnosed as a "cyclic mood disorder". Claimant intermittently had been under psychiatric treatment for this condition since 1976. Throughout the period from 1976 to April, 1980 claimant was able to function normally by taking maintenance-level doses of lithium. Beginning in April, 1980 claimant experienced a great deal of stress and increased the frequency of his psychiatric consultations. His psychiatrist increased the dosage of his medication (lithium) and prescribed other psychotropic medications. However, claimant continued working until the last day of the fall term, December 10, 1980, at which time, on the advice of his psychiatrist, claimant took a 60 day leave of absence.

Claimant filed a workers compensation claim on January 13, 1981. The blank for giving the date of injury or diagnosis was filled in erroneously as "2/10/80" instead of 12/10/80, apparently by the attorney representing claimant at that time. SAIF paid temporary disability for the period December 10, 1980 through March 9, 1981. The disability funds were paid in a lump sum to the School District in partial reimbursement of sick leave pay. Claimant was released by his physician and attempted a return to work on a trial basis on March 9, 1981. After one week of teaching claimant was unable to continue working. SAIF denied the claim on April 27, 1981.

At SAIF's request, claimant was examined by Psychological Consultants. This examination consisted of an interview of claimant by two psychologists and a physician, presumably a psychiatrist. Claimant was diagnosed by them as having moderate situational reactive depression and a cyclothymic personality. Psychiatric Consultants further opined that the April, 1980 classroom incident probably precipitated claimant's depression. In a subsequent report the Consultants wrote:

> "It would appear to us that Mr. Kaufman's difficulties existed for many years prior to his alleged job stress. But the job stress did precipitate some acute decompensation of the patient which required treatment by Dr. McCulloch."

At the hearing, claimant's treating psychiatrist, Dr. McCulloch, testified that the confrontation with school officials following the classroom incident and the ensuing corrective measures and grievance hearings exacerbated claimant's pre-existing cyclic mood disorder. Dr. McCulloch testified that neither viral infections, one of which occurred in December 1979 and another in December 1980, nor any other off-the-job events played a significant role in causing the need for medical services following the April 1980 incident or the disability in December, 1980.

In the course of the hearing itself it came to light that SAIF had an investigative report that it had not furnished to claimant's counsel despite a continuing request from claimant to be furnished with such documents. SAIF defended its failure to furnish the report on the ground that it intended to use it solely for purposes of impeachment.

In addition to finding the claim compensable, the Referee imposed a penalty for the insurer's failure to pay interim compensation within 14 days after the claim was filed and for failure to deny the claim in a timely fashion. The Referee declined to impose a penalty for SAIF's failure to furnish the report prior to the hearing.

I.

The insurer contends that if the claim is characterized as an occupational disease claim, the claim is not compensable under the standards of James v. SAIF, 290 Or 343 (1981), Walter J. Dethlefs, 31 Van Natta 169 (1981), and Robert Sanchez, 32 Van Natta 80 (1981). We note that the Board's "sole cause" test under Dethlefs and Sanchez has been supplanted by the the Court of Appeals' "major contributing cause" test in SAIF v. Gygi, 55 Or App 570 (1982). Alternatively, the insurer argues that if the claim is an industrial injury, it was not timely filed under ORS 656.265.

The Referee felt that the claim met the tests of compensability for both industrial injuries and occupational diseases. He indicated that if forced to choose, he would classify the claim as an injury because the claim involved a series of particular traumatic episodes during a discrete period of time -- April to December, 1980. We reach the opposite conclusion. We believe that the claimant's emotional condition was caused not only by the confrontations with school authorities but also the continuing assault on his professional respect and integrity from students, parents, and peers who were aware of the allegations and disciplinary measures, and the daily stress of complying with the "plan of assistance". The fact that claimant suffered emotional consequences from these circumstances cannot really be said to be unexpected. The claim more closely fits the definition of an occupational disease. See Clarice Banks, 34 Van Natta 689 (1982).

Applying the standards of James and Gygi, we find that any off-the-job stress encountered by claimant during the critical time period (April to December, 1980) was substantially different in kind and severity than the stress he encountered arising from his employment. Of the two other potential sources of stress identified by the insurer, the viral infections occurred outside the critical time period, and claimant's home life was more a source of relief during claimant's ordeal rather than a source of stress. Dr. McCulloch's file notes during this period indicate that the focus was on job-related stress, not other factors. We conclude that the stress from claimant's work exposure was unique and was at least the major contributing cause, if not the only cause, of the exacerbation of his emotional condition.

Arguably the Board's decision in Henry McGarrah, 33 Van Natta 584A (1981) is applicable to the issue of compensability. In that case we held that an adverse psychological reaction to normal and reasonable supervision was not compensable if the employee's conduct precipitating the supervision was outside the scope of employment. McGarrah was decided after the parties submitted their briefs in this case and we are not inclined to decide the case on the basis of an issue not raised on Board review. Even if we did, the facts in this case differ sufficiently from the facts of McGarrah that we would be hesitant to apply the rule. Lastly, even if we applied the McGarrah test, it does not appear that claimant engaged in conduct outside the scope of his employment or that the supervision to which claimant was exposed was "normal and reasonable" considering the alleged incident precipitating the disciplinary measures.

The insurer also argues that the claim is barred under ORS 656.265 for lack of timely filing. ORS 656.265 contains the filing time limits applicable to injury cases. As previously indicated, we believe the claim is more appropriately viewed as an occupational disease claim. Under ORS 656.807(1) the claim was timely filed.

II.

With respect to the issue of penalties and attorney's fees, the only reason advanced by the insurer in justification for its nonpayment of interim compensation and its late denial is that the 801 claim form on its face indicated that the claim was untimely filed, albeit erroneously as it turns out. The Court of Appeals has indicated that such factors are no defense to the failure to commence interim compensation or issue a denial in a timely fashion. However, the Court also has indicated that the period during which interim compensation is due begins on the date the insurer receives notice of the claim and ends on the date the denial issues. Likens v. SAIF, 56 Or App 498 (1982), Stone v. SAIF, 57 Or App 808 (1982). A penalty based upon the failure to begin interim compensation payments and failure to deny in a timely fashion is calculated as a percentage of the compensation due during the same period of time. Therefore, that portion of the Referee's order imposing a penalty must be modified to reduce the time period on which the penalty is calculated, to begin January 13, 1981 instead of December 10, 1980, and to end April 27, 1981, rather than June 29, 1981.

Our reduction of the period upon which the penalty is to be calculated requires us to consider an additional issue: whether claimant's attorney is entitled to an attorney's fee on Board review when the claimant successfully defends an issue of compensability, but the Board reduces or disallows a Referee's assessment of a penalty. In Zelda M. Bahler, 33 Van Natta 478, 482 (1981), the Board considered whether, under ORS 656.382(2), the Board's reduction of a penalty is a reduction of compensation. The Board concluded that it was and held that "to qualify for a carrier-paid attorney fee under ORS 656.382(2), the claimant's attorney must successfully defend on Board review the

entire Referee's order." Zelda M. Bahler, supra, 33 Van Natta at 483. See also Barbara Beattie, 34 Van Natta 483, 34 Van Natta 484 (1982). The Board has also applied this rationale in refraining from awarding an attorney's fee on Board review when a Referee's award of an attorney's fee is reduced by the Board and the Board affirms the Referee's order on all other issues raised by an insurer/employer's request for review. See, e.g., Melba D. Hampton, 34 Van Natta 493 (1982). Two recent Court of Appeals decisions require reconsideration of the Board's interpretation of ORS 656.382(2) as expressed in Bahler.

In Mobley v. SAIF, 58 Or App 394 (1982), claimant appealed from the portion of the Board's order reducing the attorney's fee awarded by the Referee from $1,100 to $600 and appealed the Board's failure to grant claimant's attorney an attorney's fee for prevailing before the Board on the issue of compensability of claimant's groin injury, where the request for review was initiated by SAIF. The court did not modify the Board's reduction of the attorney's fee awarded by the Referee; however, the court found that the Board's reduction of the attorney's fee awarded by the Referee had no effect upon counsel's entitlement to an attorney's fee on Board review pursuant to ORS 656.382(2).

In Teel v. Weyerhaeuser Company, 58 Or App 564 (1982), claimant appealed a Board order which failed to award an attorney's fee on Board review where the Board had upheld the Referee's finding of compensability but vacated the Referee's assessment of a penalty. Because claimant prevailed before the Board on the employer-initiated request for review on the issue of compensability, the court remanded the case to the Board for an award of a reasonable attorney's fee for services rendered on Board review.

Reading these two decision together, we find the rule to be that in cases arising under ORS 656.382(2), when an insurer or self-insured employer requests Board review, claimants' attorneys will be compensated for services rendered in connection with those issues on which the claimant prevails before the Board but not those issues on which claimant does not prevail. To the extent that our holding in Zelda M. Bahler, supra, and its progeny is to the contrary, it is expressly disavowed.

Applying this interpretation of ORS 656.382(2) to this case, we find that claimant's attorney is entitled to be compensated for services rendered on review in connection with the issue of the compensability of claimant's psychological condition and not for services rendered in connection with the penalty issue, inasmuch as the Board has reduced the penalty imposed by the Referee.

We agree with the Referee that under the law then existing, the insurer's denial itself was not unreasonable; therefore, we agree that no penalties are due for "unreasonable denial." We also agree with the Referee that SAIF's failure to furnish a copy of an investigation report, even if objectionable under OAR 436-83-400(3), was a de minimus violation.

ORDER

The Referee's order dated June 30, 1981 is modified in part. SAIF shall pay to claimant a penalty equal to 25% of the interim compensation due claimant for the period January 13, 1981 through April 27, 1981. In all other respects the order is affirmed.

Claimant's attorney is awarded $400 as and for a reasonable attorney's fee for services before the Board, to be paid by the insurer in addition to and not out of claimant's compensation.

CHAIRMAN BARNES DISSENTING:

The majority concludes that claimant had an adverse psychological reaction to the disciplinary and remedial measures his supervisors initiated when they had at least probable cause to believe he had permitted his students to consume illegal drugs in the classroom. I agree. The majority finds this employment related stress to have been the major cause of his subsequent disability. I agree. But those findings are insufficient to establish the compensability of this claim.

In my opinion, this claim is not compensable under our prior decision in Henry McGarrah, 33 Van Natta 584A (1982). The majority mentions McGarrah in passing, but is not really willing to come to grips with any real analysis of it.

In McGarrah we ruled that an adverse psychological reaction to reasonable and normal supervision is not compensable because, by the very definition of the employment relationship, an employer is entitled to control an employe. In McGarrah, for example, the claimant's adverse psychological reaction to the employer transferring him from day shift to night shift was not held compensable. Exactly the same situation is presented here. Upon learning that claimant may have committed a major breach of his duties as a school teacher, the employer properly discharged its duties to all students and their parents, if not its duties under the criminal laws, by initiating disciplinary action against claimant. Just saying, as the majority does, the facts in this case differ from the facts in McGarrah does not make it true, especially when the majority is not willing to identify the factual differences.

There is one possible distinction -- the grievance proceeding that resulted in claimant being "exonerated." However, this record contains virtually no information about that proceeding. Probably because of this void in the evidence, I do not understand the majority to attach any special weight to that outcome in finding this claim compensable. And if the outcome does not matter, it would seem to necessarily follow that the majority would find this claim compensable even if the outcome had been a finding that claimant permitted or even encouraged his students to ingest illegal drugs at school. Such a result would be, in my opinion, a perversion of the workers compensation system.

I submit that the outcome of the grievance proceeding is irrelevant for a very different reason. Our analysis in McGarrah focused on reasonable and normal supervision. It is reasonable for an employer to invoke disciplinary and remedial measures when the employer has probable cause to believe an employe has, by action or inaction, committed a serious breach of the employe's duties. That observation has to be even more obvious when the employer, as in this case, is a School District with a myriad of duties to students, parents and the district taxpayers. I find absolutely no basis in this record for concluding that the employer had other than an abundance of probable cause to initiate disciplinary action against claimant; I thus find no basis for concluding that the acts of supervision that caused claimant's psychological disability were other than reasonable and normal.

Since I would find McGarrah applicable and dispositive, I respectfully dissent.

DELFINA P. LOPEZ, Claimant
Allen, Stortz et al., Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 81-06459 & 82-02139
August 31, 1982
Interim Order

This case involves two claims arising out of a single injury incurred in December, 1979. In WCB Case No. 81-06459 the insurer has requested review of Referee Shebley's March 3, 1982 order which found claimant permanently and totally disabled as of May 30, 1981. In WCB Case No. 82-02139 the insurer has requested review of Referee Baker's July 2, 1982 order which set aside a denial issued by the insurer subsequent to Referee Shebley's order, denying the compensability of claimant's back condition. Referee Baker's order also ordered the insurer to comply with Referee Shebley's order awarding claimant permanent total disability, imposed a penalty for the insurer's unreasonable delay and resistance for failure to pay compensation pursuant to Referee Shebley's order and awarded claimant's attorney an insurer-paid attorney's fee.

The insurer has moved the Board to remand both claims to a Referee pursuant to ORS 656.295(5). In WCB Case No. 81-06459 the insurer's request for remand is based upon an allegation that claimant and her physician perpetrated a fraud upon the insurer, which prevented the insurer from properly investigating the claim. The insurer maintains that the facts disclosed at the hearing before Referee Shebley led to the discovery of information which was not obtainable prior to that hearing in the exercise of due diligence. The insurer seeks to have the case remanded for another hearing in order to present further evidence arising out of the insurer's further investigation of the claim, which occurred subsequent to Referee Shebley's hearing and led to the denial of claimant's back condition. The insurer's request for remand in WCB Case No. 82-02139 sets forth numerous grounds, including an allegation that "[t]he failure to grant remand or to otherwise act to stop the payment of compensation will result in irreparable harm to carrier and employer."

The insurer has also moved to combine or consolidate claims for purposes of Board review. The claimant objects request for remand in both claims, as well as the insurer request for consolidation.

The Board defers ruling on the insurer's motion to remand WCB Case No. 81-06459 and WCB Case No. 82-02139 until the time of Board review. The insurer's motion to consolidate is granted. All further documentation generated by the Board or the parties shall be identified by both WCB Case No. 81-06459 and WCB Case No. 82-02139.

The insurer filed its appellant's brief in WCB Case No. 81-06459 in accordance with the briefing schedule established by the Board pursuant to the insurer's request for review. Prior to the time for submission of claimant's respondent's brief, the insurer filed its motion to remand. No respondent's brief has been filed in WCB Case No. 81-06459. In WCB Case No. 82-02139 a transcript of the proceedings before Referee Baker has been made available to the Board and, presumably, to claimant's counsel, by the insurer. All issues arising under both case numbers are, therefore, ready to be briefed, if any further briefing is necessary. Since the issues in WCB Case No. 82-02139 appear to be essentially legal and procedural, and since the parties appear to have fully addressed the issues in the documents submitted to date, it would not seem that any further briefing is necessary in WCB Case No. 82-02139. In WCB Case No. 81-06459, claimant has not yet had an opportunity to submit a respondent's brief on the merits of Referee Shebley's order awarding claimant permanent total disability.

All issues that the parties wish to address to the Board for purposes of review of these proceedings shall be submitted according to the following schedule: the insurer's appellant's brief shall address the issues arising under WCB Case No. 82-02139, making any further argument deemed appropriate, and shall be submitted within fifteen days of the date of this order; the claimant's respondent's brief shall address the issues arising under WCB Case No. 81-06459 and any further argument addressing the issues arising under WCB Case No. 82-02139 as claimant deems appropriate, and shall be submitted within fifteen days of claimant's receipt of the insurer's appellant's brief; the insurer may submit a reply brief within seven days of its receipt of claimant's respondent's brief. If the insurer waives filing an appellant's brief, the claimant shall file her respondent's brief within fifteen days of claimant's receipt of the insurer's waiver, and the insurer will then be permitted seven days after its receipt of claimant's respondent's brief to file a reply brief, if deemed appropriate.

Upon receipt of all briefs, the cases will be docketed for review.

ORDER

The Board's ruling on the insurer's motion to remand is deferred. The insurer's motion to consolidate is granted. The parties shall submit their briefs in accordance with the schedule set forth above.

JEAN F. NYLIN, Claimant
Anderson, Fulton et al., Claimant's Attorneys
Macdonald et al., Defense Attorneys

WCB 81-06508
August 31, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee St. Martin's order that found she was not entitled to a greater award for unscheduled disability than the 56° previously awarded but was entitled to an increased award of 20% scheduled disability for loss of her left leg and allowed the SAIF Corporation to setoff its overpayment of temporary total disability against the increased scheduled disability award. Claimant challenges all aspects of the Referee's order, although her position on the setoff issue is far from clear.

Claimant suffered a severe compensable burn injury, primarily to her chest. In a series of surgical procedures, skin was taken from claimant's left thigh and grafted to her chest to repair the burn damage. Claimant's prior awards for unscheduled disability relate to her chest problems. The award of additional scheduled disability granted by the Referee relate to permanent loss of use at the left thigh donor site.

At the outset of the hearing, SAIF's attorney noted the overpayment and setoff issue. The Referee asked claimant's attorney: "Is there any controversy about the figure . . .?" Claimant's attorney responded: "No." Under these circumstances, we do not think claimant now presents any viable issue for review.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's orders dated March 31, 1982 and April 2, 1981 are affirmed.

HAZEL RAY, Claimant
Roll & Westmoreland, Claimant's Attorneys
Macdonald et al., Defense Attorneys

WCB 81-06183
August 31, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of Referee Seifert's order which granted claimant compensation for 50% loss of the right forearm (wrist) and 40% loss of the left forearm (wrist). SAIF argues these awards are excessive. The only issue is the extent of claimant's scheduled disability resulting from bilateral carpal tunnel syndrome.

Claimant has undergone surgery for her accepted carpal tunnel condition, twice on her right wrist and once on her left wrist. Her treating physician, Dr. Mohr, did not perform a closing examination. Instead, the closing examination was performed by Dr. Nathan who rated claimant's physical impairment at 15% of each wrist. A copy of Dr. Nathan's report was forwarded to Dr. Mohr who stated he agreed with it.

The November 19, 1981 Determination Order awarded claimant 10% loss of the right forearm and 5% loss of the left forearm. Just based on the results of the closing examination, that claimant's treating physician agrees with, we find this award is inadequate. The remaining question is what would be a more proper award.

Claimant testified about pain, numbness and loss of grip strength in both hands, worse on the right. Although Dr. Nathan's report of his closing examination is not completely clear, it appears that he considered most of claimant's complaints when he rated her impairment at 15% of each wrist. In increasing claimant's awards to 50% loss of the right wrist and 40% loss of the left wrist, the Referee cited only Boyce v. Sambo's Restaurant, 44 Or App 305 (1980), without much in the way of further analysis or explanation.

This case is thus similar to Clyde V. Brummell, 34 Van Natta 1183, WCB Case Nos. 78-05494, 78-09428, 79-06809 and 80-03709 (decided this date). In Brummell, which involved in part a scheduled ankle injury, we discussed the Boyce case as follows:

> "It is difficult to review the Referee's decision because the Referee did not explain what he regarded 'the law of Boyce' to be. Since the facts giving rise to the Boyce decision, the Workers Compensation Department has adopted new administrative rules governing the rating of permanent disability. OAR 436, Division 65. Specifically, OAR 436-65-545 and OAR 436-65-548 now contain the standards relevant to determining disability of a foot/ankle. They are basically 'mechanical impairment' standards adapted largely from the American Medical Association's Guides to the Evaluation of Permanent Impairment (1977), pp. 30-32. Boyce, however, states that 'loss of use' within the meaning of ORS 656.214(1)(a) 'does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration.' 44 Or App at 308. Other than this definition by negation, Boyce does not elaborate on the statutory language, 'loss of use.'
>
> "We have never regarded the Department's rules on rating disability as the first, last and only word for each and every case, but we have always tried to specifically identify other factors that we have taken into consideration in rating disability. See e.g., Charles Hanscom, 34 Van Natta 34 (1982). We will proceed on that understanding of the interplay between the Department's rules and the Boyce analysis. The Department's 'mechanical impairment' rules are relevant and should be considered in all cases; and, in any case in which a

> Referee or the Board finds a 'loss of use' not adequately covered by the Department's rules, that extra-rule factor should be specifically identified in the Referee's or Board's order."

In this case, involving scheduled wrist disability, the relevant administrative rules are as follows. OAR 436-65-520 governs impairment in the form of loss of motion. OAR 436-65-530(3) governs impairment in the form of disabling pain. OAR 436-65-530(1)(a)(i) and OAR 436-65-530(2)(a)(i) govern impairment in the form of sensory loss or sensory deficit, i.e., numbness. OAR 436-65-530(2)(b) and (c) and 436-65-530(5) govern impairment in the form of loss of grip strength.

As previously noted, aside from the question of to what extent claimant's complaints in her testimony at the hearing were considered by Dr. Nathan at the time of his closing examination, the only forms of impairment that claimant testified about involved disabling pain, numbness and loss of grip strength. And Brummell requires that forms of impairment other than those covered in the administrative rules be specifically identified in litigation orders on extent of disability. Here it would be impossible to identify any extra-rule factors; even accepting all of claimant's testimony, all forms of impairment here in question are covered by the administrative rules.

We turn to an application of those rules. We are aided in applying the rules by the American Medical Association's Guides to the Evaluation of Permanent Impairment (1977), from which the rules here in question were obviously derived. Table 4, at page 52, points out that the maximum award for pain and numbness in the median nerve distribution below the midforearm is 40% and the maximum award for loss of grip strength due to median nerve injury is 35%. These figures are combined, not added, producing a total maximum possible award of 61%.

(We appreciate that completely disabling pain requires a much higher degree of judgment in individual cases; we have found pain to be so severe as to warrant an award for 100% loss of an extremity, i.e., the same award as would be granted if the extremity were amputated; this has to be regarded, however, as a rare and exceptional circumstance.)

Given that the maximum possible award is 61%, subject to our qualification about disabling pain, we cannot agree with the Referee's awards of 50% and 40% in this case. Claimant obviously retains much greater use of her hands and wrists than those awards would indicate. The record contains no measurements of loss of grip strength. Claimant's description of that problem makes it sound like her loss probably is in the range of mild to mildly moderate, that is, that she retains 60% to 80% of normal grip strength. The record contains no medical description of the extent of numbness. Claimant's description of that problem makes it sound like it is intermittent, not constant.

One thing that is certain from claimant's testimony, and makes it difficult to uncritically accept Dr. Nathan's opinion of 15% loss in each wrist, is that her right wrist where she has had two operations is more impaired than her left wrist where she has had only one operation.

Considering all these factors, we conclude claimant would be more properly compensated with an award for 25% loss of the right forearm and 15% loss of the left forearm.

ORDER

The Referee's order dated December 15, 1981 is modified. Claimant is hereby granted compensation equal to 37.5° for 25% loss of the right forearm (wrist) and 22.5° for 15% loss of the left forearm (wrist). These awards are in lieu of those granted by the Referee's order.

Claimant's attorney's fee should be adjusted accordingly.

JOHN J. O'HALLORAN, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB n/a
September 1, 1982
Order of Abatement

The Board issued a Third Party Distribution Order herein on August 6, 1982. SAIF Corporation thereafter moved the Board for reconsideration of that order. In order to allow the Board an opportunity to consider the merits of SAIF's request for reconsideration, the Board's August 6, 1982 order is abated, and the appeal period provided by ORS 183.484 is hereby stayed.

SAIF Corporation is directed to submit a statement in affidavit form indicating the evidence that would be presented in a hearing if the Board either combined the issue of the proper distribution of the third party proceeds with the pending hearing concerning the extent of claimant's permanent disability or allowed an evidentiary hearing before the Board for purposes of presenting such evidence. Such affidavit, with any supporting arguments, shall be submitted to the Board within 15 days of the date of this order. Claimant is directed to respond to SAIF's affidavit and argument in any form deemed appropriate by claimant within 10 days of receipt of SAIF's submissions.

IT IS SO ORDERED.

GERALD H. HERRINGTON, Claimant
Anderson, Fulton et al., Claimant's Attorneys
Macdonald et al., Defense Attorney

WCB 79-07019 & 80-02462
September 3, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant seeks Board review of that portion of Referee Neal's order which failed to grant him compensation for permanent partial disability with the exception of a 35% award for loss of an eye. Claimant contends he has permanent impairment in his back, right arm, right leg, and groin in addition to disability due to headaches.

On de novo review, the Board affirms the conclusion reached by the Referee. Claimant raised an issue before the Referee concerning the proper distribution of the proceeds of a third-party recovery. The Referee properly found that she had no authority to rule on the third-party issue. See ORS 656.593. The Board will issue a separate Third Party Distribution Order in due course.

ORDER

The Referee's order dated January 11, 1982 is affirmed.

EDWARD KING, Claimant
Galton, Popick et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-00846
September 3, 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.

SHARON A. JONES, Claimant
Malagon & Velure, Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 82-02227
September 7, 1982
Order of Dismissal

Claimant has requested review of the Referee's August 13, 1982 Interim Order. Although the Referee's order contained an appeal notice, this order is an interim order and not a final order. It is, therefore, not reviewable by the Board at this time. Board review of the issues disposed of by the Referee's Interim Order will have to await entry of a final order disposing of all issues in this claim.

ORDER

Claimant's request for review is dismissed as premature.

VICTOR VANDERSCHUERE, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 82-0025M
September 7, 1982
Order to Show Cause

By Own Motion Orders dated July 22, 1982 and August 6, 1982 the Board ordered claimant's May 25, 1971 claim reopened effective December 8, 1981. By affidavit and motion dated August 27, 1982 claimant alleges he has received no compensation from the SAIF Corporation pursuant to the terms of the Board's prior Own Motion Orders.

NOW THEREFORE, the SAIF Corporation is ordered to show cause, if any exists, by written response filed with the Board within seven days of the date of this order, why penalties and attorney fees should not be assessed against it for noncompliance with the Board's prior orders.

WAYNE L. WEIR, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Black, Kendall et al., Defense Attorneys

WCB 80-09864
September 7, 1982
Order of Reconsideration

The Board issued its Order on Review herein on December 2, 1981. Claimant thereafter requested reconsideration, and the Board's Order on Review was abated by further order of the Board.

The Board issued its Order on Reconsideration on August 12, 1982. The employer has now moved the Board for reconsideration of that order.

The employer's request for reconsideration is granted, and on reconsideration the Board adheres to its former order of August 12, 1982.

IT IS SO ORDERED.

RAYMOND BALDWIN, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06011
September 10, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests Board review of Referee Knapp's order which found the July 10, 1980 Determination Order properly determined that claimant was medically stationary, but that claimant had permanent disability of 10% loss of use of the right forearm. The Referee denied all other relief claimant requested and allowed the SAIF Corporation to setoff a prior overpayment of temporary total disability against the additional permanent partial disability the Referee awarded.

Claimant argues that the July 10, 1980 Determination Order was premature or, alternatively, that his condition subsequently worsened and he is entitled to aggravation reopening; that his right forearm disability is greater than was awarded by the Referee; that SAIF should not be permitted to setoff its overpayment; and that penalties and attorney fees should be assessed.

The Board affirms and adopts the Referee's order with one exception. The Referee noted that no real aggravation claim had been made and: "There has been no opportunity for SAIF to consider the claim [nor] has the statutory 60 day allowance for acceptance or denial expired." Nevertheless the Referee proceeded to rule on the merits of the aggravation "claim" as if it had been denied in order to promote "finality of the hearing process."

The Referee's goal was laudable, but Syphers v. K-W Logging, Inc., 51 Or App 769 (1981), holds that in this kind of situation there is no jurisdiction to rule on the merits of a denial based on a request for hearing filed before any denial was issued.

ORDER

The Referee's order dated January 5, 1982 is modified to eliminate any decision on the merits of an "aggravation claim" and is otherwise affirmed.

WARREN CASEY, Claimant
John W. Hitchcock, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

Own Motion 81-0154M
September 10, 1982
Own Motion Order

The claimant, by and through his attorney, petitioned the Board for a claim reopening pursuant to the provisions of ORS 656.278 contending that his condition related to his 1968 industrial injury had worsened.

The Board referred this matter to the Hearings Division for a Referee to hold a hearing and to take evidence on whether claimant's current condition was related to his 1968 injury, his injury of September 22, 1980, or neither.

The hearing was held on October 5, 1981, and by an order of recommendation dated November 18, 1981, the Referee found the injury of September 22, 1980 to be a new injury and recommended that the claimant not be granted any disability compensation (claimant was self-employed and uninsured) either temporary or permanent. Following the Supreme Court's decision in Grable v. Weyerhaeuser, 291 Or 387 (1981) the carrier for the 1968 injury had voluntarily conceded payment for claimant's medical services.

After our review of the record, we find that the medical evidence is persuasive that the 1968 injury is a material contributing cause of claimant's worsened condition. Therefore, the claim should be reopened with compensation for temporary total disability commencing September 22, 1980 and until closure is authorized pursuant to ORS 656.278.

Claimant's attorney is granted, as and for a reasonable attorney's fee, 25% of the compensation for temporary total disability granted by this order not to exceed the sum of $750

IT IS SO ORDERED.

RALPH CROSS, Claimant
Doblie & Francesconi, Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 81-03964
September 10, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The employer requests Board review of Referee Johnson's order which granted claimant an award of 192° for 60% unscheduled disability. The employer contends that the award is excessive.

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

Based on the evidence presented, both lay and medical, and utilizing the guidelines set forth in OAR 436-65-600 et seq. we agree with appellant that the award granted is excessive. We agree with the Referee that claimant is not permanently and totally disabled.

We rate claimant's impairment, based on the medical documentation, as minimal to mild (+10). Claimant is 51 years of age (+8 value). He completed the ninth grade (+7 value). The SVP for his occupation is four (+3 value). The evidence reflects restrictions that allow claimant to physically perform light work (+10 value). The psychological/emotional factors are unremarkable. The labor market findings using the RFC, SVP and GED indicates no impact (0). Combining all of these factors we conclude claimant is entitled to an award of 112° for 35% unscheduled disability.

ORDER

The Referee's order dated February 11, 1982 is modified.

Claimant is hereby granted an award of 112° for 35% unscheduled disability. This award is in lieu of all prior awards. Claimant's attorney's fee is adjusted accordingly.

WILLIAM D. CROSS, Claimant
Rodriguez, Glenn et al., Claimant's Attorneys
James Larson, Defense Attorney

WCB 81-11483
September 10, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The claimant requests review of Referee Nichols' order which granted claimant an award of 5% unscheduled disability. Claimant contends that the award granted is inadequate.

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

We find from the medical evidence that the physicians involved generally agree that claimant has no identifiable or measurable impairment, only subjective complaints of pain. However, the physicians of record have placed significant work restrictions on claimant and he is now precluded from heavy manual labor, which is the only work he has performed. Assigning a value of +1 for impairment in the form of work restrictions and applying the social/vocational criteria as specified in OAR 436-65-600 et seq, we conclude that claimant is entitled to an award of 48° for 15% unscheduled disability.

ORDER

The Referee's order dated March 11, 1982 is modified.

Claimant is hereby granted an award of 48° for 15% unscheduled low back disability. This award is in lieu of all prior awards.

Claimant's attorney is allowed 25% of the increased compensation granted by this order as a reasonable attorney's fee, not to exceed $1,000.

RUSSELL HILDEBRANDT, Claimant
Charles Paulson, Claimant's Attorney
R. Kenny Roberts, Defense Attorney

WCB 81-00100
September 10, 1982
Order on Reconsideration

On May 21, 1982 we abated our order on review dated April 29, 1982 in order to allow for reconsideration of that portion of the order which refused to allow the employer authority to offset an overpayment of $3,542.28 against the claimant's increased award of compensation.

The Board refused to allow the employer authority to recover the overpayment on the grounds that it failed to present any evidence in support of its contention. As the employer has correctly pointed out however, the issue was raised in writing on August 19, 1981, and again in opening statements at the hearing, and claimant did not contest or dispute the fact of the existence of the overpayment or the amount. We conclude that we were incorrect in refusing to allow the employer the requested authority for recovery of the overpayment. Vida Hicks, 57 Or App 68 (1982), Daniel Ball 34 Van Natta 100 (1982).

The Board's order of April 29, 1982 is readopted and republished except for those portions of the order which refused to allow the employer authority to set off its overpayment of benefits, and the employer may take a set off in accordance with this Order on Reconsideration.

IT IS SO ORDERED.

GLEN V. JUBB, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-04666
September 10, 1982
Order on Review

Reviewed by the Board en banc.

The self-insured employer requests review of Referee Pferdner's order which set aside its denial of claimant's occupational disease claim for his respiratory condition.

We adopt the background facts as recited by the Referee. The critical facts are as follows. Claimant first saw a doctor for shortness of breath in 1979. The diagnosis was chronic obstructive pulmonary disease (COPD). All doctors since involved in treating or examining claimant generally agree that two distinct factors could have caused the disease. First, claimant smoked about one package of cigarettes per day for about 23 years, until around 1967, quit for about five years and then smoked the same amount again for one year before quitting again sometime around 1973. Second, claimant worked as a welder for Crown Zellerbach from 1951 to 1979. In that work he was exposed to various fumes; indeed, the initial 1979 doctor visit was due to symptoms following three days of welding inside a stainless steel tank.

Drs. Robins and Patterson have expressed opinions. From their various reports we conclude it is medically accepted that cigarette smoking is by far the most important cause of COPD, whereas welding fumes and their effects are still a matter of controversy. Dr. Robins nevertheless believes that claimant's COPD was in part aggravated by his work as a welder. Dr. Robins found it "interesting" that claimant stopped smoking several years before the onset of symptoms; if this was intended to mean that Dr. Robins thought tobacco was of secondary significance in the development of claimant's COPD, it certainly was a cryptic way of saying so.

Dr. Patterson, who had the benefit of testing performed by an industrial hygienist at the plant where claimant worked, concluded that claimant's cigarette smoking was largely, if not entirely, the cause of the disease. Dr. Patterson felt claimant's work as a welder was probably an additive factor in the development of his COPD.

The test in this occupational disease context is whether claimant's work was the major cause of his disease. SAIF v. Gygi, 55 Or App 570 (1982). We are convinced that both cigarette smoking and welding fumes contributed to causing claimant's COPD. However, we are not convinced that the work exposure was the major cause of his disease.

ORDER

The Referee's order dated January 28, 1982 is reversed. The employer's denial dated May 8, 1981 is reinstated and affirmed.

BOARD MEMBER LEWIS DISSENTING:

I would respectfully dissent. I cannot add anything to the Referee's well reasoned Opinion and Order and I would affirm and adopt and award an attorney's fee of $650 at the Board level.

JACK G. MAYSE, Claimant
Gary K. Jensen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10887
September 10, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant has requested Board review of Referee Shebley's order which found he was not entitled to compensation subsequent to a November 26, 1979 Determination Order and affirmed that Determination Order which did not award any permanent disability.

This case involves two issues: (1) Is the June 27, 1980 incident compensable as an aggravation of the July 1979 incident; and (2) If not, what is the extent, if any, of claimant's permanent disability?

We affirm the conclusions reached by the Referee, albeit for different reasons. Claimant's condition resulting from the July 16, 1979 industrial injury was a temporary worsening of his previously asymptomatic underlying Raynaud's syndrome. After a period of treatment, claimant's condition returned to its pre-injury level. The doctors involved have determined that claimant has no permanent impairment. However, he is to avoid working in cold weather and using vibratory machinery. Claimant has been told not to return to his regular job as a logger.

We are convinced that claimant's July 16, 1979 injury was a temporary worsening and that the condition resulting from that injury has entirely abated. The claimant has failed to prove that his Raynaud's Syndrome was caused or permanently worsened by his July 1979 injury. In the absence of such a showing, once the symptoms from the injury have abated, any new symptoms of the syndrome cannot be related to the 1979 injury. Thus, claimant's aggravation claim must fail.

For the same reason claimant is not entitled to compensation for permanent disability. Loss of wage earning capacity is not the issue here. Because his injury was to a scheduled body part, claimant must show a permanent loss of function due to the July 16, 1979 industrial injury. This he has failed to do.

ORDER

The Referee's order dated January 15, 1982 is affirmed.

DARRELD W. RAYL, Claimant
Doblie & Francesconi, Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys
Roger Warren, Defense Attorney

WCB 81-03255 & 81-03256
September 10, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer and its former insurer, Industrial Indemnity, request Board review and Employer's Insurance of Wausau, the employer's insurer at the time of claimant's original injury, cross-requests review of Referee Nichols' order which found claimant's compensable claim to be the responsibility of the self-insured employer, and ordered Wausau to pay a 10% penalty on compensation due claimant from the date of its denial letter and a $200 attorney's fee for unreasonable refusal to enter into an order pursuant to ORS 656.307.

The employer contends that the Referee erred in assigning responsibility to it for the claimant's current condition, and that responsibility for that condition properly rests with Wausau. Wausau contends that the Referee's finding on the responsibility issue was proper, and that it did not act unreasonably in failing to enter into an order pursuant to ORS 656.307, since claimant's aggravation rights had expired at the time of the filing of the aggravation claim.

We accept the Referee's findings of fact and adopt them as our own.

With regard to the issue of who is responsible for this claim, we agree with the Referee. The preponderance of the medical evidence indicates that claimant's most recent work activity (during the period that the employer was self-insured) materially contributed to the worsening of his condition, which resulted in his becoming disabled. Dr. Wong clearly indicates this in his deposition. Since this work activity has been identified as a material contributing cause of claimant's condition, it follows that, under the last injurious exposure rule, it contributed at least slightly. The Referee properly assigned responsibility for this claim to the self-insured employer.

Wausau's contention that it was not unreasonable in failing to enter into an order pursuant to ORS 656.307 and thus should not be subject to penalties and attorney fees is a more difficult question to resolve.

Claimant's original injury occurred on January 19, 1976. Wausau accepted the claim as a nondisabling injury and paid medical benefits on a continuous basis, apparently through at least 1980. Although claimant indicated that he lost some time from work during this period, he filed no claim. On February 18, 1981 claimant, through his attorney, filed a claim for aggravation/new injury. On March 4, 1981 Industrial Indemnity denied the claim on behalf of itself and as servicing agent for the self-insured employer. A denial from Wausau followed on March 5, 1981. Both letters denied the claim on the basis of responsibility. On March 12, 1981 Industrial Indemnity, on behalf of the employer, indicated its willingness to enter into an order pursuant to ORS 656.307. On March 27,

1981 Wausau rendered the issuance of such an order impossible by raising an issue regarding the basic compensability of the claim. See OAR 436-54-332.

In its arguments at the hearing, Wausau contended that the claimant's only recourse against it was by way of the Board's own motion authority under ORS 656.278, since five years had elapsed between the date of claimant's original injury and the filing of the aggravation claim. The Referee, based on Virgil Young, 28 Van Natta 658 (1980), ruled that since Wausau failed to notify the claimant that his injury had been classified as nondisabling, the claim remained open at the time of the filing of the aggravation and, therefore, Wausau was unreasonable in its refusal to enter into an order pursuant to ORS 656.307.

The law in effect at the time of claimant's injury provided that only claims resulting in a disabling injury were required to be submitted for claim closure to the Evaluation Division. ORS 656.268(2) (1975). If the claim were considered to be nondisabling, the insurer/employer was required to so advise the claimant. ORS 656.262 (1975). The 1975 version of ORS 656.273(4) provided in pertinent part:

> "(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."

In Virgil Young, supra, the claimant sustained an injury in 1977 which the employer classified as a nondisabling injury involving only provision of medical services. Claimant, however, received no notice from the employer indicating that the claim was accepted or closed on that basis. Claimant filed an aggravation claim in 1978. The Board held that since the employer failed to advise the claimant of his rights as required by ORS 656.262(5), that the claim remained open and that it was not possible to rule on an aggravation of the original injury.

We do not find Virgil Young to be controlling under the facts of this case. Although Wausau failed to comply with the requirement of ORS 656.262(5), claimant's aggravation claim was filed outside the five year limitation period for nondisabling injuries contained in ORS 656.273 (1975), unlike Virgil Young where the claim was filed within the five year aggravation period. Had the aggravation claim in this case been filed within five years of the date of claimant's injury, we would agree that the claim would have remained in an open status based on Virgil Young. However, despite the fact that a claimant may not have received notification under ORS 656.262(5), the statute in effect at the time of the claimant's injury established an absolute aggravation period of five years

from the date of injury for nondisabling injuries which were not submitted for determination pursuant to ORS 656.268. ORS 656.273 (1975). Despite the fact that claimant was not notified of his right to contest the insurer's classification, the aggravation claim was filed outside the five year limitation period from the date of his nondisabling injury.

We, therefore, do not find that Wausau's action in reserving the right to contest the compensability of this claim was unreasonable. The fact that a claim for aggravation is filed more than five years after the date of claimant's injury was sufficient to raise a reasonable question concerning the validity of the claim. Wausau reserved the right to contest the compensability of the claim and established a legitimate reason for its position at the hearing. Standing alone, the mere fact that the Referee may have disagreed with Wausau's legal argument should have no effect on determining the reasonableness or unreasonableness of the insurer's action, and the Referee did not find that Wausau had a completely untenable argument in favor of its position. Therefore, the Referee's award of penalties and attorney fees against Employer's Insurance of Wausau is reversed.

ORDER

The Referee's order dated January 21, 1982 is affirmed in part and reversed in part. Those portions of the order granting claimant a 10% penalty on the amounts of compensation due from the date of Wausau's letter refusing to enter into an order pursuant to ORS 656.307 and granting claimant's attorney a fee of $200, payable by Wausau, are reversed.

The remainder of the Referee's order is affirmed.

EONIA Z. STOA, Claimant
Jerry E. Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05730
September 10, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests Board review of Referee Daron's order which set aside its denial and found that claimant sustained a compensable accidental injury on May 8, 1981.

We agree with and adopt the Referee's analysis that compensability is supported by claimant's credible testimony, as corroborated in one respect by a co-worker and as corroborated in another respect by a relatively disinterested witness.

We disagree with the Referee's statement that:

> "The claimant's supervisor was not presented to testify, which I find, in this circumstance, to be the burden of the employer to bring that individual forward as that employer would have the best knowledge where to find that witness."

The claimant has the burden of proof. We do not think an inference to aid the party with the burden of proof can be drawn from the adverse party's failure to produce any evidence or specific evidence. Despite this error in the Referee's analysis, we reach the same conclusion as he did.

ORDER

The Referee's order dated February 12, 1982 is affirmed. Claimant's attorney is awarded $150 for services rendered on Board review, payable by the SAIF Corporation.

JOHN R. THOMAS, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10051
September 10, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of that portion of Referee Baker's order directing SAIF to accept "claimant's aggravation claim with respect to the conditions requiring surgery in April 1981 . . ." The Referee also approved SAIF's August 12, 1980 denial of an aggravation claim on the basis of no timely request for hearing, but this portion of the order has not been raised as an issue on review.

The usual form of order in a denied claim case is to set aside an employer's or insurer's denial. The form of the Referee's order in this case suggests a jurisdictional problem that, although not noted by the Referee or the parties, we feel obligated to consider.

This case proceeded to hearing on claimant's request for hearing transmitted on November 4, 1980, received by the Board on November 5, 1980. It is not clear what constituted the aggravation claim that the Referee ordered accepted. If such a claim was perfected after SAIF's August 12, 1980 denial of the above-referenced earlier aggravation claim, then it could only have been by a series of medical reports in the record as Exhibits 37 to 40. These reports mostly are dated or relate to events in March and April of 1981. SAIF would have had 60 days from notice of the report or reports that constitute an aggravation claim to accept or deny it. But claimant's counsel's written closing argument to the Referee, dated January 18, 1982, states that no denial has been issued "to this date." If a denial had been issued, or the insurer had failed to respond within the time permitted, then claimant would have had 60 days (or up to 180 days with good cause for delay) to request a hearing. But as noted above, no hearing request was made after the March/April, 1981 aggravation "claim"; rather, this case proceeded to hearing on a request that had been filed about six months earlier, which the Referee found was not timely filed.

Syphers v. K-W Logging, Inc., 51 Or App 769 (1981), would appear to be controlling. In that case the claimant requested a hearing before the insurer had issued a denial and before the time in which to accept or deny the claim had expired. The Court of Appeals ruled:

> "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. Claimant's request for hearing on the sole question of whether the claim should be accepted was premature and, therefore, ineffective." 51 Or App at 771.

A similar situation is presented here. The request for hearing was received on November 5, 1980. The medical reports which form the basis of claimant's more recent "aggravation claim" were received by SAIF beginning in March and April of 1981. Claimant, however, filed no new request for hearing. The November 1980 request for hearing was premature as to claimant's subsequent "aggravation claim" and is therefore ineffective with respect thereto.

ORDER

That portion of the Referee's order dated February 23, 1981 directing SAIF to accept claimant's aggravation claim with respect to the surgery in April 1981 is vacated and dismissed for lack of jurisdiction.

WALKER A. WRIGHT, JR., Claimant
Clark, Marsh et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 79-09990
September 10, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests Board review of Referee Nichols' order which set aside its denial. The issue is compensability of a claim for pseudoarthrosis, more specifically, whether the failure of claimant's back fusion was more likely due to industrial causation or instead more likely related to a noncompensable motor vehicle accident.

As a result of a prior industrial accident, claimant had a low back fusion in July of 1978. In October of 1978 claimant was involved in an automobile accident. Claimant sustained various injuries including a lacerated liver; he was hospitalized for about ten days. About two weeks after returning to work following this hospitalization, claimant bent over one day at work and could not straighten up. His problem was ultimately diagnosed as pseudoarthrosis, that is, a failure of the July, 1978 fusion.

Dr. Langston and Dr. Stevens have expressed opinions on the relationship of the October, 1978 car accident and the subsequent pseudoarthrosis. Dr. Langston believes that the pseudoarthrosis was caused by the automobile accident. Dr. Stevens opines that the pseudoarthrosis was not caused by the automobile accident.

We find Dr. Langston's opinion more persuasive for several reasons. First, Dr. Langston has the advantage of having been involved in claimant's treatment considerably longer than Dr. Stevens. Dr. Langston saw claimant prior to the initial fusion in 1978 and again in February of 1979 when the pseudoarthrosis was discovered. Dr. Langston performed the fusion surgery in September of 1979. By contrast, Dr. Stevens did not evaluate claimant until after the September, 1979 refusion surgery.

Second, claimant's car accident occurred only about three months after his initial fusion surgery at a time when, as Dr. Langston points out, the fusion would have still been healing. That accident was sufficiently violent to result in a lacerated liver and ten days of hospitalization. Just the circumstances of the accident suggest it probably caused the pseudoarthrosis.

Third, the only explanation Dr. Stevens offers for his opinion that the pseudoarthrosis was not caused by the car accident assumes that the rods at the prior fusion site were not loose at the time of the refusion. We note, however, that the operative report of the refusion stated that the rods were "slightly loose."

From the totality of the evidence, we conclude that the automobile accident three months after the initial fusion was more likely than not the cause of the need for subsequent surgical repair performed in September of 1979.

ORDER

The Referee's order dated April 2, 1982 is reversed. The denial dated August 29, 1979 is reinstated and affirmed.

LEE M. KIGHT, Claimant
Myrick, Coulter et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-11508
September 14, 1982
Order of Dismissal

The SAIF Corporation requested review of the Referee's order of July 8, 1982. The request for review was filed with the Board on August 10, 1982, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

The SAIF Corporation's request for review is hereby dismissed as being untimely filed.

LINDA SHOTSKY, Claimant
Blyth, Porcelli et al., Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-11135
September 14, 1982
Order Denying Motion to Dismiss

The insurer has moved to dismiss claimant's request for review of the Referee's June 17, 1982 order. The grounds for the motion appear to be claimant's failure to mail a copy of her request for review to the parties. The insurer's motion also alleges receipt of the claimant's request for review after expiration of the 30-day period for filing the request for review.

Whether the basis for the motion is claimant's failure to serve a copy of the request in a timely fashion or failure to serve the request at all, the motion will be denied. Matthew Sampson, WCB Case No. 81-08496, 34 Van Natta 1145 (August 23, 1982), and prior Board orders cited therein.

ORDER

The insurer's motion to dismiss claimant's request for review is denied.

NAOMA O. DOSSEY, Claimant
Olson, Hittle et al., Claimant's Attorneys
Larry Dawson, Defense Attorney

WCB 81-00570
September 15, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer seeks Board review of Referee McCullough's order which granted claimant an award of 30% unscheduled low back disability.

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

The employer contends that the award granted is excessive. We agree. Based on the minimal physical findings, that all treatment was conservative, the restrictions now placed on claimant by her physician, claimant's work experience, age and education, we feel she would be adequately compensated by an award of 15% unscheduled disability.

ORDER

The Referee's order dated February 19, 1982 is modified.

Claimant is hereby granted an award of 48° for 15% unscheduled disability. This award is in lieu of all prior awards.

Timothy A. Groves, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10887
September 15, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests review of Referee Leahy's order which affirmed the October 20, 1981 Determination Order, thereby finding that claimant had not proven entitlement to an award of permanent disability greater than the 5% awarded by that Determination Order.

In some extent-of-disability cases the claimant's actual experience after returning to work persuades us that his or her disability is greater than a physician believed at the time of and in the limited context of performing a closing examination. In this case, by contrast, we conclude that claimant's actual experience after returning to work documents that his disability is less than Dr. MacCloskey opined it to be.

With that additional explanation, we affirm and adopt the Referee's order.

ORDER

The Referee's order dated March 31, 1982 is affirmed.

HAROLD HOKE, Claimant
Galton, Popick et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-06756
September 15, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Knapp's order which determined that claimant was not entitled to an award for permanent disability greater than the awards totaling 30% unscheduled permanent partial disability that claimant had previously been granted.

We affirm and adopt the Referee's order with the following additional comments. Claimant argues the Referee ignored his request for an award for scheduled disability. We disagree; we interpret the Referee's order as resolving this issue adverse to claimant's position. We do also. There is no medical verification of any permanent impairment in a scheduled area, and claimant's various vocational activities since his injury made it impossible to accept his testimony about his scheduled impairment.

ORDER

The Referee's order dated May 18, 1982 is affirmed.

VERNON MICHAEL, Claimant
Malagon, Velure et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 80-07183
September 15, 1982
Own Motion Order on Reconsideration

The Board previously issued two Own Motion orders in this case. Our order dated August 28, 1981 concluded: "We find claimant is entitled to have his claim reopened upon the date of his hospitalization for the surgical procedure recommended by Dr. Wilson . . . " Our order dated October 9, 1981 eliminated the prior reference to claim reopening: "The claim will remain in a closed status until such time that claimant presents evidence to show he was either working or seeking to work prior to his most recent disability." Claimant has moved for reconsideration of that more recent order and an opportunity to submit written arguments. The request to submit arguments was granted and arguments have been received from both claimant's attorney and the SAIF Corporation. Having considered those arguments, we again deny any further own motion relief at this time.

Claimant compensably injured his back in January of 1972. That injury led to surgeries in 1973 and 1975. The details of the injury and medical treatment are described in our prior Order on Review, Vernon Michael, 27 Van Natta 815 (1979), in which we reversed a Referee's awared of permanent total disability and concluded that claimant's permanent partial unscheduled disability was 75%. Our decision in that proceeding was affirmed by the Court of Appeals. 45 Or App 1 (1980).

The present Own Motion matter arises from Dr. Wilson's diagnosis of pseudoarthrosis of claimant's 1975 spinal fusion. Claimant's aggravation rights from the 1972 injury have expired. By virtue of our prior two Own Motion Orders, it has been determined that SAIF must provide the medical treatment currently recommended by Dr. Wilson pursuant to ORS 656.245, and also determined that claimant's claim will not be ordered reopened for payment of temporary total disability pursuant to ORS 656.278. The current motion for reconsideration challenges the latter determination, raising the question of the interrelationship of work status and compensation for temporary total disability under the own motion statute after aggravation rights have expired.

We first articulated the belief that a claimant requesting own motion relief would not be granted claim reopening for payment of temporary total disability unless there was a medically verified inability to work and the claimant would otherwise be working in James L. Grover, 30 Van Natta 433 (1981):

> "Temporary total disability is defined in ORS 656.210. In subsection 2 of ORS 656.210, regularly employed is defined as actual employment or availability for such employment. In this case, it is apparent that the claimant has not worked, actually been employed or available for such employment for approximately ten years. Therefore, we find that the claimant is not entitled to temporary total disability compensation as granted by the original order." 30 Van Natta at 434.

In a series of subsequent cases we have repeatedly applied and increasingly refined this doctrine. In Donald R. Sanford, 31 Van Natta 210 (1981), we denied own motion reopening for payment of temporary total disability because the claimant had previously voluntarily "retired." In Romelia Gonzales de Sanchez, 32 Van Natta 271, 272 (1981), we stated: "It is the Board's present policy in Own Motion matters that a worker who is not employed or available for employment is not entitled to compensation for temporary total disability." See also Margaret J. Mosbrucker, 32 Van Natta 302 (1981); Donald Weber, 31 Van Natta 189 (1981); Verna Fields, 31 Van Natta 164 (1981); Earnest Gage, 30 Van Natta 695 (1981); James Crow, 30 Van Natta 536 (1981).

Our most recent discussion of this issue, and fullest discussion since Grover, was in Ethel Molchanoff, 33 Van Natta 551 (1981):

> "It is the Board's general policy not to award temporary total disability compensation to claimants on Own Motion cases who have voluntarily retired or otherwise left the labor market and who are not seeking gainful employment. As with all general policies, there will be exceptions. We conclude the claimant's situation in this own motion case warrants exceptional treatment.
>
> "Claimant retired in May, 1981 because of continuing severe pain that was a consequence of her 1973 compensable injury. We do not regard that act as a completely voluntary retirement. Instead, the reason claimant has left the labor market is due, at least in part, to the continuing consequences of her compensable industrial injury. In such circumstances, temporary total disability compensation should be allowed by own motion order."

After twenty months experience, since deciding Grover, the best possible summary of our own motion policy would be as follows. When we grant own motion relief, we order compensation for temporary total disability for a claimant who was working or seeking work at the time his physical condition worsened; and we order compensation for temporary total disability for a claimant who was not working or seeking work due in whole or in significant part to physical problems causally linked to the prior compensable injury; but we do not order compensation for temporary total disability for a claimant who was not working or seeking work for any other reason, such as voluntary withdrawal or retirement from the labor market.

More recently, the Court of Appeals has ruled that a claimant was entitled to interim compensation from notice of claim to date of denial even though he had voluntarily retired six years before he made his claim. Stone v. SAIF, 57 Or App 808 (1982). We find nothing in Stone that supports or requires any change in our own motion policy. Unique considerations are applicable to interim

compensation. See Jones v. Emanuel Hospital, 280 Or 147 (1977). Moreover, interim compensation is an element of the initial processing of a claim and the subsequent processing of requests for additional compensation during the five-year aggravation period, all of which is part of a claimant's rights under ORS Ch 656; by contrast, own motion relief is entirely within the Board's discretion. ORS 656.278; Fields v. Workmen's Comp. Board. 276 Or 805 (1976). Finally, and most importantly, in the exercise of our discretion we have concluded that it is inappropriate to order payment of a form of compensation intended to replace lost wages (temporary total disability) to a worker who has not lost and is not losing any wages because of his compensable physical condition. We adhere to our own motion policy as stated above.

That policy makes two factual considerations important: whether an own motion claimant is working or seeking work and, if not, the reason. We thus address the additional question of how these factual matters are to be established. OAR 438-83-810 specifies own motion procedures. That rule states in part:

> "(1) In carrying out its continuing power and jurisdiction to modify, change, or terminate orders or awards under ORS 656.278, the Board will proceed as follows:
>
> * * *
>
> "(b) A request by a claimant or the DRE/SAIF should contain a written statement of all relief sought and all reasons or grounds for such relief. Attached to the application should be appropriate medical reports, affidavits or other supporting evidence to assist the Board in determining whether or not to grant the relief applied for. A copy of the request and all supporting materials should be furnished to all parties, i.e., claimant or DRE/SAIF."

Although subsection (1)(d) provides that the Board may refer a request for own motion relief to the Hearings Division for an evidentiary hearing, the tenor of the rule contemplates and the long-standing practice indicates that most requests for own motion relief will be decided just on the written materials -- "appropriate medical reports, affidavits or other supporting evidence" -- submitted under subsection (1)(b).

We have frequently commented on requests for own motion relief that are not supported as required by OAR 438-83-810(1)(b):

> "The parties have the responsibility to submit to this Board all relevant medical and other evidence." Robert Close, 31 Van Natta 43 (1981).

> "The Board expects claimants to assemble and tender all relevant medical information when they first request the Board to exercise own motion jurisdiction." Patricia Pankratz, 30 Van Natta 465 (1981).

The lack of information about an own motion claimant's work status has especially been a problem in determining whether to order compensation for temporary total disability. See Alex Watson 32 Van Natta 198 (1981); Edward Stangl, 30 Van Natta 533 (1981); James E. Powers, 30 Van Natta 531 (1981).

Nevertheless, our procedural rule exists and is reasonably clear. A request for own motion relief must contain a statement of the relief sought and be supported by affidavits or other evidence. For most cases, this procedure should be adequate to determine whether we will order compensation for temporary total disability in accordance with the above-stated policy.

Turning to the specific contentions in this case, claimant first argues he is "entitled" to compensation for temporary total disability regardless of whether he is working or seeking work. As a matter of the exercise of our discretionary own motion authority, we reject that contention for the reasons set forth above. Claimant next argues that he is "entitled" to a hearing on the questions of his work status and the reasons he is not working. We disagree, at least as a matter of entitlement. Claimant is seeking a discretionary remedy and should do so in accordance with the applicable procedural rules. Claimant remains welcome to submit affidavits or any other form of evidence for the Board's consideration, as we previously indicated in our October 9, 1981 Amended Own Motion Order. On the present record, however, we adhere to the conclusion stated in that prior order.

Claimant's request for further own motion relief is denied.

IT IS SO ORDERED.

OLIVER M. PAYTON, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07036 & 81-05275
September 15, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Nichols' order which found the claimant's condition to be compensable and overturned the May 18, and July 24, 1981 denials issued by SAIF, and found the Determination Order of March 17, 1981 to have been issued prematurely. SAIF contends that the claimant's condition is not compensable and that its responsibility for his condition ended in January, 1981 under the terms of the July 3, 1980 Stipulation signed by SAIF and the claimant.

With regard to SAIF's contention that claimant's February, 1981 exacerbation of ulcerative colitis was caused by the stress of a cholecystectomy performed in January, 1981, we agree with the Referee. Claimant's treating physician, Dr. Erickson, in his report of June 17, 1981 states, "In my opinion his work activities are one of the material contributing factors to the aggravation of his ulcerative colitis that occurred in February of 1981." Dr. Erickson reiterated this opinion in his June 22, 1981 report. Although when questioned upon deposition, Dr. Erickson felt unable to quantify the respective amounts of stress caused by claimant's surgery versus his work, Dr. Erickson nevertheless felt that claimant's work (which he continued to perform during his recuperative period from the cholecystectomy) was a material contributing factor to the February, 1981 ulcerative colitis exacerbation.

SAIF's second contention concerns the effect of the July 3, 1980 Stipulation. SAIF initially accepted claimant's 1979 exacerbation of his preexisting ulcerative colitis as being work-related, but issued a partial denial on March 21, 1980. The parties later stipulated that the partial denial would be amended to include the following language:

> "[SAIF] will pay for medical treatment and disability only to the extent your work exacerbated the underlying condition. If your present condition resolves, we will not be responsible for any further treatment nor for any disability due to the underlying condition." (Emphasis added.)

SAIF argues that the claimant's condition due to the 1979 exacerbation had resolved by January, 1981 and that, under the terms of the Stipulation, its responsibility ended at that point.

SAIF's argument seems to be based substantially on Dr. Erickson's report of February 19, 1981, in which he stated:

> ". . . to my knowledge, his ulcerative colitis is in a quiescent state. I have not, however, seen him since the time of his surgery, in late January so it is possible something has changed in that interval of time. Otherwise, I believe he is now medically stationary and has reached his pre-exacerbation stage." (Emphasis added.)

We believe that the underlined, qualifying language of Dr. Erickson's report is significant, since on February 23, 1981, only four days after the date of that report, claimant returned to Dr. Erickson, who reported that an acute flare-up of ulcerative colitis occurred about six days prior to this visit. It is clear that claimant was not stationary at the time Dr. Erickson authored his February 19, 1981 report, a possibility that Dr. Erickson noted in that report. Dr. Erickson further clarified this upon deposition when he related that claimant's ulcerative colitis had been becoming more quiescent since 1979, but that it had not yet returned to the pre-1979 status at the time of the 1981 flare-up. We, therefore, agree with the Referee that the Determination Order of March 17, 1981, which was based on Dr. Erickson's February 19, 1981 report, was issued prematurely, and also find that SAIF's responsibility for claimant's February, 1981 exacerbation of ulcerative colitis was not terminated by the July 3, 1980 Stipulation.

ORDER

The Referee's order dated March 15, 1982 is affirmed. Claimant's attorney is awarded a fee of $400 for services rendered on Board review, payable by the SAIF Corporation.

CARLTON A. SPOONER, Claimant
Welch, Bruun et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

Own Motion 81-0060M
September 15, 1982
Order of Abatement

The Board issued its Own Motion Order on September 3, 1982 in the above entitled matter. That order is hereby abated to allow us to re-review the case based on correspondence received in late August and early September from the parties.

IT IS SO ORDERED.

WILLIAM M. STILL, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-03041 & 80-01909
September 15, 1982
Order of Abatement

A Request for Reconsideration of the Board's Order on Review dated August 18, 1982 has been received from the employer/insurer in the above-entitled matter.

In order to give the Board time to fully consider this request, that Order on review is abated. Claimant is hereby granted 20 days to file a response.

IT IS SO ORDERED.

DONALD YOUNG, Claimant
Welch, Bruun and Green, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 82-00645
September 15, 1982
Supplemental Order

The Board issued a Third Party Distribution Order herein on July 20, 1982, directing that the proceeds of the settlement of claimant's third party action be distributed in accordance with ORS 656.593(1).

Claimant's attorney has now requested clarification of that order, in response to which the Board orders that the percentage to which claimant is entitled pursuant to ORS 656.593(1)(b) is 25%.

IT IS SO ORDERED.

CLIFFORD R. ADAMS, Claimant
Coons & Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-11343
September 16, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant requests review of Referee Danner's order which found his claim was not closed prematurely, that he has not suffered an aggravation of his compensable injury, but that the claimant is entitled to 128° (40%) unscheduled permanent, partial disability.

The claimant contends that his claim was prematurely closed in that he was not medically stationary at the time of closure and, in the alternative, he is entitled to increased permanent disability including permanent and total disability. The insurer responds that claimant is not permanently and totally disabled. Rather, the reason for his present unemployment is due to economic slow down in the logging industry (logging being claimant's career). The insurer further responds that claimant has no residual physical impairment.

On January 17, 1980 claimant sustained a crushing blow to the right side of his head when the steel cable of a logging yarder snapped and recoiled at him. As a result he has suffered continual headaches. He also suffers from major depression and post-traumatic syndrome related to his accident. This condition is manifested in forgetfulness, loss of concentration, anxiety, irritability and depression.

We agree with the Referee's finding that the claim was not prematurely closed; and we cannot improve on his evaluation of extent of impairment, therefore, we affirm his order in all respects.

ORDER

The Referee's order dated February 19, 1982 is affirmed.

GERALD W. BRODE, Claimant
Ringo, Walton et al., Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 80-07697
September 17, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Seifert's order which upheld the employer's denial of claimant's claim for a myocardial infarction.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 3, 1982 is affirmed.

Chairman Barnes Concurring:

As I understand the concept, to "adopt" a Referee's order indicates total agreement with the Referee's analysis and reasoning. I cannot embrace the Referee's analysis in this case to that extent.

There are two versions of claimant's work activities preceding the heart attack that is the basis of this claim. One version is stated in an investigator's report of an interview with claimant that took place about three weeks after the heart attack. The other version is stated in claimant's sworn testimony at the hearing that took place about 15 months after the heart attack.

The medical evidence is unusually unanimous for this type of case. All doctors involved generally agree that, if the true facts are as stated in the investigator's report, then claimant's work activities were not a material cause of his infarction; conversely, all doctors involved generally agree that, if the true facts are as stated in claimant's hearing testimony, then claimant's work activities were a material cause of his infarction.

Resolving what was thus the crucial question about claimant's work activities, the Referee found the investigator's report to be "the most accurate reflection of the events as they occurred." The Board majority "adopts" this analysis.

I cannot dismiss claimant's sworn hearing testimony so lightly, nor sign a Board order that does so without explaining why. However, I do reach the same conclusion as the majority via a different analytical route: the investigator's report raises sufficient doubt in my mind about claimant's testimony about his work activities preceding the infarction that I am not persuaded by claimant's testimony. The subtle distinction -- between affirmatively finding that claimant's sworn testimony was false or inaccurate and merely finding that testimony not persuasive in light of all the evidence -- may not be important to my colleagues, but it is important to me.

IDA M. MAKUCH, Claimant
Roll & Westmoreland, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04519
September 17, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Fink's order which found claimant entitled to chiropractic treatments, overturned SAIF's denial and remanded claimant's aggravation claim for acceptance and the payment of benefits as required by law.

The facts as recited by the Referee are adopted as our own. The Referee found that claimant had a right to chiropractic treatments from Dr. Smith, that Dr. Gambee was unequivocal about what caused claimant's low back problem and that there was a definite causal connection to the industrial injury of 1975. The Referee remanded the aggravation claim to SAIF for acceptance but failed to address the issue of aggravation and/or a worsening of claimant's industrially related back condition. Instead he dwelled upon making the point to SAIF that claimant did injure her back at the time of the 1975 injury as indicated by the disability award granted for that body area, and that an injured worker has a right to be treated by a chiropractor, as well as an M.D.

We concur, that if claimant's low back condition were proven related to the 1975 injury she would be entitled to chiropractic treatments from a doctor of her choice. However, we find that claimant's back condition, if indeed it did worsen, is not related to the 1975 injury.

The most that Dr. Smith, the chiropractor, indicates is a diagnosis is "Lumbar spondylolesthesis L-4. Femoral and sciatic neuralgia-secondary to postural imbalance associated with hip replacement." He makes, in essence, a causal connection of claimant's current back condition to the non-industrial hip replacement.

The Orthopaedic Consultants noted that claimant had no symptoms for over two and one-half years and found nothing neurologically or orthopedically to substantiate her complaints. They did find x-ray changes commensurate with claimant's age and noted her postural imbalance created by leg shortening from the total hip replacement. It was their opinion that claimant's problem was from mild degenerative disc disease, obesity, atrophy and left leg weakness.

On June 30, 1981 Dr. Gambee reported that he essentially agreed with the Orthopaedic Consultants but that claimant did injure her back at the time of the injury. He saw no need for treatment and was rather appalled at the thought of chiropractic manipulations for claimant's particular back condition. He found basically no worsening of her back condition. On April 12, 1981 Dr. Gambee reported that sorting out of claimant's back problem versus her hip problem "is most difficult and demanding" and that he could not make such a determination.

The weight of the evidence does not indicate any worsening of claimant's low back condition or need for chiropractic treatment attributable to the 1975 industrial injury and its sequelae.

ORDER

The Referee's order dated December 16, 1981 is reversed.

SAIF's aggravation denial of April 21, 1981 is reinstated and affirmed.

Board Member Lewis Dissenting:

I respectfully dissent and I would affirm and adopt the Referee's Opinion and Order. I fully agree with his well reasoned analysis and would award claimant's attorney a fee of $500 for services on Board review.

CARL MOORE, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-11284
September 17, 1982
Order on Reconsideration

Claimant requests reconsideration of our Order on Review dated August 27, 1982. That order recited claimant had filed no timely brief and that we found no error in the Referee's order.

Claimant's request for reconsideration points out that he did file a brief, received by the Board on August 25, 1982. That brief, however, was received after we had completed the review process that lead to our August 27, 1982 Order on Review.

Moreover, and more importantly, claimant brief was originally due June 17, 1982, but an extension of time was requested and granted to July 1, 1982. No further extension was granted. We believe it is a disservice to the workers and employers of this state to delay the review process indefinitely. We stand by the statement in our prior order that a brief that is due July 1 and received August 25 is not timely.

Having reconsidered our Order on Review dated August 27, 1982, we adhere to the conclusions therein.

IT IS SO ORDERED.

DOROTHA LORRAINE OYLER, Claimant
Hayner, Waring et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-06185
September 17, 1982
Order on Reconsideration

By letter of September 8, 1982, claimant requested reconsideration of the Boards' Order on Review of August 18, 1982. Claimant requests reconsideration of that portion of the order which failed to award an attorney fee for prevailing on the issue of compensability over the employer's appeal, and those portions of the Order which reversed the Referee's finding of premature claim closure.

Although the employer prevailed on the issue of premature claim closure before the Board, claimant contends that she is entitled to an attorney fee for prevailing on the issue of compensability, since the employer also appealed that issue to the Board. We agree and allow claimant's attorney an employer-paid

fee of $400. See Victor F. Kaufman, WCB Case No. 81-2214, 34 Van Natta 1185 (August 31, 1982). Our order is modified accordingly.

With regard to those portions of the order reversing the Referee's finding of a premature claim closure, we adhere to the view, expressed in our Order on Review.

IT IS SO ORDERED.

TIMOTHY J. PURDUE, Claimant
Malagon & Velure, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-02185
September 17, 1982
Order on Reconsideration

The employer has requested reconsideration of the Board's Order on Review dated August 30, 1982 on the ground that the facts in the record are at variance with the facts as recited in the Order. There is no narrative report in the record identifying the medically stationary date and the checked medical forms are equivacal at best. The employer is correct insofar as Dr. Nickels in Exhibit 4 did check the box indicating that claimant was medically stationary. However, Dr. Nickels also checked the box indicating that claimant was in need of further treatment and estimated time loss at 10 days to two weeks, which indicates to us that in fact claimant was not medically stationary at that time. The employer urges us to construe Dr. Nickels' reference to time loss to be a reference to past disability rather than future disability. However, a reference to two weeks' disability is inconsistent with claimant's testimony that at the time of Dr. Nickels' examination, claimant had been off work due to the allergy for about two months. It is also inconsistent with the fact that Dr. Nickels gave no date by which claimant was released to either modified or regular work.

The remainder of the employer's contentions concern interpretations of the evidence already considered and rejected by the Board on review.

As clarified above, we republish and reaffirm the previous order on review herein.

ORDER

On Reconsideration of the Board's Order on Review dated August 30, 1982, the Board adheres to its former order.

GLEN A. WILLIAMS, Claimant
Brink, Moore et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-0227M
September 17, 1982
Own Motion Dismissal

Claimant has requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, to modify Referee McCullough's opinion and order in WCB Case No. 81-07079 dated September 18, 1980.

The Board may not exercise its own motion jurisdiction in this case because the five year aggravation period has not yet run.

ORDER

The claimant's request for own motion relief is dismissed.

GOLDIE M. DALLMAN, Claimant
Leeroy Ehlers, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01057
September 20, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review and the claimant cross-requests review of Referee Johnson's order which upheld SAIF's December 22, 1980 aggravation claim denial and set aside its June 22, 1981 denial of responsibility for claimant's mental condition as of January 1981 and associated hospitalization. SAIF contends that ORS 656.156(1) bars the payment of compensation for hospitalization and treatment in relation to the claimant's suicide attempt of January 5, 1981, and that the Referee erred in finding that the claimant had established her 1978 industrial injury to be a material contributing cause of her January 1981 mental depression. The claimant contends on cross-appeal that the Referee erred in approving SAIF's denial of her back aggravation claim.

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

With regard to claimant's exception to the Referee's finding concerning her low back aggravation claim, we affirm and adopt those portions of the Referee's order relevant to that issue.

With respect to SAIF's proposition that compensation for claimant's hospitalization and treatment in relation to her attempted suicide is barred, we agree. ORS 656.156(1) provides:

> "If injury or death results to a worker from the deliberate intention of the worker himself to produce such injury or death . . . the worker shall [not] receive any payment whatsoever under ORS 656.001 to 656.794."

In Jones v. Cascade Wood Products, 21 Or App 86 (1975), the court noted that, while the statute is not an absolute bar to the recovery of benefits where the death is caused by suicide, those claiming benefits have the burden of establishing that the suicide - and by parity of reasoning an attempted suicide - was either the result of an irresistible impulse or a complete lack of understanding of the consequences of the act. Jones, 21 Or App at 88.

The evidence is undisputed that claimant's hospitalization of January 1981 was the result of an attempted suicide, by ingestion of 30 Dalmane and 28 Sinequan capsules, subsequent to an overconsumption of alcohol. Claimant suffered from chronic alcohol abuse for many years prior to her industrial injury. Claimant argues that we should find that an intoxicated person is unable to exercise the will to consciously attempt self-destruction. That is not an appropriate matter for administrative notice and even if it were would not be adequate to satisfy claimant's burden of proof under Jones.

In addition to treatment related to the attempted suicide, claimant was also treated for general depression. Dr. Miller indicated in his report of February 20, 1981 that one of the causes of her depression was claimant's 1978 back injury. Dr. Miller also attributed two other previous and recent suicide attempts on the claimant's part to her back injury. He stated:

> "The patient was felt . . . to have an underlying tendency towards depression because of her dependent features of her personality and her recurrent depressions and it is likely that the injury and its aftermath did contribute and hasten to the increased symptoms which she experienced after her injury."

Dr. Rosenburg indicates in his chart notes of January 28, 1981 that claimant suffered from a pathological drinking pattern (14 years) precipitated by marital discord, injury and job loss. He noted excess alcohol abuse for the prior six months, loss of control, hangover, blackouts, family discord involving her exhusband who recently moved to Mexico and passive dependent relationships.

We conclude that claimant's industrial injury of 1978 and its sequelae played a minor role at best, in claimant's depression and need for treatment, and that such treatment is not the responsibility of SAIF. Claimant's hospitalization occurred some two years after the injury and nine months after her physical condition had become stationary. Claimant left a suicide note which does not reflect any injury related factors but does reveal claimant's sense of loneliness, hopelessness and despair. We do not find under these circumstances that claimant has established that her mental state was exaggerated, or accelerated to a degree which would not have occurred but for the injury and its sequelae. See Patiticci v. Boise Cascade Corp., 8 Or App 503 (1972). We find the evidence indicates that claimant would have or did arrive at her condition had the injury never occurred, and, therefore, her treatment related to her depression is not compensable.

ORDER

The Referee's order dated October 30, 1981 is affirmed in part and reversed in part. Those portions of the order finding SAIF responsible for claimant's hospitalization and treatment for her mental condition as of January 1981, reversing SAIF's June 22, 1981 denial and allowing claimant's attorney a fee of $1,050 are reversed. SAIF's June 22, 1981 denial is reinstated and affirmed.

The remainder of the Referee's order is affirmed.

DONALD L. GLENN, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03623
September 20, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of that portion of Referee Quillinan's order that concluded claimant was entitled to payment of temporary total disability at a rate that took into account the overtime he worked on a "regular basis" within the meaning of OAR 436-54-212.

We agree with the Referee. Leroy Burke, 34 Van Natta 675 (1982).

ORDER

The Referee's order dated April 27, 1982 is affirmed. Claimant's attorney is awarded $150 for service rendered on Board review, payable by the SAIF Corporation.

PAMELA HARRINGTON, Claimant
FRANK A. LEONETTI, Jr. and
LORRAINE A. LEONETTI, dba
DIP N DONUT RESTAURANT, Employer
Carl Davis, Attorney
SAIF Corp Legal, Defense Attorney
Rex Malott, Attorney

WCB 81-03142
September 20, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation requests review of Referee Seymour's order which found SAIF to be the insurer for the employer, Dip N Donut & Restaurant, at the time of claimant's injury. SAIF asserts that they never entered into a binding insurance contract with the employer and that the "guaranty contract" filed with the Workers Compensation Department was filed in error and does not make SAIF responsible for claimant's claim.

We affirm and adopt the Referee's order.

ORDER

The Referee's order dated April 20, 1982 is affirmed.

REITA WALTERS, Claimant
Gatti & Gatti, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08670
September 20, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests review of that portion of Referee Danner's order that found she had not sustained any permanent low back disability as a result of her December 18, 1979 injury and, therefore, affirmed the Determination Order dated June 26, 1981.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 29, 1982 is affirmed.

Chairman Barnes Concurring:

The evidence in this case is difficult to analyze because at hearing claimant argued both that she was entitled to an award of permanent disability for her back injury and that she was entitled to an award of permanent disability because of a mental stress component of this claim, but only the argument about the back condition is raised on Board review.

Claimant's physical injury was initially diagnosed as a low back strain. Her family physician, Dr. Porter, referred her to Dr. Lawton. It is some indication of the limited nature of the injury that, over the next year and a half, claimant only went to Dr. Lawton twice. Reporting on the second of these examinations, Dr. Lawton concluded:

> "I feel that her acute lumbosacral strain experienced on the job in December 1979 has resolved fully but she continues with her background pre-existing problems of segmental instability, lumbar lordosis and recurrent chronic lumbosacral strain."

Dr. Murphy basically agreed with Dr. Lawton's findings and opinion. In October of 1981, i.e., 22 months post-injury, claimant began being treated by Dr. Wilson, a chiropractor. Only Dr. Wilson offers the opinion that claimant sustained any permanent impairment as a result of her December 1979 low back strain.

Claimant's testimony mostly involved her adverse working conditions and their relationship to the stress component of her claim, an issue not raised on Board review. She did testify that she frequently has serious back pain and has had to significantly limit some of her activities. The Referee, as I interpret his order, necessarily found claimant's testimony about her back problems to be exaggerated. With that in mind, I agree that the preponderance of the persuasive evidence is that claimant did not sustain any permanent impairment as a result of her December 1979 industrial injury. Without permanent impairment that results from a compensable injury, there can be no award for permanent disability under the workers compensation laws.

In addition, I note that throughout the medical reports there are references to claimant's back pain possibly being related to obesity. Claimant is 5 feet, 7 inches tall and, according to all references in the record, weighs 195 pounds. In Patricia Nelson, 34 Van Natta 1078 (1982), we ruled that impairment caused in whole or in large part by a failure to lose weight is not compensable unless the claimant sustains the burden of proving inability to lose weight for some medical reason. There is no such evidence in this record.

RONALD P. AAMODT, Claimant
Bischoff, Murray et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06154
September 22, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Johnson's order which granted claimant an award of 240° for 75% unscheduled low back disability. SAIF contends that the award granted is excessive.

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

Based on the evidence of record, the lay testimony and utilizing the guidelines set forth in OAR 436-65-600 et seq., to assist us in performing our independent assessment function, we concur with the SAIF contention that the Referee's award of 75% unscheduled disability is excessive.

Applying the above cited guidelines, we find claimant's impairment is 30% (+30). He is 46 years of age (+5 value). He has an eighth grade education (+10 value). His work experience has been primarily that of a logger to which he is now precluded (+3 value). The record indicates he can no longer perform heavy work and is limited to light employment (+10 value). The labor market findings indicate 12% of the labor force is still available to him (+2 value). Combining all these factors and considering them in light of other comparable cases, we conclude that claimant is entitled to an award of 50% unscheduled low back disability to compensate him for his loss of wage earning capacity due to the residuals of this industrial injury.

ORDER

The Referee's order dated March 31, 1982 is modified.

Claimant is hereby granted an award of 160° for 50% unscheduled disability. This award is in lieu of all prior awards. Claimant's attorney's fee is adjusted accordingly.

ROBERT BELLESLE, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-4871
September 22, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The employer and its insurer request review of Referee St. Martin's order which found claimant's aggravation claim compensable and awarded penalties and attorney's fees for the insurer's alleged "unreasonable denial" of the aggravation claim. The issues are compensability of the aggravation claim, and whether penalties and attorney's fees are appropriate because the insurer unreasonably denied the claim, thereby delaying payment of compensation due to claimant. We affirm that portion of the order finding the claim compensable. We reverse the imposition of a penalty and the award of associated attorney's fees.

Claimant was originally injured in September and October, 1975. In the first incident, claimant was hit in the head by the boom bucket of a cherry picker in the course of his employment of running a chipper machine. Claimant was knocked unconscious and hospitalized for a day, experienced neck and low back pain, but returned to work with little or no time loss. About two weeks later, claimant was feeding heavy pieces of wood into the chipper when he experienced a sharp pain in his low back. Claimant ceased working on October 8, 1975. Claimant experienced neck and low back pain which frequently radiated into his left leg and occasionally radiated into his right leg.

The neck condition resolved itself within a short time. However, after five or six months of chiropractic treatment, claimant's low back was not significantly improved. Claimant came under the care of Dr. Cottrell, orthopedic surgeon. Back surgery was mentioned as a possibility as early as March, 1976, but claimant preferred to follow a conservative course of treatment involving traction, physical therapy, exercise, and use of a back support. Traction appeared to make claimant's condition worse, so it was discontinued and a neurological examination and a myelogram were performed. The neurological examination revealed no evidence of nerve root irritation. The myelogram revealed minor defects in the cervical region, but no abnormalities in the lumbosacral region. Local anesthesia injected into the left lumbosacral facet joint adjacent to the point identified by claimant as the most painful resulted in complete, albeit temporary, relief of low back and left leg pain, suggesting the advisability of facet fusion surgery. Claimant preferred to pursue additional conservative treatment and vocational rehabilitation. Claimant participated in a program of sales training and ultimately obtained employment as a car salesman.

The claim was closed by Determination Order dated June 15, 1977 awarding time loss and 10% unscheduled permanent disability. In declaring claimant medically stationary, Dr. Cottrell noted that claimant continued to experience low back pain radiating into his thigh. Claimant testified that he did not receive the Determination Order; in any event, it was not appealed.

On June 16, 1977 claimant slipped on a rock while fishing and experienced back pain radiating into the left leg similar to the pain experienced following the original injury. Dr. Cottrell opined that claimant had been doing quite well but had never been 100 percent relieved, and that this incident was a "recurrence of his previous trouble". Aggressive conservative treatment was reinstituted. Claimant and Dr. Cottrell again discussed the possibility that if claimant failed to respond to conservative treatment, surgery should be considered. The claim was closed again by Determination Order, dated July 24, 1978, awarding time loss through March 15, 1978, but awarding no additional permanent disability.

In June of 1980 claimant stepped out of a vehicle onto an unexpectedly low spot in the pavement. Claimant grabbed the door of the vehicle to regain his balance and experienced a sharp pain in his low back radiating down into both legs. In December of

1980, while on a personal trip from Longview, Washington to The Dalles, claimant stopped at a rest stop and experienced back pain so severe he could not stand upright. He continued to his destination, but spent a full week in bed before the back pain subsided enough to enable him to return home. As before, the pain was felt in the low back and radiated down into both legs. Claimant obtained some prescription medication on this occasion but otherwise did not seek medical care as a result of either incident.

In April of 1981 claimant was moving an empty bookcase estimated to weigh 25-30 pounds by sliding it across the floor when he again experienced a sharp pain in his low back. The next day he moved a desk at work and felt low back pain again. The day after that he moved a 10 gallon water cooler and experienced low back pain. In the early morning hours of the next day, claimant's back pain became excruciating. Claimant did not go to work and sought treatment from Dr. Cottrell. At that point, Dr. Cottrell submitted a medical report describing claimant's condition, verifying claimant's inability to work, relating the disability to the original industrial injury of 1975, and requesting claim reopening.

I

The insurer contends that the original injury resolved itself, that claimant went a substantial period of time without seeking medical care, and that the various off-the-job incidents involving low back pain occurring since the 1978 claim closure (particularly the furniture moving incident of April, 1981) were intervening injuries. From these facts, the insurer urges that it follows that the original injury was no longer a material contributing cause of claimant's condition in 1981, as required by Grable v. Weyerhaeuser, 291 Or 387 (1981).

The evidence indicates that in fact claimant's back condition never fully resolved itself. Dr. Cottrell so states at one point, and indeed, remarks that the award of 10% permanent disability was inadequate. The closing medical reports noted that claimant continued to experience low back pain. These closing medical reports, the fact that an award of permanent disability was made and Dr. Cottrell's remarks suggest to us that it was anticipated that the original injury would continue to plague claimant. Claimant twice was declared medically stationary, not because he had returned to his pre-injury status, but because the available treatment (short of surgery) did not offer hope of further improvement in his condition and he was able to work in spite of the intermittent pain. The pain claimant experienced waxed and waned over the years and he continually took over-the-counter and prescription medication to enable him to continue working.

Other factors help convince us that the claim is compensable. The site of the pain in the low back radiating into the legs was consistent for each incident. The treatment recommended and utilized by claimant was the same each time, and each time the treatment resulted in claimant's condition improving to the point of being able to resume more or less normal activities.

The insurer attempts to discredit Dr. Cottrell's April, 1981 report because he refers to "spontaneous episodes of low back pain", tending to indicate that claimant failed to inform the doctor of the incidents leading to each bout of back pain. Claimant's testimony tends to confirm that at least as to the April, 1981 incident he did not tell Dr. Cottrell about the furniture moving which precipitated the back pain. On the other hand, Dr. Cottrell was aware of the rock-slipping incident, and may or may not have been aware of the June, 1980 incident when claimant experienced back pain getting out of a vehicle or the 1980 incident involving back pain in the course of an extended automobile trip. Both of these latter two incidents could well be described as "spontaneous" incidents since they did not involve significant activity or trauma. In our experience, none of these incidents, including the furniture moving incident of April 8, 1981, were likely to produce the degree of pain and disability documented in the medical reports without some pre-existing spinal pathology. We are satisfied that claimant experienced disabling back and leg pain in material part because of the residual effect of the 1975 injuries.

II

Turning to the penalty issue, Dr. Cottrell's report constituting the basis for the aggravation claim could not have been received by the insurer any earlier than April 8, 1981. Although the report alleged facts which stated an aggravation claim and a right to time loss payments, the insurer came to believe that the aggravation claim was not compensable based upon its investigation. Consistent with that position, on April 20, 1981, the insurer denied the claim. The Referee imposed a penalty because the medical evidence at the time of the denial was uncontroverted that the claim was compensable and the insurer failed to seek contrary medical evidence concerning compensability until after the denial. The Referee apparently also thought that under Grable v. Weyerhaeuser, supra, it was clear that this aggravation claim was compensable.

Claimant defends the Referee's first point by noting that at the time the denial was issued the medical evidence was uncontroverted that claimant had sustained a worsening of his compensable condition requiring medical services and resulting in disability. Claimant contends that a denial based on such evidence is unreasonable. We disagree. The insurer is entitled to find the medical evidence unpersuasive. For instance, as in this case, the original injury was not all that traumatic, and there had been a substantial period of time during which the claimant apparently had not sought medical treatment for his back condition. That alone may have created sufficient doubt as to the compensability of the aggravation claim to warrant a denial.

Here, there was more. The insurer immediately interviewed the claimant and ascertained that there were a number of nonindustrial incidents (including the furniture moving incident) that had precipitated back pain. It does not appear from Dr. Cottrel's report that he was aware of the furniture moving incident. The insurer reasonably may have concluded that the physician was given

an incomplete or inaccurate history, and therefore his opinion concerning causation was not valid. Based on the evidence available to it at the time the denial was issued, the insurer had reason to believe that the claim was not compensable. The insurer maintained that position throughout the hearing and now on Board review. While we believe that the claim is compensable, we cannot say the insurer was unreasonable in taking a contrary position.

Regarding the Referee's reference to Grable v Weyerhaeuser, that case was not decided by the Oregon Supreme Court until July, 1981, three months after the denial was issued herein. The Court in Grable emphasized that its holding was consistent with previous case law. Nevertheless, we believe that the Grable "clarification" of the standard of compensability in this category of cases was sufficiently new that, under the case law existing at the time the insurer denied this claim, the insurer may reasonably have believed that the standard of compensability was the "last injurious exposure rule" applied by the Court of Appeals in Grable rather than the "material contributing cause" standard established by the Supreme Court. Moreover, even in light of Grable, although we find that the preponderance of the evidence favors compensability, in our opinion it is a close case. Under such circumstances, the insurer had a legitimate doubt concerning the compensability of claimant's aggravation claim; therefore, a penalty is not warranted. Norgard v. Rawlings, 30 Or App 999 (1977)

We award an attorney's fee to claimant's counsel for successfully defending, on Board review, the Referee's order on the issue of compensability, notwithstanding the failure to prevail on the penalties and associated attorney's fees issue. Victor F. Kaufman, WCB No. 81-02214, 34 Van Natta 1185 (August 31, 1982).

ORDER

The Referee's order dated February 17, 1982 is affirmed in part and reversed in part. Those portions of the order remanding the claim for acceptance and awarding an attorney's fee for prevailing on a denied claim are affirmed. Those portions of the order imposing a penalty and awarding an attorney's fee on the basis of the penalty are reversed. Claimant's counsel is awarded $600 as and for a reasonable attorney's fee for his services on Board review in connection with the issue of compensability.

MARY K. CHASE, Claimant
Thomas O. Carter, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05416
September 22, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Leahy's order which approved the SAIF Corporation's denial of her alleged new injury.

Claimant first injured her back while working as a nurse on April 18, 1976. She received compensation, for a 25% unscheduled

permanent partial disability as a result of this original low back strain, from Liberty Mutual Insurance Company. She underwent a laminectomy following the original injury, but has continued to have back pain. She also has degenerative lumbar disc disease, which apparently predates the 1976 injury.

On March 25, 1979, claimant was involved in an automobile accident which resulted in an aggravation of her low back condition and caused mid back pain, radiating pain in both thighs and her right leg, numbness and tingling in her right fingers and headaches.

The present case arose out of an incident on August 30, 1980. Claimant was helping a patient at Kaiser Medical Center slide back up in bed when she felt pain across her back and down both legs. Claimant filed a claim with Liberty Mutual for the incident as an aggravation of her 1976 injury and also filed a claim with SAIF, insurer for her employer at the time of the August, 1980 incident. The aggravation claim against Liberty Mutual was settled prior to the hearing. Thus, only SAIF was involved in the hearing.

We find, as did the Referee, that the medical evidence does not support a finding that claimant suffered a new injury as a result of the August 30, 1980 incident. She has only experienced an aggravation of her continuing symptoms from the prior injuries and not a worsening of her underlying condition. See Wills v. Boise Cascade Corp., 58 Or App 636 (1982).

ORDER

The Referee's order dated February 16, 1982 is affirmed.

SHIRLEY E. CLEVENGER, Claimant
Bischoff, Murray et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10555
September 22, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Shebley's order which found the claimant entitled to benefits for permanent and total disability. The only issue is the extent of claimant's disability.

The Board accepts the facts as recited by the Referee and adopts them as its own.

The Referee noted that although most of the medical and vocational experts were of the opinion that the claimant is able to perform light or sedentary work, that there was no evidence presented by SAIF that such work would be available in the general labor market to a worker with claimant's restrictions, such as her chronic pain and limited work experience. We believe that to be somewhat of a misstatement regarding the burden of proof and disagree with the Referee's finding of permanent and total disability.

The burden of proving entitlement to permanent total disability is the claimant's. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Claimant has undergone two laminectomies and a fusion arising from her industrial injury. She is 46 years of age and of average intelligence. She has not worked since 1970 nor made any concrete efforts in that direction.

All of the medical reports indicate that claimant's physical impairment is in the range of moderate. A persistent problem, however, has been her complaints of chronic pain, despite the fact that there is no know objective basis for such pain. Dr. Becker was initially of the opinion that the pain was related to the claimant's obesity and need for muscle strengthening. Dr. Carter, a psychiatrist, first examined claimant on June 5, 1978. At that time, Dr. Carter felt that one of the claimant's main problems was her perception of herself as being totally disabled. In his May 3, 1979 report, Dr. Carter states that claimant's disability is important to her and that her anxiety relief defenses were too strong for her to allow her to give up her pain and pain behavior. He felt that there was a very strong element of conversion present and that claimant basically utilized pain behavior as a means to reduce anxiety.

On April 2, 1981 Dr. Carter performed a sodium amytal interview on the claimant and concluded that her pain was mechanical and not psychogenic. But Dr. Becker was unable to find any physical explanation for claimant's pain other than some "potential" foraminal narrowing at L-4, 5. Claimant was examined by a second psychiatrist, Dr. Holland, at the request of SAIF. Dr. Holland submitted an extremely detailed and comprehensive report dated June 24, 1981. Dr. Holland noted that during the course of the examination claimant began exhibiting pain behavior when the conversations touched on a subject that was anxiety producing. Dr. Holland felt that interreaction between the claimant and her husband, who also sustained a painful injury, played a substantial role in the maintenance of claimant's impairment. He found significant secondary gain elements to be present. He concluded that claimant's pain was mainly psychological, although there did appear to be a definite mechanical element present to some degree also. He found that the claimant suffered no psychological impairment from her injury.

A consideration of all of the medical evidence leads us to conclude that, while there may be some mechanical element to the claimant's pain, there is a significant psychological component and that, even considering claimant's perceived as well as her mechanical pain, claimant is not permanently and totally disabled from a medical standpoint. Dr. Becker's letter of August 27, 1981 is particularly informative with regard to this.

Since the claimant's medical condition alone is not enough to warrant a finding of permanent total disability, the only remaining method by which she could achieve such status is by establishing that her social/vocational factors, such as age, education, adaptability and mental capacity, when combined with her medical condition result in her being unemployable in any well known branch of the labor market. Swanson v. Westport Lumber Co., 4 Or App 417 (1971). As noted above, claimant is possessed with relatively

favorable social/vocational factors. She is only 46 years of age, has a GED, is of at least average mentality and is adaptable to light to sedentary work. The vocational reports express optimism concerning claimant's employability, if her motivation were only adequate. We do not find that claimant's social/vocational factors, when combined with her medical condition and impairment, are so unfavorable as to warrant permanent total disability.

Another factor in our determination relates to ORS 656.206(3), which requires those seeking permanent total disability to establish willingness to seek regular and gainful employment and that reasonable efforts in that direction have been made. The record demonstrates a complete lack of motivation on claimant's part which would indicate that she is unwilling to return to work. The medical and vocational reports are all reflective of this. Other than reading the classified advertisements in the newspapers, in twelve years, claimant has made no job contacts of any kind, nor made any effort to seek gainful and suitable employment within her restrictions. Claimant has not established that she is entitled to relief from this requirement under Butcher v. SAIF, 45 Or App 313 (1980).

Applying the guidelines of OAR 463-65-600 et seq., and taking into consideration claimant's impairment, including disabling pain, and the other social/vocational factors as noted above, we find that claimant is entitled to 60% unscheduled permanent partial disability.

ORDER

The Referee's order dated September 30, 1981 is modified. Claimant is granted compensation equal to 60% unscheduled permanent partial disability for her back, that being an increase of 12.5% over and above the November 6, 1973 Determination Order and Stipulated Settlement and Order of July 11, 1974. This award is in lieu of that granted by the Referee.

Claimant's attorney is allowed an attorney fee of 25% of the increased compensation granted by this order, not to exceed $2,000. This is in lieu of the Referee's allowance of an attorney's fee.

The remainder of the Referee's order is affirmed.

NEIL P. HOHNSTEIN, Claimant
Cash Perrine, Claimant's Attorney
Minturn et al., Defense Attorneys

WCB 81-08848
September 22, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Mulder's order which reversed its denial of compensability for claimant's bilateral carpal tunnel syndrome and remanded the claim for payment of benefits as required by law.

Claimant commenced employment with this employer, Beaver Coaches, in April 1978. In April 1980 there was a layoff. Claimant returned to work on September 6, 1980. He testified that he then did most of the routing for the employer. Claimant's job involved the use of hand tools and routers.

Claimant testified that he rides a large motorcycle and in good weather drives about one mile to work. During the summers he takes long trips with his wife on the motorcycle. Claimant also has an extensive wood shop at home where he makes cabinets and various things using hand tools. He also does stained glass work.

Claimant testified he first noticed symptoms in the summer of 1981 while riding his motorcycle. The symptom was numbness in both hands. Claimant further testified that after the summer of 1981 he did not ride his motorcycle very often or use the tools in his wood working shop more than once a month. Claimant's wife corroborated this testimony, and the Referee found claimant credible.

Claimant's supervisor testified that claimant only used the router approximately two hours a day. Claimant testified that he used it most of the time.

The medical opinions of Drs. Newby, Altrocchi and Hakala indicate they felt claimant's condition of bilateral carpal tunnel syndrome arose out of his work activities and not from his off-the-job activities. They did feel, however, that riding the motorcycle would aggravate the symptoms of bilateral carpal tunnel syndrome.

Dr. Nathan, on the other hand, is the only physician who found no causal relationship between claimant's work activities and his condition. Dr. Nathan felt it was due to his age and "other conditions."

The definitive rule regarding compensability of occupational disease claims is set forth in SAIF v. Gygi, 55 Or App 570 (1982):

> "We conclude that ORS 656.801(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." 55 Or App at 574.

The totality of evidence in this case establishes that claimant has proven that his off work exposure was not substantially the same as his work exposure and that his work activities constituted the major contributing cause of the development of his bilateral carpal tunnel syndrome. The Referee's conclusion is affirmed.

ORDER

The Referee's order dated April 12, 1982 is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee, payable by the insurer.

GARY R. RAPP, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Attorney

WCB 82-01133 & 82-03252
September 22, 1982
Order of Dismissal

The Workers Compensation Department has requested review of the Referee's order dated July 9, 1982, which, in addition to addressing various issues concerning claimant's entitlement to compensation, ordered that Wagner Trucking Company, a noncomplying employer, be responsible for payment of benefits to claimant and make necessary monetary adjustment with Blue Mountain Forest Products for compensation paid to claimant pursuant to an ORS 656.307 Order designating Blue Mountain Forest Products as the paying agent. The Department contends that the Referee's order ignores ORS 656.029, inasmuch as Wagner Trucking Company was a noncomplying employer and Blue Mountain Forest Products the prime contractor at the time of claimant's injury.

As is often the case in hearings involving an employer who has been found by the Department to be in noncomplying status, where that issue is heard together with issues concerning the claimant's entitlement to workers compensation benefits, the Workers Compensation Department, by and through the Attorney General's office, waived its appearance at the hearing. When the hearing convened in Canyon City, Oregon, claimant and claimant's attorney were present, as were representatives of Blue Mountain Forest Products, Wagner Trucking Company and the SAIF Corporation. Counsel for SAIF appeared as the attorney for Blue Mountain Forest Products, the prime contractor, which is a contributing employer. Counsel for SAIF apparently also appeared in behalf of Wagner Trucking Company, as the attorney for the processing agent of the noncomplying employer. Counsel for SAIF and claimant stipulated that Wagner Trucking Company was the party responsible for payment of workers compensation benefits to claimant. Upon receipt of the Referee's order reciting this stipulation and finding Wagner to be the responsible party based thereon, the Department requested reconsideration or, alternatively, that the hearing be reconvened and the record reopened for full development of the issues arising under ORS 656.029. SAIF objected to the Department's request, and the Referee denied the Department's request for reconsideration.

The Department then requested review, reiterating the arguments presented to the Referee in its request for reconsideration. SAIF has moved to dismiss the Department's request for review, based upon the Department's waiver of its right to be represented and present at the hearing. We find SAIF's position meritorious and therefore grant its motion for dismissal.

The issue which the Department seeks to have reviewed by the Board is an issue which could have been raised before the Referee at the time of hearing, had a representative of the Department been present at the hearing. The Department had full notice of the issues that would be the subject of the hearing, including all issues arising under ORS 656.029, as well as the time and location of the hearing. The Department's position seems to be that there was reasonable reliance upon a representation made by SAIF's attorney prior to the hearing, that SAIF's position at hearing would be that claimant was an employe of Wagner Trucking Company at the time of his injury. We note that the Department's notice that it would not participate in the hearing preceded SAIF's representation by one and one half months; we, therefore, find it difficult to see how the Department could have acted in reliance upon this representation in deciding whether to be in attendance at the hearing. The Department was or should have been aware of possible problems arising out of SAIF's potentially conflicting interests at the hearing, since SAIF represents the prime contractor as a contributing employer and SAIF is also the agent for processing the claim against this noncomplying employer. The issue the Department now raises could have been addressed and resolved at the hearing had a representative of the Department been in attendance. We will not entertain the issue raised by the Department's request for review under these circumstances.

ORDER

SAIF's motion to dismiss the Workers Compensation Department's request for review is granted, and the Department's request for review is dismissed.

HELLENE SCHAMBEAU, Claimant
Galton, Popick et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-03670
September 22, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The claimant requests review of Referee Williams' order which found that a letter from claimant's physician did not constitute medical verification of a causally connected worsened condition and, therefore, found that claimant was not entitled to interim compensation pursuant to ORS 656.273(6). The Referee also found that, based on the whole record, claimant had failed to prove that her current asthma condition is employment related.

The claimant contends she is entitled to interim compensation, a penalty, and attorney's fees for the insurer's failure to pay interim compensation pursuant to ORS 656.273(6). She also contends she has shown a compensable worsening of her original compensable injury.

INTERIM COMPENSATION

Claimant's original injury occurred on September 12, 1977 when she was exposed to cement dust which caused an asthmatic reaction. Her claim was closed February 15, 1978 with an award of temporary disability only. On January 15, 1979 a Stipulation was entered into wherein claimant received 11° unscheduled disability. Claimant's physician filed an aggravation claim on January 15, 1981. The insurer did not act on the claim until February 25, 1981 at which time a denial was mailed.

ORS 656.273(6) requires that, in the case of an aggravation claim, interim compensation ". . . shall be paid no later than the 14th day after the subject employer has notice or knowledge of medically verified inability to work resulting from the worsened condition." In this case the issue has arisen as to whether the medical verification was adequate to require the insurer to pay interim compensation. In Silsby v. SAIF, 39 Or App 555 (1970), the court held:

> "Usually, verification need go no further than to state that there is a worsened condition arising out of the original injury or disease. Unless such verification flies in the face of other evidence sufficient to make the verification inherently incredible, the carrier's duty to pay commences and failure to pay (or deny the claim) will expose the carrier to the possibility of penalties after 14 days." Silsby v. SAIF, 39 Or App 555, 563 (1979). (Emphasis added.)

In his January 15, 1981 letter, Dr. Miller, claimant's treating physician, states his awareness of the 1977 injury, and discusses his care of claimant since October, 1979. His care included some hospitalization, continuous outpatient medication and occasional emergency room visits. He notes claimant has been unemployed the entire time he has cared for her. He then states:

"She contends that her current unemployable status and her current medical condition are directly related to the inhalation of cement dust at the time of the above mentioned incident. I have no way of determining without doubt that this is the case. I can, however, state that she does have rather severe asthma requiring continuous care and constant medication. There is little hope that her asthma will ever be cured, but with adequate care and treatment, she should be able to lead at least a tolerable existence. There may be some job for which she could be trained if it did not require any exposure to any aggravating chemicals or allergins and if it did not require more than moderate physical exertion." (Emphasis added.)

We find that Dr. Miller's letter adequately notified the insurer that claimant was unable to work due to a worsened condition arising out of the original injury. It is not necessary that the medical verification prove to an absolute certainty the causal connection between the original injury and the worsened condition. Dr. Miller's reluctance to verify the causal connection without a doubt does not make it "inherently incredible"; especially where, as here, the worsened condition claimed is the same as that already compensated in the original claim.

Where there is a doubt as to adequate verification, we understand the standard of "inherent incredibility" to require that the claimant be given the benefit of the doubt. As stated in Silsby v. SAIF, supra, at 562, the purpose of ORS 656.273(6) is not to establish the substantive rights of the claimant to compensability of the claim, but to require payment of interim compensation until the insurer can make a decision on the compensability of the claim. Of course, where there has been a doubtful claim made for interim compensation, or even an absolutely certain claim, the duty to pay interim compensation will not arise if the claim is denied within 14 days of notice of inability to work due to the worsened condition.

In this case, the claim was denied February 25, 1981, whereas Dr. Miller's letter was date stamped as received on January 22, 1981. Interim compensation payments should have commenced by February 4, 1981 - the fourteenth day after receipt of notice - and continued until the date of denial. Claimant is due payment of interim compensation from January 22, 1981 up to February 25, 1981. The benefits are due even though we agree with the Referee that the aggravation claim is not compensable. Jones v. Emanuel Hospital, 280 Or 147 (1977). Further, a refusal to pay interim compensation warrants a penalty being imposed in the amount of 15% of the interim compensation due.

AGGRAVATION CLAIM

As indicated above, a distinction must be made between the verification needed to trigger interim compensation payments under ORS 656.273(6), and the proof needed to ultimately prevail on the claim for aggravation. At this stage of the claim, claimant must

prove by a preponderance of the evidence as a whole that a sufficient causal connection exists between her worsened asthma and the original compensable injury.

Claimant contends that to prove an aggravation claim it is enough to show that there was an underlying compensable condition and that the condition is now worse. That contention is not necessarily true. The claimant must also show that the worsening is related to the compensable injury. For example, in many cases, the relationship is shown by proving that the present condition is a natural progression of the compensable injury. But often, off-the-job factors or on-the-job factors from other employment can independently and solely contribute to the cause of the worsening. The evidence indicates that claimant had an asthma condition that preexisted the September 12, 1977 cement dust exposure.

In this case the insurer presented evidence that claimant's current condition is due to this off-the-job asthma condition that preexisted the compensable injury and that this preexisting condition is what subsequently and independently worsened causing her current disability. In the face of that assertion, claimant must at least show that the original compensable injury was a material contributing cause of her worsened condition even if the preexisting condition was also a cause.

We find that claimant has not met that burden of proof. We join with Referee Williams in finding that the asthmatic exacerbation caused by the September, 1977 cement dust exposure had resolved by February, 1978 and that claimant's current disability can no longer be related to that incident.

ORDER

The Referee's order dated February 18, 1982 is modified. Claimant is entitled to interim compensation for the period of January 22, 1981 up to, but not including, February 25, 1981. The insurer is assessed a penalty of 15% of the interim compensation due for refusal to pay that compensation. Claimant's attorney is awarded $450 as a reasonable attorney's fee pursuant to ORS 656.262(9) and 656.382(1), for services before the Referee and on review, payable by the insurer.

The remainder of the Referee's order is affirmed.

LEVI M. SPINO, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Foss, Whitty et al., Defense Attorneys

WCB 81-07181
September 22, 1982
Order on Review

Reviewed by the Board en banc.

The employer requests review of Referee Gemmell's order which granted claimant benefits for temporary total disability from June 25, 1980 through November 6, 1980 and 30% unscheduled permanent partial disability for injury to his right shoulder.

Claimant was injured on December 19, 1978 while employed at Weyerhaeuser. While unjamming a panel his right arm was caught between the feed rolls of a tongue and groove machine, pulling him in up to his shoulder. Claimant sustained severe and multiple crushing injuries to his right hand, forearm and upper humerus. Numerous operations including skin grafting and a resection arthroplasty of his right elbow followed. The majority of claimant's treatment was undertaken by Drs. Harris and Nathan. By June 25, 1980 Dr. Nathan reported:

> "I believe Mr. Spino will require ongoing medical care in the future and that one should consider retraining and closure of his claim to determine the disability rating."

Dr. Nathan rated claimant's right arm impairment as being 85%. Claimant was again examined by Dr. Nathan on November 6, 1980 for what Dr. Nathan stated to be a closing examination. Dr. Nathan indicated that claimant had been "basically" medically stationary since his last examination of July 21, 1980, and that his impairment of the right arm was now rated at 100%. Dr. Nathan also indicated that claimant had very limited motion at the shoulder with abduction limited to only 90°.

On December 12, 1980 a Determination Order issued allowing claimant benefits for temporary total disability from December 19, 1978 through June 25, 1980, and 100% scheduled disability for loss of right arm. By fall of 1981, following commendable efforts by Weyerhaeuser, claimant had returned to work as a utility man. About 70% of claimant's work is at his previous pay scale of $10.60 per hour.

The employer first contends that the Referee erred in allowing claimant benefits for temporary total disability for the period July 21, 1980 through November 6, 1980, since Dr. Nathan indicates in his November 7, 1981 report that claimant had been stationary since his last examination which had taken place on July 21, 1980. It, therefore, appears that the employer concedes that the Determination Order of December 12, 1980 was in error in only allowing time loss benefits through June 25, 1980. In any event, we agree with the Referee's determination that claimant is entitled to temporary total disability benefits from June 25, 1980 through November 6, 1980. It is clear that Dr. Nathan did not find claimant medically stationary at the time of his June 25, 1980 examination. He merely indicates that claimant had reached a point where retraining and claim closure could be considered. Although Dr. Nathan indicates in his November 7, 1980 report that claimant had

been stationary since the time of his July 21, 1980 examination, there is no record of any July 21, 1980 examination having taken place. It additionally appears, as noted by the Referee, that claimant's disability increased from 85% at the time of his June 25, 1980 examination to 100% by the time of Dr. Nathan's November 6, 1980 closing examination, further indicating that claimant did not become medically stationary until November 6, 1980. We are, therefore, in complete agreement with the Referee's conclusion regarding claimant's entitlement to temporary total disability benefits.

For its second issue, the employer contends that the Referee erred in awarding claimant unscheduled permanent partial disability for loss of shoulder motion. The employer, while conceding that claimant directly injured his shoulder in the accident, states that such an award is uncalled for since the mechanism of shoulder abduction serves no purpose other than to move the arm attached to it, and that if the arm is unusuable, the inability to abduct the shoulder is a meaningless limitation, thus entitling the claimant to no award. We disagree.

The Referee, relying on Audas v. Galaxie, 2 Or App 520 (1979), held that although claimant was not entitled to duplicate awards, where the injury directly involved both a scheduled arm and an unscheduled shoulder, with resultant disability in each, separate awards were appropriate. We agree with that analysis. In Audas, as here, the claimant suffered direct injury to his arm and shoulder, but suffered a resultant partial disability to his arm. The employer in Audas, as here, argued that claimant's disability was almost entirely related only to the arm and that no unscheduled disability award for the shoulder was allowed. The court held:

> "An industrial injury to an arm that causes an indirect injury to the shoulder and that results in a permanent partial disability in both the arm and the shoulder entitles the workman to separate awards . . ." 2 Or App at 525.

The court made no qualification for a situation where a claimant has lost the total, rather than partial use of the arm. We find no authority for such a proposition and are cited to none by the employer. Claimant has sustained a permanent partial disability to his shoulder due to an industrial accident and is entitled to an award for such disability despite the fact that the disability may for the most part relate to the use of his arm. We are also unconvinced by this record that movement of the arm is the only purpose that shoulder abduction serves.

The employer's argument, as we understand it, is only that claimant did not sustain any unscheduled disability for the reasons stated above. The employer does not appear to argue in the alternative that the Referee's award of 30% unscheduled disability is excessive. With that understanding of the employer's position, we will affirm the Referee's order.

ORDER

The Referee's order dated February 25, 1982 is affirmed. Claimant's attorney is awarded a fee of $350, payable by the employer.

MARILEE J. SUNDOWN, Claimant
Tom Hanlon, Claimant's Attorney
Macdonald et al., Defense Attorneys

WCB 81-06903
September 22, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of those portions of Referee Williams' order which found her compensable injury to be nondisabling and which found that the insurer did not unreasonably resist or delay payment of compensation.

Claimant argues that since the only issue at the hearing was compensability, the Referee did not have authority to make a finding related to the extent of permanent disability by finding her injury nondisabling. She further contends that since all of the evidence in the claim points to a compensable injury, with no contrary evidence produced, that a penalty should have been assessed pursuant to ORS 656.262. The insurer responds that the Referee may rate the extent of permanent disability if the claimant is medically stationary at the time of hearing, and that there was evidence upon which such a finding could be based. The insurer further responds that no penalty is warranted because there was no unreasonable delay in denying the claim.

In the proper setting, we agree that Referees should rate the extent of disability; but for the setting to be proper, at the least extent-of-disability must be made an issue at the hearing and evidence must be submitted on that issue. Even if disability is not clearly stated as an issue at the outset, that defect may be cured if the parties actually litigate the issue so that sufficient evidence is in the record upon which a finding may be made. In this hearing, the only clear issue was the compensability of the claim:

> "REFEREE: I gather from our preliminary conversation that the sole issue is compensability.
>
> "MR. HANLON [claimant's attorney]: Yes.
>
> "REFEREE: Is that correct?
>
> "MR HANLON: That's correct, Your Honor.
>
> "MR. MCCALLISTER [insurer's attorney]: That's correct as far as I'm concerned.
>
> "REFEREE: All right."

Later, when claimant's attorney appeared to be asking a question on direct examination that went to extent of unscheduled permanent disability, the insurer's attorney objected to the question as being "immaterial at this stage," and the question was withdrawn. Some evidence of disability is present from medical reports submitted and from testimony on the issue of compensability, but we are not satisfied that all relevant "extent" evidence was presented at the hearing. We conclude that the issue of permanent disability was not an issue at the hearing and that insufficient evidence was submitted to permit a finding regarding it.

Claimant requests penalties based on ORS 656.262(9). The insurer received claimant's claim on May 8, 1981, but did not deny the claim until July 10, 1981. The denial was beyond the sixty day time limit, but only by three days making a penalty award inappropriate on the basis of a delayed denial. Zelda M. Bahler, 33 Van Natta 478,480 (1981). The claimant asserts that at the time of the denial all evidence pointed toward a compensable injury so that the issuance of a denial constituted unreasonable resistance to payment of compensation. A reading of Dr. Davis' report, received by the insurer shortly before the denial was issued could be interpreted either for or against compensability. Given that report, we do not find that the issuance of a denial was unreasonable resistance to payment of compensation.

ORDER

The Referee's order dated February 11, 1982 is modified. This claim is remanded to the insurer for processing and closure pursuant to ORS 656.268. The remainder of the Referee's order is affirmed.

SAMUEL D. VICKERY, Claimant
Galton, Popick et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-07283
September 22, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Gemmell's order which upheld the employer's denial of his claim or claims.

Exactly what is being claimed is ambiguous. At various times claimant has alleged various at-work injuries on May 26, May 27, June 8 and June 9, 1981. These injuries allegedly involved claimant's low back and/or left hip. The medical evidence contains a significant variety of diagnoses: partial sacralization of the L-5 vertebral body with a rudimentary L-5 disc; left hip discomfort; increased radiodensity of the left femoral head; capsulitis of the left hip, with lumbar strain; left trochanteric bursitis and left hip degenerative joint disease. There is little basis upon which to find one diagnosis more persuasive, but the degenerative joint disease theory is slightly more consistent with all of claimant's symptoms.

No clinical evidence suggests that claimant's probable degenerative joint disease was caused or aggravated by the four at-work incidents in May and June of 1981. Claimant's testimony suggests that possibility. The Referee, however, rejected claimant's testimony on credibility grounds and upheld the employer's denial.

We reach the same conclusion with a slightly different emphasis in our own analysis. The question of when claimant signed the injury book does not raise as serious a doubt in our minds about claimant's credibility as it apparently did in the Referee's mind. On the other hand, we are more impressed than the Referee may have been by the uncertainty in the medical evidence about diagnosis and the lack of any persuasive opinion on causation.

ORDER

The Referee's order dated May 11, 1982 is affirmed.

MELODIE A. GAGE, Claimant WCB 81-09325
Franklin, Bennett et al., Claimant's Attorneys September 24, 1982
SAIF Corp Legal, Defense Attorney Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Pferdner's order which set aside its October 2, 1981 denial. The only issue is the compensability of the claim. SAIF argues that the claim is not compensable due to claimant's lack of credibility.

We adopt the Referee's findings of fact as our own.

SAIF's argument concerning claimant's lack of credibility is well taken. The Referee noted that there were numerous inconsistencies in the claimant's story. For example, claimant stated that she informed her senior district manager about her back injury while lying on a conveyer belt at work. The manager, however, testified that he recalled no such incident and that claimant informed him of the injury while they were standing at the bottom of a flight of stairs at work. A dispatcher employed by the defendant testified that he delivered a paycheck to the claimant at her home in August of 1981, after the alleged injury. Upon arriving, he witnessed claimant carrying a garbage can down her driveway; she appeared to be in a good mood and had a "peppy" walk. Upon entering claimant's apartment, however, he found her lying on a sofa, feigning sleep and complaining of back pain. A SAIF investigator testified that claimant showed no signs of pain when he began interviewing her in September of 1981 but that, as the interview progressed, she began to exhibit signs of physical discomfort. The Referee also noted that claimant's blending of headaches and shoulder/neck complaints, along with the low back problem allegedly caused by a lifting incident at work, generated doubts in his mind. Two co-workers testified that claimant mentioned to them that she hurt her back, although claimant only told one of them that it occurred on the job. Based on the testimony of these two co-workers, the Referee stated:

> "This referee has always been susceptible to the proposition that statements made at or near the happening of the event and before litigation is contemplated are more likely to be true than are subsequent statements. It is therefore the opinion of the referee the facts slightly preponderate in favor of compensability, and I so find." (Emphasis Added.)

We also generally find corroboration in the form of statements at the time of an alleged injury to be quite persuasive. But when a claimant's credibility is otherwise impeached, as we find to be the case here, the usefulness of such corroboration is lessened considerably. In Miller v. Granite Construction Co., 28 Or App 473 (1977), the court stated that a physician's conclusions regarding causation are only valid to the extent that the claimant's history of the accident is accurate and truthful. We believe that this applies equally to statements made by a claimant to his or her co-workers.

In addition to all of the factors noted by the Referee concerning claimant's credibility, we also find it of particular import that when questioned on cross-examination, claimant stated that she was not acquainted with workers compensation claims and had never before filed a claim. Claimant was then confronted with two prior claims bearing her signature. One was filed for a 1980 ankle injury and the other for a 1977 neck injury. Claimant's attempt to explain this inconsistent evidence was less than satisfactory. This raises additional doubt regarding claimant's failure to file a claim until August 5, 1981 and failure to seek medical treatment until August 8, 1981, despite the fact that the injury was alleged to have occurred on July 17, 1981. For the reasons noted by the court in Miller, we do not find the physicians' repetition in their reports of the claimant's statements concerning her injury to be of any value. In fact, there is little, if any, objective medical evidence presented by the examining doctors.

We conclude that claimant has failed to establish that she sustained an injury on or about July 17, 1981 while at work.

ORDER

The Referee's order dated December 7, 1981 is reversed. The denial issued by the SAIF Corporation dated October 2, 1981 is reinstated and affirmed.

VICTORIA OLIVAS, Claimant
Kenneth Peterson, Claimant's Attorney
Schwabe et al., Defense Attorneys

WCB 81-08276
September 24, 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.

DAVID C. WELSH, Claimant
Malagon & Velure, Claimant's Attorneys
Richard M. Davis, Defense Attorney

WCB 80-08831
September 24, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The claimant requests review and the employer cross-requests review of that portion of Referee Danner's order which granted claimant an award of 32° for 10% unscheduled disability and granted claimant compensation for temporary total disability from December 3, 1980 through January 5, 1981 as interim compensation plus a penalty of 25% pursuant to ORS 656.262(9) and an attorney fee under the provision of 656.262(9). Claimant contends that the award granted is inadequate and the interim compensation should commence on September 1, 1980. The employer contends that claimant is not entitled to any time loss after July 29, 1980 and that the Referee erred in awarding attorney fees based on an insurer's delay in transmittal of a medical report.

Claimant, 27 years of age, was employed as a mill worker and injured his low back after lifting tank stock material on July 19, 1979. The initial diagnosis was acute traumatic lumbosacral strain. He was released for his regular work on August 13, 1979.

Claimant had continuing problems and sought chiropractic treatment from Dr. Duncan. Claimant had returned to work but was subsequently laid off. He sought treatment from Dr. Franklin who reported on June 3, 1980 that claimant's neurological examination was normal. He diagnosed mild lumbosacral strain. On June 28, 1980 claimant was found medically stationary.

Dr. Franklin indicated on July 29, 1980 that, "I do not feel that Mr. Welsh has any evidence of permanent disability. . ." On August 15, Dr. Duncan basically concurred with Dr. Franklin but recommended vocational rehabilitation.

The claim was closed by a Determination Order on September 15, 1980 with compensation for time loss only.

A report dated December 3, 1980 was then submitted by Dr. Jeppeson which found claimant's condition was not medically stationary, requesting that the claim be reopened for treatment as of September 1.

Claimant was examined by Dr. King who reported on December 16, 1980 that claimant's condition was medically stationary and that any treatment would be palliative only. He stated, "I do feel also that there will be no permanent impairment. I think that when he first returns to work there should be some restrictions. . ." Dr. King was deposed and testified that upon examination he found no gross objective findings to correlate with the complaints and no permanent impairment.

The Referee concluded that claimant was entitled to an award of 10% unscheduled disability because he was precluded from heavy work. He indicated that Dr. Jeppeson's December 3, 1980 report constituted a claim for aggravation and that the insurer had an affirmative duty to respond and make a decision. He awarded interim compensation with a penalty of 25% thereon from the date of the claim for aggravation (December 3, 1980) to the date of the hearing (January 5, 1981), which he considered as the date of the denial of claimant's aggravation claim.

As to the issue raised on review concerning the extent of claimant's disability, we reverse. All of the medical evidence indicates that claimant has no permanent impairment. Dr. King explained that the restrictions placed on claimant were only for his initial return to work and until he reached full physical recovery. Claimant returned to work after this injury and only quit working when he was laid-off and not due to physical inability to perform his work. Therefore, claimant has not proven any loss of wage earning capacity, and the medical evidence supports the conclusion that claimant has suffered no permanent impairment from this industrial injury.

On the issue of interim compensation, we reverse. We agree with the Referee that Dr. Jeppeson's report constitutes a valid claim for aggravation. However, the requirements of ORS 656.273(6) have not been satisfied and, therefore, interim compensation is not warranted. ORS 656.273(6) states:

> "A claim submitted in accordance with this section shall be processed by the insurer or self-insured employer in accordance with the provisions of ORS 656.262, except that the first installment of compensation due under ORS 656.262(4) shall be paid no later than the 14th day after the subject employer has notice or knowledge of medically verified inability to work resulting from the worsened condition."

In the instant case, not only do we have no proof of a worsened condition, we also have no medical verification of an inability to work because of his condition. Therefore, neither penalties and attorney fees nor interim compensation are warranted.

ORDER

The Referee's order dated October 26, 1981 is reversed.

The Determination Order of September 15, 1980 is reinstated and affirmed. As requested, the insurer may recover any overpayment of benefits pursuant to ORS 436-54-320.

JOHN A. WINEBARGER, Claimant
Rosenbaum et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07553
September 24, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee James' order that upheld the SAIF Corporation's denial of his aggravation claim.

Claimant originally injured his left knee on December 11, 1978. The diagnosis was a soft tissue injury with a suspected underlying chondromalacia. Because of a recurrence of left knee pain, claimant submitted to surgery performed by Dr. Schilperoort in July of 1981. The question is whether claimant has established a causal relationship between his 1978 industrial injury and his 1981 surgery.

At surgery Dr. Schilperoort found no evidence of chondromalacia. He instead found a large plica band extending over the lateral femoral condylar edge and excised the plica. There is no medical evidence in the record that even suggests any causal relationship between the condition found (and corrected) at surgery in 1981 and claimant's soft tissue injury of the left knee in 1978. The Referee properly upheld SAIF's denial of claimant's aggravation claim.

ORDER

The Referee's order dated April 22, 1982 is affirmed.

LUCY (FROYER) ANDERSON, Claimant
Ross & Westmoreland, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-04064
September 28, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Mulder's order which dismissed claimant's request for hearing from the SAIF Corporation's partial denial of April 2, 1980. The only issue is the propriety of that dismissal.

The facts are undisputed. On April 2, 1980, SAIF issued a letter denying responsibility for claimant's psychological problems, but reaffirming its prior acceptance of claimant's industrial hand injury. On April 16, 1980 a Determination Order issued allowing claimant benefits for temporary total disability with regard to her hand condition. On May 6, 1980 claimant, through her attorney, filed a request for hearing alleging as issues extent of disability and "Other issues as shall be presented at hearing." The request for hearing form contained a line relating to requests for hearing from denied claims: "____ Appeal from denial, or partial denial, of ___19___ (de facto)." Claimant did not complete that line nor otherwise indicate that this was an issue for consideration at the hearing.

On January 21, 1981 claimant, by her new counsel, requested a postponement of the hearing due to claimant's need for additional medical treatment. Claimant's attorney stated that, "The hearing on the extent of permanent disability and premature closure of her original claim should be re-scheduled in the normal course." By July of 1981 claimant was again represented by new counsel. On July 31, 1981 we received an amended request for hearing from claimant's new counsel, which, for the first time protested the April 2, 1980 partial denial.

The Referee cited Brown v. EBI Companies, 289 Or 455 (1980), for the proposition that a hearing may not be granted with respect to objections to the denial of a claim unless the request for hearing is timely filed under ORS 656.319. The Referee concluded that claimant had failed to request a hearing on the denial either within sixty days after notification, or within the outside limit of 180 days, and, therefore, dismissed the request for hearing with respect to the denial.

Claimant contends that her request for hearing was filed within sixty days of notification that the claim had been denied, that it was not necessary that the request for hearing make reference to the denial and that it should be construed as a request for hearing from the denial as well as from the Determination Order.

ORS 656.283 states:

> "(1) Subject to ORS 656.319, any party or the director may at any time request a hearing on any question concerning a claim. * * *

> "(2) A request for hearing may be made by any writing, signed by or on behalf of the party and including the address of the party, requesting hearing, stating that a hearing is desired, and mailed to the board." (Emphasis Added.)

As the emphasized portion of that statute indicates, the general hearing rights provided under ORS 656.283 are subject to the time limitations of ORS 656.319, which provides:

> "(1) With respect to objections by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless:
>
> "(a) A request for hearing is filed not later than the 60th day after the claimant was notified of the denial; or
>
> "(b) The request is filed not later than the 180th day after notification of denial. . . " (Emphasis Added.)

Although ORS 656.283 allows a party to request a hearing at any time concerning a claim, that right is modified by ORS 656.319(1) which provides that the request for hearing must be filed within 60 days of the denial or within 180 days as the ultimate limitation period if good cause is established. Failure to request a hearing with respect to a denied claim within 180 days, must result in dismissal of the request for hearing. Nelson v. SAIF, 43 Or App 155 (1979). The court in Nelson stated:

> "The benefits awarded under the workers' compensation law are purely statutory, and a claimant must strictly follow the prescribed procedures in order to recover under the law. * * * Time limitations prescribed by the law are limitations upon the right to obtain compensation and are not subject to exceptions contained within the general statute of limitations." 43 Or App at 159.

Claimant argues that under ORS 656.283(2), any writing stating that a hearing is desired is all that is required, and that even though the claimant's request for hearing only raised the extent of claimant's disability in relation to the April 16, 1980 Determination Order, it was adequate also as a request for hearing on the partial denial. We do not agree with that interpretation of ORS 656.283. That statute clearly only relates to the form by which a request for hearing may be made. It does not state that any particular hearing request is adequate for all purposes, nor does it have any effect on the running of the time limitations of ORS 656.319, with which a request for hearing must also comply.

It could be argued that if the claimant had simply written her name and address on a piece of paper stating, "I request a hearing," her request may have been adequate under ORS 656.283 to have put both the Determination Order and denial in issue; and that it is inconsistent to allow a vague request for hearing to be adequate, and to hold that by being more specific claimant has waived any objections she may have had to the denial. However, it is undisputed that claimant received both the Determination Order and the denial. She was under no obligation to appeal either or both. Claimant in this case chose only to request a hearing in regard to the April 16, 1980 Determination Order. There seems to be at least an equal inconsistency in allowing the claimant to protest the denial long after the expiration of the time limitation, when she failed to do so in the first instance and apparently then had no intention of doing so.

The claimant also cites OAR 436-83-200 in support of her proposition that the request for hearing was timely filed with regard to the denial. OAR 436-83-200 states:

> "In addition to the statutory requirements of ORS 656.283, the Request for Hearing will state the issue(s) to be resolved. Failure to state an issue may be grounds for continuance if the adverse party is surprised thereby."

Claimant contends that, if SAIF is surprised, its appropriate remedy in this case is to seek a continuance under this rule. We disagree. OAR 436-83-200 only relates to specificity of issues with regard to a timely request for hearing. It has and can have no effect on the running of time limitations within which a request for hearing on a denied claim must be filed, and cannot serve to establish jurisdiction where none exists due to a failure to timely request a hearing. See Jesse Ammons, WCB Case No. 81-06876, 34 Van Natta 1160 (1982); cf. Syphers v. K-W Logging, Inc., 51 Or App 769 (1982); see also Donald K. Shaw, WCB Case No. 81-05922, 34 Van Natta 1260 (decided this date).

In summation, we conclude that the Referee acted correctly in dismissing claimant's request for hearing with respect to the denial. Claimant's original request for hearing was an appeal from the April 16, 1980 Determination Order, and was clearly not intended to be a request for hearing in relation to the denial. This is made abundantly evident by the January 21, 1981 letter from claimant's counsel requesting postponement of the hearing. We find that claimant failed to request a hearing with respect to the April 2, 1980 denial, within either 60 or 180 days of notification as required by ORS 656.319, and that the request for hearing relative to that denial was properly dismissed.

ORDER

The Referee's order dated February 17, 1982 is affirmed.

GORDON BENFIELD, Claimant
Tom Hanlon, Claimant's Attorney
Macdonald et al., Defense Attorneys
Schwabe et al., Defense Attorneys

WCB 80-11032 & 80-00968
September 28, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation seeks review of Referee Mulder's order which set aside its denial of claimant's claim for medical services, i.e., denial of authorization for future surgery. The Referee and one of the other parties to this proceeding, self-insured employer Crown Zellerbach, have characterized this case as an ORS 656.307 responsibility matter. However, SAIF has consistently denied that claimant's need for surgery is compensable as to claimant's employment with SAIF's insured, Curtis Fluhrer, Inc. Under this view of the case, the case more appropriately should be viewed as presenting a new injury versus aggravation issue, or, assuming that neither a new injury nor an aggravation is proven, an entitlement to medical services issue.

In any event, this case poses the question of which of two employers/insurers, if either, will be required to pay for medical services, associated time loss and permanent disability (if any) where a symptomatic condition caused by an industrial injury is allegedly aggravated by work exposure at subsequent employment. Except as may be inconsistent with our findings herein, we adopt the Referee's statement of facts. We do not adopt his analysis of the case only because due to a number of recent appellate court decisions we are unsure what the correct analysis should be. However, in our opinion, the Referee reached the proper result and therefore we affirm his order.

In 1976, claimant's right index finger was crushed in the course of his employment with Crown Zellerbach. The finger was ultimately amputated at the metacarpal-phalangeal joint. After a period of recovery and vocational rehabilitation, claimant obtained employment at Curtis Fluhrer, Inc. in its cedar shake mill. His job there consisted of carrying blocks and bundles of wood weighing up to 80 pounds and using a hand tool to crimp metal bands around bundles of shakes. Claimant experienced some pain, swelling, and loss of grip strength prior to starting employment at the shake mill. During several months of employment there, claimant experienced steadily increasing pain, swelling, and loss of grip strength in the right hand. X-rays revealed that one residual of the amputation was a small boney projection of the remaining bone at the amputation site. The projection acted like a spear gouging at the surrounding soft tissue when claimant used his right hand. Conservative treatment failed to improve the problem at the amputation site. Claimant's treating orthopedist, Dr. McLoughlin, then recommended surgery to bevel off the projection. Dr. McLoughlin sought authorization for the surgery from Crown Zellerbach, which was denied on the ground that claimant's employment at Curtis Fluhrer necessitated the surgery. A claim was filed with SAIF, which was denied on the ground that the condition requiring surgery arose from claimant's employment with Crown Zellerbach.

SAIF contends that Crown Zellerbach should be liable under the "last injurious exposure" rule of Smith v. Ed's Pancake House, 27 Or App 163 (1971), because no incident occurred while claimant was employed at Curtis Fluhrer which was a causative factor in the creation of the underlying condition needing surgical repair. SAIF also argues that Crown Zellerbach is liable for the surgery as a medical service under ORS 656.245 for a condition arising from the original injury. Crown Zellerbach intertwines an argument to the effect that the work exposure at Curtis Fluhrer was a "new injury", citing J.C. Compton Co. v DeGraff, 52 Or App 317 (1981), and Kizer v. Guarantee Chevrolet, 51 Or App 9(1981), with an argument that claimant's employment at Curtis Fluhrer "could have caused" the condition requiring surgery, citing Mathis v. SAIF, 10 Or App 139 (1972), Inkley v. Forest Fiber Products Co., 288 Or 337 (1980), and Bracke v. Baza'r Inc., 293 Or 239 (1982).

Under the formulation of the last injurious exposure rule as adopted in Smith v. Ed's Pancake House, responsibility can be imposed on the second employer if there is even "slight contribution" from that employment. In occupational disease cases, a subsequent employer is responsible upon a showing that the work exposure there "was of a kind which actually could have contributed to" the disease. Mathis v. SAIF; Inkley v. Forest Fiber Products Co.. Do these cases stand for the proposition that where there is a previous industrial incident or occupational exposure, the second employer can be held responsible for a condition to which its contribution is less than material? We think that the answer has to be no, and that the underlying assumption of both the last injurious exposure rule and the "could have caused" rule is that the subsequent injury or exposure was or could have been at least a material contributing cause. See Bracke v. Baza'r Inc., 293 Or at 249. However, we are not sure.

An additional ambiguity arises in cases such as these where it is alleged that an exposure over a period of time rather than a specific incident caused the aggravation, and there is some evidence of off-the-job exposure. In order to shift responsibility from the first employer to the second employer, must there be a showing that the work exposure at the second employment was the major cause of the aggravation under James v. SAIF, 290 Or 343 (1981), and SAIF v. Gygi, 55 Or App 570 (1982)? We think so because, but for the previous compensable incident or exposure for which the subsequent employer bears no responsibility whatsoever, the subsequent employer would not be liable unless the claimant satisfied the major contributing cause standard. However, we are not sure because the last injurious exposure rule and the "could have" test suggest lower standards.

There is one further ambiguity suggested by this case. SAIF argues that claimant has failed to prove a worsening of his underlying condition attributable to employment in the shake mill, that at most claimant has proven only worsened symptoms, and therefore, SAIF/Curtis Fluhrer is not responsible for surgery the purpose of which is to correct the underlying condition. A similar analysis was advanced by the Court of Appeals in Partridge v. SAIF, 57 Or App 163 (1982) (a "spreading disability" case, knee injury to exacerbation of pre-existing psychological condition), and Wills v. Boise Cascade Corp., 58 Or App 636 (1982) (a case involving two separate, compensable fractures of the wrist

followed by a separate, compensable sprain of the wrist which exacerbated the symptoms of but did not contribute to the need for a wrist arthroplasty). See also Cooper v. SAIF, 54 Or App 659 (1981). On the other hand, in Florence v. SAIF, 55 Or App 467 (1982), the Court of Appeals held, over a dissent, that Weller v. Union Carbide, Inc., 281 Or 355 (1978) and the concept of a dichotomy between worsened conditions and symptoms are not applicable to pre-exisiting conditions allegedly aggravated by industrial accidents.

In short, we are not sure whether, in order to shift responsibility from Crown Zellerbach, the first employer, to Curtis Fluhrer, the second employer, there must be a showing: (1) that the work activity at Curtis Fluhrer contributed "at least slightly" to the condition requiring surgery, "could have contributed" to the condition, or was the "major contributing cause" of the condition; and (2) that there was a pathological worsening of the underlying condition attributable to the work activity at Curtis Fluhrer.

To the extent that it may be relevant to the outcome of this case, we find that claimant's condition worsened during the period of time he was employed by Curtis Fluhrer. Claimant testified that although he was experiencing some pain, swelling, and loss of grip strength at the time he began his employment with Curtis Fluhrer, during the ensuing months of work he experienced increased pain, swelling, and loss of grip strength. The pain, swelling, and loss of strength abated somewhat during a three month interval in which clamant had knee surgery arising from a different claim, but the pain, swelling, and grip strength never returned to pre-employment levels. SAIF's arguments to the contrary are dependent on SAIF's characterization of claimant's "condition" as being only the boney projection that needed beveling. We believe this too narrowly defines claimant's "condition". The boney projection is surrounded by soft tissue which is affected by work activity resulting in the projection causing pathological change in the soft tissue, as evidenced by pain, swelling, and loss of grip strength. Considering the boney projection together with the soft tissue around it, we are satisfied that claimant's condition worsened.

We further find that claimant's work activity at Curtis Fluhrer contributed to the worsened condition. Dr. McLoughlin testified that the repetitive trauma of claimant's work caused the increased pain, swelling, and loss of grip strength, and hastened the need for surgery. Indeed, there was some uncertainty whether claimant would need the surgery at all if he had not engaged in labor requiring heavy use of his right hand. Nevertheless, the fact remains that claimant did engage in such employment and the work activity in the course of that employment worsened his hand condition.

Lastly, we find that the work activity at Curtis Fluhrer was the major contributing cause of the worsened condition. There is some evidence that an off-the-job incident might have contributed to the worsened condition. At one point during his vocational rehabilitation program, claimant was assisting another person in the assembly of a storage shed and spent a day using a screwdriver

with his right hand. That incident resulted in claimant experiencing increased pain and swelling that did not abate until about two months later. The evidence indicates, however, that the pain and swelling returned to the pre-incident level prior to the employment at Curtis Fluhrer and was not a factor at the time authorization for surgery was requested.

Since the exposure at the Curtis Fluhrer resulted in a "new condition", Crown Zellerbach is relieved of responsibility for providing medical services under ORS 656.245, at least until such time, if ever, that the hand returns to the status that existed prior to claimant beginning his employment at Curtis Fluhrer. Roger Ballinger, 34 Van Natta 732 (1982).

For all these reasons, we believe that the Referee properly affirmed Crown Zellerbach's denial and reversed SAIF's denial.

ORDER

The Referee's orders dated April 13, 1982, and April 22, 1982 are affirmed.

DOUGLAS S. CHIAPUZIO, Claimant
Samuel Hall, Claimant's Attorney
Foss, Whitty et al., Defense Attorneys

WCB 80-01301
September 28, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Nichols' order which set aside its denial of claimant's occupational disease claim for degenerative disc disease.

Claimant, a college student, worked in a wood products mill during the summer of 1979 between school years. He experienced some low back pain earlier in the spring, while still at school, while working out with weights and running to stay in shape for intercollegiate basketball. During the summer claimant had a variety of duties in the mill, mostly on the greenchain. He testified he experienced no "specific onset of pain" at work and instead first thought there was something wrong with his back while participating in a summer basketball program. Claimant missed no time from work during the summer due to his back condition. Claimant did, however, consult Dr. Holbert in July about his back, who reported: "He lifts all day long [at work] and that does not bother him." After returning to college in the fall, claimant's back condition continually worsened until December of 1979 when surgery, a laminectomy and fusion, was performed by Dr. Holbert. The doctor's final diagnosis post-surgery was degenerative disc disease.

SAIF argues that the evidence does not satisfy the "major cause" requirement of SAIF v. Gygi, 55 Or App 570 (1982). Claimant responds that Gygi is inapplicable and that his claim is compensable because he has satisfied the requirements of Weller v. Union Carbide, 288 Or 27 (1979). This offers the opportunity to state our understanding of the interrelationship of Weller and Gygi.

We think that both Weller and Gygi are applicable to occupational disease claims. The first two prongs of the Weller test require proof that a claimant's "(1) work activity and conditions (2) caused a worsening of his underlying disease." 288 Or at 27. Gygi requires that work conditions be "the major contributing cause of the" occupational disease. 55 Or App at 574. Reading these two cases together, the rule that emerges is that a claimant seeking compensation for the worsening of a previously symptomatic underlying disease on an occupational disease theory must prove that work activity and conditions were the major cause of a worsening of the underlying disease.

As a matter of methodology, it is preferable to apply Weller and then Gygi. First, has there been any worsening of an underlying disease? Second, if so, was work activity the major cause of the worsening?

Remembering that claimant worked in the mill less than three months, June 13 to August 24, 1979, that part of this time he was on light duty and that claimant missed no time from work due to his back condition, it is far from clear that there was any worsening of claimant's disc disease during the summer of 1979. Dr. Holbert reported during that summer that claimant's mill work did not bother him. And when claimant did experience back discomfort, it was his summer basketball program, not his work, that he discontinued.

Assuming any worsening, claimant's work activities that were rather limited in duration and intensity have not been shown by any persuasive evidence to have been the major cause. Claimant's disc disease preexisted his summer work and was symptomatic; at least in retrospect, claimant's low back symptoms in the spring of 1979 were probably due in part to disc disease. All doctors agree that the physical conditioning that claimant did to prepare for basketball and the actual playing of basketball were contributing factors in the progression of the disc disease. At least the more strenuous part of claimant's summer employment probably was also a contributing factor. But on this record there is no persuasive basis for concluding that claimant's summer work activity was the major cause of the need for surgery in December of 1979 and the resulting disability.

ORDER

The Referee's order dated April 26, 1982 is reversed. The SAIF Corporation's denial dated February 6, 1982 is reinstated and affirmed.

FARRIS, WANDA. See page 1267.

DONNIE HARRISON, Claimant
Allen & Vick, Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 81-04962
September 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Foster's order which directed it to pay for all chiropractic treatment and x-rays as indicated by Dr. Robinson until claimant becomes medically stationary and, when claimant is stationary, to refer this claim to the Evaluation Division for closure.

The Referee's findings of fact, although accurate, are incomplete. The sole issue is whether SAIF is responsible for chiropractic treatment and x-rays done by Dr. Robinson from approximately March 1981 to July 1981. The Referee considered all the medical documents in the record and all the Determination Orders, possibly failing to note that claimant sustained an unrelated industrial injury on July 28, 1981 which has been accepted by SAIF. Some of the medical reports and the Determination Order of December 11, 1981 are pertinent to the new claim only and are not relevant to this proceeding.

SAIF presented several arguments in an effort to justify its denial of the treatment and x-rays in question. SAIF contends claimant's condition during that time was due to an automobile accident in which he was involved approximately 18 years earlier but from which he had no continuing complaints. The possibility of an underlying spondylolisthesis condition was considered and discarded by SAIF. SAIF also raised a question about a three-day period of employment for Crown Zellerbach, during the period in question, which could have caused some type of "new injury." We are not persuaded by any of these arguments, but agree with the Referee that SAIF should be responsible for Dr. Robinson's chiropractic treatments and x-rays provided between March and July of 1981. However, the Referee's ruling that SAIF was to pay for this treatment until claimant was medically stationary and then submit the claim to the Evaluation Division for closure was erroneous. Claimant's claim herein is currently in a closed status with the last Determination Order being issued November 10, 1981. The sole issue is medical services under the provisions of ORS 656.245. SAIF is responsible for the services in question.

ORDER

The Referee's order dated March 15, 1982 is modified.

SAIF Corporation is responsible for chiropractic treatment and x-rays as indicated by Dr. Robinson, particularly during the months of March 1981 to July 1981.

Claimant's attorney is entitled to the fee granted by the Referee plus a fee equal to $350 for his services on Board review.

The remainder of the Referee's order is vacated.

RONALD O. JAMES, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
David Horne, Defense Attorney

WCB 81-05063
September 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Pferdner's order which affirmed the Determination Order dated December 15, 1981 based upon his finding that claimant had not proven entitlement to a greater award for permanent disability than the award in the Determination Order of 5% loss of each forearm (wrist) for claimant's accepted bilateral carpal tunnel syndrome condition. Claimant argues he is entitled to a greater award.

We affirm and adopt the Referee's order with the following additional comment. Claimant argues at length that an award for permanent disability can be based solely on credible testimony without any support in the medical evidence. Assuming that to be true, it does not change the result in this case because we interpret the tenor of the Referee's order to be that the Referee found claimant's testimony to be less than completely credible.

ORDER

The Referee's order dated April 15, 1982 is affirmed.

CHARLES W. ROLLER, Claimant
Malagon & Velure, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 82-00383
September 28, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer seeks Board review of Referee Galton's order which found claimant's condition to be compensable under the doctrine of res judicata in that the question of compensability of claimant's diabetes mellitus had already been determined in a prior hearing. The Referee also assessed a penalty for the employer's unreasonable denial of claimant's continuing condition of diabetes mellitus.

The employer contends that the principle of res judicata is not applicable because the issue in the prior hearing was the compensability of the onset of claimant's diabetes; whereas, the issue in the recent hearing was whether claimant continued to suffer from any identifiable residual effect of his industrial injury as related to his diabetes. The employer further contends that the penalty assessment was unwarranted due to the medical reports they had which indicated claimant's condition was no longer their responsibility.

The claimant responds that claimant has shown a permanently unalterable aggravation of his diabetes. He cannot return to his pre-injury status when his diabetes was only latent. Claimant further responds that an employer is responsible for all of a worker's condition once an injury has aggravated or accelerated a pre-existing injury or disease, and is not allowed to deny a claim when enough time passes so that the worker is just as disabled as he would have been without the work related injury.

Although the Referee applied the principle of res judicata, we find that the party asserting that affirmative defense did not meet the burden of proving that the subsequent hearing was based on the same issue previously litigated. Merely looking to recitations in the prior order does not prove what was actually litigated in that proceeding. Multistate Tax Commission v. Merck & Co., Inc., 289 Or 707 (1980).

Further, a compensable condition remains compensable unless and until there is evidence that there is no longer a nexus between claimant's present condition and the industrial injury. Here, the employer had specific and ample medical reports, and no contrary reports, that they were no longer responsible for claimant's diabetes mellitus. For example, on December 14, 1981, claimant's treating physician Dr. Kenneth Magee agreed that: "Claimant's condition is as disabling, as severe, and as advanced at this time as it would have been whether or not claimant had had the injury."

Thereafter, on January 5, 1982, the employer issued a partial denial stating: "We have received medical information which indicates that at the present time, your diabetic condition is in a status where it would have been whether or not you had sustained the industrial injury of January 11, 1980. Since there no longer is any identifiable residual effect on the diabetes from your industrial injury, we are denying further responsibility for that condition."

We do not find that denial to be unreasonable. We further find that the medical evidence does show that the diabetes is no longer related to the industrial injury.

ORDER

The Referee's order dated May 18, 1982 is reversed. The denial issued January 5, 1982 is reinstated and affirmed.

ROGER R. ROSALES, Claimant
Allen & Vick, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 82-00089
September 28, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Pferdner's order which upheld the employer's denial of his claim.

We agree with the Referee's conclusion but feel that both the Referee and the parties, in their briefs, have gotten somewhat tangled in a web of esoteric terminology about "legal causation, medical causation," etc. The issue as we see it is simple: Did claimant prove, as claimed, that he injured his back at work on December 11, 1981.

The Referee found:

> "The Referee is unable to perceive how the type of motions described by claimant could have produced any low back stress or injury. Two of claimant's co-workers

testified that prior to the date of the alleged injury claimant had informed them that he anticipated being laid off and it was about time for him to have another low back injury."

We interpret the Referee's findings to be a polite way of saying that he did not believe that claimant's testimony was completely credible. Based on that understanding of the Referee's order, we conclude that claimant did not prove that he injured his back at work on December 11, 1981.

ORDER

The Referee's order dated March 5, 1982 is affirmed.

DONALD K. SHAW, Claimant
Brown, Burt et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05922
September 28, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Howell's order which found claimant entitled to an additional 15° scheduled permanent partial disability for loss of right leg, 80° unscheduled permanent partial psychological disability and benefits for temporary total disability from August 1, 1980 through January 19, 1981. SAIF contends that the Referee lacked jurisdiction to consider a challenge to the Determination Order of October 28, 1980 on the grounds that claimant failed to request a hearing on that Determination Order. Alternatively, SAIF argues that the Referee's award of unscheduled disability is excessive.

The facts relevant to the jurisdictional issue may be briefly summarized. Claimant, an electrical safety inspector for the State of Oregon, sustained compensable injuries on June 2, 1978 when the vehicle he was driving collided with a jackknifed tractor-trailer. Claimant suffered numerous injuries including injuries to the left wrist, back, shoulder and a zygomatic fracture. A Determination Order dated July 14, 1980 allowed claimant temporary total disability benefits and 20% scheduled disability for the right knee. On August 15, 1980 a second Determination Order issued setting aside the previous Determination Order because claimant's condition had not been medically stationary at that time. A third Determination Order issued on October 28, 1980 closing the claim with additional temporary total disability benefits and the same amount of permanent partial disability as previously awarded. On November 28, 1980 claimant requested reconsideration of the October 28, 1980 Determination Order. This request was refused on the grounds that claimant failed to provide additional medical information not available at the time of the determination. On June 25, 1981 claimant requested a hearing. The request stated:

> "This claim was closed by Determination Order on July 14, 1980, which was followed by a Determination Order dated August 15, 1980. Claimant disagrees with both Determination Orders and is accordingly requesting a hearing. The issue to be resolved at the hearing is the extent of permanent partial disability, and in addition claimant contends that he should have been awarded permanent partial disability for a psychiatric condition. . . ."

The request for hearing was never amended to indicate that claimant wished to contest the October, 1980 Determination Order.

The Referee found that the claimant did receive the October 1980 Determination Order. While agreeing with SAIF that if claimant failed to file a timely request for hearing from the Determination Order he would lack jurisdiction to hear the matter, he nevertheless concluded that claimant did file a timely request for hearing from that Determination Order. The Referee relied on several considerations in arriving at this conclusion. He noted that the Workers Compensation Board rules of practice and procedure do not require pleading specificity, and that failure to state an issue is merely grounds for a continuance of the hearing. OAR 436-83-200. He also found that the request for hearing met the requirements of ORS 656.283(2), since that statute only requires that a request for hearing be in writing, signed by or on behalf of the claimant, stating that a hearing is desired. The Referee additionally noted the benevolent purposes of the workers compensation system and the rule of liberal construction in favor of an injured worker as additional basis for his decision. The Referee then proceeded on the merits to determine the extent of claimant's permanent disability.

We disagree with the Referee's analysis and determination that jurisdiction existed in regard to the October 1980 Determination Order for the purposes of this particular case. We considered several of the reasons given by the Referee as a basis for his determination that jurisdiction existed in relation to the disputed Determination Order in Lucy (Froyer) Anderson, WCB Case No. 80-04064, 34 Van Natta 1249 (1982), (decided this date). In that case, a Determination Order issued closing the claim, and was followed by a partial denial. Claimant thereafter requested a hearing, theoretically within the appropriate time limitations of both the Determination Order and the denial. The request for hearing specified that a hearing was desired only in relation to the Determination Order. The request for hearing was amended some 14 months later, raising for the first time a protest about the partial denial. The Referee dismissed the request for hearing against the denial as being untimely and the Board approved of this action.

In regard to OAR 436-83-200, the Board in Anderson stated that:

> "OAR 436-83-200 only relates to specificity of issues with regard to a timely request for hearing. It has and can have no effect on the running of time limitations within which a request for hearing on a denied claim must be filed, and cannot serve to establish jurisdiction where none exists due to a failure to timely request a hearing." 34 Van Natta at 1251

This statement is equally applicable in regard to requests for hearing in relation to Determination Orders. OAR 436-83-200 only relates to specificity of issues, not time limitations.

In regard to the Referee's reliance on ORS 656.283 in this case, we point out, as we did in Anderson that ORS 656.283 is modified by ORS 656.319, which provides in pertinent part that:

> "(2) With respect to objections to a determination under ORS 656.268(3), a hearing on such objections shall not be granted unless a request for hearing is filed within one year after the copies of the determination were mailed to the parties." (Emphasis Added.)

ORS 656.283 relates only to the form by which a request for hearing may be made. "It does not state that any particular request for hearing is adequate for all purposes, nor does it have any effect on the running of the time limitations of ORS 656.319, with which a request for hearing must also comply." Anderson, 34 Van Natta at 1250.

We also find that the Referee's reliance on the rule of liberal construction in favor of an injured worker and the benevolent purposes of workers compensation was misplaced in the context of the present jurisdictional problem. See Syphers v. K-W Logging, Inc., 51 Or App 769 (1982); Nelson v. SAIF, 43 Or App 155 (1979).

We also have a more fundamental reason for our disagreement with the Referee. Following SAIF's jurisdictional challenge during the course of opening statements at the hearing, claimant's counsel stated: "So I think it goes without saying, I can clearly state for you that we did not appeal within a year any October 28, 1980 determination order." In our opinion, counsel's statement amounts to an admission that there was no jurisdiction for the Referee to hold a hearing with regard to the October, 1980 Determination Order. Despite claimant's open admission, in effect agreeing with SAIF that the Referee lacked jurisdiction since there had not been a timely request for hearing from the October 1980 Determination Order, the Referee proceeded to find to the contrary. His finding was, therefore, gratuitous and contrary to the admitted facts.

Under other factual circumstances, we may have agreed that the request for hearing was adequate as against all three Determination Orders. However, in the face of the admission of claimant's counsel, and the fact that the second Determination Order vacated

the first, we find that in this case the Referee lacked jurisdiction to consider the October 1980 Determination Order. Therefore, the Referee's award of increased compensation must be reversed since it was based on the third Determination Order.

ORDER

The Referee's order dated February 19, 1982 is reversed.

TUCKER, ROBERT. See page 1270.

WILLIAM E. URTON, Claimant
Coons & McKeown, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 78-06892
September 28, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Williams' order which affirmed the SAIF Corporation's August 25, 1978 denial of claimant's June 1, 1978 myocardial infarction claim.

Claimant, at the time of his heart attack, had been employed as a fireman by the City of Medford since approximately 1970. Prior to that, claimant had worked as a fireman in California for about eight years. Claimant's regular duties required 24 hours of on-duty time followed by 24 hours of off-duty time, in a nine day cycle. In 1972 claimant became a negotiator for the Fire Fighters Union, in addition to his regular duties as a fireman. Beginning in 1976, subsequent to the arrival of a new city manager, claimant became involved in a protracted series of disputes between the union and his employer. In 1976 the city terminated the union contract. Claimant continued to be involved in negotiations between the union and the city throughout 1977 and 1978. In 1977 the union filed a lawsuit against the city, and claimant was elected president of his union.

In 1976 claimant had taken an examination for City of Medford fire inspector. He passed the exam and was placed on an eligibility list. By 1977 claimant was the only qualified candidate on the list. The Fire Chief, however, whom the claimant perceived as being anti-union, refused to allow the claimant to fill that position. Claimant then filed an unfair labor practice complaint with the Employment Relations Board.

In the meantime, the lawsuit between the union and city proceeded to the Court of Appeals and Supreme Court. In 1978 the union filed for fact finding. In an effort to prevent fact finding, the city initiated another judicial proceeding. Claimant was involved in meetings with attorneys and other interested persons in connection with that proceeding. About this same time, in the spring of 1978, the hearing on claimant's unfair labor practice complaint was held. On the morning of June 1, 1978, about one-half hour after reporting for duty, while sitting at the breakfast table at the fire station, claimant experienced a myocardial infarction. Claimant had been off duty for four days preceding the attack.

Claimant was 38 years old at the time of his heart attack. He had experienced no prior symptoms nor shown any sign of heart disease prior to the attack. Claimant has smoked since the age of 14. In the year and a half preceding his heart attack, claimant smoked two to three packages of cigarettes per day. Claimant also experienced a 20 pound weight gain over the two years prior to the attack. The Referee noted that claimant experienced sleep deprivation problems in the year-and-one-half prior to the attack, and also experienced domestic difficulties and was considering leaving his wife.

ORS 656.802 contains the so-called "fireman's presumption." In Wright v. SAIF, 289 Or 323, 331 (1980), the court held that, when the basic facts giving rise to the presumption are established, the presumption is binding if there is no opposing evidence and that, if there is opposing evidence, the trier of fact must weigh the evidence, giving the presumption the value of evidence, and determine upon which side the evidence preponderates. The court stated that the presumption imposes the burden of producing opposing evidence that the cause of a claimant's condition is unrelated to his employment as a fireman upon the employer/insurer. Wright, 289 Or at 332. This can be done by establishing facts which show that the claimant's employment was not the legal or medical cause of his heart condition or attack. For example, the opponent may show that the exertion or stress precipitating the attack was not connected with the claimant's employment, or that if such stress did occur in relation to his employment, that it was not a material contributing factor precipitating the attack. Foley v. SAIF, 29 Or App 151 (1977). The employer/insurer could also cause the presumption itself to disappear if evidence is presented establishing the nonexistence of one of the factors giving rise to the presumption. Wright, 289 Or at 332.

All parties in this case agree that the facts giving rise to the presumption are in existence. Thus, the only question is whether SAIF has presented evidence that claimant's heart attack is unrelated to his employment, and whether it has done so by a preponderance of the evidence.

Each side presented expert evidence. Dr. Mathews, who participated in claimant's initial treatment, was of the opinion that claimant's infarction was caused by coronary artery disease which developed over the course of many years. Dr. Mathews did not regard claimant's employment or his job activities of July 1, 1978 as a factor. Dr. Griswold felt that claimant's attack developed as a natural progression of coronary atherosclerosis, and that claimant's work activity and associated anxieties were not a factor in the acceleration of his atherosclerosis. We do not understand either Drs. Mathews or Griswold to be of the opinion that stress, physical or emotional, can never cause or contribute to heart disease or a heart attack. The fact that Oregon law subscribes to the school of medical thought that exertion or stress can be a causative factor in heart cases does not necessarily mean that the opinions of those physicians who attribute a claimant's heart attack or condition to stress or exertion will automatically be accepted over the opinions of those who find that exertion or stress was not a factor present in a particular claimant's heart condition or attack, assuming they accept the legal edict that as a general matter stress and exertion can be factors in heart cases. See Bales v. SAIF, 57 Or App 621 (1982).

Dr. Schafer was also involved in claimant's initial treatment. Responding to an inquiry from claimant's attorney in which the attorney had explained the fireman's presumption, Dr. Schafer opined that he was unaware of any evidence that would overcome the presumption. Dr. Kloster, in his September 26, 1979 report was of the opinion that the claimant's work activity as a firefighter and his activities as representative and negotiator for his union were material contributing factors to his heart disease and infarction. He noted the unusual stresses associated with firefighting and that claimant was exposed to excessive and unusual stress for the two years preceding his heart attack in relation to his union activities. Dr. Kloster stated:

> "As a result of his deep involvement in the negotiations and identification by the other side as their chief adversary, he was subjected to much greater demands and pressure in his work than might otherwise have occurred. . .
>
> "It is my impression that the combination of the physical and the emotional stress inherent in his usual work as a fire fighter, plus the unusual tensions and pressure related to his representation of the Fire Fighters Union were substantial and material contributing factors in his development of coronary heart disease and ultimate myocardial infarction."

Claimant also produced an opinion from Dr. Bullard, a psychologist, who felt job related stress factors were a contributing factor in the claimant's heart attack. Dr. Bullard's opinion, however, was disputed by Dr. Walker who did not feel stress was a factor in heart disease or attacks. Since Dr. Bullard offers an opinion somewhat out of his area of expertise, and since Dr. Walker feels stress can never play a role in heart cases, their opinions are weighed accordingly. Bales v. SAIF, supra.

Claimant has established the facts necessary to give rise to the presumption that his heart attack resulted from his employment. SAIF, however, in an attempt to overcome the presumption, has introduced evidence which indicates that his heart problem was not work related. Claimant has met and somewhat blunted this attack with evidence from his own experts indicating that the opposite is true. Even considering the presumption as evidence, we conclude that SAIF has introduced enough evidence, as summarized above, to overcome the presumption and establish that claimant's heart disease and attack were not related to stress from his job or otherwise, but instead to a combination of factors relative to claimant's long history of smoking and the natural progression of his coronary atherosclerosis.

The Referee found that the evidence established that emotional stress was a material contributing factor in the development of claimant's atherosclerosis and myocardial infarction, along with other factors such as sleep deprivation and smoking. The Referee apparently concluded, however, that the evidence presented by SAIF successfully rebutted the presumption by showing that the legal cause of claimant's heart problem was stress that was related to claimant's union activities and not related to his employment as a fire fighter.

Claimant argues emphatically that his activities with the union are within the unitary "work connection" approach established in Rogers v. SAIF, 289 Or 633 (1980). There is no case in Oregon directly or even indirectly on point. Larson states generally that union activity is for the personal benefit of the employe and notes cases from other jurisdictions which have so held. Larson, The Law of Workman's Compensation § 27.33 (1979). Larson notes that, in an increasing number of cases, activity undertaken by an employe in the capacity of union officer is being held to serve the interests of the employer as well as the employe. Larson, supra at 5-304. Assuming without deciding that that is the correct position, we would not find that the particular facts of this case support such a decision. In the cases Larson notes where compensation has been allowed, it was generally in the context of a claimant acting in the dual capacity of an employe-shop steward who had special responsibilities and was injured while performing an activity of mutual benefit to the union and the employer, and also acting within explicit contractual provisions of the collective bargaining agreement. Such is not the case here.

Larson also notes the case of Salierno v. Micro Stamping Co., 345 A.2d 342 (N.J. App. 1975), where compensation was allowed for an employe who suffered a heart attack at a collective bargaining session, after which he returned to work and suffered a second heart attack. Again, the facts of the current case differ. Claimant did not suffer his heart attack during or following any negotiating meetings with the employer. His testimony indicates that he was off work for a period of four full days preceding the heart attack, and that he engaged in no activity for his employer at the time, and no activity related to the union which could be said to be of mutual benefit to the union and employer. If we accept the fact that claimant's heart attack was the result of stress related to his union activities, we nevertheless find that SAIF has presented sufficient evidence to establish that most, if not all of the claimant's union activities were not activities undertaken for the mutual benefit of the union and employer. Therefore, even if claimant's myocardial infarction was due to stress related to his union activities, it is not compensable.

ORDER

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

WANDA FARRIS, Claimant
Olson, Hittle et al., Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 80-04671
September 28, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer has requested review and the claimant has cross-requested review of Referee Knapp's order which granted claimant compensation for permanent total disability and denied claimant's request for additional compensation for traveling expenses and examination by Dr. Adams in California. The employer contends claimant is not permanently and totally disabled. Claimant contends that she is entitled to payment for medical services and traveling expenses incurred in connection with her treatment with Dr. Adams.

Claimant, a then 40 year old nurse's aide, compensably injured her back November 1, 1976. Eventually a partial laminectomy and discectomy was performed on March 17, 1977 by Dr. Lilly. Claim closure followed on December 19, 1977 with an award of 20% unscheduled low back disability. Claimant, however, continued to experience low back pain which Dr. Lilly associated with nerve root scarring, but found her medically stationary on December 29, 1978 and felt that further surgery was contraindicated. The Determination Order of February 15, 1979 allowed no additional permanent partial disability. Claimant continued to complain of pain and was referred to Dr. Klump, who also felt that surgery was not indicated. Despite claimant's persistent complaints of pain, Dr. Lilly concluded that she was medically stationary with a 25% permanent impairment of the whole person. Claim closure again followed on July 27, 1979 with an award of temporary total disability benefits only. On September 4, 1979, Dr. Laubengayer requested that the claim be reopened on the basis of the claimant's continued back and leg pain complaints. Claimant continued to treat with Dr. Laubengayer and was accepted into the Northwest Pain Center. Dr. Laubengayer found the claimant to be medically stationary but recommended a change in occupation which allowed frequent postural changes and no repetitive bending, lifting or stooping, and recommended part-time work only. The Determination Order of May 15, 1980 granted claimant an additional 20% unscheduled permanent partial disability.

Since October, 1979 claimant has been treating with Dr. Rimel, a psychiatrist. In a September 3, 1980 report, Dr. Rimel indicated that claimant had suffered increased pain following completion of her Pain Center treatment which resulted in her becoming depressed and hopeless about her future. Dr. Rimel felt that, from a psychiatric point of view, claimant might never be able to return to work because of her injury-related depression. Dr. Laubengayer stated in his November 3, 1980 report that the claimant's combined back pain and depression rendered her unemployable "at this time." Claimant was examined by Dr. Adams at the University of California Hospital in San Francisco on February 2, 1981, following a referral by Dr. Klump. Dr. Adams agreed that surgery was not indicated and suggested ten days of pelvic traction. On July 24, 1981 the insurer denied payment for expenses incurred in relation to the claimant's examination by Dr. Adams.

The Referee found that the medical evidence combined with his observations of claimant's demeanor at the hearing substantiated claimant's contentions of permanent total disability. Although finding the claimant had made only a minimal effort to seek work as required by ORS 656.206(3), he concluded that under Butcher v. SAIF, 45 Or App 313 (1980), she was relieved of that statutory duty.

Although the evidence on the matter is somewhat equivocal, we find that the claimant is not permanently and totally disabled from employment at a gainful and suitable occupation. From the standpoint of claimant's injury and the physical residuals of that injury, there is not a single medical opinion which concludes that claimant is permanently and totally disabled. In his chart notes of April 25, 1980 Dr. Laubengayer states that claimant has a significant permanent partial disability and indicates that her future work should not involve repetitive bending, lifting and stooping. Dr. Seres at the Pain Center also found that claimant had a significant disability but that, based upon her performance in the pain program, she could engage in light to moderate activity, but that the main obstacle to achieving this was her attitudinal problems. Dr. Seres concluded: "One doubts she will return to work, although certainly the potential exists if she is willing to put forth the effort." Dr. Laubengayer in his April 25, 1980 report and in his deposition agreed with Dr. Seres and again noted that an occupation with appropriate restrictions was indicated. From a physical standpoint alone, there is no question that claimant could perform at a suitable and gainful occupation if she but chose to do so.

In addition to her physical disability, claimant also suffers from depression which Dr. Rimel has treated. Dr. Rimel opines that claimant's injury and continued pain have resulted in feelings of depression and hopelessness. In his November 3, 1980 report Dr. Laubengayer stated that the combination of back pain and depression made the claimant unemployable.

We are not convinced that the claimant's combined physical and emotional problems render her unemployable. Extensive evidence on the claimant's potential employability was provided by the physicians and psychologists at the Northwest Pain Center following a three week assessment. We have already noted Dr. Seres' opinion as to the claimant's employability and Dr. Laubengayer's concurrence in that opinion. Moreover, Dr. Laubengayer, in his deposition, again indicated that despite claimant's depression, she would be employable at an occupation with appropriate restrictions. Dr. Painter, clinical psychologist at the Pain Center, was not impressed with claimant's alleged degree of psychological difficulties. Dr. Painter stated that claimant certainly could work if she desired, and that her decision not to represented a judgment on her part. Dr. Cramer found elements of secondary gain to be present. Dr. Ballering, another psychologist, also found elements of secondary gain to be present and found her motivation to return to work to be questionable. The basic conclusion of all the Pain Center evaluations and of Dr. Laubengayer is that claimant certainly has the ability to return to work, but lacks the motivation to do so.

The only opinion in seeming disagreement with the conclusions of the Pain Center doctors is that of Dr. Rimel, who believes that claimant's depression renders her unemployable. Dr. Rimel, when questioned upon cross examination, had no explanation for his disagreement, other than "doctor's often disagree." Disagreement may be common; our duty is to resolve that disagreement. We conclude the preponderance of the medical evidence is inconsistent with Dr. Rimel's conclusions. Additionally, we question Dr. Rimel's objectivity in view of the fact that in his July 29, 1981 letter he emphatically urges that the insurer pay for the claimant's examination by Dr. Adams in San Francisco and demands that it authorize additional treatment by Dr. Adams. This was done by Dr. Rimel in spite of the fact that such treatment was fully available to the claimant within Oregon and through claimant's primary treating physician, Dr. Laubengayer, which was known to Dr. Rimel. The only explanation that Dr. Rimel offered for this upon cross examination was that claimant had told him she wanted to see Dr. Adams. It seems apparent from Dr. Rimel's letters and his testimony upon cross examination that he has lost his objectivity and become claimant's advocate. See Robert Mowry, 32 Van Natta 144 (1981). We, therefore, weigh Dr. Rimel's opinion accordingly.

In addition, we do not find that the claimant's condition is so severe as to relieve her of the seek-work requirements of ORS 656.206(3). We do not believe that this claimant is in the same position as was the injured worker in Butcher, where the medical evidence, along with factors such as claimant's age, education, work experience and mental capacity indicated that it would be futile for the claimant to seek work. On the contrary, the preponderance of the medical evidence indicates that the claimant in this case is capable of gainful and suitable employment if she had the motivation to obtain such employment. The extensive vocational rehabilitation reports in the record all express optimism at the claimant's employability, but despair at her motivation. Claimant's former employer indicated that it had a position as an activity director open for the claimant, which was within her physical limitations, and that it would train the claimant for that position. The claimant, however, refused to accept the position. A second job possibility was communicated to the claimant in June of 1980 at Mechano-Electric. The company offered free training and part time work in electronics assembly. Claimant, however, repeatedly put off applying for the job in spite of her agreement to do so and the expressed interest on the part of the employer. Although verbalizing an interest in returning to work, claimant has made no concrete efforts in this direction. We find that she has not met the requirements of ORS 656.206(3).

Considering the factors set forth in OAR 436-65-600 et seq, taking into consideration claimant's impairment, age, education, mental capacity, work experience and all other relevant factors bearing upon this worker's disability, we find that claimant would be properly compensated by an award of 60% unscheduled permanent partial disability.

With regard to the claimant's contention that she be compensated for payment of medical services and travel expenses in relation to her examination by Dr. Adams in San Francisco, we affirm the Referee's conclusion denying such benefits. As noted by the Referee, the court in Rivers v. SAIF, 45 Or App 1105 (1980), interpreted ORS 656.245(2) as denying an injured worker the right to choose a physican outside the State of Oregon without the insurer's or self-insured employer's approval. Even if the claimant takes up residence in another state, he is free to choose his own physician within the State of Oregon, and have the insurer/employer pay for such treatment and travel expenses

incurred from the Oregon border to his physician's office. Pyle v. SAIF, 55 Or App 965 (1982). We do not interpret Pyle to require the insurer/employer to pay for such expenses when the claimant resides within Oregon and has chosen to obtain treatment outside of the state, when such services are equally available within Oregon. Rivers is directly controlling in such a situation.

ORDER

The Referee's order dated December 8, 1981 is modified. The claimant is granted benefits for 60% unscheduled permanent partial disability for her back, that being an increase of 20% over and above the Determination Orders of December 19, 1977 and May 15, 1980. This award is in lieu of that granted by the Referee.

Those portions of the Referee's order denying claimant payment for expenses in relation to examination and treatment by Dr. Adams are affirmed.

Claimant's attorney is allowed a fee of 25% of the increased unscheduled permanent partial disability granted over and above the Determination Orders of December 19, 1977 and May 15, 1980, not to exceed $2,000. This fee is in lieu of that allowed by the Referee.

ROBERT TUCKER, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Schwabe et al., Defense Attorneys

WCB 81-04099
September 28, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The employer requests review of Referee Pferdner's order which found claimant has sustained 50% (160°) unscheduled permanent disability due to his compensable myocardial infarction.

The employer contends the Referee improperly included impairment from claimant's noncompensable coronary artery disease in determining the extent of disability. The claimant responds that the report of the treating physician, Dr. Intile states clearly enough that considering claimant's myocardial infarction claimant had lost roughly 25% loss of function as compared to his pre-infarction status.

Dr. Intile's report is subject to different interpretations; that is, either his opinion about claimant's impairment included a noncompensable condition or he was only considering the effects of claimant's compensable infarction. No party sought any clarification from Dr. Intile. Although the matter is not free from doubt, we agree with the Referee that the slightly more plausible interpretation is that Dr. Intile was attempting to comment only on impairment resulting from the infarction.

ORDER

The Referee's order dated March 9, 1982 is affirmed. Claimant's attorney is awarded $500 on review as a reasonable attorney's fee, payable by the insurer.

JESSE J. AMMONS, Claimant
Dennis Henninger, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 81-06876
September 29, 1982
Order of Abatement

The Board has been advised that the parties have settled this matter. In order to prevent our Order on Review dated August 30, 1982 from becoming final and to allow time for deliberate consideration of whether to approve the parties' settlement, our Order on Review dated August 30, 1982 is abated.

IT IS SO ORDERED.

FRED HANNA, Claimant
Elliott Lynn, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04719
September 29, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of Referee Igarashi's order which granted claimant an award of permanent total disability effective the date of the hearing, July 2, 1980.

I

There are two threshold comments that need to be made about the record.

Exhibits 1 through 97 were admitted at the July 2, 1980 hearing. At some point between the date of the hearing and the date of the Referee's subsequent order, SAIF's attorney tendered two additional exhibits which have been marked as Exhibits 98 and 99. The Referee ruled in her November 14, 1980 order that exhibits 98 and 99 would not be admitted because they were not tendered at least ten days prior to hearing as generally required by OAR 436-83-400(3).

SAIF's brief, as we understand it, argues we should reverse the Referee's evidentiary ruling. That understanding may be debatable because SAIF presents its evidentiary argument almost as an aside in the course of its argument on the merits. There is, however, no particular format currently required for briefs before the Board, and informality is the norm and is appropriate. We thus conclude the evidentiary issue is properly before us.

We note that many of the exhibits were submitted in violation of the ten-day rule stated in OAR 436-83-400(3). Twenty-eight of the exhibits were submitted by SAIF under cover of a letter dated June 27, 1980, date stamped received by the Hearings Division on July 1, 1980. These exhibits were thus neither mailed nor received more than ten days before the July 2, 1980 hearing, but were admitted at that time. Thus the Referee admitted 28 late exhibits notwithstanding OAR 436-83-400(3), while excluding two late exhibits because of OAR 436-83-400(3).

There are only two possible grounds in the record for distinguishing between the late exhibits that were admitted and the late exhibits that were excluded. First, there was no objection to those admitted; claimant's attorney did object to those that were excluded. But we generally do not think that the ten-day rule contemplates such selective enforcement. That rule is intended to permit the parties and the Referee to be prepared at the time of hearing. In other words, the rule in part protects an interest of this forum that transcends the strategic interests of the litigants. So viewed, all late exhibits are equally subject to exclusion regardless of whether objections are made by the parties.

The second distinction between the late exhibits that were admitted and the late exhibits that were excluded tends to favor the exact opposite combination of evidentiary rulings. The late exhibits that were admitted were mostly generated between 1967 and 1978, that is, they were in existence long before the July 2, 1980 hearing and obviously in time to be submitted in compliance with the ten-day rule. By contrast, Exhibits 98 and 99 are reports that are both dated June 30, 1980; although they were in existence before the July 2, 1980 hearing, it is unlikely that they were in counsel's possession by the time of the hearing. It was impossible to submit these exhibits in compliance with the ten-day rule. The appropriate question in this kind of situation is whether the reports could have been generated earlier with due diligence. Robert Barnett, 31 Van Natta 172 (1981). But due diligence was not even mentioned by the Referee in her evidentiary ruling.

We conclude that Exhibits 98 and 99 should have been admitted and we have considered them in our review of this case.

We are aware that claimant's attorney has made objections that go to the weight to be accorded these two exhibits. Exhibit 99, for example, does contain "hearsay on hearsay." We think this objection to persuasiveness is very well taken and have relied upon Exhibit 98 little and Exhibit 99 very little in our review of this case.

The second threshold problem with the record is that the mass of medical reports contain numerous contradictions and conflicts on much of the historical detail, especially on dates. Many different doctors have commented on their difficulty getting an accurate history from claimant. A 1968 report calls claimant a "very poor historian." A 1977 report refers to claimant as "an unreliable historian." Our factual findings which follow are thus subject to the qualification that several details and dates, most of which are not especially critical, are certainly subject to many different possible interpretations.

II

Claimant has a long and involved history of treatment for a variety of back problems. One report in this record refers to claimant having had back problems since the early 1940s. This record reflects specific treatment for back problems, mostly in the form of hospitalizations, in 1963, 1967, 1968, 1971, 1972, 1974, 1975 and 1976 -- all before the workers compensation claims relevant to this case. The most common theme in the pre-1977 reports, especially from radiologists, is that claimant had degenerative disc disease. The pre-1977 treatment was mostly conservative with one notable exception: In 1971 claimant had a three level exploratory laminectomy, apparently with nerve root decompression and foraminotomy at two levels. Despite the 1971 surgery and extensive other treatment, claimant was able to work at a series of physically demanding jobs between 1981 and 1977.

Claimant made workers compensation claims for back injuries in April of 1977, January of 1978 and March of 1978. These claims have been the subject of two prior litigation orders. In WCB Case Nos. 78-02082 and 78-03803 Referee Pferdner: (1) Recited that the April 1977 claim had been resolved by a disputed claim settlement pursuant to ORS 656.289(4) -- there is no other evidence of the disposition of the April 1977 claim in the record, but neither party takes any exception to Referee Pferdner's recitation; (2) affirmed SAIF's denial of the January 1978 claim; and (3) set aside SAIF's denial of the March 1978 claim. No appeal was taken from Referee Pferdner's order.

After the March 1978 claim was ordered accepted, it was processed to Determination Order dated January 24, 1979. WCB Case No. 79-01117 was claimant's appeal from that Determination Order. In that case Referee Mongrain awarded claimant 50% permanent partial disability as a result of his March 1978 injury. No appeal was taken from Referee Mongrain's order.

In early 1980 claimant's claim was reopened when he entered an authorized program of vocational rehabilitation. After claimant's participation in the program terminated, his claim was again closed by Determination Order dated May 9, 1980 that awarded compensation for temporary total disability during the period that claimant had been in the rehabilitation program and stated: "On redetermination the Department finds your permanent partial disability to be the same as that of Opinion and Order of April 30, 1979," i.e., 50% permanent partial disability which had been awarded by Referee Mongrain in WCB Case No. 79-01117. This case is an appeal from that Determination Order.

III

We turn to a more detailed consideration of claimant's post-1977 back problems.

In April of 1977 claimant fell on some stairs while working as a dishwasher at the Pancake Corner Restaurant. He was initially hospitalized for bed rest and traction. When claimant's condition did not improve, a myelogram was performed which revealed a defect in the right L4-5 interspace. Surgery was

performed in July of 1977 with removal of herniated disc material at the L4-5 level and nerve root decompression with foraminotomy. The parties seem to assume that this July 1977 surgery was a consequence of the injury that gave rise to claimant's April 1977 claim, although no cause-and-effect relationship is shown on this record. The April claim and presumably the July surgery were apparently resolved on a disputed claim basis.

There is even less information in the record about the January 1978 back injury claim which allegedly arose from a lifting incident after claimant had returned to work at the Pancake Corner Restaurant. In any event, that claim was denied and the denial was upheld by Referee Pferdner in WCB Case Nos. 78-02082 and 78-03803. We regard that finding now to be res judicata.

Claimant began working as a dishwasher at Rose's Delicatessen in the middle of March of 1978 and again injured his back while lifting on March 26, 1978. Dr. Noall's initial diagnosis was an acute lumbosacral strain superimposed on degenerative disc disease. Dr. Sirounian offered substantially the same diagnosis. In November of 1978 Dr. Duckler opined: "I do not think [claimant] is going to sustain a permanent partial disability." In December of 1978 Orthopaedic Consultants stated: "We do not feel there is any loss of function due to the injury of March 26, 1978." Referee Mongrain's subsequent order in WCB Case No. 79-01117 recites that Dr. Duckler agreed with Orthopaedic Consultants' assessment, but we do not otherwise find any indication of such agreement in this record. Referee Mongrain concluded in that order:

> "I do not believe the claimant's physical condition is a great deal worse than it was before this injury. As noted, however, because of the injury it is somewhat worse. While the increment in physical disability might not be particularly significant to one with greater resources, it seems to me that it can be very
>
> significant to one who is a marginal employee to begin with. As a quantitative analogy, a person who could choose from 10,000 different jobs would not suffer a great loss of earning capacity by losing access to 10 of them, or even 100 of them. However, a person who could choose from only 4 different jobs would lose 50 percent of his earning capacity by losing access to only 2 of the jobs. I view the present case as being closely akin to the latter situation, and I evaluate the claimant's loss of earning capacity due to the compensable injury of March 26, 1978, at 50 percent."

Were the issue before us, we would have difficulty agreeing that claimant sustained any permanently increased physical impairment as a result of the March, 1978 lifting incident. Claimant had advanced degenerative spinal disease and two back operations before the March, 1978 incident, which produced only a strain. We have no doubt that the March, 1978 claim was compensable as a temporary exacerbation of a pre-existing condition, but we note that all doctors involved in claimant's treatment at that time believed that claimant's lumbosacral strain did not permanently worsen his underlying degenerative condition. However, Referee Mongrain found that there was increased permanent impairment, and we regard that finding to now be res judicata.

Following the issuance of Referee Mongrain's order, claimant continued to seek medical attention from a variety of doctors. Based on his May 14, 1979 examination of claimant, Dr. Grewe reported: "I believe [claimant] probably does have some residual pains but I think [claimant] would be capable of being gainfully employed if so moved." Dr. Hummell submitted reports dated September 26, 1979, January 17, 1980 and February 26, 1980 all expressing the opinion that claimant was permanently and totally disabled. Claimant was examined by Dr. Butler for a possible left leg problem in April of 1980. There are also cryptic records of claimant's frequent examination for back pain at several hospital emergency rooms.

All of the other reports in this record generated since Referee Mongrain's order are psychological and vocational reports written in connection with claimant's vocational rehabilitation program that claimant participated in during January to March of 1980. Those psychological/vocational reports paint a bleak picture. Briefly, claimant scored very low on intelligence tests, reading tests, etc; the combination of those test scores, claimant's age -- he is now in his early 60's -- and his generally poor performance even in a sheltered workshop environment lead the vocational experts to opine that it was highly unlikely that claimant could be gainfully employed or retrained for employment.

IV

We agree with Dr. Hummell and the vocational experts: considering claimant's back impairment, other physical problems and serious social/vocational handicaps, claimant is probably permanently totally disabled. It does not necessarily follow that claimant is entitled to an award for permanent total disability under the workers compensation system. We conclude claimant is not so entitled for three main reasons.

First, we cannot escape the impression that claimant's physical complaints are probably exaggerated, and probably unconsciously so in the sense that the fantastic amount of medical attention he has sought over the years was as likely a form of treatment for loneliness as for pain. For example, Dr. Hummel's chart note of July 11, 1979 states: "Claimant comes in essentially for a 'social visit' today. He brings me a large Walla Walla sweet onion." It matters not, of course, whether pain is physical or psychological in origin, so long as it is real. Juanita M. DesJardins, 34 Van Natta 595 (1982). But the less there is in the way of a physical explanation, the harder it is to prove that pain is real. DesJardins, supra.

Second, it must be remembered that we are here rating claimant's disability in connection with his March, 1978 injury that was diagnosed only as a lumbosacral strain. There is nothing about that injury that remotely suggests total disability. Claimant's argument for total disability must rely on that part of ORS 656.206 (1)(a) which permits consideration of "pre-existing disability."

ORS 656.206(1)(a) is subject to interpretation. See Emmons v. SAIF, 34 Or App 603 (1978). And we see a significant interpretation problem in this case. At least some of what would otherwise be claimant's pre-existing back disability within the meaning of ORS 656.206(1)(a) resulted from his April, 1977 injury that gave rise to a prior workers compensation claim. That claim was resolved on a disputed claim basis pursuant to ORS 656.289(4). The essence of a disputed claim settlement is that the claimant has no further rights under the Workers Compensation Act in connection with an injury or alleged injury. Given that claimant no longer has any rights under the Act in connection with his April, 1977 claim, can he nevertheless ask that disability resulting from that injury be considered as "pre-existing disability" under ORS 656.206(1)(a) as part of his proof that he is now entitled to an award for permanent total disability?

We doubt that the legislature ever considered the problem, but if it had we believe it would have answered in the negative. Some small indication of legislative intent can be found in the 1981 amendment that added subsection (5) to ORS 656.278. That subsection prohibits the Board from changing, under its own motion authority, a former finding that a claimant did not incur a compensable injury or a former approval of a disputed claim settlement. If such prior actions are afforded the highest form of finality, then it seems incongruous to go behind such finality and permit an injury/claim settled on a disputed basis subsequently to be part of the calculus leading to an award of permanent total disability.

We think claimant's April, 1977 injury which led to his July, 1977 surgery contributed significantly to his back disability. Despite his prior back surgery in 1971, claimant was able to work at physically demanding jobs until his second surgery in 1977. Claimant's back condition has deteriorated markedly since that second operation. Based on our conclusions and analysis, the situation is: (1) Claimant's March, 1978 injury that gives rise to this proceeding contributed very little to claimant's overall disability; (2) claimant's pre-existing disability that can be considered under ORS 656.206(1)(a) includes his 1971 surgery and chronic strain history; but (3) claimant's pre-existing disability that we do not think can be considered under ORS 656.206(1)(a) includes his 1977 surgery and any impairment resulting from it. Considering only the consequences of claimant's 1978 injury and his pre-existing disabilities other than the consequence of claimant's 1977 surgery, we conclude that it becomes quite clear that we confront a situation of very minimal physical impairment that can be considered under the Workers Compensation Act.

Our third and final reason for concluding that claimant has not proven entitlement to an award for permanent total disability relates to the timing of the various proceedings in which claimant has been involved. Referee Mongrain's order that addressed the extent of claimant's permanent disability resulting from his 1978 injury is dated April 30, 1979. In that order Referee Mongrain rejected claimant's argument that he was then permanently and totally disabled and instead granted an award of 50% permanent partial disability. No party requested review of that order.

There has been virtually no proven change in claimant's condition since the date of Referee Mongrain's prior order. Following that order claimant's claim was reopened, not for provision of any medical services, but instead for vocational rehabilitation.

Claimant argues that it was only after his claim was thus reopened "that the extent of his previously undisclosed psychological disabilities came to light." We disagree. There is considerably more detail about claimant's psychological disabilities in the reports written after Referee Mongrain's 1979 order, but the evidence at that time painted the basic picture and undoubtedly was the basis of Referee Mongrain's comment about "a marginal employe" quoted above. Claimant also argues he "injured himself at least two times while working" in his vocational rehabilitation program. We do find cryptic references in the record about those "injuries"; we do not find any medical information in the record about those "injuries" or any basis for believing they resulted in any increased impairment.

When a claim is closed with an award for permanent partial disability and later reopened, then at the time of the subsequent reclosure of the claim it is necessary to again rate the extent of permanent disability. This does not mean, we believe, that the prior extent rating is in any way binding or conclusive; nor does it mean that the prior extent rating is totally irrelevant. We conclude that the emphasis in this kind of situation has to be on changed circumstances since the last rating of permanent disability. So viewed, claimant has not proven any changed circumstances since Referee Mongrain considered the extent of his permanent disability in April of 1979.

ORDER

The Referee's order dated November 14, 1980 is reversed. The Determination Order dated May 9, 1980 is reinstated and affirmed.

JUAN ANFILOFIEFF, Claimant
Paul Lipscomb, Claimant's Attorney
Keith Skelton, Attorney
SAIF Corp Legal, Defense Attorney
Carl Davis, Attorney

WCB 78-03801
September 30, 1982
Order on Reconsideration

Claimant's attorney requests reconsideration of that portion of our Order on Review dated May 27, 1982 which failed to grant him an attorney's fee for services rendered on Board review.

The request is denied for two reasons. First, we received the request for reconsideration on June 23, 1982, on the eve of the expiration of the thirty-day period after which an Order on Review becomes final, see ORS 656.295(8); and our Order on Review became final before there was any real opportunity to address the belated reconsideration request. Second, claimant's attorney has not cited nor are we aware of any authority to grant attorney fees in this type of case, which involved the issue of the complying or noncomplying status of claimant's employer and had no effect on claimant's receipt of compensation benefits.

IT IS SO ORDERED.

GERALD BLANDIN, Claimant
Myrick, Coulter et al., Claimant's Attorneys
Cowling, Heysell et al., Defense Attorney

WCB 81-09228 & 82-00066
September 30, 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.

REX BLOESSER, Claimant
Cowling, Heysell et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02994
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Seifert's order which set aside its partial denial of medical services in the form of chiropractic treatments of claimant's back, which was compensably injured in 1979. SAIF argues its partial denial should be upheld and argues that the Referee's award of $900 in attorney fees was excessive.

We affirm and adopt those portions of the Referee's order finding the disputed medical services to be compensable.

We agree that the attorney's fee awarded by the Referee is excessive. An award of attorney fees should be based on efforts expended and results obtained. OAR 438-47-010(2). In Clara M. Peoples, 31 Van Natta 134 (1981), we recognized that the "normal" range of fees in the "average" denied-claim case is $800 to $1,200 and commented "efforts expended and results obtained can, of course, justify a larger or smaller attorney fee." 31 Van Natta

at 135. Since Peoples, we have frequently found both efforts expended and results obtained to be something less than average when the entire dispute is over the provision of medical services.

This is such a case. The controversy is only over chiropractic treatment. Although the record is far from clear, apparently a grand total of six office visits are disputed. We conclude the attorney's fee for services at the hearing level should be modified to parallel more closely the results obtained.

Claimant's attorney is also entitled to a fee for services rendered on Board review in successfully defending the Referee's finding on the compensability of the disputed medical services. Victor F. Kaufman, WCB Case No. 81-02214, 34 Van Natta 1185 (August 31, 1982).

ORDER

The Referee's order dated April 2, 1982 is modified. Claimant's attorney is awarded $500 for services rendered at the hearing, payable by the SAIF Corporation; this award is in lieu of that granted by the Referee. In addition, claimant's attorney is awarded $200 for services rendered on Board review, payable by the SAIF Corporation.

RICHARD M. BRITTON, Claimant
Malagon & Velure, Claimant's Attorneys
Roger Warren, Defense Attorney

WCB 81-06499
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests review of that portion of Referee Foster's order which granted claimant compensation for 15% unscheduled low back disability. The employer contends claimant's current disability is completely unrelated to claimant's November 8, 1980 industrial injury.

Claimant's claim involves an onset of low back pain sustained on November 8, 1980. He has a history of back injuries, the most recent ones being in 1972, 1975 and 1978. Claimant also has underlying degenerative disease and a documented functional overlay component. The sole question before us is what permanent disability is a consequence of the compensable 1980 injury.

Based on a totality of the medical evidence, we are persuaded claimant does have permanent impairment due to his 1980 compensable injury, although minimal. A significant amount of his disability is a direct result of the earlier injuries and his functional overlay. Claimant is 50 years old with a high school education and one year of Bible college. There is no persuasive evidence which establishes claimant is precluded from returning to his former job as a truck driver. Claimant has chosen to pursue the pastorate and has been successfully performing those types of duties. After consideration of the above factors in light of OAR 436-65-600 et seq., we conclude claimant would be more properly compensated with an award for 5% unscheduled disability for injury to his low back.

ORDER

The Referee's order dated February 25, 1982 is modified.

Claimant is granted compensation equal to 16° for 5% unscheduled disability for injury to his low back. This award is in lieu of that granted by the Referee. The attorney's fee granted by the Referee should be adjusted accordingly.

The remainder of the Referee's order is affirmed.

DIANE BURNHAM, Claimant
Welch, Bruun et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 78-05496
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Pferdner's order which granted her compensation for 15% unscheduled disability. Claimant contends her condition was not stationary at the time of the June 4, 1981 Determination Order or, in the alternative, that she is entitled to an increased award of compensation for permanent disability.

We adopt the Referee's findings of fact.

Claimant's October 26, 1977 industrial injury resulted in several problems, both physical and psychological. There is little question that at the time of closure (June 4, 1981) claimant's physical condition was medically stationary. Claimant continued, however, for quite some time under psychological care. Claimant argues that the more plausible inference is that her psychological condition was not stationary. In May, 1981 Dr. Lauby indicated that claimant had been transferred to Dr. Braddock for further psychological treatment. Dr. Braddock, in July of 1981, felt claimant's traumatic depressive symptoms would continue for a period of time. In September, 1981 Dr. Parvaresh noted that claimant had been under treatment for four years with very little beneficial result. No doctor has stated whether the psychological treatment after June of 1981 has been curative or palliative. The evidence before us is that claimant's psychological condition has changed only slightly, if at all, since the injury. We are not persuaded that her claim was prematurely closed in June, 1981.

With respect to claimant's extent of disability, we conclude the totality of the medical evidence supports the award granted by the Referee.

ORDER

The Referee's order dated April 22, 1982 is affirmed.

JOHN A. COOK, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05579
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Galton's order which set aside its denial of claimant's aggravation claim. The issue is the compensability of the aggravation claim.

Claimant, a 31 year old carpenter, sustained a compensable injury to his low back in October, 1977. The injury occurred when claimant was moving a rack on a job site, and it was diagnosed as a lumbosacral strain. A Determination Order of January 16, 1978 granted claimant compensation for temporary total disability only. Claimant quit his job in 1979 and went to work for himself until low back pain forced him to stop working. He was examined by the Orthopaedic Consultants on June 5, 1979, who diagnosed lumbosacral strain, found him to be medically stationary and rated his loss of function from the injury to be minimal. A second Determination Order issued on July 25, 1979, granting claimant additional time loss benefits. A stipulation was entered on October 8, 1979, granting claimant 14% unscheduled permanent partial disability.

Claimant was thereafter examined by Dr. Young. Dr. Young, in an undated report, diagnosed ankylosing spondylitis. Dr. Ladd, a rheumatologist, in his February 21, 1980 report indicated that his examination of claimant suggested ankylosing spondylitis. Claimant was examined by Dr. Snodgrass, a neurologist, on May 5, 1981 who also suspected that claimant suffered from ankylosing spondylitis, and thought another opinion by another rheumatologist was appropriate. Dr. Snodgrass felt that if this diagnosis was confirmed, then it was his opinion that the condition was not caused by the claimant's occupation, although symptoms could be temporarily worsened by physical activity. He noted that claimant had some aching radiation down the left lower extremity and scheduled claimant for an electromyogram by Dr. Stolzberg. Dr. Stolzberg reported findings consistent with moderately severe subacute or chronic L-5 or S-1 radiculopathy on the left side. After reviewing the electromyogram report, Dr. Snodgrass stated:

> "I think it is quite likely that he has a bulging disc at the lower level on the left causing these symptoms. I still am concerned that he has a more generalized or widespread problem with his spine that is not related to his injury. I think he is not at the present time having sufficient radicular symptoms to justify myelography and consideration of surgery. . ."

Claimant was next examined by Dr. Rosenbaum, a rheumatologist. Dr. Rosenbaum made a definite diagnosis of ankylosing spondylitis. He states:

> "There is some indication in the records that Dr. Snodgrass, a neurologist, and Dr. Stephen Stolzberg have made a diagnosis of a possible moderately severe radiculopathy

> on the left side. It would be my opinion that this is probably the result of the ongoing inflammatory process in the spine, and is not work related."

Dr. Rosenbaum reiterated his opinion in his August 8, 1981 report, but makes no further mention of radiating pain. However, we infer from his previous report that Dr. Rosenbaum was aware of a possible disc problem.

The Referee found that claimant was suffering from a bulging disc and that it was causally related to claimant's industrial injury of 1977, stating that he accepted Dr. Snodgrass' opinion on that question over Dr. Rosenbaum's. The parties at the hearing stipulated that claimant suffered from ankylosing spondylitis and that it was not SAIF's responsibility. The Referee stated that it was "impossible to tell if temporary total disability benefits would be due, based upon the problems of segregating claimant's injury-related disability * * * from the ankylosing spondylitis." The Referee, however, ordered payments to be made under ORS 656.273. We disagree with the Referee's conclusion.

We find that claimant has failed to carry his burden of proof in establishing that he is currently suffering from an aggravation of his industrial injury. Drs. Snodgrass and Stanley expressed the only opinions regarding a bulging disc, or disc syndrome, and their diagnoses are made more in terms of medical possibility rather than probability. In any event, they recommended no treatment, diagnostic or otherwise, for the problem. Dr. Rosenbaum, who was aware of Dr. Snodgrass' concerns regarding radiating pain, felt that this pain was a result of claimant's ankylosing spondylitis.

Dr. Rosenbaum's area of expertise is rheumatology, and his opinion that claimant's radiating pain is related to his ankylosing spondylitis is entitled to at least equal weight with Dr. Snodgrass' opinion regarding the possibility of a bulging disc.

Even if the medical evidence was sufficient to convince us that claimant is suffering from a bulging disc, we would still find that the claim fails. There is absolutely nothing in the record relating the diagnosis of possible bulging disc to claimant's industrial injury which took place almost four years prior to that diagnosis. Claimant's arguments regarding "negative implications" in the medical evidence are not convincing.

ORDER

The Referee's order dated March 4, 1982 is reversed. The SAIF Corporations's denial of June 5, 1981 is reinstated and affirmed.

MICHAEL R. CRANMER, Claimant
Michael Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-9002
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant seeks review of that portion of Referee Baker's order which upheld the insurer's denial of claimant's knee condition claim. The sole issue is compensability. We affirm.

On July 13, 1981, at about 1:00 p.m., in the course of his employment as a furniture store delivery person, claimant unloaded a 44 square foot carpet, by himself, from a delivery truck. As he hoisted the carpet onto his right shoulder he felt a sudden, sharp pain in his back. He dipped down for a moment and decided to complete unloading the carpet before pausing further. Claimant got the carpet off the truck, rested briefly, then proceeded to install the carpet. Claimant further testified that he mentioned the incident and his discomfort to Mrs. Rickerd, the woman in whose house the carpet was installed, and reported the incident and his injuries in greater detail to his fiancee, his mother, one of the owners of the furniture store, and his first treating physician. At the hearing, claimant's fiancee (now his wife) and his mother corroborated his story; Mrs. Rickerd and the store owner testified to the contrary. The physician's chart notes and a subsequent report indicate that claimant made no mention of knee pain in the course of various tests to diagnose the nature and extent of his back injury; certainly no complaint of knee pain was recorded. Claimant contends that the back pain very much overshadowed the knee discomfort he was experiencing and for that reason it was not noted by the doctor.

Claimant filed a claim within a day or two after the lifting incident alleging back pain but without mention of any problem with his knee. That claim was accepted and processed to closure with an award of time loss but no permanent disability. Several weeks after the lifting incident, at a time when the back pain was subsiding and the knee pain either increasing or at least becoming more noticeable in light of decreased back pain, it was discovered that claimant had a torn meniscus of the right knee.

Claimant urges the Board to adopt a rule that, when confronted with a latent condition, i.e., a condition that does not manifest itself immediately after an off-the-job incident, the claimant will have discharged his/her burden of proving compensability by proving that (1) an on-the-job incident happened, and (2) the condition is consistent with that type of incident. The claimant further contends that after such a showing, in order to avoid a finding of compensability, the burden of proof should shift to the insurer/employer to prove that some other incident caused the condition. Claimant acknowledges that such a rule is at variance with existing law that puts the entire burden of proof on the claimant to establish compensability. Claimant points out that many conditions go unnoticed or unreported at first because the symptoms do not manifest themselves right away or are overshadowed by some other condition. Claimant further contends that where there is an interval between the incident and discovery of the condition, it is always possible to argue that some unidentified event happened to cause the condition, and that it places an impossible burden of

proof on claimant to have to prove the non-existence of an unidentified event.

Claimant presents an attractive argument, to a degree. We can accept in the abstract the hypothesis that where latent conditions are concerned, under the proper set of facts, the claimant may discharge his burden of proof of causation by proving an on-the-job incident and a condition consistent with that incident. But we are unwilling to adopt a rule that would require such a conclusion in every case of a latent condition.

For instance, in this case, we are not convinced that a compensable incident even happened. Mrs. Rickerd testified that she observed claimant unload the carpet and did not see him experience any difficulty unloading it. She also testified, contrary to claimant's testimony, that claimant did not mention the incident nor did he complain of back or knee discomfort. Moreover, it appears from the record that on the Friday and Saturday preceding the alleged Tuesday, July 13, 1981 incident, claimant rode a mechanical bull several times, that he was thrown off twice, and that the rides were sufficiently strenuous to cause his arm to be sore and to chaffe his thighs. In addition, after the lifting incident, claimant rode his bicycle to work, a distance of approximately six miles. In attributing causation of the torn meniscus to the July 13, 1981 lifting incident, the doctors do not appear to have been aware of these activities. If it is possible for a torn meniscus to be a latent consequence of a lifting incident, it appears equally possible for it to be a latent consequence of riding a mechanical bull or a bicycle.

ORDER

The Referee's order dated March 26, 1982 is affirmed.

EARL FREEMAN, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07072
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Fink's order which affirmed the SAIF Corporation's denial of claim reopening for surgery performed on February 26, 1981.

We adopt the Referee's findings of fact as our own.

The Referee upheld the denial of surgery based on claimant's lack of credibility. We do not find credibility to be critical. We are satisfied that the injury occurred, claimant suffered continuing symptoms and no intervening incident occurred. The medical evidence overwhelmingly supports a causal relationship between the June 16, 1980 injury and claimant's subsequent surgery. The only question is whether the surgery was reasonable and necessary. There is some doubt raised on this question by Dr. Norton, SAIF's consultant. But Dr. Norton also suggests some deference to Dr. Poole, claimant's treating physician.

We agree. On medical-service questions we defer to the treating doctor absent compelling reasons for a contrary conclusion. Lucine Schaffer, 33 Van Natta 511 (1981). We find no basis in this record to do other than defer to Dr. Poole with respect to the need for and the reasonableness of the February, 1981 surgery. We conclude that claimant is entitled to have his claim reopened effective February 4, 1981, the date he was first hospitalized by Dr. Poole.

ORDER

The Referee's order dated March 17, 1981 is reversed.

Claimant's claim is reopened as of February 4, 1981 for the payment of compensation and medical services to which claimant is entitled, including the surgery performed on February 26, 1981, until the claim is closed pursuant to ORS 656.268.

Claimant's attorney is awarded $1,200 as a reasonable attorney's fee for services at the hearing and Board review, payable by the SAIF Corporation.

GEORGE A. FULGHAM, Claimant
Cash Perrine, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09355
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Presiding Referee Daughtry's Order of Dismissal entered July 16, 1982 after claimant's only response to an Order to Show Cause entered April 16, 1982 was to file an Application to Schedule.

The original hearing request in this case was received October 29, 1979 -- almost three years ago. Hearings were scheduled and postponed on several occasions, most recently in February of 1982. The most recent letter of postponement stated: "Claimant has 30 days or until 03/24/82 in which to file an application to schedule a hearing." The April 26, 1982 Order to Show Cause noted that no communication had been received since that postponement letter and directed claimant to show cause why his "case should not be dismissed as abandoned." Claimant's only response within the time allowed was to file an Application to Schedule, received May 17, 1982.

By letter dated June 9, 1982 claimant's attorney was advised that his Application to Schedule was "not an adequate response to the Show Cause Order" and allowed fifteen additional days "to show good cause, in writing, why the Order to Show Cause entered April 26, 1982 should be vacated." Claimant failed to respond to that June 9 letter, which led to the Presiding Referee's Order of Dismissal entered on July 16, 1982.

Claimant has filed no timely brief stating why the Presiding Referee's order should be reversed, but states in his request for Board review: "It is improper for the Board to make rules drawn on the Memorandum in WCB News and Case Notes and that an Application to Schedule Hearing was filed." This is a reference to an item the Board published in its newsletter in January of 1982:

> "When requests for hearing have been pending a long time without apparent action, the Hearings Division now issues Order to Show Cause why the request should not be dismissed as abandoned. The policy in the past was that an Application to Schedule for Hearing was a sufficient response to the Show Cause Order. The Show Cause Order would be vacated, and the case would be sent to the Docketing Section.
>
> "Effective for Show Cause Orders issued after April 1, 1982, an Application to Schedule will no longer be regarded as a sufficient response to a Show Cause Order. After a Show Cause Order has been issued, the request for hearing will be dismissed unless good cause not to do so is shown notwithstanding submission of an Application to Schedule."

We do not regard this to be an administrative rule. The only relevant administrative rule is OAR 436-83-310:

> "A request for hearing may be dismissed for want of prosecution where the party requesting the hearing occasions a delay of more than 90 days without good cause."

All of the procedures that have evolved to enforce this rule and keep hearing requests actually moving toward hearings now exist without any foundation in the Board's rules of practice and procedure. Specifically, there is no rule that provides for issuing Orders to Show Cause and there is no rule that requires filing Applications to Schedule.

We find that the absence of such rules did not in any way prejudice claimant in this case. Between the 1979 hearing request and the 1982 dismissal there were numerous delays of more than 90 days within the meaning of OAR 436-83-310. The case could have thus been dismissed at several points without any prior warning from this agency. Instead, when the most-recently scheduled hearing was postponed in February of this year, as a courtesy to claimant a letter issued stating what action was required on his part. When claimant failed to comply, as another courtesy to claimant the April 26, 1982 Order to Show Cause was issued. When claimant failed to respond other than to file an Application to Schedule, as yet another courtesy to claimant our June 9, 1982 letter stated more specifically what was required and allowed additional time for a response. Claimant did not respond.

OAR 436-83-310 permits dismissal "where the party requesting the hearing occasions a delay of more than 90 days without good cause." (Emphasis added.) Claimant's ultimate point in this case, as best as we understand his comments in his request for review, must be that we cannot or should not interpret the good-cause stan-

dard in our rule as requiring some explanation for an apparent want of prosecution. We disagree. We interpret OAR 436-83-310 as requiring at least something in the way of explanation for the delay when, as in this case, a hearing request has been pending for more than two years. And the ultimate reality is that claimant has offered no explanation for the apparent want of prosecution in this case because an Application to Schedule does not explain anything.

ORDER

The Presiding Referee's order dated July 16, 1982 is affirmed.

DELMAR L. HERRON, Claimant
Coons & Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-11267 & 82-00170
September 30, 1982
Order on Reconsideration

The Board issued an Order on Review on August 25, 1982, affirming the Referee's order which found that claimant's claim was prematurely closed, and upheld the denial of a claim for spondylolisthesis. SAIF initiated the request for Board review, assigning the Referee's finding of premature claim closure as error. Claimant cross-requested review, assigning the affirmation of the denial as error. The Board awarded no attorney's fee for services rendered by claimant's attorney on Board review. Claimant's attorney has requested reconsideration of that portion of the order which awarded no attorney's fee on Board review.

Subsequent to the issuance of the Order on Review in this case, the Board decided Victor F. Kaufman, WCB Case No. 81-02214, 34 Van Natta 1185 (August 31, 1982), in which we held:

> "[I]n cases arising under ORS 656.382(2), when an insurer or self-insured employer requests Board review, claimants' attorneys will be compensated for services rendered in connection with those issues on which the claimant prevails before the Board but not those issues on which the claimant does not prevail."

That conclusion in Kaufman was based upon Mobley v. SAIF, 58 Or App 394 (1982), and Teel v. Weyerhaeuser Co., 58 Or App 564 (1982).

This being the rule, claimant's attorney is entitled to be compensated for services rendered on review in successfully defending the issue of premature claim closure.

ORDER

On reconsideration of the Board's Order on Review dated August 25, 1982, the Board modifies its order. Claimant's attorney is awarded $300 as a reasonable attorney's fee for services rendered on Board review. Except as modified, the Board adheres to its former order.

ROBERT D. HEWITT, Claimant
Welch, Bruun et al., Claimant's Attorneys
Minturn, VanVoorhees et al., Defense Attorneys

WCB 80-07544 & 81-02394
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Daron's order which upheld the SAIF Corporation's August 5, 1980 denial of responsibility for claimant's occupational disease/injury claim for his arthritic hip condition, and also upheld SAIF's August 5, 1980 and March 11, 1981 denials which denied that claimant's hip condition was a result of a January 14, 1980 fall suffered at work, and refused to provide benefits for hip replacement surgery.

At the time of the hearing, claimant was 37 years old. Except for a two year break, claimant has worked as a logger since 1965.

Claimant first experienced pain in his hips in December of 1977. He saw a chiropractor at that time who referred him to an orthopedic surgeon, Dr. MacCloskey. In March of 1978 Dr. MacCloskey diagnosed degenerative joint disease in both hips and suggested that claimant should consider a job change. Claimant continued to work from March 1978 to January of 1981, with increasing hip pain. On June 3, 1980 claimant filed a notice of occupational disease for the hip condition. This claim was denied. He has not worked since January 14, 1981, after sustaining a compensable injury as the result of a fall. SAIF accepted responsibility for the treatment of the jamming and twisting of claimant's left leg and hip in the fall, but denied any connection between this injury and claimant's need for a total left hip replacement.

Claimant's family apparently has a history of hip problems. His mother has degenerative arthritis of the hip and underwent a total hip replacement at age 65. A paternal uncle also has experienced hip pain. However, claimant had not experienced any problems with his hips prior to 1977.

Claimant asserts that the heavy labor involved in his work as a logger has caused or at least accelerated his bilateral degenerative hip disease. Alternatively, he claims that the January 14, 1981 injury at work caused a worsening of his left hip condition to the point that a total hip replacement was necessary.

Dr. MacCloskey wrote to SAIF on July 10, 1980, stating that claimant suffered from severe degenerative changes in his hips and that the condition was probably the result of his heavy work combined with possibly softer than average bone in the joints. SAIF's Dr. Norton reviewed Dr. MacCloskey's report on August 1, 1980 and opined that physical activity is not considered the primary cause of degenerative hip joint disease. SAIF then denied the claim for the hip disease on August 5, 1980.

Claimant was examined by Orthopaedic Consultants on January 22, 1981 following his fall at work the week before. It is unclear from their report whether they knew that claimant had worked 14 of the last 16 years as a logger. They agreed with the

diagnosis of bilateral degenerative hip disease but apparently focused on whether his recent injury had caused the hip condition and did not rule out the possibility that long term heavy labor had accelerated the degeneration of his hips:

> "The physical requirements of being active, as in timber falling, have no doubt caused an increased amount of pain in his hips. It is our opinion, however, that he has an underlying idiopathic, degenerative process, which is not related to any definite injury according to the patient's history. In this case, it is one of natural progression of degenerative joint disease of the hips."

Claimant was also examined by Dr. Cutter, a rheumatologist, at the request of SAIF. In his January 28, 1981 report Dr. Cutter stated:

> "It is known that these changes, although cause unknown, are progressive no matter what type of activity, although certainly strenuous, heavy activity, including overweight, can hasten the rapid progression of the degeneration."

On February 17, 1981 SAIF denied responsibility for any worsening of claimant's degenerative hip condition as a result of the January 14, 1981 injury. Dr. MacCloskey was deposed by SAIF. Dr. MacCloskey stated that the exact etiology of the claimant's condition was unknown, although he felt that there could be multiple factors involved. He basically repeated the statements in his previous reports in which he related that he felt that claimant had an underlying bone deficit, and that his occupation accelerated the degenerative changes, which would have otherwise occurred at a much later point in the claimant's life.

Claimant was also examined by Dr. Fraback, a rheumatologist, on April 27, 1981. His report states:

> "I would diagnose Mr. Hewitt's condition as advanced osteoarthritis of both hips. Because of the severity of his disease and family history, I would say that he probably has a genetic tendency to develop this problem. I think that the process was greatly aggravated by his work over 14 years as a timber faller. I would consider that his employment resulted in a permanent worsening of the underlying condition and subsequent permanent disability. . . . He certainly will not be able to return to his occupation as a timber faller and I think will need to enter some type of sedentary occupation."

* * * * *

"I reviewed the opinion of Orthopaedic Consultants. I concur with most of their findings and recommendations, although I disagree with their last remarks in that I think his occupation definitely accelerated the degenerative process. It is very unusual to see this degree of osteoarthritis in a 37 year old man, even with a strong family history of the disease. I can elicit no other contributing factors to the process, other than his family history and occupational stresses."

The Referee found that this case was best decided on the basis of occupational disease, and that claimant failed to sustain his burden of proof relative to occupational disease claims. Although finding that claimant's work activities were the major cause of his hip condition, he ruled that Robert Sanchez, 32 Van Natta 80 (1981), required that the claimant establish his at work exposure was the sole cause of his disease.

We concur with the Referee that this case is best decided on the basis of occupational disease. We also agree that the claimant has established by a preponderance of the evidence that his work exposure was either the major cause of his hip condition or the major aggravating or accelerating factor necessitating surgery. Subsequent changes in occupational disease law have made Sanchez obsolete. In Kay Murrens, 33 Van Natta 586 (1981), we reconsidered the issue of burden of proof in occupational disease cases and ruled that a claimant must establish his at work exposure to be the significant predominant cause of his occupational disease, overruling Sanchez in part. In SAIF v. Gygi, 55 Or App 570, 574 (1982), the court ruled: "If the at-work conditions, when compared to the nonemployment exposure, are the major contributing cause of the disability, then compensation is warranted." Based on these subsequent changes in the law of occupational disease, we find that the claimant has established the compensability of his hip condition and need for surgery.

With regard to WCB Case No. 81-02394, we agree with the Referee that there is absolutely no medical evidence that relates claimant's hip problem with his compensable fall in January of 1981.

The issue of penalties was also raised on review. Claimant asserts that SAIF unreasonably delayed payment of compensation by denying the occupational disease claim solely on the basis of Dr. Norton's assessment of Dr. MacCloskey's report. We agree with the Referee that the denial of August 5, 1980 was not unreasonable under the circumstances.

ORDER

That portion of the Referee's order in WCB Case No. 80-07544 affirming the SAIF Corporation's denial of claimant's occupational

disease claim is reversed and the claim is remanded to SAIF for processing and the payment of compensation. The Referee's denial of penalties is affirmed. Claimant's attorney is awarded $1,500 as a reasonable attorney's fee for services rendered at the hearing and on Board review, to be paid by the SAIF Corporation.

The Referee's order in WCB Case No. 81-02394 affirming SAIF's denials of February 17, and March 11, 1981 is affirmed.

DONALD W. HILL, Claimant
Bottini & Bottini, Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-04580
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The claimant requests review of Referee Neal's order which affirmed the Determination Order of April 16, 1981 which granted claimant compensation for temporary total disability only. Claimant contends that he is entitled to an award of unscheduled permanent partial disability for loss of wage earning capacity due to his hand eczema, and that the Referee erred in making a finding regarding compensability when that issue was not before her.

We adopt the Referee's findings of fact as our own.

We disagree with the claimant's contention that the Referee made a finding regarding compensability on this admittedly accepted claim. The Referee stated:

> "The question is, however, whether claimant suffered his loss of earning capacity as a result of an occupational disease related to his employment at the aluminum plant. I find the medical records insufficient to establish that claimant's work permanently worsened or caused a condition affecting claimant's earning capacity."

The Referee additionally stated that, "The sole issue is the extent of disability, with a minor issue of timely payment of time loss compensation." We find the above-quoted language to be a clear indication that the Referee made no finding concerning the compensability of this claim.

With regard to the claimant's contention that he is entitled to an award of unscheduled permanent partial disability for loss of earning capacity suffered as a result of his hand eczema, we disagree. If claimant is entitled to any award for his hand eczema, it would be a scheduled, not unscheduled, award. The employer-insurer admits in its brief that claimant contracted his condition as a result of exposure to aluminum ore while employed as a welder for the Martin Marietta Company, and that claimant suffered recurrences of his condition whenever he attempted to return to work at the aluminum plant. Claimant contends that since he is precluded from returning to work as an aluminum welder, that he has suffered a loss of earning capacity. We agree with that statement. Unfortunately, however, that is not the appropriate test for scheduled portions of the body.

In Ronald McNutt, 25 Van Natta 121 (1978), the claimant sustained an injury at work which resulted in a bacteriological infection, causing dermatitis to appear on claimant's feet and elbows. The infection caused a permanent sensitization to certain substances which precluded claimant from returning to certain types of work. Since claimant's dermatitis was found to be systemic in nature, we made an award of unscheduled permanent partial disability. In Irene Penifold, 29 Van Natta 288 (1980), reversed and remanded on other grounds, Penifold v. SAIF, 49 Or App 1015 (1980), the claimant developed dermatitis allegedly as a result of exposure to substances at her place of employment. The condition, however, only affected claimant's hands and forearms. The Board stated:

> "There is no evidence this condition has resulted in claimant losing any function of her hands or forearms and especially no evidence of any loss of wage earning capacity. This condition only affects her hands and forearms and any disability would have to be confined to the scheduled area." 29 Van Natta at 290.

The same facts are present in the current case. There is no evidence that claimant's condition is systemic in nature, and the only place that it manifests itself is in his hands. Neither is the any evidence of resultant loss of use or function. Furthermore, there is additionally no direct evidence in the medical reports that claimant has suffered any permanent sensitization as a result of his work exposure. We, therefore, find that claimant is not entitled to an award of permanent partial disability, either scheduled or unscheduled.

ORDER

The Referee's order dated February 12, 1982 is affirmed.

DELLA A. LAYMON, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10479
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Menashe's order which granted claimant compensation for permanent total disability. SAIF contends that this award is excessive.

We adopt the Referee's findings of fact as our own.

The Referee found that there was insufficient evidence to consider the claimant permanently and totally disabled from a medical standpoint alone, but when social/vocational factors were also considered, that claimant's prospects for employment were very unfavorable. The Referee, therefore, found claimant to be permanently and totally disabled. We disagree.

Claimant sustained a fracture of the fourth sacral segment as a result of her compensable injury. She subsequently developed headaches and pain in her left shoulder and on the left side of her body. Claimant also suffers from a degenerative condition in her lower back. Claimant's fracture healed, but she continued to experience headaches and pain. None of the claimant's physicians felt that surgery was warranted. Dr. Pasquesi noted that claimant had serious social problems and that she should be limited to lifting less than 30 pounds. In his report of July 11, 1980, he stated that claimant should be able to function in employment not requiring her to sit continuously in an eight hour shift. He found a 17% impairment of claimant's left upper extremity, a 5% impairment due to her sacrum fracture and allowed 15% impairment for pain. Dr. Neufeld agreed with Dr. Pasquesi's findings and recommendations. The Determination Order of August 8, 1980 granted claimant 50% unscheduled low back disability and 20% disability for loss of shoulder. Both parties agreed at the hearing that the shoulder disability was incorrectly rated on a scheduled rather than an unscheduled basis.

Claimant is 52 years of age, has a fifth grade education and has worked as a fry cook since she was 14 years old, an occupation to which she cannot return. She has successfully completed training as an electronic component assembler. However, the vocational reports state that claimant has been unable to find work due to the depressed market in electronics. There is general agreement among claimant's physicians that she is not totally disabled, but that claimant's social restrictions are a factor that make finding employment difficult.

Although we agree with the Referee that claimant suffers from some serious social/vocational obstacles to employability, we do not believe that they are serious enough, when combined with her fairly moderate impairment (moderate enough that no physician believes that surgery is warranted) that permanent total disability is warranted. All of claimant's treatment for her injury has been conservative, and all of claimant's physicians agree that claimant is physically capable of doing some form of work. Claimant has been successfully retrained for an occupation suitable to her physical restrictions, but she has made minimal efforts to find work. We do not find the record to indicate that claimant is excused from the ORS 656.206(3) seek-work requirement by Butcher v. SAIF, 45 Or App 313 (1980).

Utilizing Dr. Pasquesi's findings concerning claimant's shoulder ranges of motion, we find that this correlates to a 10% whole person impairment under the guidelines of OAR 436-65-600 et seq., rather than the 17% he suggested. Allowing 5% impairment for claimant's fractured sacrum and 15% for disabling pain as suggested by Dr. Pasquesi, claimant's permanent impairment is equal to 30%. As previously noted, claimant's age is 52 (+7), she has a fifth grade education (+15), her work experience equals +3, and her adaptability to other forms of work results in a +15 figure, as does her general labor market finding. Considering these findings and all other relevant evidence in the record, we find that claimant should be granted an award equal to 70% unscheduled permanent partial disability.

ORDER

The Referee's order dated December 17, 1981 is modified. Claimant is awarded 224° for 70% unscheduled permanent partial disability. This award is in lieu of all prior awards. Claimant's attorney's fee shall be adjusted accordingly.

CINDY L. LOTT, Claimant
Roy Dwyer, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 80-08736
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Danner's order which affirmed the Determination Order dated July 30, 1980, based upon his finding that claimant had not proven entitlement to an award for permanent disability.

Claimant's condition in issue is variously described as trochanteric bursitis and tightness of the fascia lata. The parties disagree whether this condition should be assessed as a scheduled leg problem or an unscheduled hip problem. Compare David Blair, 32 Van Natta 97 (1981), with John Cameron, 34 Van Natta 211 (1982); see also Chester Clark, 31 Van Natta 10 (1981); Sawyer v. SAIF, 29 Or App 573 (1977). The medical evidence is quite ambiguous on this point, but we find it unnecessary to resolve it. If an appropriate award would be scheduled, we find no evidence of permanent loss of use of claimant's leg. If an appropriate award would be unscheduled, we affirm and adopt the Referee's order finding no permanent loss of wage earning capacity due to the compensable consequences of this claim.

ORDER

The Referee's order dated April 14, 1982 is affirmed.

LAURA MAITLAND, Claimant
Olson, Hittle et al., Claimant's Attorneys
Stoel, Rives et al., Defense Attorneys

WCB 81-01594
September 30, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests review and the employer cross-requests review of Referee Wolff's order which: (1) granted claimant compensation for temporary total disability from August 20, 1980 through January 6, 1981 as interim compensation; (2) ordered the employer to pay a 25% penalty on such amounts for unreasonable delay in denying the claim and failure to pay compensation; (3) ordered the employer to pay claimant's attorney a fee of $1,000; (4) affirmed the employer's January 6, 1981 denial of claimant's aggravation claim; and (5) affirmed the Determination Order of December 20, 1979.

Claimant contends that she is entitled to an award of permanent partial disability, and that her claim for aggravation was improperly denied. The employer argues that claimant failed to request a hearing in relation to the Determination Order of December 20, 1979 in a timely manner, and alternatively, even if the request for hearing was timely, that claimant is not entitled to an award of permanent partial disability and that the Referee erred in granting interim compensation, penalties and attorney fees.

Claimant, age 30, was employed as a secretary for Tektronix when, on November 3, 1978, her typing load was greatly increased. Claimant was seen by Dr. Kelber who diagnosed tendonitis of the left hand, forearm and elbow. On December 18, 1978 he released her to return to regular work.

By a report of December 15, 1978 Dr. Button diagnosed left scapular bursitis and mild left ulnar nerve neuritis. He indicated that he found no permanent impairment. By a letter dated September 4, 1979 claimant resigned from her employment with Tektronix, citing health reasons. Her last day of work was September 14, 1979. Subsequently, claimant obtained part time employment as a substitute teacher. A Determination Order issued on December 20, 1979 closed the claim with compensation for temporary total disability only.

On September 9, 1980 Dr. Mayhall reported that claimant had possible compression neuropathy at the elbow. On September 15, 1980, claimant wrote to Tektronix asking for prompt payment of her medical bills and for workers compensation benefits following termination of her unemployment compensation benefits. She stated, "If Tek's Workmans Compensation does not feel my claim is justified, I wish to begin the process for a formal hearing and determination."

On October 9, 1980, Dr. Button indicated that after the claim was closed in December of 1979, claimant had been asymptomatic for a period of time and that her present problems could not be directly related to the 1978 employment. He felt that her problems were due to her new employment as a substitute teacher. On December 19, 1980 Dr. Rosenbaum reported that he found no objective evidence to account for the claimant's continued symptoms, and that they were not related to the 1978 injury.

The Referee found that claimant's letter of September 15, 1980 was adequate as a request for hearing in relation to the December 20, 1979 Determination Order. We agree. OAR 436-83-230 requires the employer or insurer to forward to the Board misdirected requests for hearing that it may receive. The employer in this case failed to do so. Had claimant's letter been forwarded to the Board, it undoubtedly would have been processed as a request for hearing.

We also agree with the Referee that claimant has failed to establish entitlement to an award of permanent partial disability. The only physician to find that claimant suffered from any type of permanent impairment was Dr. Mayhall. We find Dr. Mayhall's testimony on this point to be both confusing and contradictory. Additionally, Dr. Mayhall's conclusions seem to be

based substantially on claimant's subjective complaints, and the Referee found the claimant to have been less than credible.

Regarding the issues of aggravation, penalties and attorney fees, we affirm the Referee in part and reverse in part. We agree with the Referee that claimant's letter dated September 15, 1980 constituted a valid claim for aggravation. ORS 656.273(6) states:

> "A claim submitted in accordance with this section shall be processed by the insurer or self-insured employer in accordance with the provisions of ORS 656.262, except that the first installment of compensation due under ORS 656.262(4) shall be paid no later than the 14th day after the subject employer has notice or knowledge of medically verified inability to work resulting from the worsened condition." (Emphasis Added.)

Contrary to the Referee's finding, we conclude Dr. Mayhall's report of September 9, 1980 does not indicate an inability to work. Dr. Mayhall's report is only a recitation of claimant's complaints: "She stated that the aggravation was not as a result of part-time employment at the Salem School District"; "She does not feel at this time that her injury is stopping her from working in a secretarial capacity, as she is unable to type." (Emphasis Added.) This is not a medically verified inability to work. No interim compensation is due nor penalties and attorney fees for failure to pay compensation within 14 days.

There is no question, however, that the employer's letter of denial was issued substantially beyond the statutory 60 day period. The claim for aggravation was dated September 15, 1980 and the employer did not deny the claim until January 6, 1981. However, as we have found, there was no compensation owed since claimant failed to present medical verification of inability to work. Even though the employer was late in issuing a denial, since there was no compensation due, there are no amounts on which to calculate a penalty, and no statutory authority for an award of an attorney's fee Cf. Kosanke v. SAIF, 41 Or App 17, 21 (1979).

ORDER

The Referee's order dated November 3, 1981 is affirmed in part and reversed in part. That portion of the Referee's order granting interim compensation from August 20, 1980 through January 6, 1981 and a penalty of 25% of such amounts and a $1,000 attorney fee is reversed.

The remainder of the Referee's order is affirmed.

HENRY G. MAURER, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08329
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee McCullough's order which upheld the SAIF Corporation's denial of his aggravation claim. The Referee succinctly stated the issue: "The specific issue framed at the hearing is whether claimant's drug addiction, which necessitated extensive medical treatment beginning on May 24, 1981, is a compensable consequence of his accepted June 28, 1976 work injury, [which involved a cervical strain] thereby justifying reopening of his claim as of May 24, 1981." The Referee answered the question in the negative.

We agree with the Referee's conclusion, but do not agree with all of his analysis.

SAIF argues in part: "The evidence shows no evidence of an addictive drug prescribed for the compensable [cervical] condition, and contains voluminous evidence that narcotics were used for numerous other problems." Part of the Referee's reasoning was along this same line. In our opinion, this is not completely responsive to claimant's theory of the case. Claimant argues his 1976 cervical injury resulted in basically continuous pain which led to his use and abuse of addictive medication. Under this theory we think it is irrelevant for what purpose or by what means claimant acquired the prescriptive medication; the issue is just one of a causal link between the 1976 compensable injury and the 1981 drug addiction problem. See Donald P. Neal, 34 Van Natta 237 (1982).

We are not persuaded that the evidence establishes such a causal link. Claimant's 1976 cervical strain injury was only treated conservatively; no surgery was ever performed. In November of 1979 claimant was willing to stipulate that his permanent disability as a result of the 1976 injury was 7.5%, which does not seem to us to be consistent with the level of chronic pain that would cause drug abuse. Claimant apparently returned to and was able to do some work between 1976 and 1981. Finally, claimant had a variety of other injuries and other health problems between his 1976 cervical injury and his 1981 hospitalization for addiction; thus drug abuse because of pain does not necessarily mean drug abuse because of cervical pain.

ORDER

The Referee's order dated March 22, 1982 is affirmed.

NORMAN G. MUNGER, Claimant
Galton, Popick et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05855
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee St. Martin's order which granted claimant compensation for permanent total disability. SAIF contends this award is excessive.

We adopt the Referee's findings of fact as our own.

Claimant has received awards totalling 40% for low back and excretory problems related to his July 21, 1979 industrial injury. He is restricted to lifting no more than 35 pounds, with no bending, stooping or crawling. Claimant basically can perform only light work, which precludes him from returning to his job of 20 years as a truck driver and laborer. He has had two back surgeries, one as a result of this injury. His back condition, though significant, is not the major part of his disability.

Claimant also has neurogenic dysfunction of the bladder. The condition is permanent and renders him unable to void without self-catheterization. This would have to be done three times during a normal eight-hour work day (15 minutes each time). Without a sterile shelf or table in an employer's restroom, claimant would be unable to perform the catheterization safely. The Referee apparently was persuaded that this condition produced permanent total disability status. We are not so convinced that this problem is insurmountable. Claimant testified the restroom near the hearing room could be easily adapted for his use. A 15-minute process three times in an eight-hour day as described by claimant should not render him permanently and totally disabled.

Much discussion centers around claimant's psychological problems. Dr. Glaudin, after one examination, diagnosed chronic paranoid schizophrenia and indicated he felt claimant would be unable to adapt to a new job. We are not totally convinced by Dr. Gaudin's report and testimony. We do not find support in the record for the doctor's theory that claimant's job for the last 20 years was in a "sheltered" environment and, therefore, he would be unable to adapt to a new situation. Claimant worked under his brother-in-law's supervision but there is no persuasive evidence that he was as protected as Dr. Glaudin would have us believe. To the extent that the vocational rehabilitation reports depend on Dr. Glaudin's findings, we weigh them accordingly.

Claimant's motivation is also suspect. He has not applied for work of any kind since the July 1979 injury.

Claimant is 55 years old with an eighth grade education.

After thorough consideration of the evidence before us, we conclude claimant is not permanently and totally disabled. A more appropriate award for his disability would be 75% unscheduled disability.

ORDER

The Referee's order dated February 26, 1982 is modified.

Claimant is hereby granted compensation equal to 240° for 75% unscheduled disability. This award is in lieu of that granted by the Referee.

The attorney's fee should be adjusted accordingly.

BRYCE H. OSTRANDER, Claimant
Cushing et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-06955
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer and its insurer request review of that portion of Referee Daron's order which awarded claimant 160° equal to 50% unscheduled permanent partial disability compensation for his low back injury. The employer contends that the award is excessive and is not justified by the evidence.

The employer's brief has highlighted those portions of the record that particularly apply to the factors of unscheduled disability found in ORS 656.214(5) and OAR 436-65-600 et seq. We find that application of these guidelines produces a disability rating somewhat lower than that granted by the Referee.

Claimant is presently 52 years of age (+7). Though he has only nine and one-half years of formal education, he has obtained a GED certificate recently (0). His occupation at the time of the injury was that of sales and service manager for his employer, a recreational vehicle manufacturer. At the exact time the claimant was injured, he was helping move the company to another location by operating a forklift. Sales management (DOT 163.167-018) is assigned a specific vocational preparation factor of 8 (over two years) yielding an impact of +10. Claimant's job did require some physical labor in the handling and stocking of supplies that was apparently in a "medium work" range (frequently requiring strength exertion of 25 pounds with occasional requirements of up to 50 pounds). OAR 436-65-605 (2)(b). Dr. Fax, claimant's treating orthopedist, repeatedly restricted the claimant to light work, with no heavy lifting or repetitive bending and stooping, in reports dated January 17, 1980 (closing exam), February 20, 1980 and December 11, 1981. On the other hand, on September 24, 1979 the Callahan Center deemed the claimant capable of performing medium work and, on November 29, 1979, Orthopaedic Consultants stated the claimant could return to his regular work without limitations. We find that claimant's testimony about his present physical abilities in his job as a motel manager and the medical consensus lead to the conclusion that claimant's residual functional capacity is in the light work range (+5). His mental capacity and psychological reactions are normal (0). Given his considerable vocational preparation (8), his general educational development level (4), and his light work residual functional capacity, claimant has 41% of the labor market in Oregon available to him, yielding an impact factor of -25.

As to impairment, the Callahan Center reported a mild to mildly moderate (20 to 40%) physical impairment due to claimant's chronic low back strain. Orthopaedic Consultants found a minimal loss of function due to his back injury though the restricted ranges of thoracolumbar motion they reported indicate a 10% impairment. Dr. Fax had reported a restricted range of motion of 9% on January 17, 1980, increasing to 23% on January 11, 1982. Taking all these medical reports into consideration, along with the testimony produced at the hearing by claimant and corroborating witnesses, we find claimant's present physical impairment to be 20% (+20).

Combination of all the impact factors produces a disability rating of 25%, which we find to be more in line with the loss of wage earning capacity demonstrated by this claimant as compared to other similar cases.

ORDER

The Referee's order dated April 6, 1982 is modified. Claimant is awarded 80° equal to 25% unscheduled permanent partial disability compensation in lieu of all prior awards of permanent disability. Claimant's attorney's fee should be adjusted accordingly. The remainder of the Referee's order is affirmed.

GARETH STOCKTON, Claimant
Cowling, Heysell et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-11059
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of that portion of Referee Peterson's order which granted claimant an award of permanent total disability. The only issue for review is the extent of claimant's disability.

Claimant was employed as a supervisor by the State of Oregon Highway Division when he was injured on May 23, 1977 while lifting a sign. The injury was initially diagnosed as an acute strain. Subsequent examination revealed preexisting degenerative disc disease. Dr. Saez diagnosed lumbar spondylosis with post-traumatic aggravation and musculoskeletal strain. A myelogram revealed the degenerative changes but no herniated disc was found. Claimant also suffers from preexisting angina and hypertension, as well as a certain amount of functional overlay. Claimant received conservative treatment for his back injury.

In his July 6, 1978 report, Dr. Saez indicated that claimant could be placed in a job with light or lightly moderate physical restrictions and in which he would not be required to lift in excess of 30 to 35 pounds. In September of 1978 Dr. James examined the claimant and found mechanical low back pain, with a degree of functional overlay. Dr. James recommended no work involving prolonged sitting or standing, and found claimant's condition to be medically stationary. On April 6, 1979 Dr. Matthews reported that claimant appeared to be a satisfactory candidate for light to moderate types of work. A Determination Order dated April 26, 1979 awarded claimant 35% unscheduled permanent partial disability.

On October 10, 1979 an initial rehabilitation evaluation took place. The claimant indicated that he felt there were no jobs available to him and that, if his application for Social Security assistance was approved, he would not be interested in vocational rehabilitation. On November 8, 1979 Dr. Flowers indicated that claimant was incapable of working and that he expected improvement within about two months. Dr. Maukonen reported on November 23, 1979 that he did not feel that the claimant would receive any benefits from Pain Center treatment because claimant did not wish to return to work since he had no financial incentive to do so and did not wish to give up pain medications. Dr. Flowers, however, apparently disagreed with Dr. Maukonen and felt claimant to be permanently and totally disabled. In April 1980, claimant was examined by a panel of physicians from the Southern Oregon Medical Consultants. The physicians felt his condition was not stationary and recommended a fusion. They additionally found that if surgery was not possible, claimant would be capable of only sedentary employment. Although disagreeing with the recommendation of surgery, Dr. Maukonen did concur with the consultants' findings regarding impairment and work capacity. Dr. Maukonen stated:

> "I have, on multiple occasions in the past, stated that this patient's job potential is limited to non-manual labor that did not involve any prolonged car riding which is in agreement with the Orthopaedic Consultants' opinion, I believe."

In September, 1980 Dr. Davol reported that claimant's prognosis for return to work was poor unless it offered significant financial incentives, and that prognosis for recovery was good if he attained a satisfactory claim settlement, and that he had convinced himself that he was incapable of prolonged physical activity.

In December, 1980 the claim was reopened by stipulation. On January 9, 1981 Dr. Sullivan reported claimant was medically stationary and that no additional treatment was indicated. The Determination Order of January 28, 1981 granted additional time loss benefits only.

The Referee found that claimant's psychological problems were related to his industrial injury. The Referee also noted that claimant had made only token efforts to seek regular and gainful employment as required by ORS 656.206(3), but concluded that his lack of efforts were not unreasonable under the circumstances, citing Butcher v. SAIF, 45 Or App 313 (1980). We disagree.

Claimant's industrial injury involved a strain to the lumbar area superimposed on an advanced degenerative condition. Claimant has received only conservative treatment and no surgeries have been performed or are indicated at this point. The diagnostic myelogram revealed only degenerative changes, and was otherwise normal. Although Dr. Flowers is of the opinion that claimant is permanently and totally disabled, we find that the preponderance of the medical evidence establishes that claimant is capable of

engaging in gainful employment, if he were but motivated to do so. Dr. Maukonen, Dr. James and the panel from the Southern Oregon Medical Consultants all felt that claimant would be capable of returning to employment. None of the physicians who examined the claimant expressed an opinion of claimant's impairment due to the residuals of claimant's compensable injury alone, but included claimant's total lumbar impairment, including his preexisting advanced degenerative condition. We are left uncertain by the medical reports to what extent, if any, claimant's industrial injury contributed to or aggravated his preexisting back condition.

Claimant is now 60 years of age, has a high school education and owned his own automotive body shop for some 20 years. Claimant also has work experience as a parts manager, and clerk for various other employers, and has obtained supervisory experience under a CETA program. We do not find the evidence sufficient to allow claimant to be relieved of his burden under ORS 656.206(3). The preponderance of the evidence indicates claimant is capable of work, but has made no real efforts to find work, and has little if any interest in retraining. We, therefore, concluded that claimant is not permanently and totally disabled.

Based on the record before us, and the guidelines for rating unscheduled permanent partial disability contained in OAR 436-65-600 et seq., we conclude that claimant should be awarded 60% unscheduled permanent partial disability.

ORDER

The Referee's order dated November 30, 1981 is modified. Claimant is awarded 192° for 60% permanent partial disability. This award is in lieu of all prior awards. Claimant's attorney's fee should be adjusted accordingly. The remainder of the Referee's order is affirmed.

DONALD A. STONEKING, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07866
September 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Seifert's order which found claimant's right knee claim was timely and remanded it for acceptance and payment of compensation. Claimant, in his brief, asks for additional compensation for permanent disability of both arms and his cervical/dorsal condition.

With respect to the late filing of notice of claimant's knee injury, we agree with the finding of the Referee that claimant has shown good cause for his failure to file within 30 days. ORS 656.265(4)(c). The employer contends that because of the late notice they were not able to make a timely investigation of the claim. While the passage of time does make the investigation more difficult, it does not appear that the employer was sufficiently prejudiced thereby to bar the claim.

Claimant has shown by a preponderance of the evidence that his knee condition is compensable.

Claimant requests the Board consider the awards granted by the Referee. The order awarded him compensation for 10% loss of the right arm, 10% loss of the left arm and 5% unscheduled cervical and

dorsal disability. After consideration of the evidence, in light of the Department guidelines, we conclude the scheduled awards were proper. However, we find the unscheduled award to be somewhat low. Claimant's impairment is minimal - in the range of 5% according to Dr. Schmidt, his treating physician. Claimant is 45 years old (+3), with a high school education (0). The SVP ("Specific vocational preparation") of his job at the time of the injury is 7 (+10). Based on claimant's restrictions, his education and his work experience, we find he has 78% of the general labor market open to him (-25). Based on these guidelines and in accordance with previous cases with similar facts, we conclude claimant would be more adequately compensated for his cervical/dorsal condition with an award equal to 48° for 15% unscheduled disability.

ORDER

The Referee's order dated April 8, 1982 is modified.

Claimant is hereby granted compensation equal to 48° for 15% usncheduled cervical/dorsal disability. This award is in lieu of that granted by the Referee.

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

The remainder of the Referee's order is affirmed.

FRED TAYLOR, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-05972 & 81-05973
September 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer, Columbia Body and Equipment, requests review of Referee Menashe's order finding it, as a self-insured entity, responsible for payment of compensation to claimant under the last injurious exposure rule for accidental injuries. Smith v. Ed's Pancake House, 27 Or App 361 (1976). The only issue is responsibility. The employer contends that on October 1, 1980, claimant experienced an aggravation of his original compensable low back injury sustained March 3, 1978, for which EBI Companies (employer's previous insurer) is responsible.

On de novo review we agree with the Referee's finding that the evidence is strongly suggestive of a new injury, as opposed to an aggravation of claimant's 1978 injury. The Board affirms and adopts the Referee's order.

Claimant's attorney is not entitled to an attorney's fee on Board review. Gordon L. Lukacik, WCB Case Nos. 81-07098, 81-08797, 34 Van Natta ___ (August 30, 1982).

ORDER

The Referee's order dated June 3, 1982 is affirmed.

TEDDY G. TILLEY, Claimant
Johnson & Johnson, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 79-06802
September 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Nichols' order which upheld the SAIF Corporation's denial of his claim.

Claimant worked as a brush thinner. The employer required the crew of brush thinners to assemble at a motel in John Day in the early morning; the employer would then provide transportion to the site where the crews would be working that day. On June 5, 1979 claimant worked in this manner from 5:00 a.m. to 2:00 p.m. In the course of the approximately 25 to 30 mile return trip back to John Day, claimant's supervisor became aware that the company vehicle in which the crew was being transported was going to pass within a few miles of claimant's home. The supervisor suggested and claimant agreed that claimant would get off the company vehicle close to his home rather than complete the return trip to John Day and then retrace his steps to get home. The vehicle stopped on the edge of a public highway and claimant got off. Claimant then began to cross the highway and was injured when he was struck by a pickup truck on the highway. That accident happened at about 2:30 p.m.

The question is whether claimant's injuries were sustained in the course of his employment. The general test is stated in Rogers v. SAIF, 289 Or 630, 642 (1980): "is the relationship between the injury and the employment sufficient that the injury should be compensable?" Numerous much more specific rules implement the very general Rogers test. Injuries sustained while an employe is traveling to or from work are usually not deemed to arise out of and in the course of employment, e.g., Kringen v. SAIF, 28 Or App 19 (1976). As an exception to the "going and coming" rule, injuries are compensable if sustained while an employe is being transported to or from work in the employer's vehicle which is under the employer's control, e.g., Giltner v. Commodore Con. Carriers, 14 Or App 340 (1973). On the other hand, injuries are not compensable when sustained on a public street over which the employer exercises no control. Adamson v. The Dalles Cherry Growers, 54 Or App 52 (1981).

We find the present case closer to Adamson than to Giltner. Claimant was injured after he had departed from the company vehicle at his destination; he was no longer being transported by his employer. Claimant was not on the employer's premises, either the physical plant or the employer-owned vehicle; instead he was on a public highway over which the employer maintained no control.

Moreover, if this claim were found compensable it would be difficult to draw any meaningful lines short of portal-to-portal workers compensation coverage, which is the exact opposite of the "going and coming" rule. When claimant stepped off the company vehicle on the highway he intended to walk about three miles up a side road to get home. If an accident within the next few seconds and the next few feet is compensable, what of an accident after claimant had traveled 100 yards or one mile or almost three miles? Larson believes it "would be undesirable to start the dangerous and unending game of fixing a 'reasonable distance' to which protection

is extended." 1 Larson, section 17.40. We agree and thus are not willing to extend protection in this case beyond the easy-to-identify limit of transportation in an employer-owned and controlled vehicle.

ORDER

The Referee's order dated January 29, 1982 is affirmed.

KEITH G. UNDERWOOD, Claimant
DeForest, Hansen et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Reviewed by Board Members Barnes and Ferris.

WCB 81-03452
September 30, 1982
Order on Review

Claimant requests review of Referee Mongrain's order which upheld the SAIF Corporation's denial or partial denial of his back injury claim and ordered interim compensation paid from February 9, 1981 to March 25, 1981. Claimant seeks to have the denial set aside and also argues he is entitled to an attorney's fee for prevailing at hearing on the interim compensation issue.

Claimant sustained a nondisabling low back injury at work on November 26, 1980. Claimant did not seek medical attention at that time or miss sufficient time from work to be entitled to time loss benefits.

> "No disability payment is recoverable for temporary total disability suffered during the first three calendar days after the worker leaves work as a result of his compensable injury unless the total disability continues for a period of 14 days or the worker is an inpatient in a hospital." ORS 656.210(3).

Claimant continued working throughout December, January and into February.

On February 9, 1981 claimant experienced severe low back pain at home. He was hospitalized and surgery was performed for removal of a herniated L-5 disc. Claimant's theory is that his February, 1981 surgery is causally related to his November, 1980 at-work injury.

No doctor so opines. Claimant argues this is a situation in which expert medical opinion is not required. Even assuming that position is correct, however, the question remains of whether as factfinders we are persuaded there is a causal relationship between the seemingly minor November, 1980 injury and the February, 1981 surgery. We are not persuaded. Claimant's November injury was not substantial enough to cause him to seek medical care. He returned to work almost immediately and continued working for almost two and a half months. According to the recorded medical histories, claimant did not mention the November incident to any of his doctors. Indeed, the history taken upon claimant's hospital admission in February included: "He has had some problems with his back in the past, but nothing of significance."

In Richard R. Miller, 34 Van Natta 514 (1982), we stated:

> "The Court of Appeals has twice recently ruled that the act of driving a bus or van

without accident or other identifiable trauma can cause a disc herniation. Valtinson v. SAIF, 56 Or App 184 (1982); Hamel v. SAIF, 54 Or App 503 (1981). In Hamel the Court quoted from a doctor's report:

> '. . . ruptured discs are known to occur in people who have no good history of trauma, that is injury. The simple act of turning over in bed or bending over to pick up a handkerchief off the floor might well result in a herniated disc.' 54 Or App at 506.

and concluded 'relatively minor activity can trigger the herniation of a vertebral disc.' 54 Or App 508."

The claimant in this case obviously engaged in such minor activities as turning over in bed and bending over to pick up things. We are not persuaded that one minor activity -- the November, 1980 at-work incident -- was more likely the cause of claimant's disc herniation than any of numerous other possible minor activities.

We turn to the question of attorney's fees. Claimant made his claim shortly after his February 9, 1981 hospitalization. SAIF issued its denial on March 25, 1981. Claimant was entitled to interim compensation from notice of the claim to date of denial. Donald Wischnofske, 34 Van Natta 664 (1982). SAIF's only payment of interim compensation was made on March 11, 1981 for the period between February 12 and 25, 1981. SAIF offers no explanation for its failure to pay all interim compensation due.

Accordingly, the Referee ordered SAIF to pay time loss benefits "for the period of time from February 9, 1981 to March 25, 1981, less any amounts already paid for that period of time." The Referee also ordered SAIF to pay claimant a penalty of 10% of this compensation for unreasonable refusal to timely pay. However, the Referee did not allow claimant's attorney any form of attorney's fee.

The Referee's failure to allow an attorney's fee from the increased compensation, in the form of interim compensation, obtained at the hearing was erroneous. OAR 438-47-030 Moreover, we have ruled that when there is an unreasonable refusal to pay compensation, as we agree there was in this case, "an ORS 656.382(1) separate award of carrier-paid attorney fees is mandatory." Zelda M. Bahler, 33 Van Natta 478, 481 (1981). Claimant's attorney is entitled to fees on this basis also.

The Referee's order dated April 21, 1982 is modified.

ORDER

Claimant's attorney is allowed 25% of the increased compensation payable to claimant under the terms of the Referee's order as and for a reasonable attorney's fee. In addition, claimant's attorney is awarded $250, payable by the SAIF Corporation, in addition to compensation as an attorney's fee pursuant to ORS 656.382(1).

The balance of the Referee's order is affirmed.

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IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Allen Giesbrecht, Claimant.

GIESBRECHT,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB No. 80-8237, CA A23414)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 28, 1982.

David W. Hittle, Salem, argued the cause for petitioner. With him on the brief was Olson, Hittle & Gardner, Salem.

Darrell E. Bewley, Chief Appellate Counsel, SAIF, Salem, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

PER CURIAM.

Affirmed.

PER CURIAM.

Claimant appeals from a determination by the Workers' Compensation Board that his multiple sclerosis disease was not aggravated by excessive heat in his work environment. Four physicians, three of them board certified in neurology, testified at the hearing that the heat exposure increased the symptoms, but did not worsen the underlying condition. The referee, however, felt bound by the written opinion of another physician, who did not testify, that the heat caused a worsening of claimant's underlying condition, solely because this court had found that doctor's opinion to be persuasive in another multiple sclerosis case. *Abbott v. SAIF,* 45 Or App 657, 661, 609 P2d 396 (1980). Not only did *Abbott* not concern the issue of heat as a cause of worsening of multiple sclerosis, but the contribution of one expert's opinion to the preponderance of evidence in one case has no bearing on the relative weight of the same expert's opinion in another case with a different mix of medical opinions.

Claimant did not sustain his burden of proof.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Elmer W. Petz, Claimant.

PETZ,
Petitioner,
v.
BOISE CASCADE CORPORATION,
Respondent.

(WCB No. 79-01374, CA No. A21763)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 13, 1982.

Robert W. Muir, Albany, argued the cause for petitioner. With him on the brief was Emmons, Kyle, Kropp & Kryger, P.C., Albany.

Katherine H. O'Neil, Portland, argued the cause for respondent. With her on the brief were Paul R. Bocci, and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Reversed; referee's order is reinstated.

VAN HOOMISSEN, J.

Claimant appeals an order of the Workers' Compensation Board that reversed a referee's opinion and order finding that he is permanently and totally disabled. Because claimant was determined to be permanently and totally disabled in 1975, the employer bears the burden of proving that he is no longer totally disabled. *Bentley v. SAIF,* 38 Or App 473, 478, 590 P2d 746 (1979). The issue is whether employer has sustained its burden of proof.

Claimant sustained an on-the-job injury to his back in 1969. A lumbar laminectomy was performed. He was declared medically stationary in 1970 and returned to work. In September, 1971, he reinjured his back, resulting in his hospitalization for traction. He has not been gainfully employed since.

In March, 1972, the Back Evaluation Clinic reported:

"Diagnoses:

1. Status post-lumbar laminectomy.
2. Probable herniated nucleus pulposus question L5-S1 left secondary to injuries sustained September 19, 1971, by history.

"Recommendations:

1. The patient should be returned to his treating doctor to be considered for further investigation including myelography and surgery if indicated.
2. Claim closure to be initiated after completion of treatment by treating physician at the request of the treating physician.
3. The patient can be discharged from the Disability Prevention Division.
4. The patient is unable to return to his former occupation; at present it can not be determined if a job change is indicated."

Dr. Tsai performed a second laminectomy in September, 1972. He reported that claimant "has been temporarily totally disabled from May 18, 1972 through approximately 4-6 months after [the second] surgery."

Dr. Seres examined claimant in March, 1974. He found him to "have a permanent disability with respect to his low back," which he rated "moderately severe." In August, Dr. Russakov said that "decreased mobility and endurance would substantiate the fact that this man is feeling real pain and I see him as totally disabled in terms of any work situation." Dr. Russakov's report was reviewed and "approved" by Dr. Seres. At the same time, Dr. Newman, a psychologist, observed that "taken together, emotionally, intellectually and physically, [claimant] appears to me to be significantly, if not totally, disabled."

Prior to April, 1975, claimant had been awarded a total of 75 percent unscheduled disability. In April, 1975, a referee concluded that he was permanently and totally disabled. No appeal was taken from that order.

In 1978, at employer's request, claimant was examined by Dr. Specht, who also viewed movies of claimant working on his house. He said:

> "It is evident to me and was evident before viewing the movie alluded [to], that [claimant] is not totally and permanently disabled. He is capable of vocational rehabilitation and in spite of his low degree of education, he has certain very marketable skills such as construction abilities. He is capable of performing work which does not involve excessive frequency of bending and stooping, or lifting over 35 pounds * * *."

Employer then wrote to the Evaluation Division enclosing Dr. Specht's report and advising that, to the best of its knowledge, claimant had not been under the care of a physician since 1974 and that he had apparently not been taking any medication, because no bills had been submitted to employer for payment. On the carrier's request for a redetermination, the Division recommended that claimant's award be modified to 80 percent unscheduled disability. In February, 1979, the Board, on its own motion, *see* ORS 656.278(1), reduced claimant's award to 80 percent unscheduled disability. After the Board issued its order, claimant tried without success to find employment.

Claimant appealed, ORS 656.278(3), and requested a hearing. ORS 656.283. The referee found that claimant's testimony about his disability was "not significantly

contradicted by the films" and that there was "no other evidence to question the claimant's credibility." The referee concluded that claimant is permanently and totally disabled and has been since 1975. On appeal, the Board concluded,

> " * * * based on a preponderance of the evidence presented, that claimant is not permanently and totally disabled."

The Board thereupon reinstated the award of 80 percent unscheduled disability. One Board member dissented. We review *de novo.* ORS 19.125.

Claimant, age 54 at the time of the hearing, was employed as a millwright at the time of his back injuries. He had previously worked as a mechanic, machinist, truck driver and lumberjack. He has an eighth-grade education with some training in welding and diesel mechanics. When he was originally found to be totally disabled in 1975, the referee found that his "ability to sit, stand, walk, bend, lift, drive and sleep has been severely reduced." He could not sit or stand for any extended period without changing position.

At the 1980 hearing, claimant testified that his physical condition is the same as or worse than it was in 1975, that he cannot sit for more than twenty to thirty minutes without changing position and that he cannot stand for more than ten to fifteen minutes without sitting or lying down to obtain relief. He cannot walk more than one block over pavement and has "good and bad days" — usually four or five bad days a week and sometimes continuously for up to twelve days. On bad days, he must lie down from four to six hours during the daytime. His leg buckles three to four times a day, and he sometimes falls. He experiences pain "all the time," but on bad days he is prone to sharp and sudden pain which radiates down his left leg, so that at times he is "afraid to take a step." He gets muscle spasms and cramps three to five times daily.

On a bad day he cannot stand for more than ten minutes and cannot lift even a pound comfortably. He wakes up frequently at night because of pain and spasms in the left leg and gets only three to four hours of uninterrupted sleep on a good night. Claimant's wife and sons substantially

corroborated this testimony, and the referee, to whom we normally defer on the issue of credibility, *Condon v. City of Portland,* 52 Or App 1043, 629 P2d 1324, *rev den* 291 Or 662 (1981), found "no evidence to question the claimant's testimony."

Employer's evidence consisted primarily of the report of Dr. Specht and surveillance films. Claimant testified that Dr. Specht examined him for five minutes, after which he concluded that claimant was not totally disabled.[1] Dr. Specht found claimant capable of vocational rehabilitation, with certain "very marketable" skills. He stated that claimant:

> "* * * [i]s capable of performing work which does not involve excessive frequency of bending and stooping, or lifting over 35 pounds. This may or may not occasion some subjective complaints, but they should not be incapacitating and such activities will not injure his lumbar spine."

He also conjectured that "either hysteria or elaboration" added to claimant's symptoms.

Dr. Specht's opinion was contradicted by the report of Dr. Tsai, who examined claimant after the Board had originally reduced his award. He did not believe that claimant will be able to return to any gainful employment. Dr. Tsai was one of claimant's physicians at the time of his 1971 injury. He examined claimant several times before and after his second laminectomy, which he performed. While Dr. Tsai may not be properly considered claimant's treating physician because of the hiatus in claimant's visits to him, he is in a better position to judge claimant's change for better or worse over a period of time than Dr. Specht, who performed only one examination. Dr. Tsai disagreed with Dr. Specht about the possibility of exaggeration of the injury by claimant and found "no functional interference" during his latest examination.

The referee found that "claimant's testimony was not significantly contradicted by the films * * *." As described by the investigator who took the films, there is

[1] Given the detail of Dr. Specht's report, this seems an unusually brief period, but employer put on no evidence to rebut claimant's testimony about the duration of the examination.

nothing in them that demonstrates that claimant's physical condition has significantly improved. The investigator testified that claimant was frequently out of view on the first day of filming and numerous times on the second day. Thus, nothing in the films contradicts claimant's testimony that he must lie or sit down to obtain relief after standing for ten or fifteen minutes. Further, the films fail to rebut claimant's testimony that he has "good and bad days." Claimant may have been able to perform the filmed activities on a good day and still may have suffered total incapacity on a bad day. The films, taken over a period of only two days, do not in themselves rebut claimant's testimony about the degree of his disability on a bad day, because they do not reveal whether he was photographed on a good or bad day. A mere showing that he is able to engage in sporadic physical activity does not sustain employer's burden of proving that claimant is no longer totally disabled.

On *de novo* review, we conclude that employer has failed to sustain its burden of proof.

The Board's order is reversed. The referee's order is reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the matter of the compensation of Walter R. Richmond, claimant.

RICHMOND,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(No. 80-01520, CA A22718)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 19, 1982.

David Filer, Eugene, argued the cause for petitioner. On the brief was Gary K. Jensen, Eugene.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Warden, and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

The issue in this workers' compensation case is compensability. The Workers' Compensation Board (Board) affirmed the opinion and order of the referee, which denied the claim. We review *de novo* and affirm.

Claimant is a police officer employed by the City of Lebanon. He injured his knee while playing in a benefit basketball game between the Police and Fire Departments of the city. Knee surgery was required, which resulted in time loss.

The facts are not disputed. The basketball game took place at the Lebanon Union High School gymnasium for the benefit of the Wigwam Wisemen, an athletic booster club at the high school. This was the third annual game between the departments. The games were organized by members of the police and fire departments, partly during on-duty time. Each year the game participants selected an organization to receive the ticket sales proceeds. Athletic jerseys were purchased by individual players, although some were borrowed from the high school. Game tickets were provided by a volunteer organization of the fire department. A marksmanship trophy, which belonged to

businesses were solicited and donated half-time prizes. Ticket sales and publicity were supervised by the booster club. Copies of the game program were made on a city copy machine. The game was video-taped with city equipment by fire department employes. A fire department ambulance and another vehicle were present at the game, as were uniformed police officers and firefighters. The players practiced on their off-duty time, and each team used department volunteers. The city neither orally nor in writing approved or disapproved the game.

Claimant argues that his knee injury is compensable, because he and the other participants would not have played in the basketball game but for their employment as police officers and firemen. SAIF maintains that claimant was not in the course and scope of his employment within

the meaning of ORS 656.005(8)(a)[1] when he was participating in the game.

The issue of "work-connection" was addressed in *Rogers v. SAIF,* 289 Or 633, 616 P2d 485 (1980), where the court adopted a "unitary work-connection" analysis to determine compensability. *Rogers* described the ultimate inquiry:

> "[I]s the relationship between the injury and the employment sufficient that the injury should be compensable?" 289 Or at 642.

In making that determination, we find Professor Larson's analysis helpful:

> "Recreational or social activities are within the course of employment when
>
> "(1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> "(2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> "(3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." 1A Larson, Workmen's Compensation Law, 5-71, § 22.200 (1979).

Larson emphasizes that the indicia of time and place in the first test "are of unusual potency in identifying an activity with employment." 1A Larson at 5-106. Here, the game took place at the high school, not on the employer's premises.[2] Claimant contends that, as a police officer, he is on

[1] ORS 656.005(8)(a) defines a "compensable injury" as an "accidental injury * * * arising out of and in the course of employment * * *."

[2] Although the game took place within the geographical boundaries of the city, the gymnasium at Lebanon Union High School is not the employer's premises, in the sense that the employer could direct, control, allow or prohibit activities as it could on its own premises.

duty 24 hours a day and that, even though he was technically off-duty while participating in the game, the activity was within his duty hours. That argument is not persuasive. If carried to its logical conclusion, any off-duty

activity by a police officer would have the indicia of compensability, a result clearly not contemplated by the statutory scheme.

Claimant also argues that some of the preparation for the game was accomplished during on-duty time and that therefore the activity was within the time and place of employment. However, there was no persuasive evidence that the chiefs of the respective departments had knowledge of or gave their permission to those on-duty activities. That is also the case with respect to the use of the city's copy machine and video equipment.

Larson's next test is the extent to which the employer requires participation in the activity, thereby making it part of the services of the employe. The record does not reflect a requirement by the city or its department chiefs that employes participate in the game. The evidence was that the chiefs of the departments acquiesced in the games and participated as players. They neither gave nor required permission to play. The game was organized on the initiative of the employes, and the chiefs were merely informed of their activities. Sponsorship and promotion were provided by the booster club. The only evidence of the city's participation was the donation of a police department trophy, which was transformed gratuitously into a basketball trophy. At most, the evidence amounts to tacit approval by the police and fire departments that the employes participate in the game, but it falls short of the supervision or complusion necessary to bring the recreational activity within the course of employment.

The final test articulated by Larson concerns the direct benefit the employer derives from the activity, which must be beyond an improvement in employe health and morale. *See Haugen v. SAIF,* 37 Or App 601, 588 P2d 77 (1978). Claimant argues that the city was benefited by the game, because it helped contribute to a positive image of the police department within the community. While acknowledging that public relations may be improved by worthwhile charitable activities such as the one here, we do not find that the benefit to the city was sufficiently substantial or of such a direct nature to establish the necessary beneficial relationship between the recreational activity and the employment.

Claimant has not met his burden of proving a sufficient work connection between his injury and his employment.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Thomas E. Humphrey, Claimant.

HUMPHREY,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(No. 80-02689, CA A22799)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 19, 1982.

Dwight Ronald Gerber, Florence, argued the cause and 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 Gillette, Presiding Judge, and Warden and Young, Judges.

YOUNG, J.

Reversed and remanded to reinstate the referee's order as modified by this opinion.

YOUNG, J.

The issues in this worker's compensation case are 1) whether claimant's epididymitis is compensable and 2) if so, whether the period for which temporary total disability was awarded was correctly assessed.

Claimant was injured in a car accident November 30, 1979, while he and his employer were traveling to a job site. He was thrown from the vehicle and suffered multiple contusions and bruises to the hip and back area. The State Accident Insurance Fund (SAIF) accepted responsibility for medical treatment resulting from those injuries but denied that claimant's epididymitis was causally related to the accident. The referee reversed SAIF's denial, finding the epididymitis compensable, and ordered that temporary total disability benefits be awarded for the period of December 1, 1979, through December 9, 1979, assessed a penalty for delay in payment and awarded attorney fees. The Workers' Compensation Board (Board) upheld SAIF's denial, reversed claimant's award of attorney fees and affirmed the remainder of the referee's order.

Whether claimant's epididymitis was compensable is a fact question of medical causation. The medical experts agreed that, when epididymitis is caused by trauma, it is common for the symptoms to appear seven to ten days following the trauma. The question of causation, therefore, depends on a determination of the time claimant began to experience the problems associated with epididymitis. The referee found:

> "The medical evidence in this case all points in the same direction. In short, if the history given to Dr. Collins to the effect that right testicular pain came on within a week or so after the accident is believed, the epididymitis is compensable. If the symptoms came on later, it is not compensable. By the credible testimony of the claimant, his mother, his wife, and his father, I conclude that the epididymitis is compensable."

The Board accepted the referee's findings of fact but rejected the conclusion regarding compensability.

> "The preponderance of the evidence is that claimant made no complaint of his symptoms *to any physician* until two months after his industrial injury. Therefore, the

> denial of compensability will be upheld." (Emphasis added.)

In reaching its conclusion, the Board necessarily rejected the testimony of claimant, his wife, his mother and his father. It is also evident that the Board erroneously focused the inquiry on the time that claimant registered a complaint with a physician, rather than on the time when the symptoms actually manifested themselves. We have repeatedly held that, in exercising *de novo* review, we defer to the referee's determination of credibility because of his opportunity to observe the witnesses. *Anfilofieff v. SAIF,* 52 Of App 127, 131, 627 P2d 1274 (1981); *Crampton v. Bullis,* 48 Or App 179, 182, 616 P2d 562 (1980); *Miller v. Granite Construction Co.,* 28 Or App 473, 477, 559 P2d 944 (1977).

The Board accepted the referee's findings of fact. It does not point to any inconsistencies in claimant's or his witnesses' testimony that would indicate unreliability. There is no persuasive evidence in the record that undermines claimant's evidence concerning the onset of epididymitis symptoms or the explanation for his delay in seeking treatment. He saw his family physician, Dr. McLean, twice in the four days following the accident. No specific complaint of epididymitis was made at either time, but that would be consistent with the medical evidence that symptoms may not occur until several days after the trauma. Claimant was also taking pain medication at the time and was experiencing severe discomfort in the lower back area. Claimant testified that when the symptoms of epididymitis appeared, he did not seek immediate medical assistance, because he could not foresee how the medical bills would be paid.

The fact that there is conflicting evidence as to when claimant complained of his condition to a physician is not conclusive on the question of causation, because the medical experts agreed that if the symptoms appeared within seven to ten days of the accident, the epididymitis was related to the accident. The record does not include any other explanation for the epididymitis. We find the testimony of claimant and his witnesses persuasive. Accordingly, we find that claimant carried his burden of proving

by a preponderance of the evidence that the epididymitis is compensable.

Claimant next assigns as error the referee's award of total temporary disability only for the period of December 1, 1979, through December 9, 1979. He argues that the period should be extended to February 12, 1980. Claimant attempted to return to work for his employer but was unable to continue after working one day, due to disabling pain caused by the epididymitis.[1] He also trained as a truck driver for six days, without pay, but was forced to discontinue, because of pain, by February 2, 1980. The epididymitis cleared up by February 12, 1980.

Temporary total disability has been defined as

> "* * * compensation for loss of income until claimant's condition becomes stationary in order to enable a claimant to support self and family during that period." *Taylor v. SAIF,* 40 Or App 437, 440, 595 P2d 515, *rev den* 287 Or 477 (1979).

It is not clear from the record when claimant was formally released to return to work.[2] However, there is no dispute that claimant's attempt to return to his previous employment was unsuccessful. It is also clear that he tried to work as a truck driver and completed six days of training, but was thwarted in his efforts because of his physical condition. SAIF argues that because no statement of work restriction appears on claimant's medical reports and because he applied for unemployment compensation, he was capable of gainful employment. Claimant applied for unemployment benefits because he had no other source of income, and his application was rejected because he was not actively looking for a job. Furthermore, the urologist who treated claimant's epididymitis advised him to "stay off work" until his condition cleared.

---

[1] There is some conflict as to whether claimant returned to work on December 10, 1979, or December 12, 1979.

[2] The referee's findings of fact state:

> "It was the claimant's understanding that he was released to return to work on January 11, 1980. The medical record does not support or deny this."

Dr. McLean, the original treating physician, whose notes the referee described as "cryptic at best," made the following entry on claimant's record:

> "Final 1/11/80"

We find from a preponderence of the evidence that claimant's work history from November 30, 1979, to February 12, 1980, was limited to two brief attempts to rejoin the work force. The fact that he was able to work sporadically does not negate the conclusion that he was incapable of working regularly at a gainful and suitable occupation. *Hedlund v. SAIF,* 55 Or App 313, 637 P2d 1329 (1981); *Vader v. State Ind. Acc. Com.,* 163 Or 492, 98 P2d 714 (1940). Accordingly, we find that the award of temporary total disability benefits should be extended from December 9, 1979, to February 12, 1980.[3]

Reversed and remanded to reinstate the referee's order as modified by this opinion.

[3] Temporary total disability benefits are often awarded "less time worked" in a situation where the worker is able to work sporadically. Such a deduction would not be appropriate here, because claimant was not compensated for his days of driver training.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
David Mobley, Claimant.

MOBLEY,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB No. 80-08362, CA A23544)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 10, 1982.

Alan M. Scott, Portland, argued the cause for petitioner. With him on the brief were Catherine Riffe, and Galton, Popick & Scott, Portland.

Darrell E. Bewley, Appellate Counsel, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Affirmed in part; reversed in part and remanded to Board for award of an attorney fee.

THORNTON, J.

Claimant appeals from that portion of the Workers' Compensation Board's order reducing his counsel's attorney fees from $1,100 to $600. Claimant also appeals from the Board's failure to grant his counsel attorney fees for prevailing on an insurer-initiated appeal.

Claimant filed a claim for a groin injury, which SAIF denied. Claimant requested a hearing, which resulted in the referee's ordering SAIF to accept the claim. The referee also ordered SAIF to pay claimant's counsel $1,100 as a reasonable attorney fee. SAIF requested Board review on the issues of compensability and the award of attorney fees. The Board affirmed the referee's order that the claim be accepted by SAIF, but modified the order by reducing the attorney fee to $600.

In reducing the fee award, the Board noted that the transcript of 21 pages suggested a low level of effort was expended. It also noted that the results obtained at the hearing were limited to payment for minimal medical services with no temporary total or permanent disability order.

In *Bentley v. SAIF,* 38 Or App 473, 481, 590 P2d 746 (1979), concerning the amount of attorney fees, we stated:

> "* * * We give deference to the administrative agency's expertise in terms of its awareness by experience of the normal amount of work necessary to represent a claimant. We will alter the award only in case of a manifest abuse of discretion."

We do not find that the Board's reduction constituted a "manifest abuse of discretion." Therefore, we affirm that portion of the order.

Claimant also contends the Board was required to award his counsel an attorney fee for prevailing on the issue of compensability before the Board on the SAIF-initiated appeal. ORS 656.382(2) provides:

> "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 a claimant should not be disallowed or reduced,

> the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney's fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at the hearing, review or appeal."

SAIF argues that the above provision does not apply because claimant prevailed on only one of two issues before the Board. The statute requires the insurer to pay a reasonable attorney's fee if the Board finds that the compensation awarded should not be disallowed or reduced. The Board made such a finding in this case. The reduction in the fee ordered by the Board had no effect on the entitlement to an award of attorney fees under ORS 656.382(2).

It is clear from our review of the record that claimant's attorney expended time in the Board review. *Cf. Bentley v. SAIF, supra,* 38 Or App at 482 (where no services were performed by claimant's counsel, it was an abuse of discretion to award attorney fees). Therefore, claimant's counsel was entitled to a reasonable attorney fee.

Affirmed in part; reversed in part and remanded to the Board for award of an attorney fee.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Robert W. Teel, Claimant.

TEEL,
Petitioner - Cross-Respondent,
v.
WEYERHAEUSER COMPANY,
Respondent - Cross-Petitioner.

(No. 80-02438, CA A23460)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 19, 1982.

Evohl F. Malagon, Eugene, argued the cause for petitioner - cross-respondent. With him on the briefs was Malagon & Velure, Eugene.

Katherine H. O'Neil, Portland, argued the cause for respondent - cross-petitioner. With her on the briefs were Delbert J. Brenneman and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P. J.

Affirmed as to compensability and remanded for award of a reasonable attorney fee.

RICHARDSON, P. J.

In this workers' compensation case, both claimant and employer appeal the order of the Workers' Compensation Board affirming the referee's decision that claimant's back injury is compensable. Claimant appeals the Board's failure to award a reasonable attorney fee, and employer cross-appeals on the issue of compensability. We affirm on compensability and remand to the Board for award of a reasonable attorney fee.

The procedural history of this case may be briefly summarized. Claimant appealed employer's denial of his claim. The referee ordered employer to accept the claim and assessed a penalty for employer's unreasonable refusal to pay compensation. Employer appealed, and the Board affirmed the finding of compensability but vacated the assessment of a penalty. The Board did not award claimant attorney fees, and that is the sole issue raised in claimant's appeal.

Claimant relies on ORS 656.382(2), which provides:

> "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 a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney's fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at the hearing, review or appeal."

Employer properly concedes that the Board was required to award a reasonable attorney fee, because claimant prevailed on the employer-initiated appeal to the Board on the issue of compensability. Claimant is entitled to the award of a reasonable attorney fee for his attorney's representation on the compensation issue, but not on the penalty issue on which the employer prevailed before the Board. *See Korter v. EBI Companies, Inc.,* 46 Or App 43, 52-54, 610 P2d 312 (1980), *remanded on other grounds,* 290 Or 301 (1981).

On cross-appeal, employer contends that claimant failed to establish by a preponderance of the evidence that

he suffered a compensable injury. Employer's argument rests entirely on its contention that claimant lacks credibility. In its order on review, the Board stated:

> "The first issue, compensability, largely depends on claimant's credibility. The Referee found claimant to be credible. Arguing that we should make a contrary finding, the employer's brief presents an impressive catalog of inconsistencies in claimant's testimony. We find some of the inconsistencies were created by words being put into claimant's mouth during skillful cross-examination. Others are on collateral and relatively inconsequential matters. The employer's brief raises doubts in our minds about claimant's credibility, but not sufficient doubt to overcome the Referee's advantage in seeing the witnesses."

Employer makes the same arguments on appeal, and on review we come to the same conclusion as the Board.

We affirm the finding of compensability and remand to the Board for award of a reasonable attorney fee.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
James Thurston, Claimant.

THURSTON,
Petitioner,
v.
MITCHELL BROS. CONTRACTORS,
Respondent.

(WCB No. 79-09759, CA A22120)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 13, 1982.

Doug Vande Griend, Salem, argued the cause and filed the brief for petitioner.

Emil R. Berg, Portland, argued the cause for respondent. With him on the brief was Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Claimant appeals from an order of the Workers' Compensation Board reversing a referee's finding that his myocardial infarction was job-related. The issue is compensability. We review *de novo* and affirm.

Claimant, age 50, was employed as a truck driver. At noon on February 20, 1979, he left home to load his truck in Tacoma for a haul to San Francisco. On reaching Tacoma at 2 p.m., his first task was to strap and tie down his load. That process took from 20 to 30 minutes and was physically demanding, causing him to sweat and to breathe heavily. He began driving from Tacoma at about 3 p.m. On reaching Tumwater at about 4 p.m., he repeated the load-tying process. He then drove to Coburg, Oregon, where he stopped at about 9 p.m. During the trip from Tacoma to Coburg, he stopped and tightened his load at least three times.

Claimant began feeling chest pains about 30 to 60 minutes after leaving Tumwater.[1] Initially, it felt like indigestion and back strain, but grew in intensity. Between 6 and 7 p.m., the pain became very acute. He was unable to get to sleep until 2:30 to 3 a.m. the next morning.

On February 21, claimant continued to drive. Beginning at 8 a.m., he drove about ten hours. His chest pain continued. By 8 p.m. the pain had increased so much that he entered a hospital in Fairfield, California, where he was examined by Dr. Robinson. Later, he was transferred to the care of Dr. Parkinson. With one exception, the histories taken by the doctors are similar.[2] Dr. Robinson reported:

> "* * * [Claimant] reports that for the past several years he has had intermittent episodes of sharp, stabbing chest pain, occasionally radiating to the back or to the left arm. These have been brought on most frequently by exercise, occasionally by large meals but not by exposure to colds or anxiety. He reports that since 9 o'clock yesterday morning,

[1] He had suffered similar pains in 1976 or 1977. On that occasion, claimant had rested at a motel, because he had no schedule to meet.

[2] Dr. Robinson reported that claimant said he had suffered persistent chest pain "since 9 o'clock yesterday morning (February 20)." Claimant checked into the hospital about 8 p.m. on February 21. Dr. Parkinson reported that claimant said his difficulty "began 24 hours ago when he experienced quite marked pain * * *."

> he has had persistent chest pain, again described as sharp and stabbing with radiation into the back, intermittently associated with nausea and diaphoresis. It was not specifically aggravated by difficulty while driving but tonight he felt an increase in pain that made him feel it was impossible for him to continue. He has a strong family history for myocardial disease, his parents died in their mid 60s of heart attacks, his maternal grandfather has diabetes. He at one time weighed 310 pounds and now is in his mid 250s. He reports playing semipro baseball as a young man but recently has had one block extertional pain and had to stop working as a construction worker because of chest discomfort. * * *"

Dr. Parkinson's history indicated:

> " * * * His current difficulty began 24 hours ago when he experienced quite marked pain between his shoulder blades, radiating through into the epigastric area, associated with substernal pressure achy feelings and pain radiating down the left arm and some pain radiating to the right jaw. * * * He noted a similar type pain 3 days ago but it was of shorter duration and had disappeared by the following morning and he had no pain during the next 2 days. Ten days ago while in Portland after eating a heavy meal, he had similar type pain. He relates that he has had this same type of discomfort and the same pain complex as far back as 1972. * * * In 1972, he saw a chiropractor about this but has not actually seen a physician about this pain since its onset. * * * Several years ago he weighed 300 pounds but more recently he has weighed between 250 and 260 pounds. * * *"

Claimant was released from the hospital on March 6. Dr. Parkinson's final diagnosis was:

> "1 - Acute inferior wall myocardial infarction.
>
> "2 - Arteriosclerotis heart disease with prior anteroseptal myocardial infarction and with subsequent episodes of angina and probable cardiomyopathy.
>
> "3 - Cardica rhythm disturbance with episode of acute ventricular tachycardia and subsequent episodes of multifocal PVC's secondary to #1 and #2 occurring during hospital course.
>
> "4 - Episode of acute congestive heart failure with pulmonary edema secondary to #1 and #2.
>
> "5 - Newly discovered diabetes mellitus."

Claimant then came under the care of Dr. Feld, an internist.

Employer's insurer retained Dr. Rush, a cardiologist, to analyze the case for compensability. In August, 1979, he wrote:

> "From the information available, it would be my opinion that Mr. Thurston's myocardial infarction was not related to his employment nor accelerated by it. It appears that he had had coronary disease probably for five to seven years with an old, probably anteroseptal infarction. The myocardial infarction that resulted in his hospitalization on February 21, 1979 was most likely due to the progression of his coronary artery disease in an individual with multiple risk factors including obesity, diabetes and cigarette smoking."[3]

The insurer sent a copy of Dr. Rush's report to Dr. Feld, who had been treating claimant since his release from the hospital. Dr. Feld replied that he essentially agreed with Dr. Rush's hypothesis. The insurer then denied the claim and claimant requested a hearing on the issue of compensability.

[3] Dr. Rush did not have an opportunity to study claimant's hospital EKG records before he wrote his August, 1979, opinion letter. However, prior to the hearing, he reviewed those records and concluded that they supported his hypothesis.

Dr. Rush examined claimant in February, 1980, and reviewed the medical records. He found him to be "markedly obese" and diabetic. He concluded:

> "I find nothing on examining him to change my opinion as stated in my letter of August 23, 1979. This is that the myocardial infarction that occurred was related to the progression of his coronary disease which had most assuredly been present since at least 1972."

In May, 1980, Dr. Feld wrote claimant's attorney:

> " * * * regarding the role of Mr. Thurston's work on his development of a heart attack on February 21, 1979:
>
> "1) Mr. Thurston's work was probably a causal factor in the attack.
>
> "2) Mr. Thurston's work was not a primary or predominant factor in the attack.

> "3) I am unable to quantify the amount of significance that the work was to the attack except as above."

Prior to the hearing, Dr. Grossman, an internist who treats a large number of cardiac patients, was retained by claimant for purposes of diagnosis. After examining claimant, and having reviewed all the medical reports, including those from the hospital, he reported:

> "The sequence of events indicates that Mr. Thurston's myocardial infarction was work related and that the work activity of 2/20/79 including emotional strains did in fact contribute significantly to triggering of the (1st?) attack which probably started developing in the late work hours of 2/20/79, finally culminating in complete occlusion of the coronary artery while eating dinner at 6:15 p.m. on that day."
>
> " * * * * * *
>
> "Ideal care would have meant immediate hospitalization and bed rest. In the absence of this and with continued work activity of 2/21/79, it is probable that the activity aggravated his condition on that day and was responsible for increasing the area of infarction, or in the alternative, precipiated a second coronary occlusion in the evening of 2/21/79 with increasing steady pain which forced him to seek hospitalization."

Acknowledging claimant's pre-existing coronary arteriosclerosis and the existence of factors predisposing him to heart attack, Dr. Grossman concluded:

> "In any case there was a sequence of events which clearly implicate his work activity in the triggering of his coronary thrombosis and myocardial infarction on 2/20/79, and the continued activity aggravated his infarction by increasing its size or triggering a second occlusion."

Both Dr. Rush and Dr. Grossman testified at the hearing. Each adhered essentially to the opinion expressed in his written reports. Dr. Rush's pre-hearing reports did not speak to the issue of aggravation. At the hearing he testified:

"Q. Can you conclusively say, assuming that Mr. Thurston did have an infarction in the afternoon, evening of the 20th, that his work activity of the 21st did not aggravate the situation that was already there?

"A. No.

"Q. Can you say that it's more likely than not that he did not aggravate it?

"A. It's my opinion that the work was not a major contributing factor to his infarction. And that his activity on the 21st did not materially make his infarction bigger by the means we have of measuring this.

"Q. You indicated that it was not a major contributing factor. Was it a minor contributing factor?

"A. I have no way of knowing that."

The referee said:

"Considering the testimony of both Dr. Grossman and Dr. Rush, I find Dr. Grossman's explanation of the cause of the claimant's heart attack the more persuasive. I find that claimant's work activity was a material contributing cause of the myocardial infarction which he experienced and his subsequent hospitalization and need for treatment."

The referee ordered that the claim be accepted by the insurer. On review, the Board reversed:

"The Referee found Dr. Grossman's explanation of the cause of claimant's heart attack the more persuasive. We do not. We find Dr. Feld's opinion of little value except to observe that his opinion is essentially 'neutral' on the question of causation—at one point he concurs with Dr. Rush's opinion of no relationship and at another point, absent any reason for the shift, he makes the statement that he does not know to what extent claimant's work contributed to the myocardial infarction.

"We are thus faced with two medical opinions, diametrically opposed on the question of medical causation. We are more persuaded by the opinion of Dr. Rush because (1) he is a cardiologist, Dr. Grossman is not; (2) his opinion seems to be more logically developed than does that of Dr. Grossman; and (3) his opinion is more consistent with and is supported by the history obtained at Intercommunity Hospital than is the opinion of Dr. Grossman."

To prove a compensable heart attack, claimant must establish both legal and medical causation by a preponderance of the evidence. *Coday v. Willamette Tug & Barge,* 250 Or 39, 48, 440 P2d 224 (1968); *Batdorf v. SAIF,* 54 Or App 496, 498, 635 P2d 396 (1981); *Harris v. Farmers' Co-op Creamery,* 53 Or App 618, 621, 632 P2d 1299, *rev den*

291 Or 893 (1981). If an injury has sufficient work relationship, then it arises out of and in the course of employment and the statute is satisfied. *Rogers v. SAIF,* 289 Or 633, 643, 616 P2d 485 (1980).

In determining legal causation, the question is whether claimant exerted himself in carrying out his job, a fact question. Usual exertion in claimant's employment is sufficient to establish the necessary legal causal connection. *Clayton v. Compensation Department,* 253 Or 397, 454 P2d 628 (1969); *see also Coday v. Willamette Tug & Barge, supra; Bales v. SAIF,* 57 Or App 621, 646 P2d 83, *rev allowed* 293 Or 28 (1982); *Carter v. Crown Zellerbach Corp.,* 52 Or App 215, 627 P2d 1300, *rev den* 291 Or 368 (1981). We conclude that claimant exerted himself in carrying out his job. Thus, legal causation is established. *See Rogers v. SAIF, supra,* 289 Or at 643; *Batdorf v. SAIF, supra,* 54 Or App at 500.

In determining medical causation, which is the difficult issue here, the question is whether the exertion connected with claimant's employment was a material contributing factor to the heart attack, a fact question requiring expert evidence. *Batdorf v. SAIF, supra; Harris v. Farmers' Co-op Creamery, supra; Carter v. Crown Zellerbach Corp., supra; Foley v. SAIF,* 29 Or App 151, 562 P2d 593 (1977); *Summit v. Weyerhaeuser Company,* 25 Or App 851, 551 P2d 490, *rev den* (1976).

Dr. Grossman reported that claimant's heart attack was precipitated by his work activities and that his work activities on February 21 probably aggravated the damage done by the heart attack. On the other hand, Dr. Rush testified that claimant's work was not a material contributing factor to his heart attack and did not materially make the attack worse.

On *de novo* review, ORS 656.298(6), we must determine whether claimant has sustained his burden of proof. The medical evidence is in conflict. The fact that Dr. Rush is a cardiologist and that Dr. Grossman is an internist who treats a large number of cardiac patients is not dispositive. *See Costello v. Georgia-Pacific Corp.,* 28 Or App 795, 799-801, 561 P2d 654 (1977) (internist found more persuasive

than cardiologist). Neither physician was a treating doctor, and therefore we can not rely on the premise than a treating physician is more credible than a consultant. *But see Hammons v. Perini Corp.,* 43 Or App 299, 602 P2d 1094 (1979) (consultant found more persuasive than treating physicians).

As triers of fact, we conclude that Dr. Rush's hypothesis is more persuasive and that claimant has failed to prove medical causation by a preponderance of the evidence. While it is not dispositive, we are influenced to some extent by the fact that Dr. Rush is a specialist in cardiology. We also conclude that his opinion is more consistent with and is supported by the histories obtained by Drs. Robinson and Parkinson. We agree with the Board that Dr. Feld's opinions are, at best, "neutral" on the issue of medical causation.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Ray C. Armstrong, Claimant.

ARMSTRONG,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 80-01476, CA A24685)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for reconsideration filed June 28, 1982. Appeal dismissed May 26, 1982.

Robert K. Udziela, and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland, for petition.

Before Thornton, Presiding Judge, Joseph, Chief Judge, and Warden, Judge.

PER CURIAM

Reconsideration allowed; order adhered to.

PER CURIAM

The Workers' Compensation Board's order on review states that it was mailed on December 31, 1981. Claimant's petition for judicial review recites that "Claimant's attorneys were not served with the Order on Review and Order Denying Remand until May 12, 1982." The notice of appeal was filed on May 17, 1982. We dismissed the petition on our own motion as not being timely under ORS 656.295(8):

> "An order of the board is final unless within 30 days after the date of mailing of copies of such order to the parties, one of the parties appeals to the Court of Appeals for judicial review pursuant to ORS 656.928. * * *"

Accepting as true that claimant's counsel did not receive the order until some 132 days after it purportedly was mailed,[1] still the statute is quite clear. The order became final on January 30, 1982, and judicial review was not sought within that period. ORS 656.298(1). Relying on *Stroh v. SAIF,* 261 Or 117, 492 P2d 472 (1972); *Wisherd v. Paul Koch Volkswagen,* 28 Or App 513, 559 P2d 1305 (1977); and *Stevens v. SAIF,* 20 Or App 412, 531 P2d 921 (1975), all of which deal with other provisions of ORS 656.295, claimant argues that ORS 656.295(8) is not jurisdictional. We hold that it is jurisdictional.

Relying principally on *Lindsey v. Normet,* 405 US 46, 92 S Ct 862, 31 L Ed 2d 36 (1972), claimant asserts that the dismissal of his petition for judicial review constitutes a violation of his Fourteenth Amendment due process rights. The thrust of the holding in *Lindsey* is that a state cannot impose conditions that effectively preclude indigents from perfecting appeals. Absent any showing here that the failure of the claimant and his counsel to receive notice of the Board's action during the 30-day period after the mailing of the order was caused by the Board, claimant's situation does not fall within the proscription of *Lindsey.* ORS 656.295(8) involves a notice procedure that is "reasonably calculated, under all the circumstances, to apprise interested parties" of their procedural situation,

[1] According to an affidavit submitted with the petition for reconsideration, claimant *never* received a copy of the order.

and that is all that is required. *Mullane v. Central Hanover Tr. Company,* 339 US 306, 314, 70 S Ct 652, 94 L Ed 865 (1950). Again, absent any showing why the notice was not timely received, claimant has not demonstrated that his due process rights were violated. *See Greene v. Lindsey,* 456 US ____, 102 S Ct 1874, 72 L Ed 2d 249 (1982).

Reconsideration allowed; order adhered to.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Brian J. Wills, Claimant.

WILLS,
Petitioner,
v.
BOISE CASCADE CORP.,
Respondent.

(No. 80-07735, CA A22988)

Judicial Review from Workers' Compensation Board.

Submitted on record and briefs April 28, 1982.

Jerome F. Bischoff and Bischoff, Murray & Strooband, Eugene, filed the briefs for petitioner.

Ridgeway K. Foley, Jr. and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland, filed the brief for respondent.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

GILLETTE, P. J.

Affirmed.

GILLETTE, P. J.

The issue in this workers' compensation case is which of two employers is responsible for an injury to claimant's right wrist. Its resolution depends on whether the second of two injuries to the right wrist worsened the underlying condition or merely aggravated his symptoms.

Claimant fractured his right wrist on May 27, 1976, while working for Boise Cascade in Washington. He underwent two surgeries and subsequently received a 30 percent permanent partial disability award under Washington's Workers' Compensation law. When the Washington mill closed in March, 1979, claimant obtained employment at Boise Cascade's mill in Valsetz, Oregon. On May 2, 1980, he slipped while crossing a log chain and sprained his right wrist. He continued to experience increasing difficulties until a successful implant arthroplasty was performed on December 2, 1980. He returned to work at the Valsetz mill on January 1, 1981.

The Oregon employer accepted responsibility for the sprain but denied responsibility for the subsequent surgery. The referee set aside the denial, holding the Oregon employer responsible. The Board reversed the referee, stating:

> "We find that the medical evidence establishes that the May 2, 1980 injury sustained by the claimant was a separate injury which did not contribute to the causation of the claimant's condition which required surgery. Under the last injurious exposure rule, the employer at the time of the original injury remains responsible for the claimant's surgery and any disability as a result thereof. *Smith v. Ed's Pancake House,* 27 Or App 361 (1976)."

We agree with the Board's conclusion.

The Board correctly characterized this case as one of responsibility rather than compensability. In *Smith v. Ed's Pancake House,* 27 Or App 361, 364, 556 P2d 158 (1976), we quoted from 4 Larson, Workmen's Compensation Law, 17-71 through 17-78, Section 95.12 (1976):

> " '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. This is consistent with the general principle of the compensability with the aggravation of a pre-existing condition.' "

27 Or App 364-65.

See also Bracke v. Baza'r, 51 Or App 627, 626 P2d 918 (1981), *aff'd as modified* 292 Or 239, 646 P2d 1330 (1982). Claimant acknowledges the application of that rule to this case but argues that the evidence demonstrates that the May, 1980, incident contributed independently to his condition. We disagree.

Two opinions of claimant's treating physician in Oregon, Dr. Nathan, indicate that the May, 1980, accident aggravated claimant's *symptoms* but did not worsen his underlying *condition.* Dr. Nathan reported to the employer:

> "It would be my opinion that all of the injuries have contributed to his present status, beginning in May of 1976 and continuing through May of 1980. The osteoarthritic changes definitely preceded the recurrent injury of May, 1980, however. The incident of May, 1980, most probably is limited to an aggravation of his symptoms rather than any physical change within the wrist bones."

He responded similarly to claimant's inquires:

> "I feel the incident in May of 1980 played a role in creating his current condition, which eventually led to an implant arthroplasty. As I stated in my December 4, 1980, letter to Ms Kathleen A. Trempel of Boise Cascade, however, I do feel the incident of May, 1980, was an aggravation of symptoms rather than any physical change within the wrist bones."

Claimant relies upon those portions of Dr. Nathan's statements that indicate that the second injury "contributed to" claimant's status and that the May, 1980,

"incident played a role in creating [claimant's] current condition." Admittedly, those portions of Dr. Nathan's letters, considered alone, suggest that claimant's second accident contributed to his underlying condition. In both letters, however, the statements claimant relies on are followed by unequivocable statements that the second accident merely *aggravated* claimant's *symptoms.* We conclude, therefore, that the statements relied on by claimant merely indicated that the second injury made claimant's *symptoms* — his "current condition" — worse. Applying the "last injurious exposure" rule for subsequent injuries to the medical evidence and the record generally, we conclude that claimant's second injury did not contribute to claimant's underlying condition. We therefore uphold the Board's decision that the Oregon employer is not responsible for claimant's surgery following the second accident.

Affirmed.[1]

[1] Because of the disposition we make of this case, we are not required to consider respondent's alternative argument that this court should reconsider its holding in *Florence v. SAIF,* 55 Or App 467, 638 P2d 1161 (1982).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Wesley C. Muffett, Claimant.

MUFFETT,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB Case No. 80-00805, CA A23392)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 28, 1982.

Burton J. Fallgren, Portland, argued the cause and 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 Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J.

Remanded to referee for taking additional evidence.

WARDEN, J.

Claimant appeals the denial of his claim for a bilateral carpal tunnel syndrome. One of his assignments of error is that the Board erred in refusing to remand the claim to the referee for admission of an exhibit that was not available to claimant until after the opinion and order of the referee was issued. The exhibit was in the form of a letter dated June 25, 1980, from Dr. Stolzberg to Dr. Silver. In pertinent part, it stated:

> "I disagree most strongly with Doctor Dietrich's views on the pathogenesis of carpal tunnel syndrome. I think the condition is caused by swelling of the flexor tendons and arises in people who use their grip a lot - not in people who bang on the base of the hand. Furthermore, the great majority of patients I see are workers, not housewives. So please let me know if SAIF gives you any trouble with this claim."

Dr. Stolzberg had examined claimant at the request of respondent. The hearing before the referee took place on October 17, 1980, and was closed December 2, 1980. The letter was received by respondent on December 19, 1980, and the opinion and order was issued on January 8, 1981.

On March 11, 1981, claimant's counsel received from respondent a copy of Dr. Stolzberg's letter. Claimant immediately moved to remand the case to the referee for consideration of the additional evidence. ORS 656.295(5). The Board refused to remand but agreed to consider the exhibit in its review of the case.[1] Remand by the Board to

[1] The Board's review powers are contained in ORS 656.295(5), which provides:

> "The review by the board shall be based upon the record submitted to it under subsection (3) of this section and such oral or written argument as it may receive. However, if the board determines that a case has been improperly, incompletely or otherwise insufficiently developed or heard by the referee, it may remand the case to the referee for further evidence taking, correction or other necessary action."

The Board had no power to consider any evidence not already included in the record. Its only statutory power was to remand the case to the referee for further evidence taking. *Gallea v. Willamette Industries,* 56 Or App 763, ___ P2d ___ (1982); *Brown v. SAIF,* 51 Or App 389, 625 P2d 1351 (1981); *Penfold v. SAIF,* 49 Or App 1015, 621 P2d 646 (1980). To the extent that OAR 436-83-720(G) purports to extend the Board's power to review exhibits not in the record, the rule may be invalid.

the referee is a matter of discretion. *See Holmes v. SAIF,* 38 Or App 145, 589 P2d 1151 (1979); *Mansfield v. Caplener Bros.,* 3 Or App 448, 474 P2d 785 (1970). The Board is obliged to remand, however, if it determines that a case has been "improperly, incompletely or otherwise insufficiently developed * * *." ORS 656.295(5). On *de novo* review of the record, we find that Dr. Stolzberg's letter contains information that should have been considered by the referee in order to complete the development of claimant's case. Because the information was unavailable to claimant before the original hearing, we conclude that it was an abuse of the Board's discretion to refuse to remand the case to the referee.[2]

Remanded to the referee with instructions to take further evidence, including the June 25, 1980, letter from Dr. Stolzberg to Dr. Silver.

[2] On appeal, claimant asks us, in the alternative, to consider the letter in our *de novo* review of the case pursuant to ORS 656.298(6). This we decline to do, because, in the interest of fairness, claimant should have an opportunity to develop the theory expressed by Dr. Stolzberg's letter, and respondent should have an equal opportunity to refute it.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Thomas A. Jacobs, Claimant.

JACOBS,
Petitioner,
v.
LOUISIANA-PACIFIC,
Respondent.

(WCB No. 80-00313, CA A20770)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 10, 1981.

Michael Strooband, Eugene, argued the cause for petitioner. With him on the brief was Bischoff, Murray & Strooband, P.C., Eugene.

Dennis R. VavRosky, Portland, argued the cause for respondent. With him on the brief were Ronald W. Atwood, and Rankin, McMurry, VavRosky & Doherty, Portland.

Before Buttler, Presiding Judge, and Joseph, Chief Judge, and Warren, Judge.

BUTTLER, P. J.

Reversed; referee's order reinstated.

BUTTLER, P. J.

Claimant suffered a compensable low back injury resulting in a herniated disc requiring surgical disc excision in June, 1979. Although he has made an excellent recovery and has returned to work with the same employer with some modification in his work, he has passed up three specific higher paying, but more strenuous, jobs because of his injury. By a determination order, claimant was granted 32 degrees for unscheduled permanent partial disability; after hearing, the referee increased the award to 64 degrees (20 percent) for unscheduled permanent disability. The referee specifically found that claimant was credible and that he did not exaggerate his disability.

On review by the Board, the order of the referee was reversed, and the determination order was affirmed. In reaching its decision, the Board pointed out that claimant was able to perform his previous job with few modifications. It then stated:

> "* * * The fact that he had to turn down three higher paying jobs is not evidence of a loss of wage earning capacity."

It appears that the Board confused loss of earnings with loss of earning capacity. The distinction was made clear in *Ford v. SAIF,* 7 Or App 549, 552, 492 P2d 491 (1972), in which we stated:

> "Earning capacity must be considered in connection with a workman's handicap in obtaining and holding gainful employment in the broad field of general industrial occupations and not just in relationship to his occupation at any given time. A workman's post-injury earnings is evidence which, depending upon the circumstances of an individual case, may be of great, little, or no importance in determining loss of earning capacity. * * *"

If, in fact, claimant here was qualified, but for his physical disability, for higher paying jobs, his wage-earning *capacity* has decreased by virtue of his disability.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Alice S. Brewer, Claimant.

BREWER,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 81-00687, CA A24122)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 28, 1982.

Eric R. Friedman, Portland, argued the cause for petitioner. With him on the brief was Fellows, McCarthy, Zikes & Kayser, P. C., Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Warden, and Young, Judges.

WARDEN, J.

Order affirmed in its denial of claimant's claim for compensation for left wrist, penalties and attorney fees for unreasonably withholding payments; reversed in its denial of claimant's claim for aggravation of right wrist carpal tunnel syndrome; remanded with instructions to accept claimant's aggravation claim for right wrist.

WARDEN, J.

In this workers' compensation case, claimant requested that her previously closed claim be reopened because of aggravation of her occupational disease, bilateral carpal tunnel syndrome. SAIF denied her request, a hearing was held, and the referee reversed the denial, finding that

> "the evidence slightly preponderates that claimant's case should have been reopened as of October 26, 1980, for both the right and the left carpal tunnel problems."

The Workers' Compensation Board reversed the referee, and claimant appeals.

We adopt the facts of the case as set out in the Board's order on review as follows:

> "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 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. * * *"

To prevail on an aggravation claim, claimant must show a worsening of her condition since her previous award and a causal relation between the worsening and her industrial injury. ORS 656.273(1).[1] Claimant must prove her

[1] ORS 656.273(1) provides:

claim by a preponderance of the evidence. *Hutcheson v. Weyerhaeuser,* 288 Or 51, 55, 602 P2d 268 (1979). *De novo* review of the record satisfies us that claimant has met that burden of proof with regard to the worsening of her right wrist condition.

We find the reports of Dr. Waller, claimant's treating physician, most convincing. He was of the opinion that claimant's right wrist problems were caused by the fact that in the March, 1980, carpal tunnel release operation "the transverse carpal ligament, the primary offending structure, had never been surgically divided." He also stated, "I think that it is reasonable to state that the nature of Mrs. Brewer's job was such that her employment was the cause of her current medical difficulties." In its order on review, the Board stated:

> "We are not persuaded 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."

The logical inference from the evidence is that Dr. Waller knew of the fall. In an April 30, 1981, letter, Dr. Waller stated:

> "She has been a patient in the Kaiser Permanente Health Care System, and approximately a year ago sought medical attention there for symptoms of numbness and tingling in the hands. *I have reviewed her Kaiser outpatient chart,* * * *." (Emphasis supplied.)

That chart includes claimant's medical history regarding the fall. The Board had no basis for an inference that Dr. Waller had not taken the fall into account when he formed his opinion that claimant's wrist problems were work-related. Dr. Norton, upon whom the Board relies, did not examine claimant, and Dr. Dennis' testimony, which the Board finds conclusive against claimant, is equivocal at best.

Although the record shows a relationship between claimant's employment and the problems associated with her *right* wrist, claimant has not met her burden concerning the *left* wrist.

"After the last award or arrangement of compensation, an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury."

Claimant also contends that the referee and Board erred in failing to award penalties and attorney fees against SAIF for unreasonably withholding payments. The referee found against claimant, because there was no verification or authorization of time loss. The Board affirmed and we affirm the Board on that issue.

The order of the Board is affirmed in its denial of claimant's claim for compensation for her left wrist and in its denial of penalties and attorney fees for unreasonably withholding payments; it is reversed in its denial of claimant's claim for aggravation of her right wrist carpal tunnel syndrome; and the Board is instructed to accept claimant's claim for aggravation of her right wrist.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Carroll Paine, Claimant.

Carroll Paine,

Petitioner,

v.

No. 80-06329
CA A22657

Widing Transportation,

Respondent.

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Judicial Review from Workers' Compensation Board.

Argued and submitted April 21, 1982.

Robert L. Burns, Gresham, argued the cause and filed the brief for petitioner.

Emil R. Berg, Portland, argued the cause for respondent. With him on the brief was Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

Affirmed.

FILED: September 15, 1982

RICHARDSON, P.J.

Claimant appeals the order of the Workers' Compensation Board holding that closure of his claim was proper and awarding permanent partial disability. Claimant argues that his claim was prematurely closed before his condition became medically

stationary and that, if closure was proper, he is entitled to permanent total disability. The referee held that the claim was properly closed and that claimant was entitled to 30 percent unscheduled permanent partial disability. On appeal, the Board reduced the award to 20 percent and otherwise affirmed. We review de novo, ORS 656.298(6), and affirm.

At the time of his injury in October, 1979, claimant was a 55 year old heavy-haul truck driver. He twisted his back when he slipped getting into his truck. After seeing his family physician, he was referred to Dr. Goodwin, an orthopedist, who diagnosed an acute lumbar strain and a possible extruded disc. Dr. Goodwin treated claimant conservatively with local heat, physical therapy, exercise and analgesics. Dr. Goodwin referred claimant to Dr. Cruickshank, a neurologist, for a second opinion. Dr. Cruickshank diagnosed acute lower back sprain but not an extruded disc, and he advised against surgery.

In April, 1980, the employer's insurance carrier referred claimant to Dr. Langston. After examining claimant, Dr. Langston reported:

> "* * * It is the opinion of this examiner that this man is now stationary for any further medical treatment. I would recommend closure of his claim. He may return to his previous occupation without limitations. I would evaluate his disability as a result of this accident to be minimal and as it exists today to be minimal. He also may engage in some other type of occupation similar to truck driving without limitations. He does not need psychological evaluation. He does not need referral to a pain clinic."

The insurance carrier asked Dr. Goodwin to respond to Dr. Langston's report. Dr. Goodwin wrote that he "generally" concurred with Dr. Langston. On this basis, a determination order was issued closing the claim and awarding temporary total

disability benefits for the period from the date of injury until May 10, 1980.

Dr. Goodwin again examined claimant after the determination order was issued. His report reiterated his diagnosis of an extruded disc but that the lack of a concurring second opinion prevented surgical treatment. He advised claimant that conservative treatment should be continued and that, notwithstanding claimant's lack of response to this treatment, he had little more to offer. He also stated, concerning claimant's work status, that

> "* * * if his employer could find him a job, which he could do without heavy lifting, long periods of sitting, or a job that he could tolerate, then of course the patient could return to limited duty. Otherwise, the patient is at a stand still, and would not be considered eligible to return to his regular duty."

In July, 1980, Dr. Smith, a neurologist, performed a myelogram on claimant at Dr. Goodwin's request. His conclusion was that the myelogram was "normal."

Dr. Goodwin again examined claimant in September, 1980. He reported that claimant's symptoms "are not materially changed" and recommended that claimant be enrolled in physical conditioning or retraining programs. Later in September claimant was examined by a panel of physicians at Orthopaedic Consultants. Their report concluded:

> "It is our opinion, after this examination today, that this patient's condition is medically stationary. We do not feel that we can recommend any surgery which would be expected to improve him. He has probably reached a maximum improvement from this last injury, at this time. He could not return to the same occupation without limitation, but he could return with limitations on heavy lifting. He should be able to change position frequently so that he is not required to sit in one position for prolonged periods of time.

"The patient will probably need vocational assistance to get some sort of job which he can carry out.

"It is the opinion of the examining panel that the total loss of function of the lower back, as it exists today, is in the mild category, and due to this injury in the minimal category. We do not feel that the patient has any permanent loss of function in the leg."

In December, 1980, claimant was evaluated at the Workers' Compensation Department's Callahan Center. The interviewing psychologist reported that claimant has "excellent intellectual capabilities and aptitudes in order to entertain an alternative vocational direction" but that he was depressed and anxious because of his inability to work.

Claimant argues on appeal, as he did before the referee and the Board, that his claim was prematurely closed by the May, 1980, determination order.[1] He relies on ORS 656.268(2), which provides:

"When the injured worker's condition resulting from a disabling injury has become medically stationary, unless the injured worker is enrolled and actively engaged in an authorized program of vocational rehabilitation, the insurer or self-insured employer shall so notify the Evaluation Division, the worker, and employer, if any, and request the claim be examined and further compensation, if any, be determined. A copy of all medical reports and reports of vocational rehabilitation agencies or counselors shall be furnished to the Evaluation Division and to the worker and to the employer, if requested by such worker or employer. If the attending physician has not approved the worker's return to the worker's regular employment, the insurer or self-insured 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." (Emphasis added.)[2]

Because the claim was closed in May, 1980, the Evaluation Division obviously did not consider medical reports submitted after closure. At no time did Dr. Goodwin, the attending

physician, approve claimant's return to regular employment. Therefore, claimant argues, absent Dr. Goodwin's approval of his return to work, the claim could not properly be closed until those reports subsequent to May 10 were submitted to and examined by the Evaluation Division.

The employer's insurance carrier properly followed the statutory procedure on the basis of all medical reports then in existence, including Dr. Goodwin's general concurrence that closure was appropriate. Dr. Goodwin's approval of claimant's return to regular employment bears only on the need for a determination order to close the claim. Had claimant been allowed to return to work earlier, then the insurance carrier could have terminated payment of benefits earlier, without a determination order. Here, claimant was not released to return to work, so payments continued until termination was authorized by the determination order.

Following closure of the claim, the subsequent medical reports do not indicate that the claim should have been reopened or should have remained open. The key issue is not whether claimant was released to return to his regular employment, but whether claimant's condition was "medically stationary."[3] The evidence indicates that his condition was medically stationary both at the time of and subsequent to the issuance of the determination order. In September, 1980, Dr. Goodwin concluded that claimant's symptoms "are not materially changed," and Orthopaedic Consultants specifically stated that claimant's condition is medically stationary.

Claimant's situation differs from that in Brown v.

Jeld-Wen, Inc., 52 Or App 191, 627 P2d 1291 (1981), in which we held that the claim was prematurely closed. In that case, the attending physician initially agreed that the claim should be closed, but shortly thereafter the claimant was rehospitalized for further treatment. The determination order was issued without knowledge of the hospitalization but at a time when the claimant's condition was not medically stationary. Therefore, closure was premature. In the present case, claimant's condition was medically stationary, and closure was proper.

Claimant also argues that the extent of his disability entitles him to an award of permanent total disability benefits. He contends that the Board placed undue emphasis on his activities, such as using a chainsaw to cut firewood, carrying firewood into his home, mowing his lawn, pruning his trees and panning for gold on a one-time, two-day trip. It does not appear that the Board excluded from consideration claimant's testimony of the extent of his pain and its effect on his activity. The medical evidence indicates that his disability is "minimal" and that he has "excellent intellectual capabilities and aptitudes."

After reviewing the record, we conclude that claimant has not met his burden of establishing that his injury resulted in a permanent total disability. See Morris v. Denny's, 50 Or App 533, 623 P2d 1118, clarified 53 Or App 863, 633 P2d 827 (1981). In determining the extent of partial disability, we generally defer to the Workers' Compensation Board. Owen v. SAIF, 33 Or App 385, 576 P2d 821 (1978). However, "[w]here the degree fixed by the Board is not within a range which we deem

appropriate under the facts of the case, then our duty to review de novo requires us to make a determination within the range which we believe to be justified." 33 Or App at 388. In this case the 20 percent disability determined by the Board is within the range appropriate under the facts of this case.

Affirmed.

FOOTNOTES

1

Improper or premature closure of the claim may subject the insurance carrier to statutory penalties. ORS 656.262(9) provides:

> "If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

2

ORS 656.268(2) was amended by Or Laws 1981, ch 535, § 7a; ch 854, § 19; ch 874, § 13. These amendments do not materially alter the version of the statute in force when the claim arose.

3

ORS 656.005(17) provides:

> "'Medically stationary' means that no further material improvement would reasonably be expected from medical treatment, or the passage of time."

See Dimitroff v. State Ind. Acc. Com., 209 Or 316, 306 P2d 398 (1957); Pratt v. SAIF, 29 Or App 255, 562 P2d 1242 (1977).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
David Fraijo, Claimant.

David Fraijo,

Petitioner,

v. No. 80-06516
CA A22873

Fred N. Bay News Company,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted April 28, 1982.

Peter W. McSwain, Eugene, argued the cause for petitioner. On the briefs were Steven C. Yates and Malagon, Velure & Yates, Eugene.

Katherine H. O'Neil, Portland, argued the cause for respondent. On the brief was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

GILLETTE, P. J.

Order modified to award 128 degrees for 40 percent permanent partial disability.

FILED: September 15, 1982

GILLETTE, P. J.

The issue in this workers' compensation case is the extent of permanent partial disability sustained by claimant as a result of a compensable industrial injury to his neck on June 16, 1975. In a series of three determination orders, claimant was awarded 20 percent of the maximum allowable permanent partial disability, in addition to temporary total

disability. The referee increased claimant's permanent partial disability award to 50 percent. The Workers' Compensation Board (Board) lowered the referee's award to 30 percent. Claimant appeals, arguing that the rules adopted by the Board to determine the extent of unscheduled, permanent partial disability transform unscheduled injuries into scheduled ones, violate due process and eliminate de novo review in extent of disability cases. He argues further that, even if the rules are valid, the Board misapplied them to the facts of this case and that he is entitled to at least 50 percent permanent partial disability. We modify the award.

Claimant suffered an injury to his neck in June, 1975, while employed by Fred N. Bay News Company (hereinafter "employer"). Dr. Torres, diagnosed dorsal back strain and ordered claimant off work. Claimant subsequently was examined by several doctors, at least two of whom suggested that he not return to the same occupation and that he limit his lifting to 40 or 50 pounds. Psychiatric examination indicated that claimant performed intellectually at a low-average to dull normal range with non-verbal materials and at a dull normal to borderline range with verbal materials. Dr. Munsey, the psychologist, indicated that he was quite focused on his physical symptoms, some of which were likely psychological in origin.

Claimant was referred to Dr. Hill, who in turn referred him to Orthopedic Consultants. The doctors there diagnosed chronic cervical ligamentous and muscular strain. They also recommended that claimant limit his lifting to 40 pounds. They concluded that total loss of function of the neck was mild, that loss of function due to the 1975 injury was minimal and that

the difference was due to an earlier injury which claimant had sustained in 1972. They felt that claimant's condition was stationary.

In September, 1977, Dr. Hill reported that claimant's problem had become that of chronic pain syndrome and referred claimant to the Northwest Pain Clinic. There, Dr. Seres concluded that claimant's disability was not severe and that he could return to moderate work activity if he chose to do so. Dr. Hill reported that claimant's condition was medically stationary on March 30, 1978.

In May, 1978, claimant came under the care of Dr. Danielson, a neurosurgeon, who recommended surgery, and Dr. Anthony Gallo, also a neurosurgeon, who Health Sciences Center concurred with that recommendation. Claimant underwent surgery for anterior cervical disc excision and intercorporal fusion, anterior bilateral foraminotomies and excision of the posterior osseous plate.

Claimant continued to experience pain in his shoulder and neck area following surgery. On June 10, 1980, Dr. Danielson reported that claimant was medically stationary and that his total loss of function was moderate. He stated that claimant was unable to do his prior work-related activities and that his disability was permanent. He did feel, however, that claimant was capable of doing work in the performing music field, a field claimant had entered, because he could sit and stand and would not be required to do heavy lifting or other deterimental activities while performing. Dr. Danielson subsequently reported that claimant was not capable of work activities requiring frequent bending, stooping, squatting, overhead activities, heavy lifting or pushing type maneuvers.

On August 18, 1980, claimant was examined by Dr. Smith, a neurosurgeon, at the request of the carrier. He reported that his examination suggested no specific findings that could be directly correlated with continuing disability referred to the neck or the subsequent surgical procedure. He recommended two or three weeks of physical therapy, after which he believed that claimant could be considered stationary and released to return to any type of occupation he desired. Smith did not believe that claimant had a physical impairment that he would rate beyond the minimal to mild level and concluded that claimant could return to "any occupation [for which] he feels suited." Claimant was also examined by Orthopedic Consultants on September 23, 1980, at the request of the carrier. The doctors there said that claimant's condition was stationary and that he should be able to do light work. They concluded that his loss of function due to his 1975 injury to the cervical spine was mild.

The referee accurately summarized claimant's current employment options and his employment history as follows:

> "In approximately August, 1980, claimant became employed as lead guitarist with the Crystal Sage Band, a six-member country and western group which plays regularly at Charlie Chin's Restaurant. The band initially played six nights a week and claimant earned $250.00 per week, but for the past month they have been cut to five nights a week and he earns $215.00 per week. Each night, claimant plays five forty-five-minute sets with a fifteen minute break between each set. He has a stool available when he is playing and can sit or stand as he chooses.
>
> "Claimant is 39 years of age and has a ninth grade education. He has worked making screen doors, doing body and fender work and driving truck. During this time, he also played guitar occasionally. He has had prior injuries to his neck before his 1975 injury, beginning with an injury in 1972 and all incurred while

working for the same employer as when he was injured in 1975. His current complaint is of pain in his neck with strenuous activity, especially with heavy lifting or using his arms overhead. He complains of a knot in his upper back which occurs when he performs these activities. The pain causes him to refrain from these activities or to cease doing them when he tries. He is able to drive a tractor and rake for short periods and he has split, cut and brought in some wood. Before his injury, claimant rode horses. He tried to ride since his surgery but it caused him pain. Following his surgery, claimant attempted to work tending race horses owned by his son. He worked for three hours a day for a month or two brushing and walking horses but had to leave this job because of the pain which it caused."

The extent of unscheduled, permanent partial disability is determined on the basis of permanent loss of earning capacity. ORS 656.214(5) states:

> "(5) In all cases of injury resulting in permanent partial disability, other than those described in subsections (2) to (4) of this section [i.e., scheduled injuries] the criteria [sic] for rating of disability shall be the permanent loss of earning capacity due to the compensable injury. Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience. The number of degrees of disability shall be a maximum of 320 degrees determined by the extent of the disability compared to the worker before such injury and without such disability. For the purpose of this subsection, the value of each degree of disability is $100."

The Workers' Compensation Department, in turn, has promulgated rules to determine the extent of permanent loss of earning capacity in unscheduled injury cases. OAR 436-65-600 provides:

> "605-600 GUIDELINES FOR THE RATING OF UNSCHEDULED PERMANENT DISABILITY
>
> "(1) Sections 65-600 through 65-675 apply to the rating of unscheduled permanent partial disability under the Workers' Compensation Law.
>
> "(2) The criteria [sic] for rating of disability shall be the permanent loss of

earning capacity due to the compensable injury. Earning capacity is the ability to obtain and hold gainful employment in the broad range of general occupations.

"(a) Impairment of the whole person. This is the basic factor in the evaluation of lost earning capacity. The phrase, 'the whole person,' refers to the average functional capacity normally present in an uninjured worker. Injury-related impairment of the whole person must be documented in the medical record.

"(b) Social/vocational considerations. These are additional factors to be included in the evaluation of lost earning capacity. Depending on the circumstances of the individual worker, they may include: age, education, work experience, adaptability to less strenuous physical labor, mental capacity, emotional and psychological findings and findings in the labor market. For each social or vocational factor a range of expected impact on disability is given. The range begins at zero impact. Those findings which tend to reduce the disabling effects of the injury are given negative (-) values. Those findings which tend to increase the disabling effects of the injury are given positive (+) values."

OAR 436-65-601 provides:

"65-601 ASSEMBLING THE FACTORS RELATING TO LOSS OF EARNING CAPACITY

"(1) Determine the basic value which represents the impairment of the whole person, according to the appropriate findings and classifications described in Sections 65-609 through 65-675 below. If impairment is present, this will always be a positive (+) value.

"(2) Identify the appropriate social/vocational factors applicable to the injured worker, according to the relevant findings described in Sections 65-602 through 65-608 below. Depending on their impact on the worker's disability, these may be determined to reprsent either positive (+), negative (-), or zero values.

"(3) In two spearate calculations,

"(a) combine together the positive (+) values found in (1) and (2) above, and then

"(b) combine together the negative (-) values found in (2) above.

> "(4) The final negative (-) combination value is then taken as a percentage of the final positive (+) result, when rounded to the nearest five percent, represents the percentage of lost earning capacity to be compensated."

OAR 436-65-602 to 436-65-608 contain criteria for assigning scores in each of the categories listed above--age, education, work experience, adaptability to less strenuous physical labor, mental capacity, emotional and psychological findings and labor market findings.

In his first assignment of error, claimant argues that the quoted rules turn unscheduled disabilities into scheduled ones. His third assignment of error claims that the rules eliminate de novo review in extent cases. Together, the two assignments constitute an attack on the legality of OAR 436-65-600 et seq. We considered a challenge to the legality of these same rules in OSEA v. Workers' Compensation Dept., 51 Or App 55, 642 P2d 1078, rev den 291 Or 9 (1981). There the petitioner argued "that the plus and minus system of calculation established by OAR 436-65-601 is a formulaic chart and graph method which is not found in existing law." We stated:

> "Petitioners' contention here seems to be that such an evaluation system with this weighing of factors is not found in existing law. Again our response is that the director is authorized to do more than compile existing law. Petitioners contend that it is inflexible and prevents personal evaluation of each individual. We cannot say that the system of evaluation is invalid on its face. If the rules are applied in such a manner as to be inconsistent with the statutory or case law regarding permanent unscheduled disability they may be challenged on that basis at the time." (Emphasis supplied.) 51 Or App 64-65.

Claimant argues that "[t]he court never addressed the issue of unscheduled injuries in OSEA v. Workers' Compensation

Dept., supra." That is obviously incorrect. As the above quotation illustrates, we expressly upheld the facial legality of the rules concerning unscheduled injuries. Although we acknowledged the possibility that the rules could be applied in such a manner as to be inconsistent with the law, we declined to find them unlawful in the abstract. Claimant's attack here resembles that in OSEA. It is for the most part hypothetical, i.e., it does not show how the rules, as applied to claimant, were inconsistent with the law. To the extent it is hypothetical, claimant's argument is therefore resolved by OSEA v. Workers' Compensation Dept., supra. To the extent that the rules are being attacked as applied, we deal with that problem in our de novo evaluation of the extent of claimant's disability, infra.

In his second assignment of error, claimant argues that the rules violate "due process." The argument is not supported by constitutional authority and appears merely to repeat arguments already considered. We therefore reject it.

Claimant argues next that the Board misapplied the rules in this case. He points out that the Board's order misstated his age and that it incorrectly characterized his intelligence level as "low average" when, in fact, it is "dull normal." The employer acknowledges that the Board erred in stating claimant's age as 30 instead of 39, but does not address the alleged error in characterizing claimant's intelligence level. Psychological tests indicated that claimant's intelligence level was "dull normal to borderline" verbally and "low average to dull normal with non-verbal materials." Claimant is therefore correct in that the Board should have characterized his intelligence level as "dull normal" rather than "low

average."[1] A correct calculation based on claimant's correct age and intelligence level results in a 40 percent loss of earning capacity rather than the 30 percent loss found by the Board.[2]

In his final assignment of error, claimant argues that the extent of his permanent loss of earning capacity is at least 50 percent. We have conducted our own de novo review, utilizing the Department's rules merely as a tool. In this and future extent of permanent partial disability cases, and in view of our de novo review responsibilities, we shall use the Department's "green book" rules only when the record discloses the manner in which the Board used them, and then only to the extent their intrinsic persuasiveness assists us in performing our independent assessment function. We assume the Board is doing what we are doing--using the rules as guidelines only.[3]

After reviewing the record, we conclude that the 40 percent figure which happens to be the figure reached by a correct application of the Department's rules is also a fair assessment of the extent of claimant's disability. Accordingly, claimant's award is modified to 128 degrees for 40 percent permanent partial disability.

Order modified to award 128 degrees for 40 percent permanent partial disability.

FOOTNOTES

1

OAR 436-65-606, which assigns values to mental capacity, does not contain the "low average" category used by the Board. The Board gave claimant a value of zero in this category, which is appropriate for a person of average mental capacity.

2

The Board calculated as follows:

"Consideration of the rating standards in OAR 436-65-600, et seq, produces the follows:

"Impairment	+10		
"Age			-5
"Education	+ 8		
"Work Experience		-0-	
"Adaptability	+ 5		
"Mental Capacity		-0-	
"Emotional & Psychological			-5
"Labor Market	+15		
	+33		-10

"Multiplying positive by negative produces 3.30. Subtract this result from the positive total to produce 29.70, or 30%."

The Board should have assigned a score of 0 for claimant's age. See OAR 436-65-602(2). Claimant should have received a +5 score for his "dull normal" mental capacity. The resultant calculation should have been:

Impairement	+10		
Age		-0-	
Education	+ 8		
Work Experience		-0-	
Adaptability	+ 5		
Mental Capacity	+ 5		
Emotional & Psychological			-5
Labor Market	+15		
	+43		-5

Multiplying positive by negative produces 2.15. Subtracting this result from the positive total of +43 produces 40.85 or 40 percent. (We do not claim to understand the mathmatics of the scoring system.)

3

A review of the Board's order leaves doubt as to just how the Board is using the rules. At one point, it appears to be following them lockstep, without consideration of the individual. At another point, however, it explains its reduction of the referee's award, not in terms of the rules but rather on a traditional basis: "Based on the record before us[,] we find the Referee's award is excessive and not comparable to other cases in which 50 percent unscheduled disability awards have been granted." On the assumption that the latter approach is being used, there is nothing that the Board is doing which arguably requires correction.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
of Brock Weidman, Claimant.

Brock Weidman,

Petitioner,

v. WCB Case No. 81-04440
CA A23955

Union Carbide Corporation and
Kemper Group,

Respondents.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted July 21, 1982.

Richard W. Condon, Salem, argued the cause and filed the briefs for petitioner.

Noreen K. Saltveit, Portland, argued the cause and filed the brief for respondents.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

YOUNG, J.

Reversed and remanded with instructions that the claim be accepted.

FILED: September 15, 1982

YOUNG, J.

This is an appeal from an order of the Workers' Compensation Board denying compensation. Claimant contends that he carried his burden to prove that his compensable on-the-job injury was a material contributing cause of his present disabling condition. We review de novo, ORS 656.298(6), and reverse.

On October 3, 1980, claimant was injured while pushing a wheelbarrow loaded with sand up a ramp. The wheelbarrow lodged in the ramp and flipped claimant sideways, which resulted in a back injury. After reporting the incident to his foreman, he continued to work with some pain for an additional hour and 45 minutes because the crew was shorthanded. The back pain continued, which prevented claimant from finishing the shift, and he was sent home early. The next day he performed light duty. The following day he did not work due to soreness and discomfort in his low back. On October 6, claimant, along with 80 other employees, was laid off. He has not worked since.

Claimant and his wife testified that the soreness in his back continued over the next few months in varying degrees. He limited his activities but did not feel it was necessary to see a doctor. Claimant did seek medical attention, however, in March, 1981, when his condition significantly worsened and he began to experience pain down his right leg. Dr. Held, the treating chiropractor, diagnosed a lumbar sprain with muscle spasm and radiculitis of the right sciatic plexus. He concluded that claimant had a pre-existing spondylolisthesis that was stable at the time of the accident. He was of the opinion that the injury in October resulted in the symptoms he observed in March. After treating claimant without success, Dr. Held referred him to Dr. Bell, a neurologist, who diagnosed a "soft tissue injury to the back." Claimant subsequently submitted to an independent medical examination by the carrier's physician, Dr. Pasquesi, an orthopedist, who reported:

> "Some event, whether documented by the patient or not probably made the spondylolisthesis and spondylolysis symptomatic rather than the sprain superimposed upon these areas which is estimated to have occurred on 10-3-80.
>
> "* * * * *

"In my opinion the patient's treatment has been in relationship to the worsening of this patient's pre-existing condition due to developmental problems rather than a previous strain."

The referee found both claimant and his wife credible but adopted Dr. Pasquesi's theory of causation, concluding that claimant's disability was the result of a natural progression of the pre-existing condition rather than the industrial injury. The Board affirmed the referee's opinion and order, concluding that claimant had not sustained his burden of proof. We do not agree.

Claimant has the burden of proving that the compensable injury was a material contributing cause to his worsened condition at the time it required medical care. See Grable v. Weyerhaeuser, 291 Or 387, 631 P2d 768 (1981). Claimant had not experienced any back problems before his injury on October 3. Although he had a [illegible] spine (spondylolisthesis and spondylolysis), that condition was stable and asymptomatic before the accident. The referee found credible claimant's and his wife's testimony regarding the sequence of events immediately following the accident and the progressive deterioration of claimant's condition. There is no evidence of an "independent, intervening" non-industrial cause of claimant's condition.

In light of these facts, we find Dr. Pasquesi's conclusion unpersuasive. It appears that the doctor was unaware that claimant had missed work because of the accident. He reported, "* * * Patient apparently did sustain a low back injury which did not necessitate his losing time from work * * *." Nor is there any indication that he was aware that claimant's back had been symptomatic since the date of the injury. Furthermore, his opinion appears to be based on inconsistent theories of causation: the occurrence of an intervening "undocumented" event and the natural progression of a pre-existing condition. These deficiencies severely diluted the

strength of his opinion. Foley v. SAIF, 29 Or App 151, 156-57, 562 P2d 593 (1977).

In contrast, Dr. Held had treated claimant over a three-month period before preparation of his report and provided an accurate case history and an unequivocal relationship between the October injury and the March symptoms. We disagree with the Board's characterization that this report is nothing more than a "bald conclusion." See Hamlin v. Roseburg Lumber, 30 Or App 615, 567 P2d 612 (1977). We are persuaded, as was the dissenting member of the board, that claimant has carried his burden of proving that the on-the-job injury was a material contributing cause (if not the sole cause) of his back condition in March, 1981.

Reversed and remanded with instructions that the claim be accepted.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Michael Dobbs, Claimant.

State Accident Insurance Fund
Corporation,

Petitioner,

v. No. 80-06514
CA A24004

Michael Dobbs, Willharp, Inc./
Timjoist, Inc., and Industrial
Indemnity,

Respondents.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted July 28, 1982.

Darrell E. Bewley, Appellate Counsel, Salem, argued the cause and filed the brief for petitioner.

Raymond Smitke, Tualatin, filed the brief for respondent Michael Dobbs.

John E. Snarskis, Portland, argued the cause for respondents Willharp, Inc./Timjoist, Inc. and Industrial Indemnity.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

YOUNG, J.

Affirmed.

FILED: September 15, 1982

YOUNG, J.

The issue in this workers' compensation case is the assignment of responsibility between carriers. Neither employer denies the compensability of the claim, but each contends that the other is responsible. The referee found Industrial Indemnity, the carrier for Timjoist, Inc., liable. The Workers'

Compensation Board found SAIF, Viking Industries' carrier, liable, and SAIF appeals. We affirm.[1]

Claimant sustained a compensable back injury in September, 1979, while working for Viking as a glazer and a punch press operator. After his condition improved, he returned to work. His claim was closed in November, 1979, with an award for time loss only. On October 15, 1979, claimant began working at Timjoist, Inc., as a gluer and offbearer. Thereafter, he was laid off periodically but worked steadily at Timjoist, Inc., from March, 1980, until May 21, 1980, when he experienced a sudden onset of back pain while at work. On May 27, 1980, claimant was hospitalized; in June, a myelogram was performed, revealing a large herniated disc; on July 1, 1980, surgery was performed.

SAIF contends that claimant's disability and resulting surgery were caused by a new injury on May 21, 1980. It argues that the "last injurious exposure rule" as stated in Smith v. Ed's Pancake House, 27 Or App 361, 556 P2d 158 (1978), is dispositive:

> "As stated in 4 Larson, Workmen's Compensation Law 17-71-17-78, § 95.12 (1976):
>
> "'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. This is consistent with the general principal of the compensability with the aggravation of a pre-existing condition.'" 27 Or App at 364-65.

SAIF maintains that application of the rule would place full liability on Industrial Indemnity as the carrier covering the risk on May 21, 1980. Industrial Indemnity challenges the applicability of the "last injurious exposure rule" and contends that, in any event, claimant's disability is the result of an aggravation of the injury incurred in September, 1979.

The events of May 21, 1980, are in dispute. Claimant maintains that he injured his back when he bent over to set down an empty glue bucket that weighed about one pound. Claimant's foreman contradicts claimant's account of what transpired. The referee found claimant less than credible and gave greater weight to the testimony of other witnesses and medical experts. The Board found that there was a "dearth of evidence in the record indicating that any kind of incident occurred at Timjoist. * * * The best that can be said of the matter is that claimant's back was bothering him at work on May 21, 1980." The Board concluded that the medical evidence supported a finding of an aggravation of claimant's injury of September, 1979. We agree.

Claimant was diagnosed as having a chronic lumbosacral strain before the September, 1979, accident. After the compensable injury, he suffered lumbosacral pain radiating down the entire leg to the foot. Of those medical experts who were familiar with claimant's complete history, all agreed that the herniated disc was "coming on over a long period of time." Dr. Raaf, a neurosurgeon, 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."

Dr. Berselli, the treating orthopedist, testified that it was not unusual for a person to suffer a herniated disc and then to have a period of remission. Given claimant's history of radicular pain, a suspected disc problem in 1979 and Dr. Raaf's opinion that "* * * sooner or later enough disc material would have extruded, regardless of activity * * *," we are persuaded that the requisite proof of a causal relationship between claimant's disability and the Viking injury has been presented. We conclude that whatever minor incident, if any, occurred in May, 1980, it did not contribute even minimally to claimant's disability. Calder v. Hughes & Ladd, 23 Or App 66, 541 P2d 152 (1975).

Affirmed.

FOOTNOTE

1

Claimant agrees with SAIF that Industrial Indemnity is the responsible carrier.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Larry Cochell,

Petitioner,

v. WCB Case No. 80-04312
CA A23338

State Accident Insurance Fund
Corporation,

Respondent.

* * * * * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted April 28, 1982.

Jeff Gerner, Salem, argued the cause for petitioner. With him on the brief was Michael B. Dye, Salem.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

YOUNG, J.

Affirmed.

FILED: September 15, 1982

YOUNG, J.

The issue in this workers' compensation case is the compensability of claimant's foot condition. The referee found that the condition was compensable, and the Workers' Compensation Board reversed. We affirm.

Claimant has metatarsus primus varus, a congenital deformity of the right foot. This condition resulted in the formation of a bunion. The claim is based on an incident that claimant alleges occurred on April 21, 1980. Claimant, during his last day of work for Dalke Construction, jumped from a loading dock and fell. Another worker testified that claimant was limping when he got up. He saw Dr. Burr several days later. Dr. Burr found swelling, tenderness and redness over the first metatarsophalangeal joint of claimant's great toe. Dr. Burr also noted the congenital deformity and resulting bunion formation. Claimant reported that the foot had been asymptomatic until the April 21 incident. Because of the pain experienced after April 21, surgery was eventually performed, apparently in June, 1980. Dr. Burr performed a bunionectomy and realignment of the metatarsal bone. Claimant had had similar surgery on his left foot in 1978. His only contention is that the April 21 fall caused a worsening of his underlying condition, requiring medical treatment, and is therefore compensable under Weller v. Union Carbide, 288 Or 27, 602 P2d 259 (1979).

The referee found that the medical reports showed objective signs of swelling, tenderness and redness after April 21. She noted that the independent witness testified that claimant was limping after the fall, although he had not been limping before the fall, nor did he have a swollen foot before the fall. She concluded that the fall aggravated the underlying condition and found the condition compensable.

The Board found that claimant was not credible[1] and that it was impossible to determine the cause of the swelling and tenderness observed by Dr. Burr. The Board went to great length to compile the

discrepancies in claimant's story and even decided that "based on our intuition and insight, that this witness [to claimant's fall] was not as 'independent' as the Referee suggested."

We agree with the Board that there are indications in this record that claimant may not have been entirely truthful. We are not privy to the Board's "intuition and insight" and find no basis for disbelieving the witness to the fall. We do not, however, decide this case on the basis of credibility because, even accepting claimant's version of the April 21 fall, we find that he has not established that the fall caused a worsening of his underlying condition. Under Weller v. Union Carbide, supra, without a worsening of claimant's underlying condition for which medical treatment was required, the claim is not compensable.

Claimant was examined by two doctors after his fall. Dr. Burr treated him for the pain he experienced and eventually performed the corrective surgery. In a letter to claimant's attorney he stated:

> "Larry Cochell, by his history to me, had not had previous problems with this right foot. He indeed did have a long standing metatarsus primus varus with hallux valgus and bunion formation of a small degree, but this was asymptomatic. On April 21, 1980, after jumping up and down on the construction site, he started to have pain in his right foot which became exquisitely severe.
>
> "Past history was that he had a similar injury to his left foot years before which had the same metatarsus primus varus. He continued to have pain until surgery was performed.
>
> "The patient continued to have pain in his right foot and because of this continued pain surgical therapy was indicated and performed. The nature of the surgery was basically that of bunionectomy and realignment of the metatarsal bone."

Dr. Anderson, who examined claimant at SAIF's request, reported:

> "The injury that the patient sustained on April 21, 1980 did not alter or change the fundamental pathology which was pre-existing in his right foot. It did probably cause an increased amount of pain.

In Cooper v. SAIF, 54 Or App 659, 635 P2d 1067 (1981), rev den 292 Or 356 (1982), we held that, where work-connected activities caused an onset of pain only, without medical evidence of a worsening of the underlying condition, the claim is not compensable, even if the pain is of sufficient intensity to be disabling and require surgery. We said that "under Weller, we are not entitled to presume that pain and a worsening of the underlying condition are connected." 54 Or App at 664.

That principle is dispositive here. Claimant has not established that there was a worsening of his underlying foot condition. Dr. Anderson stated that there was no worsening of that condition. Dr. Burr stated only that the surgery was conducted because of the pain. He did not state that claimant's fall caused a worsening of the underlying, preexisting condition. Under Weller and Cooper, claimant has not established a compensable claim.

Affirmed.

FOOTNOTE

The referee stated:

> "The credibility of the claimant in this matter is important but not controlling. The medical reports do show that the claimant had objective signs of his foot problem: tenderness, swelling and redness. There was an independent witness who saw claimant fall and then limp somewhat immediately afterward, when he noticed no limp before the alleged fall."

The Board concluded that, because this statement followed a recital of the inconsistencies in claimant's accounts of the accident and his medical history, it amounts to a finding that claimant is less than credible. Claimant argues that the statement precedes facts tending to support the claim and therefore is a finding that claimant is credible.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
of Henry McGarrah, Claimant.

Henry McGarrah,

Petitioner,

v.

WCB No. 79-05440
CA A22990

State Accident Insurance
Fund Corporation,

Respondent.

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Judicial Review from Workers' Compensation Board.

Argued and submitted June 28, 1982.

Robert H. Grant, Medford, argued the cause for petitioner. With him on the brief was Grant, Ferguson & Carter, Medford.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Evohl F. Malagon, Eugene, filed the brief amicus curiae for Oregon Workers' Compensation Attorneys Association.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed; referee's order reinstated.

FILED 9/29/82.

BUTTLER, P. J.

Claimant appeals from a determination by the Workers' Compensation Board (Board) that his psychiatric disability is not compensable. This case is the first to reach us of a

series decided after James v. SAIF, 290 Or 343, 624 P2d 565 (1981), in which the Board has attempted to adapt an exception to compensability for physical injuries, where there has been a deviation from work duties, to cases involving adverse psychological reaction to supervision. The principal question on appeal is whether claimant's condition arises out of and in the scope of his employment within the meaning of ORS 656.802(1)(a).[1]

Claimant, 40 years old at the time of the hearing, was a deputy sheriff in Jackson County from the fall of 1975 through December 4, 1978. He had worked previously as a deputy from 1969 to 1973, when his back was injured in a job-related automobile accident. After a period of recuperation, he was rehired in 1975. Sometime thereafter, claimant wrote a memorandum to his superiors requesting an investigation into the low morale within the department and apparently suggesting that a certain officer known as "B.J." not participate in the investigation. Subsequently, B.J. became a captain and claimant's superior.

A series of events ensued that convinced claimant that he was being subjected to a personal vendetta by Captain B.J. to encourage him to resign or quit. Those events included the removal of claimant one month early from a public relations job, which he enjoyed, in order to transfer him back to patrol, where it appeared to claimant and to a chief deputy that he was not really needed; his transfer from the day shift to the night shift (which claimant considered a rookie shift), despite his high seniority in the department; failure to promote him to senior deputy status, despite his seniority and his achievement of

advanced officer status, when others eligible at that time for the promotion were granted it; frequent oral reprimands in the presence of others by the captain or his subordinates about claimant's appearance, which claimant felt was satisfactory; reprimands for not writing enough traffic tickets; oral reprimands in public for having left his post without authorization when his son was injured at school, although claimant had unsuccessfully attempted to reach his supervisor; a reprimand for abandoning his vehicle, which was stuck in a snowdrift in an area where radio communications were blacked out; and a memorandum inquiring into the possibility that claimant had allowed narcotics to go aboard an airplane while he was supervising security personnel at the airport, although no investigation was ever conducted to permit claimant to exonerate himself. The reprimands, standing alone, were not as upsetting to claimant as was the fact that they were usually made in the presence of others.

Claimant did not initiate a union grievance concerning any of the above incidents, although he did write a letter invoking the union contract in response to his early transfer back to patrol. By the same token, the reprimands were unofficial disciplinary actions. That Captain B.J. was the source of low morale in the department was corroborated at the hearing by a former colleague of claimant. Another former officer confirmed that Captain B.J. exhibited a pattern of putting pressure on individual officers through manipulation of shift scheduling and excessive criticism of the quantity and quality of the individuals' work. These pressures evidently reached a critical point for claimant on the day he learned of

his shift change. He went home in a state of acute depression with violent feelings of hostility about Captain B.J. That condition persisted for some time. Claimant did not return to work as a deputy sheriff. Eventually, he turned to selling real estate, which he had done earlier in his career.

A psychiatrist testified at the hearing that claimant suffered from anxiety and depressive neurosis directly related to his job as deputy sheriff, as a result of the perceived vendetta and the natural stresses of the job. No psychiatrist consulted found otherwise, and there was no evidence of stress outside the job that was a contributing cause of claimant's condition.

The referee found that claimant had proved a compensable occupational disease. The Board, although it adopted the referee's factual description of claimant's condition,[2] reversed the referee and ruled that claimant's condition was not compensable. The key portion of the Board's opinion states:

> "* * * An adverse psychological reaction to normal and reasonable supervision is not within the scope of employment when the precipitating event (supervision) occurred because the employee was not functioning within the scope of employment. First, it seems illogical to say that the physical results of an injury-producing activity are not compensable when the injury-producing activity is beyond the scope of employment, but to also say that the psychological results of supervision intended to end that deviation are compensable. Second, assuming supervision to keep employees functioning within the scope of their employment is inevitable in the employment relationship, then it is nothing more than the existence of the employment relationship itself that produces a finding of compensability if this supervision supplies the only nexus that makes resulting psychological problems compensable. Just as the employer must take the employee as he is, the employee must to a large extent take the job as it is."

It appears to us that there are serious analytical problems with the Board's test and its application in this case.

The Board characterized the origin of this claimant's stress as "conflict between the way [claimant] wanted to do his job * * * and the way his supervisors wanted the job done * * *." Although elements of such a conflict did exist, we find it difficult to understand how failing to measure up to a desired standard would constitute functioning outside the scope of employment. That concept is crucial to the rationale of the Board's rule, yet it is not amplified or defined in the Board's opinion. The Board states simply that the rule applies when the "precipitating event (supervision) occurred because the employe was not functioning within the scope of employment." As applied, the rule seems to stand for the proposition that any shortcoming in an employe's job performance means the employe is functioning outside the scope of employment. The proposition is far broader than the analogous proposition culled by the Board from cases involving physical injury, where deviation from employment duties, such as engaging in prohibited activities, is beyond the scope of employment.3

The physical injury cases cited by the Board predate the decision by the Supreme Court establishing a unitary work connection approach to compensability. Rogers v. SAIF, 289 Or 633, 616 P2d 485 (1980). In Rogers, a heart attack sustained after a scuffle in a bar between members of a crew working on location, but during off-hours, was considered to have sufficient work connection to be compensable. In this case, the Board cited Rogers without discussion, but in formulating its rule here it attempted to analogize such cases as Frosty v. SAIF, 24 Or App 851, 547 P2d 634, rev den (1976), where we held that injuries sustained by a charter bus driver while skiing were not

compensable where the claimant had been specifically instructed not to ski during ski charters.

As quoted above, the Board found it illogical to deny compensability under such circumstances for a physical injury but to allow it for a psychological condition. The two situations, however, are not comparable, because claimant's condition here was the direct result of supervision of his work within the scope of his employment, not relating to activity that was not a part of his job. At most, claimant was not doing all that was within the scope of his employment, or was not doing it as well as his supervisor desired. A better test of the Board's rule, on its face, might be presented if the claimant in Frosty had suffered a psychological disability as a direct result of his supervisor having castigated him severely for having skied while on a charter run, contrary to express instructions, even though he performed well the job for which he was hired. That question, however, is not presented here, and we do not decide it.[4]

In reasoning that supervision may not provide the only nexus that makes psychological problems compensable, the Board appears to have concluded that the scope of employment concept includes the quality of performance, falling short of which puts the activity and the related supervisory control outside the scope of that employment. We know of no authority for such a proposition, and it is contrary to the workers' compensation scheme, under which fault is not a consideration in determining compensability. See ORS 656.012(2)(a)[5]; Clark v. U.S. Plywood, 288 Or 255, 265, 605 P2d 265 (1980).[6] So, too, is the Board's statement: "Just as the employer must take the

employee as he is, the employee must to a large extent take the job as it is."7

Assuming the validity of the general proposition stated by the Board that claimant's adverse reaction to reasonable and normal supervision is outside the scope of employment where the supervision was precipitated by the employe's acting outside the scope of his employment, it is not applicable here. Where an employe deviates from expected performance standards, supervision directed at improving job performance, by definition, falls within the scope of employment. Such supervision, as the Board itself recognized, is "inevitable in the employment relationship." In other words, if that kind of supervision is the nexus linking the psychiatric condition to the job, the claim arises out of and in the course of employment within the meaning of ORS 656.802(1)(a).

We turn to SAIF's arguments in support of the Board's order. SAIF first contends that because the series of reprimands was not within claimant's and the employer's contemplation of job tasks, claimant's mental problems were not a risk within the scope of employment. However, the job tasks were within those assigned to him; the problem related to claimant's performance of those tasks. We have already said that an adverse psychological reaction to supervision directed at improving job performance is within the scope of employment. Because such supervision is part of the work relationship, a reaction to it must be deemed a risk of employment.

SAIF also contends that it was claimant's own deviation that instigated the reprimands and that, if claimant had done his job adequately, he would not have suffered the

psychological disabilities of which he now complains. Carried to its logical conclusion, that line of reasoning would reintroduce fault into the workers' compensation system, contrary to the express policy of the Workers' Compensation Law. Accordingly, we reject it.

Finally SAIF argues that, because claimant's perception of being singled out or discriminated against unfairly was unfounded, legal causation of his psychological difficulties is lacking. We note that colleagues of claimant corroborated the existence of a pattern of conduct in the sheriff's department involving selective job pressure directed at some individuals, including claimant, and that the captain was the source of low morale in the department. As the referee observed, supra n 2, it is unnecessary that claimant prove that his stress resulted from harassment or other illegitimate supervision. That, too, would inject the element of fault into the proceeding.

Neither is the claim precluded because the incidents contributing to claimant's stress might not have adversely affected an average worker. We explicitly rejected that idea in our opinion in James v. SAIF, 44 Or App 405, 411, 605 P2d 1368 (1980). Nothing said by the Supreme Court in its opinion remanding the case to us, see James v. SAIF, 290 Or 343, 624 P2d 565 (1981), is inconsistent with what we said, and we reiterate it:

> "* * * Courts may feel more secure in being able to point to job conditions that would cause mental disability in the average person; however, the price of this requirement would be denial of claims of persons who are, in fact, disabled because of conditions of employment. There is no logical basis for distinguishing between physical and emotional disability. When the ordinary stress of employment causes a physical disability, the requirements of the law are met. This rule should not be made more strict simply because the result is a mental disability." 44 Or App at 411.

In this case it is clear that claimant believed he was being harassed by a superior. It is also clear that the events about which claimant complains did, in fact, occur, although it is difficult to know whether they were intended to harass, as claimant perceived them. We can imagine a case in which an acute paranoid state is triggered by job stresses and, as a result, the employe finds evidence of a conspiracy against him in the most innocent events occurring on the job. If the job stresses were "the major contributing cause" of the paranoia, see SAIF v. Gygi, 55 Or App 570, 574, 639 P2d 655, rev den 292 Or 825 (1982), it would be irrelevant for purposes of compensability whether or not claimant's perception of events that, in fact, occurred was well founded. If claimant's perception were well founded, it would be debatable whether there was in fact a mental illness.

In James, the Supreme Court implicitly accepted the notion that criticism by a supervisor can be a contributing cause of compensable mental illness. 290 Or at 351. We conclude that claimant was not required to make out a case of intentional harassment in order to show that work supervision was the legal cause of the appearance or worsening of a mental condition. He need only show, as he did, that supervisory action and criticism relating to his performance on the job, to which he was not ordinarily subjected or exposed other than during a period of regular employment, was the major source of stress triggering his psychological disability.

The Board's approach in this case evidences a legitimate concern for the need to confine psychological disability claims under the workers' compensation law to those

that are legitimately work connected. We believe, however, that the limitation on liability attempted by the Board here does not comport with the statutory scheme. In that scheme, there is no distinction among occupational diseases or between physical and mental or psychological disability. See ORS 656.802 et seq. It does, however, contain a limiting test emphasized in the Supreme Court's opinion in James v. SAIF, supra, and articulated by this court in SAIF v. Gygi, supra: on-the-job stress must be the major contributing cause of an occupational disease. That standard is not at issue here. Neither SAIF nor the Board has taken the position that job-related stress was not the major contributing factor. Both the medical and other evidence establish that job-related stress caused claimant's mental disorder.

The only questions we decide here are whether claimant's depressive condition can be said to have arisen out of and within the scope of his employment within the meaning of ORS 656.802(1)(a), and whether claimant must prove that he was being harassed or discriminated against on the job to show legal causation of his disorder. In holding that claimant's disease did arise out of his employment, we reject the applicability of the rule articulated by the Board to this case. We also hold that claimant was not required to prove harassment or unfair discrimination to make out a claim for his psychological disorder resulting from the stressful effect of his supervision.

Reversed; the referee's order reinstated.

FOOTNOTES

1

ORS 656.802(1)(a) provides:

"(1) As used in ORS 656.802 to 656.824, 'occupational disease' means:

"(a) Any disease or infection which arises out of and in the scope of the employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein."

2

The Board adopted the following portion of the referee's opinion, which contains not only description but legal conclusions:

"The evidence does not support, objectively, many of the claimant's contentions. Captain [B.J.] testified credibly that the Department was equipped with avenues to correct improper behavior by officers and to allow them to express their grievances and that these avenues alone were used for disciplinary measures and for the evaluation of complaints by employees. I do not understand the law here to require that the claimant's perception of a vendetta against him be accurate. It requires that the claimant's mental difficulty can be traced to objective stimuli on the job. It is a fact that the claimant was removed from his public relations job. It is a fact that he was changed from day shift to night shift. It is a fact that he was reprimanded on various occasions for not writing traffic tickets or for not having proper appearance in uniform. It is a fact that he tried for professional advancement and was repeatedly turned down. It is probably a fact that the claimant's perception of what he should be, as a professional law enforcement officer, differed somewhat markedly from the notion held by his superiors and that friction repeated itself due to this problem. It is probably a fact that at times the claimant's performance fell down. At least one of his superiors testified that the claimant tended to fail to respond to calls on occasion and did not pay enough attention to traffic enforcement.

"Given all of these facts a different individual, even a somewhat sensitive individual, might not have responded with the gradual emotional buildup the claimant suffered. For the claim to be compensable it is not, in my understanding, required that stress on the job be illegitimate. There are many jobs which

legitimately are stressful on a day-to-day basis. Responding to identifiable and objective verifiable stimuli, the claimant suffered a mental disease from his job experience, an experience which was stressful to him for circumstances to which he was not subjected other than at work during the course of the development of his difficulty."

3

The Board's opinion states in relevant part:

"It is a familiar doctrine in workers' compensation that an injury that happens when an employee is acting beyond the scope of employment is not compensable. Clark v. U.S. Plywood, 288 Or 255 [266-67, 605 P2d 265 (1980)]; Lane v. Gleaves Volkswagen, 39 Or App 5 [7, 591 P2d 368, 40 Or App 139, 594 P2d 1249 (1979)]; Frosty v. SAIF, 24 Or App 851 [853-54, 547 P2d 634, rev den (1976)]. Sometimes these cases find a worker is beyond the scope of employment because of deviation from employment duties. O'Connell v. SAIF, 19 Or App [735, 528 P2d 1064 (1974)]. Certain forms of horseplay have been found to be a deviation from work duties. Hackney v. Tillamook Growers, 39 Or App 655 [659, 593 P2d 1195, rev den 286 Or 449 (1979)]. In all of these situations, one of the significant tests used to determine whether the employee was within or beyond the scope of employment is whether the injury-producing activity was contemplated by the employer and employee either at the time of hiring or later. Ramseth v. Maycock, 209 Or 66, [76, 304 P2d 415 (1956)]; Etchison v. SAIF, 8 Or App 395 [399, 494 P2d 455 (1972) (citing Ramseth v. Maycock, supra)]. "The law intends . . . to protect [the employe] against the risk or hazard taken in order to perform the master's task." Brady v. Oregon Lumber Co., 117 Or [188, 197, 243 P 96, reh den 118 Or 15, 245 P 732 (1926)]. Compensability depends upon whether the

worker was injured 'doing the duty which he is employed to perform.' Stuhr v. SIAC, 186 Or 629 [636, 208 P2d 450 (1949)]."

4

It is also possible that an adverse psychological reaction may result directly from unauthorized activity outside the scope of employment, rather than from supervision concerning that activity. A fanciful example would be that of a zoo employe assigned exclusively to duty at an aviary but who, despite clear instructions to the contrary, found himself

repeatedly drawn, with a kind of morbid fascination, to the snake house, as a result of which his long-standing fear of snakes gradually developed into a psychosis. That example illustrates the direct analogue, in the realm of psychological conditions, of the "deviation from work duties" exception to compensability for physical injuries. Under a correct expression of that principle, therefore, a psychological condition that arises directly out of activities outside the scope of employment would not be compensable. But that is not the rule advanced by the Board.

5

ORS 656.012(2)(a) provides:

> "(2) In consequence of these findings, the objectives of the Workers' Compensation Law are declared to be as follows:
>
> "(a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents."

6

See also Prosser, Torts 531, § 80 (4th ed 1971):

> "Workmen's compensation is * * * a form of strict liability. The employer is charged with the injuries arising out of his business, without regard to any question of his negligence, or that of the injured employee. He is liable for injuries caused by pure unavoidable accident, or by the negligence of the workman himself. The three wicked sisters of the common law--contributory negligence, assumption of risk and the fellow servant rule--are abolished as defense. The only questions remaining to be litigated are, first, were the workman and his injury within the act, and second what shall be the compensation paid."

7

Certainly, an employe may be required to meet minimum job expectations. Under our analysis, however, if the employe is unable to handle the physical or mental demands of the job and succumbs to its pressures, resulting in either physical or mental illness or injury, then a compensable condition has arisen out of the employment if the requirements of James v. SAIF, supra, are met.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Mildred Balfour, Claimant.

Mildred Balfour,

Petitioner,

v. WCB Case No. 79-04213
CA No. A23059

State Accident Insurance Fund Corporation,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted June 28, 1982.

Peter McSwain, Eugene, argued the cause for petitioner. On the brief were Evohl F. Malagon and Malagon & Velure, Eugene.

Darrell E. Bewley, Appellant Counsel, SAIF Corporation, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

FILED: September 29, 1982

Affirmed.

WARREN, J.

Claimant seeks judicial review of a determination by the Workers' Compensation Board that her psychological occupational disease was not compensable. This case was earlier remanded to the Board by this court, 51 Or App 2, 624 P2d 643 (1981), for reconsideration in light of James v. SAIF, 290 Or 343, 624 P2d 565 (1981).

In denying compensability, the Board relied on two grounds. The first is an application of a general rule adopted by the board and applied by it in Harry McGarrah, WCB Case No. 79-05540 (1981). We have rejected the application of that rule to the facts in that case.

McGarrah v. SAIF, ___ Or App ___, ___ P2d ___ (September 29, 1982). In this case, we conclude that claimant's condition, to the extent that it resulted from stress caused by her work supervision, was not excluded from compensability on the ground that it did not arise out of her employment within the meaning of ORS 656.802(1)(a).

The second ground is an application of the requirement that the work stress be the major contributing cause of the occupational disease. See SAIF v. Gygi, 55 Or App 570, 574, 639 P2d 655, rev den 292 Or 825 (1982).[1] The Board stated, in relevant part:

> "In addition to possible work causation, there were several possible nonwork causes. Claimant had recently had surgery. Claimant was anxious over the health of her husband. One of claimant's grandchildren died. Considering all the evidence, we are not persuaded that claimant's work experiences (even assuming they were all within the scope of her employment, which they were not) were the significantly predominate [sic] cause of her psychological condition."

Claimant, 61 years old at the time of the hearing, was a housekeeper in a hospital. In October, 1978, a new supervisor revamped the housekeeping regimen at the hospital to increase efficiency and reduce the infection rate. That resulted in changes in claimant's work routine, including a new work assignment, albeit one chosen by claimant, use of more efficient cleaning machines and agents and possibly a larger area to clean. Claimant experienced some difficulty adjusting to the changes. She was reprimanded for less than satisfactory work performance, although that had occurred on occasion before the changes. It is not entirely clear from the record why or how specific changes may have been particularly upsetting to claimant. In any event, claimant left her employment in March, 1979.

The record does reveal a number of off-the-job sources of continuing stress. Claimant's husband had been injured in 1967 and remained permanently and totally disabled. In 1975, his ongoing problems apparently caused a six-month bout of depression on

claimant's part. In March, 1978, before the new regimen was initiated, claimant told her doctor about depression because of pressure at work and her husband's difficulties. At the end of 1978, about the time the new supervisor came on the scene, claimant told that doctor that her depression was because of two foot surgeries she had had in 1978, which were complicated by infections. At the hearing, claimant testified that she had been taking several anti-depressive medications for years.

Claimant was first referred to her treating psychiatrist in December, 1978. At the time of the original diagnosis that the cause of claimant's anxiety was job related, the doctor was unaware of the previous use of medications and that claimant had been previously treated for depression. In a deposition, this doctor admitted that claimant's previous use of medications would tend to indicate that the problem of depression was ongoing. The doctor testified that, notwithstanding those facts, her opinion was still that the changes in the housekeeping routine were a contributing cause of claimant's depression, based on claimant's perception of what the change did to her.

We review the record de novo. Given the continuing sources of nonwork stress admittedly affecting claimant during the relevant time period, we are not persuaded that claimant's work was the major contributing cause of her increased depression, as required under SAIF v. Gygi, supra.

Affirmed.

FOOTNOTE

1 The Board used a substantially similar test: "significant preponderance of causation [must be] work-related," derived from its decision in Kay L. Murrens, WCB Case No. 79-01573 (1981).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
of Charles Maddox, Claimant.

Charles Maddox, Petitioner,

v. WCB Case No. 77-02861
CA No. A23277

State Accident Insurance Fund
Corporation,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted June 28, 1982.

Linda C. Love, Salem, argued the cause for petitioner. With her on the brief was Olson, Hittle & Gardner, Salem.

Darrell E. Bewley, Appellant Counsel, SAIF Corporation, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

FILED: September 29, 1982

Reversed; order reinstated.

WARREN, J.

After our remand of this case, 51 Or App 2, 624 P2d 643 (1981), for reconsideration in light of the Supreme Court's decision in James v. SAIF, 290 Or 343, 624 P2d 565 (1981), the Workers' Compensation Board, reversing the referee's original opinion and order of January 31, 1978, ruled that claimant's depressive disorder was not compensable. The Board based its conclusion on a rule it articulated in Harry McGarrah, WCB Case No. 79-05440 (1981). We have rejected the application of that rule in that case. McGarrah v. SAIF, ... Or App ..., ... P2d ... (September 29, 1982). We conclude, as in McGarrah v. SAIF, supra, that claimant's condition, being the result of supervision designed primarily to improve his job performance, is sufficiently work connected that it arises out of claimant's employment within the meaning of ORS 656.802(1)(a).

In denying compensability, the Board also invoked its rule that work must be the significant predominant cause of an occupational disease. See Kay L. Murrens, WCB Case No. 79-01573 (1981). This is essentially the standard articulated in our decision in SAIF v. Gygi, 55 Or App 570, 574, 639 P2d 655, rev den 292 Or 825 (1982) (interpreting James v. SAIF, supra; work must be "the major contributing cause"). The Board found that the test was not satisfied here, because one physician reported that "[claimant's] disorder was not caused by his work, but his work situation materially contributed to and exaggerated his depression."

It is well settled that, to establish a compensable occupational disease, a claimant need not show that work caused the underlying disease itself; it is enough that work precipitated or worsened the condition. Weller v. Union Carbide, 288 Or 27, 31, 602 P2d 259 (1979); Beaudry v. Winchester Plywood, 255 Or 503, 512, 469 P2d 25 (1970). We interpret the Board's comment to mean that the quoted language does not establish that work was the predominant or major cause of the disorder. We note that, at the time the doctor rendered his opinion, this particular requirement had not yet been articulated in the case law. Hence, the lack of technically correct language in a medical report would not necessarily be dispositive. Moreover, there is another, more persuasive medical opinion in this case. Another physician unequivocally tied the illness to claimant's work: "The pressure as a counselor for vocational rehabilitation led to traumatic neurosis"; without that work-related trauma, claimant "could have functioned without difficulty up until his retirement and thereafter without the precipitation of mental illness." On this record, we find that there was no significant stress outside claimant's work environment that contributed to his mental disorder. We conclude that the requirement of major contributing cause has been met.

Reversed and remanded for reinstatement of the referee's order.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Kathleen M. Hall, Claimant.

Kathleen M. Hall,

Petitioner,

v. WCB 80-04718
CA A22926

The Home Insurance Company and
American Motorists Insurance Co.,

Respondents.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted April 21, 1982.

Douglas L. Minson, Hillsboro, argued the cause and filed the brief for petitioner.

Deborah S. MacMillan, Portland, argued the cause for respondent The Home Insurance Company. With her on the brief were Frank A. Moscato, and Moscato & Meyers, Portland.

Noreen K. Saltveit, Portland, argued the cause and filed the brief for respondent American Motorists Insurance Co.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Affirmed.

FILED: September 29, 1982

VAN HOOMISSEN, J.

Claimant appeals an order of the Workers' Compensation Board that reversed a referee's order awarding her compensation. The issue is compensability.

Claimant had been an employe of GAF Corporation since 1963. In September, 1979, she experienced disabling back

pain. GAF was insured by Home Insurance at that time. On November 1, 1979, GAF changed coverage to American Motorists Insurance. Claimant had disabling back pain again in April, 1980. She contends that her work activities during one of these periods is responsible for her present back condition, diagnosed as grade one spondylolisthesis. Both carriers deny compensability, and Home Insurance contends her claim against it is barred for failure to file her claim timely.

Claimant's back pain first appeared in August or September, 1979. She noticed it when she lifted heavy boxes. The pain gradually worsened. On September 19, 1979, she requested a leave of absence, checking the "illness" box rather than the "industrial accident or illness" box on the request form. At that time she was experiencing pain both at work and at home, and she did not associate the pain directly with her work. Her treating physician, Dr. Ramsthel, was unable to determine the cause of her pain, and he referred her to Dr. Keizer, an orthopedic surgeon. He diagnosed acute lumbosacral spine strain superimposed upon spondylolysis of the L-5 vertebra. He treated her conservatively and prescribed a transcutaneous electrical nerve stimulator, which afforded some relief. On November 12, 1979, claimant spoke to her employer about the possibility of obtaining workers' compensation benefits, but she did not file a claim at that time.

Claimant returned to work in January, 1980, performing light work. In April, she was reassigned to work checking and packing. This task involved packing sixty units in a box and then stacking the box on a skid. When full, each box weighed about twenty pounds. She packed 8,500 units a day. After her second full day at that task, claimant noted stiffness in her

back. The following morning she had soreness in her back. Dr. Hill hospitalized her for tests and treated her conservatively. She was released to return to light work on May 27, 1980.

We conclude that there is insufficient evidence in the record to establish a causal relationship between claimant's work activity in August and September, 1979, and her present back pain. Dr. Ramsthel was unable to find a work connection. Dr. Keizer said that claimant's pain developed somewhat insidiously but was associated with her work at GAF. Although claimant first noticed her pain at work, ordinarily that alone does not establish either medical or legal causation. See, e.g., Uris v. Compensation Dep't, 247 Or 420, 427 P2d 753, 430 P2d 861 (1967).

Dr. Hill concluded that claimant's work activity in April, 1980, did not cause any new anatomical changes that could be observed on a myelogram. In his opinion, her work did, however, "irritate" and "aggravate" her pre-existing spondylolithesis. Dr. Hill's report, read as a whole, may be construed to mean that the lifting and twisting claimant performed at work in April, 1980, increased her pain but did not worsen her underlying condition. An increase in symptomatology without a concomitant worsening of the underlying disease is not compensable. Weller v. Union Carbide, 288 Or 27, 35, 602 P2d 259 (1979); Johnson v. SAIF, 54 Or App 620, 622, 635 P2d 1053 (1981); Autwell v. Tri-Met, 48 Or App 99, 102, 615 P2d 1201, rev den 290 Or 211 (1980); Slechta v. SAIF, 43 Or App 443, 446, 603 P2d 366 (1979), rev den 288 Or 519 (1980).

Claimant argues that Weller is not applicable here, because the Weller test relates to a claim for occupational disease, not industrial injury. Florence v. SAIF, 55 Or App 467,

470, 638 P2d 1161 (1981). Claimant's signed statement of May 7, 1980, states that she had no accident or injury on April 24, 1980, just stiffness at the end of the day. She also stated that she had been working on the rivet machine for several weeks when, one day in September, 1979, she "started having low back pain, which came on gradually and gradually seemed to get worse." Occupational diseases are distinguished from accidental injuries in that the former are not unexpected and are recognized as an inherent risk of continued exposure to conditions of the particular employment and are gradual rather than sudden in onset. Valtinson v. SAIF, 56 Or App 184, 187, 641 P2d 598 (1982); O'Neal v. Sisters of Providence, 22 Or App 9, 16, 537 P2d 580 (1975). Claimant's condition more closely fits the description of an occupational disease than of an accidental injury under the act.

To be compensable as an occupational disease, claimant's gradual onset of back pain in September, 1979, which was irritated by repetitive lifting, bending and twisting in April, 1980, must meet the Weller test. We conclude that claimant has failed to sustain her burden to prove causation under the Weller test and that her claim is therefore not compensable.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Robert Hollingsworth, Claimant.

Robert Hollingsworth,

Petitioner,

v. WCB 80-8197 and
WCB 80-11433
CA A23266

May Trucking and Industrial
Indemnity Co.,

Respondents.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted April 21, 1982.

Kathryn T. Whalen, Portland, argued the cause for petitioner. With her on the brief was Richardson, Murphy & Lawrence, Portland.

John E. Snarskis, Portland, argued the cause for respondents. On the brief was Gary D. Hull, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Affirmed.

FILED: September 29, 1982

VAN HOOMISSEN, J.

Claimant appeals an order of the Workers' Compensation Board that affirmed the referee's order that he was not entitled to benefits. The issue is whether claimant is covered under the Oregon Workers' Compensation Law.

Claimant started driving for May Trucking, an Idaho based company, in September, 1978. In June, 1979, he suffered a lumbar strain during a delivery in Seattle. His claim was accepted, and benefits were paid under the Idaho workers' compensation law. Claimant requested a hearing on that claim, which was still pending at the time of the hearing on this claim.

Claimant suffered an acute back strain in May, 1980, while working in California. He filed an Oregon claim, alleging a new injury. The carrier denied that claim in September, 1980, contending that the injury was an aggravation of his 1979 injury. In December, 1980, he filed this claim for aggravation of his 1979 injury. The carrier denied the claim, asserting that claimant was not covered by the Oregon Workers' Compensation Law. Claimant appealed both denials. A referee denied both claims on the basis that claimant was not covered. He also concluded that the May, 1980, incident was an aggravation of claimant's June, 1979, injury.

A covered worker permanently employed in Oregon who temporarily leaves the state incidental to his employment and who receives an injury arising out of and in the course of his employment while out-of-state is entitled to benefits as if he had been injured within Oregon. ORS 656.126(1). The issue is whether the worker is permanently, as opposed to temporarily, employed in Oregon at the time of an out-of-state injury. Langston v. K-Mart, 56 Or App 709, 642 P2d 1205, rev den 293 Or 235 (1982).

Claimant, whose home is in Oregon, was hired by May Trucking's home office in Idaho in 1978. May was aware that he lived in Oregon and, in fact, expressed some concern that his

trips would not take him back to his home. He assured May that that would present no problem, and he agreed to drive anywhere he was sent. At the time, May had approximately 100 drivers, about 10 percent of whom lived outside of Idaho. Paychecks were issued by May's Idaho office, and withholding taxes and workers' compensation contributions were paid to Idaho.

When claimant began working for May Trucking, he parked his vehicle in a fenced area in Portland. He would pick up his loads at various locations. In February, 1979, May began to use parking space at a truck stop in Aurora, Oregon. May was allowed to do so in consideration for buying fuel there.

Claimant received his dispatches and assignments by calling Idaho. After February, 1979, May's drivers were instructed to contact the area coordinator in Aurora if a trip terminated in that area. The area coordinator received his instructions and information from Idaho. If the area coordinator did not have additional information or was unsure what the scheduling was, drivers were instructed to contact Idaho. If a trip terminated in Oregon but not in the Aurora area, drivers were told to contact Idaho rather than the area coordinator in Aurora.

After his June, 1979, injury and until his May, 1980, back pain, claimant drove flatbed trucks, which involved light loading duty. All dispatches of flatbed trucks were made from Idaho. Thus, claimant was dispatched out of Aurora for only a few months and then only if his trip terminated there. Although he made some trips solely in Oregon, no more than 25 percent of his work was in Oregon. He was dispatched almost equally, in

addition to Oregon destinations, to points in Washington, California, Idaho and Utah.

Claimant contends that the truck parking arrangements in Oregon, the receipt of dispatches in Aurora and his residence in Oregon make him a permanent Oregon employe who was only temporarily out-of-state when he was injured. May asserts that the case is factually indistinguishable from Jackson v. Tillamook Growers Co-op., 39 Or App 247, 592 P2d 235 (1979). In Jackson, the claimant, an Oregon resident, was hired by an Oregon corporation to drive in several states. The employer's main terminal was in California, and all drivers, including the claimant, called the California office to receive dispatches. All employes, including the claimant, received paychecks from the California office, and from each of those paychecks the employer withheld California income taxes. Three months after he was hired, the claimant was injured in California. We held that the fact that the claimant was hired in Oregon, drove out of Oregon to other states and continued to believe that he was Oregon-based was insufficient to establish that he was permanently employed here.

Langston v. K-Mart, supra, is similar. Although Langston did not involve a driver, the claimant there was hired in Washington and worked as a regional supervisor, covering 14 states. She later moved to Oregon and resided here, although her regional headquarters were in California. For periods both before and after her injury she had been assigned to a store in Oregon. We held that her work in California, during which she was injured, was not in any way incidental to Oregon employment.

Jackson and Langston hold that residence in Oregon alone is insufficient to make a worker an Oregon employe. Moreover, the occasional receipt of dispatches in Oregon does not establish permanent employment in Oregon, when those dispatches were relayed from May's office in Idaho and were sent only if claimant's trip terminated in the Aurora area. The time spent driving in Oregon, as compared to other states, was insufficient to raise a presumption that Oregon was claimant's regular base of employment or to render all trips out of Oregon "temporary." Claimant agreed to accept trips in any state; no understanding existed between him and May that Oregon was to be his permanent area of employment.[1] We agree with the referee and the Board that claimant was not covered under the Oregon Workers' Compensation Act.

Affirmed.

FOOTNOTE

1

In Kolar v. B & C Contractors, 36 Or App 65, 583 P2d 562 (1978), the claimant worked in Oregon only three days before being transferred to the employer's project in Washington. Although he worked in Washington for six months before becoming disabled, the claimant would have been returned to work on projects in Oregon upon completion of his work in Washington. We concluded that the claimant was a permanent Oregon employe temporarily out of the state.

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