LAWRENCE RYAN, Claimant
Jack Polance, Claimant's Attorney
Starr & Vinson, Attorneys
SAIF Corp Legal, Defense Attorney
David Horne, Attorney

Own Motion 83-0004M
January 5, 1983
Interim Own Motion Order

The Board previously issued orders dated December 3, December 15 and December 16, 1982 in this matter. The most recent of those orders abates the prior two, and they remain abated notwithstanding of this order.

The purpose of this interim order is to grant relief on which the parties now generally agree, pending final dispositon of this request for own motion relief. Accordingly, claimant's request for own motion relief against Employers Insurance of Wausau on his 1974 injury is granted at this time on an interim basis and Wausau is directed to reopen claimant's claim effective July 26, 1980 and to pay claimant compensation for temporary total disability until September 8, 1980. In addition, both parties are directed to forward to the Board all documents relevant to whether claimant should be granted additional temporary or permanent disability within 30 days of the date of this order, or such additional time that may be mutually agreeable to the parties. Claimant's attorney is allowed 25% of the time loss benefits granted by this interim order.

IT IS SO ORDERED.

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ANTHONY A. BONO, Claimant
Greco & Escobar, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-11418
January 6, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Danner's order which dismissed claimant's request for hearing.

Claimant, a then 28-year-old cabinet maker, was involved in an automobile accident on October 9, 1978 while in the course and scope of his employment with Taylor and Taylor Construction Company. Claimant reported the incident to his employer, but neither the employer nor claimant thought to file a workers compensation claim. The accident occurred on claimant's last day of employment with Taylor and Taylor. He intended to and did begin employment the following Monday with a new employer. Claimant treated with Dr. Wolansky, a chiropractor, following his injury. Dr. Wolansky diagnosed cervical muscle strain and cervical ligamentous sprain with loss of normal cervical curvature, all generally referred to as "whiplash."

Claimant retained an attorney to pursue an action against the driver of the vehicle which collided with him. That attorney subsequently committed suicide. Claimant then retained his present counsel. The claim against the third party was settled for property damages only; the statute of limitation had run on a personal injury action. Claimant's new attorney advised that a workers compensation claim existed.

Claimant completed and signed a 801 form almost two years subsequent to the motor vehicle accident. In the period between the accident and the filing of his workers compensation claim, claimant was generally self-employed as a cabinet maker but did work for various employers when he had no work of his own. He was also unemployed for certain periods of time, although he indicated on his applications for unemployment benefits that he was not disabled nor under a doctor's care. SAIF accepted the claim as nondisabling on November 14, 1980, 86 days after the 801 form was signed, not 50 days later as the Referee indicated (this appears to be a typographical error, however, since the Referee did indicate in the latter portion of his order that SAIF required several additional weeks in which to investigate the claim).

Claimant was examined by Dr. Wilson, who reported on June 16, 1981 that claimant had no permanent impairment although physical laboring did seem to cause symptoms. The Orthopaedic Consultants reported on July 29, 1981 that claimant's condition was stationary, but that he continued to have episodic neck stiffness and soreness, although there was no evidence of permanent impairment. The examiners stated that there was a reasonable probability that claimant had temporary periods where he could not work at his regular occupation due to his neck condition.

On December 4, 1980 claimant's attorney wrote to SAIF protesting SAIF's classification of claimant's injury as nondisabling. On December 14, 1980, claimant requested a hearing, stating the issues to be: "1) Reclassification of injury as disabling, 2) extent of temporary total disability benefits, 3) extent of interim compensation, 4) extent of permanent partial disability, 5) attorney's fees, 6) penalties."

The Referee concluded that he had no jurisdiction to rule on the issue of permanent disability, reasoning that claimant must first request a re-evaluation and a determination from the Evaluation Division before he could proceed to hearing on the issue of extent of disability. The Referee also concluded that claimant had not established that he sustained any compensable time loss prior to the acceptance of the claim by SAIF, since he apparently continued to work at his regular job; that since no compensation was due, there could be no penalty; and that he would not penalize SAIF in any event for taking some additional time in which to investigate the claim considering the fact that claimant himself waited nearly two years before filing the claim.

I.

It is undisputed that SAIF did not pay interim compensation between the date the claim was filed and the date on which the claim was accepted. On review claimant argues that he is entitled to interim compensation based on Jones v. Emanuel Hospital, 280 Or 147 (1977), and Likens v. SAIF, 56 Or App 498 (1982). Claimant argues that those cases stand for the proposition that SAIF is required to pay interim compensation pursuant to ORS 656.262(4) no later than 14 days after notice of the claim is received, even though he may have been working at his regular job for the entire period between notice of claim and acceptance by the insurer (or denial, as the case may be).

In Ronald D. Brown, 34 Van Natta 1004 (1982), we considered the implications of the rulings of Jones, Likens, Bell v. Hartman 289 Or 447 (1980), Langston v. K-Mart, 56 Or App 709 (1982), and Stone v. SAIF, 57 Or App 808 (1982), on the issue of interim time loss compensation and stated:

> "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. * * * 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. * * * 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." 34 Van Natta at 1006."

We now confront the issue that we hoped in Brown would not arise -- a claim for interim compensation made by a worker who was working between the time he made his claim and the time it was accepted. Despite Likens and Stone, we conclude that a worker who is working is not entitled to interim compensation.

We base our conclusion primarily on Jones v. Emanuel Hospital where the court stated:

> "To interpret the word 'compensation' as the employer would have us do would give the employer a third choice: To delay acceptance or denial of the claim while making no interim payments. This third choice would delay the worker's appeal from an adverse decision since the worker cannot appeal until he or she receives the notice

> of denial. ORS 656.262(6). During this time the worker would receive no benefits; thus, the employer would be able to gamble on the ultimate outcome of the case and at the same time delay that outcome." 280 Or at 152-53. (Emphasis added.)

The claimant in Jones was unable to work when the claim was filed, and the employer failed to issue a timely denial of the claim. We understand Jones to say that the basic purpose to be served by requiring an employer or insurer to pay interim compensation, as the court in Stone recognized, is to prevent the employer or insurer from delaying acceptance or denial of a claim, while paying nothing to the claimant in the interim, on the hope that the claim will be ultimately defeated at hearing or on appeal. However, as is clear from the emphasized portion of the quotation from Jones, this was premised on the idea that a worker was receiving no benefits during that interim period, i.e., a claimant is entitled to receive interim compensation in order to protect the claimant and his or her family, and to prevent total loss of health and home, while the employer or insurer decides whether to accept or deny a claim. A claimant, therefore, need not prove "entitlement" in the sense of having a valid claim in order to trigger the insurer's obligation to pay interim compensation; instead, a claimant receives these benefits pursuant to ORS 656.262(4) regardless of the ultimate determination on the compensability of the claim.

We believe that if the court in Jones had considered the question, it would have held that interim compensation is not payable to a claimant who is working at his regular job. The danger of which the court spoke in Jones does not exist in such situations. The claimant is obviously not without resources since he is still receiving wages and has neither been precluded from nor rendered incapable of performing his regular work. It is still desirable to resolve all claims with a minimum of delay, even those that are nondisabling and made by a claimant who is still working at his regular job. The legislature, by virtue of ORS 656.262(6), has allowed the employer or insurer up to 60 days in which to accept or deny the claim, and failure to make a decision within that period of time will expose the employer/insurer to penalty provisions of the Act. See Zelda M. Bahler, 33 Van Natta 478 (1981), aff'd 60 Or App 90 (1982).

We are aware of no case, including Jones, in which the court ordered interim compensation to be paid a claimant who was working at his regular job between filing and acceptance or denial of a claim. In Williams v. SAIF, 31 Or App 1301 (1977), the claimant notified the employer of her injury on January 17, 1976. The claimant was released to return to and apparently did return to regular work on March 15, 1976. The insurer did not deny the claim until April 1, 1976, two weeks beyond the statutory period, and did not pay interim compensation in a timely manner. With regard to the period from March 15 to April 1, 1976, the court stated: "For that two-week period, there is no compensation due on which a penalty could be computed or imposed." 31 Or App at 1305.

In Candee v. SAIF, 40 Or App 567 (1979), the claimant was injured on May 12, 1976, and was released to modified work on September 23, 1976. Claimant's employer paid her an amount equal to her regular wages for the period May 12 to July 15, 1976. In October 1976 claimant's employer was declared non-complying, and the claim was submitted to SAIF for processing. SAIF paid claimant compensation from July 16 to September 23, 1976. Claimant contended that SAIF was liable for compensation from the date of injury until September 23, 1976, even though the employer had already paid claimant for part of that period. The court stated:

> "Claimant urges that, as a matter of public policy, we should allow the double recovery because that result is more likely to effectuate the purposes of the Act, including compliance with all of its terms. On the other hand, the overriding public policy of the Act is that injured employees be paid for their work time lost as a result of covered injuries. As between the claimant who has in fact been compensated and the non-complying employer, we see no compelling reason to uphold an award that overcompensates the claimant." (Emphasis added.) 40 Or App at 570-71.

A similar situation occurred in Mavis v. SAIF, 45 Or App 1059 (1980), and the court there cited Candee with approval. 45 Or App at 1063. See also Bold v. SAIF, 60 Or App 392 (1982).

Likens is more difficult to reconcile. In that case the claimant quit her job on February 13, 1979, allegedly due to back pain. SAIF did not deny the claim until March 19, 1980, and did not pay any interim compensation. The Board affirmed the denial of the claim, but refused to allow interim compensation since there was no proof claimant was off work due to her back condition and no medical evidence authorizing time loss. The court affirmed the Board's decision concerning the denial but held that claimant was entitled to interim compensation, stating that the court in Jones did not condition recovery on a claimant's proof of entitlement. 56 Or App at 501. However, it is clear that the court in Likens did not directly address the issue we face here.

Stone is perhaps impossible to reconcile with the cases previously cited and the conclusion we reach in this case.

In summary, we conclude that Jones, Williams, Candee and Mavis, are all consistent with the conclusion that we reach in the present case. Those cases state the purposes and policies that are served by requiring employers and insurers to pay interim compensation benefits. We do not believe those purposes and policies are served by requiring the payment of such benefits when a claimant is working at his regular job during the interim between filing and acceptance or denial of the claim. To the extent that Likens and Stone may be inconsistent with our conclusion, we can only state that this issue was not directly addressed by the court in those cases.

Finally, aside from the judicial precedents, there is some additional guidance available in the official forms promulgated by the Workers Compensation Department. The vast majority of claims are initiated by the filing of an 801 form (worker's report of injury or disease) or an 827 form (physician's initial report). On the portion of the 801 form completed by the employer, the question is asked whether the claimant returned to his or her next shift after the injury. On the 801 form, the physician is asked to state whether the claimant is released for work. A statement that the claimant did return to work or is released to return to work indicates a claim for medical services only or a nondisabling claim. This has long been understood to indicate that no interim compensation is due; if that is incorrect, it is impossible to understand the purpose of soliciting this information on the 801 and 827 forms.

II.

Claimant argues that the medical evidence establishes that he suffered some permanent partial disability as a result of his injury, and that the Referee should have ordered the claim reclassified from nondisabling to disabling and referred the claim to the Evaluation Division for issuance of a Determination Order. SAIF argues that it properly closed this claim as nondisabling pursuant to ORS 656.268(3) and that claimant's proper remedy under that statute is to request a Determination Order. Since claimant did not do so, SAIF argues that the Referee correctly ruled that he lacked jurisdiction to consider the issue.

As claimant correctly points out, despite SAIF's statement to the contrary, there is nothing in this record indicating that SAIF closed this claim. ORS 656.268(3) requires the insurer or selfinsured employer to issue to a worker a notice of claim closure if it is determined that the claim will be closed without submission to the Evaluation Division. There is no testimonial or documentary evidence in the record that SAIF ever closed this claim in accordance with ORS 656.268(3). It is an assertion made for the first time in SAIF's brief to the Board. Since our review is limited to the record made before the Referee, and since there is no evidence in the record that this claim was ever closed, we will proceed on the assumption that SAIF is simply mistaken in its assertion. This could give rise to another jurisdictional problem under the reasoning of Syphers v. K-W Logging Inc., 51 Or App 769 (1981), but we will proceed to consider the jurisdictional issue decided by the Referee and briefed by the parties.

SAIF initially issued its notice of acceptance of the claim as nondisabiling on November 14, 1980. It appears that the notice contained the proper information required by ORS 656.262(6)(b), which provides that the notice of acceptance shall:

> "Inform the claimant of hearing and aggravation rights concerning nondisabling injuries including the right to object to a decision that the injury of the claimant is nondisabling by requesting a determination thereon pursuant to ORS 656.268."

ORS 656.268(8) provides:

> "Upon receipt of a request made pursuant to ORS 656.262(6) or subsection (3) of this section, the Evaluation Division shall determine whether the claim is disabling or nondisabling. A copy of such determination shall be mailed to all interested parties in accordance with subsection (6) of this section."

Rather than requesting a determination by the Evaluation Division, claimant requested a hearing, contending that the Referee had authority to re-classify his claim as disabling.

ORS 656.283 states that a hearing may be requested by any party at any time regarding any question concerning a claim. The statutes relating to nondisabling injuries, however, provide that the claimant must exhaust the remedy provided under ORS 656.268(8) by submission of the matter to the Evaluation Division for determination before he may request a hearing on the question of reclassification of his claim.

ORS 656.005(8)(b) and (c) recognize the fact that an injury may be classified as either disabling or nondisabling. ORS 656.262(6) requires that the claimant be provided written notice of acceptance or denial of his claim; subsections (a) and (b) require that the notice inform the claimant whether the injury is classified as disabling or nondisabling and require notification that, if it is disabling, claimant can request a determination pursuant to ORS 656.268. As previously noted, ORS 656.268(8) requires the Evaluation Division to determine whether a claim is disabling or nondisabling when a request pursuant to ORS 656.262(6) is received, and to then mail a copy of that determination to all interested parties. ORS 656.268(6) provides:

> "The Evaluation Division shall mail a copy of the determination to all interested parties. Any such party may request a hearing under ORS 656.283 on the determination made under subsection (4) of this section within one year after copies of the determination are mailed." (Emphasis added.)

Clearly the statute contemplates that a claimant first exhaust his remedy under ORS 656.268 before he is allowed a hearing pursuant to ORS 656.283. That is the only logical manner in which to interpret the entire statutory scheme.

The only case that presents even a moderately close analogy to the present situation is Logue v. SAIF, 43 Or App 991 (1979), where the court held that a claimant need not request a reconsideration of a Determination Order as a prerequisite to requesting a hearing on the matter.

Different statutes are subject to different interpretations and, as clearly as the statutes in question in Logue provided that

a request for reconsideration of a Determination Order was merely an alternative remedy, the statutes relevant in this case provide that a claimant must first exhaust his remedy of requesting a determination from the Evaluation Division before he may request a hearing on the issue of the proper classification of his claim. We conclude that the Referee was correct in finding that he had no jurisdiction to rule on the issue of the proper classification of claimant's claim and that the matter is a question that must be submitted to the Evaluation Division in the first instance for determination.

ORDER

The Referee's order dated February 4, 1982 is affirmed.

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DENNIS A. RENTZ, Claimant
Breathouwer & Gilman, Attorneys

Own Motion 83-0001M
January 6, 1983
Own Motion Order

Claimant, by and through his attorney, requested the insurer to authorize medical treatment for conditions related to his February 25, 1977 industrial injury.

The materials submitted by the insurer indicate a dispute over entitlement to medical benefits under ORS 656.245. Subsection (1) of that statute provides in part: "The duty to provide such medical services continues for the life of the worker." ORS 656.245(2) provides in part: "If the claim for medical services is denied, the worker may submit to the Board a request for hearing pursuant to ORS 656.283." Although it is thus quite clear that claims for medical services must be formally accepted or denied notwithstanding the expiration of a claimant's aggravation rights, it would appear that this claim for medical services has neither been accepted nor denied.

We, therefore, construe the material that has been submitted to us ostensibly under our own motion authority pursuant to ORS 656.278 to actually be a request for hearing under ORS 656.283. The Docket Clerk is directed to set a preferential hearing and the Referee is directed to take evidence on the issues of entitlement to medical services and penalties/attorney's fees for failure to accept or deny this claim for medical services. The Referee shall issue an appealable order on those issues pursuant to ORS 656.295, with a copy to the Board, and the Board shall then consider whether to grant claimant compensation for temporary total disability under its own motion authority.

IT IS SO ORDERED.

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THOMAS SCHREIBER, Claimant
Gatti & Gatti, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02195
January 6, 1983
Order on Review

Reviewed by the Board en banc.

The insurer requests review of Referee Foster's order which found claimant's left knee injury has worsened since the last arrangement of compensation. The Referee awarded 75° for 50% disability of the left knee in lieu of prior orders and a stipulation.

The insurer contends that since claimant stipulated to an award of 20% disability on June 27, 1980 and had no medical evidence showing a worsening since that time, the award should be held to the stipulated amount.

On June 27, 1980 claimant stipulated to an award of 20 disability for his left knee injury. From September 29, 1980 to November 24, 1980 claimant was enrolled in an authorized vocational rehabilitation program. A Determination Order issued on December 30, 1980 at the close of the program found claimant was entitled to no additional permanent disability compensation. Claimant has appealed that Determination Order.

A claim reopened for vocational rehabilitation purposes is subject to redetermination by the Evaluation Division. ORS 656.268(5). The claim is examined and extent of compensation, including permanent disability, is redetermined. ORS 656.268(4). Contrary to the insurer's argument at hearing, it is not necessary for the claimant in this case to have submitted an aggravation claim pursuant to ORS 656.273 in order to put the extent of permanent disability at issue.

When a claim is reopened for vocational rehabilitation and subsequently closed pursuant to ORS 656.268(5), in order to warrant an additional award of permanent disability, the claimant must prove a change in his condition since the last rating of permanent disability. Fred Hanna, 34 Van Natta 1271 (1982).

The Referee found that claimant's condition had worsened since the stipulation awarding him a total of 20% disability. The stipulation was the last rating of permanent disability before the December 30, 1980 Determination Order. The Referee stated in his opinion, "It makes no difference whether this came about by aggravation or always existed." We agree with the finding that claimant has shown a worsening. However, we disagree with the Referee's statement, which is inconsistent with our holding in Fred Hanna, supra. The claimant must show changed circumstances since the last rating of permanent disability; otherwise the prior determination is binding, and claimant is not entitled to an additional award of compensation for permanent disability.

ORDER

The Referee's order dated May 19, 1982 is affirmed. Claimant's attorney is awarded $350 for his servies on review.

Board Member Barnes Concurring in Part and Dissenting in Part:

The Referee's order could be interpreted to mean that he believed that claimant was now entitled to an award for 50% left leg disability because that degree of disability existed even before claimant stipulated to an award of 20% left leg disability in June of 1980. I agree with the majority's rejection of that possible interpretation of the Referee's order. Under Fred Hanna, 34 Van Natta 1271 (1982), the issue is whether claimant's knee condition has worsened since the last award of compensation made by the June, 1980 stipulation. In other words, it is necessary to compare claimant's knee condition now with his knee condition in June of 1980.

My comparison of the available information leads me to the conclusion that the Referee's award is excessive. Exhibits 21 and 35 describe claimant's condition in June of 1980. Claimant's left knee ligament surgery resulted in 5° loss of extension, quadriceps atrophy and chronic pain. The most recent and most comprehensive report is Exhibit 60 in which Dr. Pasquesi finds claimant's total left knee disability, not all of which is related to claimant's industrial injury, to include ligament surgery, 30° loss of extension, 20° loss of flexation, quadriceps atrophy, chronic pain and effusion. Post-surgery status is the same. Quadriceps atrophy is the same. Chronic pain is the same. All that is different is a greater loss of extension, loss of flexation and effusion not previously noted in the medical reports, but not said to be either premanent or disabling.

I agree with the majority that this comparison supports the conclusion that claimant's loss of use of his left knee is now greater than it was in 1980 when he stipulated to an award for 20% loss of use. I cannot agree that the evidence in this record establishes that claimant is now entitled to an award for 50% loss of use. His condition has worsened, but certainly not that much. I would modify the Referee's order and grant an award for 30% loss of use.

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

Own Motion 81-0157M
January 7, 1983
Own Motion Order

On July 15, 1982, the Board issued an order referring the above-entitled claim to the Hearings Division for an evidentiary hearing on claimant's entitlement to additional permanent partial disability, specifically permanent total disability. Claimant's compensable industrial injury was sustained on July 16, 1973 and his aggravation rights have since expired.

Referee Seifert, after hearing held on August 25, 1982, recommended to the Board that claimant be granted compensation for permanent total disability. We accept the Referee's findings of fact as our own. However, we disagree with his conclusion.

We acknowledge that three of claimant's doctors and a vocational consultant have indicated their opinion that claimant is permanently and totally disabled. However, this is a legal judgment based on a combination of factors. No doctor has said that claimant is permanently and totally disabled based solely on his physical condition. We are persuaded by a totality of the evidence that claimant, although severely disabled, is not permanently and totally disabled even when considering both his physical condition and other social/vocational factors. It becomes claimant's burden then to show a willingness to find suitable gainful employment. This he has failed to do. It is acknowledged that the opportunities in his locale are scant, but we have previously ruled that ". . . 'reasonable efforts' to obtain employment can include a willingness to relocate, at least for workers in smaller communities." Raymond Osborn, 34 Van Natta 576 (1982). Claimant has apparently never even considered moving to an area with more opportunities. We also note that he has shown less than convincing effort to obtain work in his geographical area, small though the area may be. Based on the above, we conclude claimant has failed to show entitlement to compensation for permanent total disability.

Claimant has received awards totaling 65% unscheduled disability. We conclude he is entitled to an increased award of compensation for 10% low back disability resulting from his injury of July 16, 1973.

ORDER

Claimant is hereby granted an additional award of compensation for 10% low back disability, making a total award of 75%.

Claimant's attorney is granted as a reasonable attorney fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,000.

IT IS SO ORDERED.

★★★★★★★★★★

GLENN O. HALL, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
John Snarskis, Defense Attorney

WCB 81-03510
January 10, 1983
Order of Abatement

On December 30, 1982, we issued our Order on Review herein. On January 6, 1983, we received a request from the employer and its insurer for an order on reconsideration allowing the employer/insurer to take a credit of permanent total disability benefits paid to claimant pending Board review against the permanent partial disability awarded by the Board's Order on Review.

In order to allow sufficient time to consider the merits of the employer/insurer's request, we hereby abate our order herein dated Decmber 30, 1982.

IT IS SO ORDERED. ★★★★★★★★★★

LIESELOTTE DAVIS, Claimant
Black & Hansen, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10225
January 11, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Mongrain's order which ordered the SAIF Corporation to pay claimant temporary total disability compensation from October 20, 1981 until claimant either returns to work or is released to return to work by her attending physician, or until "such date as may be authorized by Determination Order."

Claimant raises two issues on review. First, claimant contends that the Referee erroneously determined that she was barred by principles of res judicata from raising an issue concerning the rate of temporary total disability compensation which she was entitled to receive, either as of the time of her original injury or the time of claim reopening in August of 1981. Second, claimant contends that the Referee's order misstates the insurer's obligation to pay temporary total disability benefits as set forth in ORS 656.268(2). We agree with claimant's second contention and, therefore, modify the Referee's order in part.

A Referee's order in a prior proceeding ordered this claim reopened for surgery, and claimant submitted to surgery in August of 1981. SAIF commenced payment of temporary disability benefits at that time and terminated benefits as of October 20, 1981, based upon a chart note in the attending physician's record indicating that claimant's examination was within normal limits and that "[s]he is released from follow up at this time." Exhibits 17 and 18 are records of telephone conversations between a SAIF representative and an employe in the physician's office, indicating that, in response to a telephone inquiry, SAIF was informed in December of 1981 that claimant was released for regular work on October 19 or 20, 1981. These documents, however, were admitted solely for the purpose of establishing that SAIF's conduct in terminating claimant's temporary disability compensation as of October 20, 1981 was not unreasonable. SAIF does not question this evidentiary ruling. Therefore, these documents are not evidence that claimant actually was released for work in October of 1981.

The insurer is obligated to pay temporary disability compensation until one of three things occurs: either the worker returns to regular work, is released by the attending physician to return to regular work or there has been a determination pursuant to ORS 656.268 that the worker's condition is medically stationary. ORS 656.268(2), Jackson v. SAIF, 7 Or App 109 (1971). An insurer cannot unilaterally terminate time loss benefits based upon a doctor's report indicating that a worker is medically stationary. Mark L. Side, 34 Van Natta 661 (1982).

An insurer can unilaterally terminate time loss benefits when a claimant is released to return to work, but we have concluded that a release to work should be clear and unambiguous in order to justify termination of time loss benefits. John R. Daniel, 34 Van Natta 1020 (1982). The possible work releases in this record,

based on the evidence admitted without limitation, would be the attending physician's October, 1981 chart note that "claimant is released from follow up at this time" and a December, 1981 report that states that the prior October claimant was "allowed to return to activities as tolerated." We find these "releases" to be ambiguous and insufficient to justify termination of time loss benefits under the rationale of Daniel.

Without a clear work release, SAIF was obligated to continue to pay compensation for temporary total disability until a Determination Order was issued. SAIF did not do so. The Referee correctly ruled that SAIF was subject to a penalty for its unilateral termination of temporary disability benefits; however, the Referee's order does not go far enough. As a penalty, SAIF is prohibited from recovering as an overpayment the temporary total disability benefits it should have paid claimant during the interim between claimant's medically stationary date and the issuance of the Determination Order. Mark L. Side, supra, 34 Van Natta at 663.

We affirm and adopt the remaining portions of the Referee's order.

ORDER

The Referee's order dated February 8, 1982 is modified in part. Those portions of the Referee's order directing SAIF to pay claimant temporary total disability benefits from October 20, 1981 to either the date that claimant returns to work or is released to return to work or "such date as may be authorized by Determination Order," and that imposed a penalty of 25% of the temporary disability compensation made payable by the Referee's order, are modified as follows. SAIF shall pay claimant temporary total disability compensation from October 20, 1981 until the date of a Determination Order reclosing the claim pursuant to ORS 656.268, less time worked. SAIF is prohibited from taking a setoff for any of this amount of temporary disability compensation against any additional compensation to which claimant is or may be entitled, including temporary and permanent disability benefits. The remainder of the Referee's order is affirmed.

* * * * * * * * * * *

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

WCB 81-05446
January 11, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Wilson's order which affirmed the insurer's denial of her claim for a condition denominated "meat wrappers asthma."

We adopt the Referee's findings of fact as our own.

The Referee determined that claimant's claim must fail for two reasons: (1) claimant's condition did not result in the need for medical services or disability; and (2) claimant's work activity did not cause a worsening of her underlying disease under the rationale in Stupfel v. Edward Hines Lumber Co., 288 Or 39 (1979).

Although claimant's asthma condition did not result in the need for treatment or time off from work, we find that she did require medical services. The condition was significant enough that she did see Dr. Bury, Dr. Vervloet and later, at SAIF Corporation's request, Dr. Keppel. As a result of claimant desiring treatment for her persistent cough, tests were done to determine the reason for her problems.

We find that the reasoning of the court in Stupfel is not applicable in this particular case. There is no evidence indicating even a possibility that claimant's condition preexisted her work activity at Sherman's Thunderbird Market. We conclude claimant must show that her work activity was a major contributing cause of her disease. SAIF v. Gygi, 55 Or App 570 (1982).

Dr. Vervloet, a specialist in pulmonary disease, did extensive testing on claimant and determined that there was no question that claimant's job as a meat wrapper caused the disease. Other contributing factors, such as smoking and hayfever, were not present in claimant's case. SAIF's own industrial hygienist, Mr. Schoenborn, indicated it appeared claimant had a valid claim. Dr. Keppel examined claimant at the request of SAIF. We do not find his reports detrimental to claimant's claim, as SAIF argues they are. In May of 1981 Dr. Keppel indicated claimant was not, at that time, symptomatic. He stated that at the time she left work at Sherman's she may have had some airway irritation resulting in a cough and thickness in her sputum that may have been due to the price label adhesive or to the polyvinyl chloride. He felt, however, that this was not a permanent condition. He did feel that any present symptoms were probably not the result of work irritants. In January of 1982 Dr. Keppel indicated he did not repeat the Mecholyl test. He felt ". . . that a time distant from her initial exposure a negative test would not completely rule out that the difficulty she had previously was due to the fumes from the adhesive or from the polyvinyl chloride." Again, he reiterated that she had no disability.

We find Dr. Vervloet, claimant's treating doctor, very definitely indicates claimant's work exposure at Sherman's was the major, if not the only, cause of claimant's disease. Although Dr. Keppel is much more equivocal, we do not find he disproves claimant's claim. He seems to focus more on whether claimant's condition has permanency and has caused disability. This has very little to do with whether claimant has a compensable occupational disease. We conclude the preponderance of the evidence indicates that claimant's "meat wrappers asthma" was contributed to in major part by her work activity at Sherman's. The denial should be reversed.

Claimant raised an issued concerning penalties and attorney fees for SAIF's failure to issue a timely denial. ORS 656.262(9), 656.382(1). We find that a penalty is warranted and impose a penalty equal to 25% of interim temporary total disability compensation for the period April 28, 1981 through June 19, 1981. Norman J. Gibson, WCB Case Nos. 80-08932 and 80-07855, 34 Van Natta 1583 (November 19, 1982). No associated attorney's fee will be imposed, however, based upon our rationale expressed in Zelda M. Bahler, 33 Van Natta 478, 481 (1981), rev'd. on other grounds, 60 Or App 90 (1982).

ORDER

The Referee's order dated March 9, 1982 is reversed.

Claimant's claim for "meat wrappers asthma" is hereby remanded to SAIF Corporation for acceptance and payment of compensation to which claimant is entitled until closure under ORS 656.268.

The insurer is directed to pay to claimant an amount equal to 25% of interim temporary total disability compensation for the period April 28, 1981 through June 19, 1981.

Claimant's attorney is awarded $1,250 as a reasonable attorney's fee for services at the hearing and on Board review, payable by SAIF Corporation.

★★★★★★★★★★

ROY D. NORTHEY, Claimant
Michael Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00163
January 11, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Peterson's order which granted claimant an award of 192° for 60% unscheduled disability. SAIF contends that the award granted is excessive.

Claimant, age 50, has been a journeyman carpenter for over 20 years and was so employed on February 15, 1977 when he fell 20 feet from a scaffold and suffered multiple injuries. His injuries included rib fractures, facial injuries, cervical strain and right shoulder strain. Subsequently claimant came to surgery and underwent disc excision and a fusion.

The claim was closed by a Determination Order of March 19, 1979 with an award of 48° for 15% unscheduled disability.

The claim was reopened and claimant, under the auspices of vocational rehabilitation, obtained his GED and took course work which he completed to become a building inspector. Claimant now has a part-time job as a construction inspector as he failed the licensing examination to become a building inspector.

Claimant has physical restrictions placed on him from this industrial injury which precludes his return to his regular occupation. Claimant has an 11th grade education but has acquired his GED. Based on medical and non-medical factors the Referee concluded claimant was entiled to 60% for his loss of wage earning capacity. We modify that award.

We find claimant's impairment from this injury is mild but that he is precluded not only from his regular occupation but also from a rather broad field of the labor market. He has been retrained, albeit he did not pass the examination in his chosen field. Utilizing the guidelines set forth in OAR 436-65-600 et seq., we find claimant would be adequately compensated for his loss of wage earning capacity by an award of 50% unscheduled disability.

ORDER

The Referee's order dated October 14, 1981 is modified. Claimant is hereby granted an award of 160° for 50% unscheduled disability. This award is in lieu of any prior awards. Claimant's attorney's fee should be adjusted accordingly.

★★★★★★★★★★★

RICHARD J. OSWALD, Claimant
Wolf, Griffith et al., Attorneys
Schwabe, Williamson et al., Attorneys

WCB 81-07609
January 11, 1983
Order of Dismissal

The Board having received the Amended Motion to Dismiss Appeal on behalf of Mark Morris Tire Company and Insurance Company of North America, and the Referee having ruled by order of April 23, 1982 that that portion of the order of October 1, 1981, joining Mark Morris Tire Company, be vacated, and no appeal having been taken therefrom,

ORDER

It is hereby ordered that Mark Morris Tire Company and its insurer, Insurance Company of North America, be removed as a respondent from claimant's request for Board review filed December 14, 1982.

★★★★★★★★★★

EUGENE THOMAS, Claimant
Ted Turner, Claimant's Attorney
Lindsay, Hart et al., Defense Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-07043 & 81-07044
January 14, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

EBI Companies requests review of Referee James' order which: (1) found EBI to be the responsible insurer for the March 5, 1981 incident, and (2) awarded claimant's attorney fees based on unreasonable delay in requesting an order pursuant to ORS 656.307.

Claimant is a 54 year old short haul truck driver who has worked for this employer many years. Besides driving a truck, claimant's job included loading and unloading the goods he hauled. On October 31, 1977 he picked up a 30 pound pipe and, in turning, felt a snap with low back pain. His resulting claim was accepted by EBI, the industrial insurer at that time. Claimant was off work for six weeks, then returned to regular work. In October, 1978 the EBI claim was reopened. Claimant was off nine weeks due to increasing low back pain radiating to his legs, the right leg more than the left. At that time, a herniated lumbar disc at L4-5 on the right was diagnosed. Surgery was recommended, but claimant declined that option. The claim was closed in February of 1979 with an award of 32° unscheduled permanent disability, in addition to time loss payments. Claimant returned to lighter work, but eventually took on his regular work load. While working over the next two years, claimant had chronic, but minor problems with his back and right leg. Occasionally, he missed two or three days of work at a time because of back pain. Also, he told his supervisor many times that his back was hurting him.

On March 5, 1981 claimant was assisting in guiding a 300 pound pipe onto his truck when the forklift holding the pipe dropped it while the claimant was holding one end. He completed loading the pipe after resting a few minutes, but he was unable to report to work the next day due to pain. He reported to his doctor severe back and right leg pain that was occurring in the same body part, but was more severe than he had ever experienced before. On March 13, 1981, claimant underwent bilateral laminectomies and disc excision at L4-5. He testified that he decided to have the operation this time because the pain was much worse and he could not continue on as he had before the March, 1981 lifting accident.

The employer had changed insurers and Argonaut Insurance Company was on the risk in March of 1981. Argonaut denied responsibility for the March injury and surgery on the ground that it was an aggravation of claimant's 1977 injury for which EBI was responsible. EBI denied responsibility on the ground that the March incident was a new injury for which Argonaut was responsible.

In successive injury cases where compensability is not an issue, responsibility is placed upon the insurer covering the risk at the time of the most recent injury that bears a causal relationship to the disability. Smith v. Ed's Pancake House, 27 Or App 361, 364 (1976). Dr. Hill, claimant's treating physician and surgeon since October of 1978, states that the March, 1981 incident was an aggravation of claimant's previous injury and was not a new injury. Dr. Hill's conclusion does not require us to find that there was an aggravation as that term is used in workers compensation proceedings. Under Workers Compensation Law, when the issue is one of responsibility between successive insurers, even though a prior injury remains a significant cause of disability, if the present disability is even slightly caused by the more recent incident, the insurer on the risk at the time of the more recent incident is responsible for the disability. See Smith v. Ed's Pancake House, supra, and Calder v. Hughes & Ladd, 23 Or App 67, 69 (1975).

We here conclude that the second insurer, Argonaut Insurance, is the responsible insurer because the 1981 incident contributed at least slightly to claimant's subsequent disability. Although the claimant continued to suffer intermittent back and right leg pain between closure of the EBI claim in February, 1979 and the March, 1981 incident, his pain was at a manageable level in that he was able to perform his regular work, was not limited to light duty, and he did not need medical treatment. He occasionally needed to take time off from work due to his back, but was always able to return in two or three days. His back problem, though not entirely asymptomatic, was relatively stable throughout that period. The sudden jolt of the dropped 300 pound pipe in 1981 was a specific incident after which the claimant stated to his doctor and at hearing that the pain was more severe than he had ever before experienced. Claimant testified that he knew he could not return to work because of this pain. Before the pipe lifting incident, the claimant had declined to undergo a back operation and was able to work without it. After the March, 1981 incident he felt compelled to undergo the operation because of his worsened condition.

The remaining issue involves penalties and attorney fees. Although claimant's aggravation claim was dated March 11, 1981 and received by EBI on March 13, 1981, EBI neither denied the claim nor requested an order pursuant to ORS 656.307 until June 10, 1981, about 90 days later. We believe that all denials, whether of compensability or responsibility, have to be issued within 60 days. ORS 656.262(6). In addition, when insurer responsibility issues arise, OAR 436-54-332 requires all involved insurers to "expedite" claim processing by "immediate priority investigation." The 90 day period between EBI's receipt of claimant's aggravation claim and action on that claim does not conform to the letter or spirit of the statute or administrative rule.

Based on the criteria discussed in Zelda M. Bahler, 33 Van Natta 478 (1981), rev'd on other grounds, 60 Or App 90 (1982), claimant is entitled to the maximum penalty of 25%. Also, for the reasons stated in Bahler, assessment of an attorney fee pursuant to ORS 656.382(1) is appropriate in this case.

The Referee declined to assess a penalty because EBI was paying interim compensation until the date of its denial; the Referee thus reasoned that there were no amounts of compensation "then due" upon which to assess a penalty. In Norman J. Gibson, 34 Van Natta 1583 (1982), we admitted that the "then due" language of ORS 656.262(9) has created considerable confusion in this kind of situation, but concluded that when a denial is unreasonably late we will assess a penalty on the interim compensation paid between the sixtieth day and the date of the denial.

ORDER

The Referee's order dated April 30, 1982 is reversed. Argonaut Insurance Company's denial dated July 20, 1981 is set aside and claimant's claim is remanded to Argonaut for acceptance and the provision of benefits. EBI Companies' denial dated June 10, 1981 is reinstated and affirmed.

Argonaut shall reimburse EBI for all benefits paid pursuant to the terms of the Referee's order.

In addition, claimant is awarded a penalty, payable solely by EBI, equal to 25% of the compensation for temporary total disability due from May 12, 1981 through June 10, 1981. Claimant's attorney is awarded a fee of $400 for services rendered in connection with the penalty issue, payable solely by EBI; this fee is in lieu of and not in addition to the fee awarded by the Referee.

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DIANNA MARIE MORTON, Claimant
Malagon & Velure, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-01538
January 17, 1983
Order on Reconsideration

Claimant seeks reconsideration of the Board's Order on Review dated February 11, 1981 which reversed the Referee's order which set aside the March 19, 1980 Determination Order and ordered the claim reopened and processed pursuant to ORS 656.268. Finding that the claim was, in fact, properly closed, the Board considered the alternative issue of extent of disability and awarded 48°, for a 15% unscheduled permanent disability for claimant's neck injury, together with temporary total disability compensation for a period of time during which the claimant was hospitalized following closure of the claim, from May 12, 1980 through May 20, 1980. The Board abated its Order on Review by an Order of Abatement dated February 25, 1981.

Having reconsidered the parties' arguments and reexamined the entire record, we now conclude that our prior Order on Review was factually and legally incorrect.

On March 29, 1979 claimant injured her cervical area lifting a tray of dishes while working as a waitress. Over the following year claimant was examined or treated by Drs. McClure, Dunn, Nickels, Samuel, Loeb, Toon and an Orthopaedic Consultants panel. These doctors consistently reported that claimant's March, 1979 injury produced only a cervical strain. Based on information that the strain condition was medically stationary, the challenged Determination Order was issued in March of 1980.

Claimant thereafter came under the care of Dr. Campagna. In April, 1980 he reported his diagnosis of cervical nerve root compression as a "result of [the March, 1979] industrial injury." The next month he performed a myelogram and reported it revealed a cervical disc problem.

The ultimate issue is whether this cervical disc problem, discovered after issuance of the challenged Determination Order, establishes that claimant's claim was prematurely closed.

In answering that question in the negative, our prior Order on Review states: "The Board concludes that the claim was properly closed based on the evidence in the record at that time." (Emphasis added.) This emphasis portion of that order is at least misleading.

A claim for additional compensation for temporary total disability after claim closure can be based either on the theory of premature closure or on the theory of aggravation. Roy A. McFerran, 34 Van Natta 621 (1982), aff'd, 60 Or App 786 (1982). The difference is: Premature closure means that the claimant's condition was not medically stationary at the time of claim closure; aggravation means that the claimant's condition was stationary but subsequently worsened sufficiently to require claim reopening.

The Board's prior Order on Review in this case seems to have

confused (1) what the issue was and (2) what evidence was relevant to that issue. The issue was whether claimant was medically stationary; since claimant expressly stated that she was not claiming subsequent aggravation, it was claimant's burden to prove that she was not medically stationary on the date of claim closure. However, in attempting to sustain that burden, claimant was not limited to relying on the evidence in existance on that date. William Bunce, 33 Van Natta 546, 547 (1981):

> "We conclude that the better approach in this kind of situation is to regard the first Determination Order as premature. That should not, however, carry any negative connotation regarding the carrier's act of submitting the claim for closure or the Evaluation Division's act of closing the claim. Both acted properly based on what was then known. But there is an objective reality that exists even if a doctor has not been able to find it, and we now know that the objective reality was that claimant had a herniated disc at the time of closure."

Of course, the strongest evidence that a worker was not medically stationary at the time of claim closure would be information then available to the effect that further medical treatment or the passage of time would improve the worker's physical condition within the meaning of ORS 656.005(17). But often information about the need for further treatment only surfaces after claim closure. A serious ambiguity often then arises: Is the need for further treatment best viewed as being in the nature of an aggravation claim or being circumstancial evidence of premature closure? Because aggravation reopening of a claim and setting aside a closure as premature are such closely related remedies in many cases, perhaps it would be desirable in all cases to interpret a request for either remedy also to necessarily include a request for the other remedy.

We conclude it is unnecessary and inappropriate to consider that procedural approach in this case solely because of claimant's express disavowance of the aggravation alternative.

The strongest evidence in this case that claimant's claim was prematurely closed in March, 1980 is Dr. Campagna's reports from the following two months in which he states that claimant has cervical nerve root compression as a result of her 1979 industrial injury. We emphasize, however, that claimant's condition in April and May is merely indirect evidence of her condition in March; Dr. Campagna's reports merely support a permissable inference about claimant's condition before she ever saw Dr. Campagna. That inference is strengthened in this case by claimant's testimony that her condition had not appreciably changed since the time of the injury and the time of the hearing.

The strongest evidence to the contrary is that nine different doctors submitted reports of treatment or examination of claimant

before her claim was closed, and none of these reports found, suggested or even mentioned the possibility of a cervical disc problem. From the fact that no cervical disc problem was diagnosed before claim closure, it could readily be inferred that no cervical disc problem existed before claim closure.

When we find only evidence that would support either inference on the ultimate fact question, articulating why we as factfinders choose to draw one inference and not the other can be almost impossible. Suffice to say, we are slightly more persuaded that it is slightly more likely than not that claimant's cervical disc problem existed at the time of claim closure even though it had not previously been diagnosed.

ORDER

On reconsideration, the Board's Order on Review dated February 11, 1981 is vacated and the Referee's order dated July 16, 1980 is affirmed. Claimant's attorney is awarded $700 for services rendered on Board review, payable by the SAIF Corporation.

The SAIF Corporation may setoff any amounts paid under the terms of our Order on Review dated February 11, 1981 against amounts payable under the terms of this order.

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DAVID CHENEY, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Keith Skelton, Defense Attorney

WCB 81-01812
January 18, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Seifert's order which denied claimant's claim for reinstatement of temporary disability, and penalties and attorney's fees. We reverse on all issues.

Claimant sustained neck, leg and other injuries in August, 1979 when he was involved in a motor vehicle accident in the course of his employment as a truck driver. Following hospitalization and an extended recovery period, Dr. Norris-Pearce declared claimant to be medically stationary and released him to return to work in a report dated October 13, 1980. In that report Dr. Norris-Pearce indicated that claimant was having extreme difficulty with exercise, "most likely due to his excessive weight." The doctor noted that claimant still complained of persistent leg swelling but said that claimant's leg would continue to be symptomatic until he lost a substantial amount of weight.

Claimant obtained new employment as a long-haul truck driver in August of 1980 and continued working until November 28, 1980 when he quit because of physical problems and returned to Dr. Norris-Pearce. Following an examination on December 11, 1980, in a report dated February 3, 1981, Dr. Norris-Pearce verified that claimant was no longer able to continue working due to the 1979 injuries and that claimant was in need of further medical services and entitled to time loss benefits.

In the meantime, in October of 1980 the insurer had submitted the claim for closure based on Dr. Norris-Pearce's October closing examination report. The Evaluation Division returned the file requesting clarification concerning objective measures of extent of permanent impairment. Before that information was made available to the Evaluation Division and a Determination Order was issued, Dr. Norris-Pearce's February 3, 1981 report was received. The insurer treated the February 3, 1981 report as an aggravation claim and on June 12, 1981 issued a denial on the ground that claimant's continuing symptoms were the result of his obesity and "other activities" claimant was involved in since being declared medically stationary effective August, 1980.

I

We first consider the unusual procedural posture of this case. The insurer apparently ceased time loss payments on August 6, 1980 when it received notice that claimant had returned to regular work. The insurer then requested that the claim be closed on November 12, 1980 but, as noted above, the Evaluation Division refused to close the claim until additional medical information was obtained. Before the insurer obtained this information it received Dr. Norris-Pearce's report of February 3, 1981 indicating that claimant had been unable to work since November 28, 1980. The insurer treated this report as an aggravation claim under ORS 656.273 and issued a denial. The insurer was justified in terminating time loss payments when claimant returned to work. Jackson v. SAIF, 7 Or App 109 (1971). However, since the claim had never been closed, there could be no such thing as an "aggravation claim" based on a worsened condition after the last award of compensation because there had been no award of compensation. We believe it would be more appropriate to characterize the February 3, 1981 report as a request for reinstatement of temporary total disability benefits.

The parties and the Referee were somewhat unclear concerning their characterization of this claim. The insurer's denial focused on causation and the wording suggests that it was applying a "sole cause" test, i.e., that to justify "reopening" of his claim, claimant had to show that his compensable injuries were the sole cause of his disability. In upholding the denial, the Referee concluded that claimant failed to establish a "worsening of his condition" and that, if there were a worsening, it was due to claimant's obesity or his "other jobs" since being released to work.

As noted above, we believe that it is better to treat this claim as a request for reinstatement of time loss benefits that were previously terminated when claimant returned to work. In this kind of situation, we think the better rule is: Where there is a subsequent request for temporary disability arising from the same injury prior to claim closure, it is unnecessary for the claimant to prove a worsening of the compensable condition; it is sufficient to show that the circumstances that justified prior termination of time loss benefits (a release to return to regular work and/or actual return to work) no longer exist due in material part to the effects of the injury.

We turn to application of that rule in this case. The circumstances that justified the insurer's termination of claimant's time loss benefits in August of 1980 were that claimant had been released to regular work by his treating doctor and had returned to work. At first blush, it seems obvious that these circumstances no longer existed after November of 1980 when claimant left work. Claimant testified that by the end of November he was unable to work because of shoulder and neck pain, and swelling and pain in his left leg. Claimant's employer during that time testified that claimant periodically complained of swelling in his knee and difficulty "getting around into loads, tarping," etc. In his February 3, 1981 report, Dr. Norris-Pearce indicated his belief that claimant was disabled as a result of pain "sufficiently severe to distract [claimant] from being able to safely pursue driving." The one ambiguity, however, which was correctly identified by the Referee, is whether claimant's disability after November of 1980 was due in material part to his August, 1979 industrial injury. The evidence suggests three possible sources of claimant's post-November disability: claimant's obesity, his work activities during the prior three months and the residuals of his 1979 injuries.

Dr. Norris-Pearce submitted three reports in support of the claim for reinstatement of benefits: his initial report dated February 3, 1981 and two additional reports in response to letters from the insurer seeking clarification. If we had to consider only his first two reports we would have no difficulty finding that claimant had established his case.

> "I saw Mr. Cheney in re-evaluation on 11 December, 1980, at which time he stated that he had been unable to continue working because of pain in his neck and leg, particularly in his leg. He stated that the pain was sufficiently severe to distract him from being able to safely pursue driving." (Dr. Norris-Pearce's report dated February 3, 1981.)
>
> ". . . [T]his patient attempted to return to work and was unable to work beyond the date of 28 November, 1980. He was unable to work because of severe pain that occurred in the left leg attempting to assume his regular occupation of driving a truck. These complaints are directly related to his on-the-job injury of August 23, 1979. It is my opinion that his over-weight status has contributed to some degree to his symptoms, but is certainly not the sole cause of persistent pain symptoms in his leg." (Report dated March 12, 1981.)

However, following another letter from the insurer seeking further clarification, Dr. Norris-Pearce wrote:

"It is my impression that this [pain and swelling in the left leg] would significantly improve if a significant degree of weight loss could be achieved. It is my firm opinion that he will be relatively asymptomatic once he achieves a significant degree of weight loss." (Report dated April 27, 1981.)

This last excerpt provides the strongest support for the insurer's position. Cf. Patricia R. Nelson, 34 Van Natta 1078 (1982). However, we do not understand Dr. Norris-Pearce to be saying that claimant's shoulder and neck pain, which also is part of the basis for reinstatement of benefits, would be affected by weight loss.

The Referee's reference to claimant's "other activities" after returning to work as a causative factor in claimant's disability in November of 1980 is somewhat obscure. The insurer spent a great deal of time developing the record concerning such matters as claimant's involvement with a contract to supply firewood, truck driving and operation of a "snow cat" at a resort. However, it is unclear when the firewood transaction took place or extent of claimant's involvement with it, and the other two activities took place in April and June, 1981, long after the November, 1980 date by which claimant alleges he became disabled. The critical time period is from August through November, 1980 and during this time claimant was regularly employed as a truck driver. The insurer neither argued nor presented any evidence to the effect that this latter employment constituted a supervening cause of claimant's disability.

On the same day the insurer issued its denial of the new time loss claim, it sent claimant a notice of an independent medical examination. On the advice of counsel, claimant failed to attend the examination. The insurer contends that claimant's "contumacious refusal" to submit to an independent medical exam in June, 1981 should be held against him. Claimant's failure to submit to an exam could bear on the length of time to which he is entitled to time loss benefits or the rating of extent of his permanent impairment, see Christine Nelson Givens, 34 Van Natta 258 (1982), but we fail to see how an examination in June, 1981 would be of much aid in determining whether claimant was entitled to time loss benefits beginning in November, 1980.

Viewing the record as a whole, we conclude that the residuals of claimant's injuries constituted a material portion of his condition as it existed on November 28, 1980 and that claimant is entitled to reinstatement of temporary disability benefits effective November 28, 1980.

III

Claimant also seeks penalties and attorney's fees because the insurer never reinstated claimant's time loss, nor did it issue a denial until three to four months after the request for time loss benefits was submitted by Dr. Norris-Pearce. We are tempted to

impose no penalties or attorney's fees because in this order for the first time we clarify an insurer's responsibility regarding a request for an additional period of time loss before claim closure. But aside from the confusion that may have previously existed in this area, it was unreasonable for the insurer in this case not to respond in any way more promptly to the request for additional time loss benefits. We conclude that failure to respond to a claim for reinstatement of time loss benefits in a timely fashion subjects the carrier to assessment of penalties and attorney's fees, although we do not believe that they should be severe in this case due to the confusion that surrounded the claim from both a factual and legal standpoint.

ORDER

The Referee's order dated August 4, 1981 is reversed. The insurer's denial dated June 12, 1981 is set aside and the claim is remanded to the insurer for payment of compensation for temporary total disability effective November 28, 1980 and for processing in accordance with law. Claimant's attorney is awarded a fee of $1,400 for services at the hearing and on review in overcoming the insurer's denial of reinstatement of time loss benefits, payable by the insurer.

Claimant is also awarded a penalty equal to 10% of all temporary total disability compensation payable from November 28, 1980 to June 12, 1981. Claimant's attorney is awarded an additional fee of $200 pursuant to ORS 656.382.

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RICHARD DAVIES, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 80-05224 & 80-02635
January 18, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee James' order which upheld two denials issued by two separate insurers, one claim being for an aggravation of claimant's 1974 right knee injury while working for Hanel Lumber, insured by Argonaut, the other claim being a 1979 right knee new injury claim asserted against Universal Drywall, insured by the SAIF Corporation. The Referee also assessed a penalty and attorney fee against each insurer for breach of various statutory duties.

We are generally only willing to review issues raised by the parties, but there is some uncertainty about what issues are actually raised in this case. Claimant's opening brief focuses almost exclusively on his new injury claim against Universal Drywall/SAIF. Claimant's reply brief adds considerable argument about his aggravation claim against Hanel Lumber/Argonaut. Assuming the latter issue is properly before us, we agree with the Referee that the medical evidence does not support an aggravation claim, especially considered in light of claimant's work history between 1974 and 1979.

The Referee concluded that the new injury claim against Universal Drywall/SAIF depended ultimately on an assessment of

claimant's credibility, found he was not credible and thus affirmed SAIF's denial. We think the Referee's credibility finding is certainly debatable, at least insofar as the reasons the Referee stated for that finding. We are aware, however, that the basis for a credibility finding cannot always be precisely articulated. We often accept unexplained findings by Referees that a witness was credible; perhaps there should also be room to accept unexplained findings to the contrary. In any event, the pattern of our decisions is one of general deference to the credibility findings of Referees and, despite some misgivings, we find no comfortable basis in the record in this case to depart from that practice.

Both insurers challenge the penalties and attorney fees assessed by the Referee. Claimant argues for additional penalties and attorney fees.

The Referee assessed a 25% penalty against Argonaut to be calculated on the amount of time loss payments due from March 5, 1980 (when SAIF stopped paying interim compensation) to June 20, 1980 (date of Argonaut's denial) as well as a $300 attorney's fee. The penalty was imposed because the aggravation claim was not denied within 60 days of a March 19, 1980 letter from claimant's attorney requesting reopening for an aggravation of the 1974 injury. This constituted a valid aggravation application pursuant to ORS 656.273(2). Argonaut had a duty to accept or deny the claim for aggravation within 60 days after notice or knowledge thereof. ORS 656.262(5). Argonaut did not deny the aggravation claim until 75 days after it was made, a period of 15 days beyond the 60-day statutory limitation. The Referee found that this was an unreasonable delay.

We agree with the Referee's analysis, but disagree with his conclusion to assess penalties and fees because of an additional factor. Time loss payments need only be commenced in response to an aggravation claim if there has been medical verification of the claimant's injury related inability to work. ORS 656.273(6); Silsby v. SAIF, 39 Or App 555 (1979). We conclude -- indeed, it is the only possible conclusion -- that between the date of claimant's aggravation claim against Hanel Lumber/Argonaut and the date of Argonaut's denial, there was no medical verification of this claimant's inability to work. Argonaut thus had no duty to initiate payment of interim compensation. It follows that, during the period that Argonaut's denial was late, there was no compensation "then due" within the meaning of the penalty statute, ORS 656.268(9), upon which to base a penalty. See Kosanke v. SAIF, 41 Or App 17, 21 (1979). This case is thus exactly like Brewer v. SAIF, 59 Or App 87, 91 (1982): "The Referee found against claimant [on the issue of penalties], because there was no verification or authorization of time loss. The Board affirmed and we affirm the Board on that issue."

On the Universal Drywall/SAIF new injury claim, the Referee assessed a penalty and attorney fee because SAIF's first payment of interim compensation was made beyond the 14-day statutory limit. We do not understand the assessment of that penalty to be in issue, although claimant argues for a larger attorney fee.

SAIF also denied the claim late. We deem notice or knowledge of this claim to run from December 20, 1979, the date claimant executed an 801 form. SAIF had 60 days, or until February 18, 1980, to accept or deny the claim. SAIF did not issue its denial until March 5, 1980, sixteen days after the sixtieth day. SAIF

was paying interim compensation until the date of its denial. The Referee declined to assess a penalty and attorney fee because of the late denial. On review, claimant argues that a penalty and attorney fee should be assessed.

The legislature has provided that claims must be accepted or denied within 60 days, ORS 656.262(6), but has not expressly provided a penalty for failure to do so. Instead, the legislature has provided generally for penalties based on a finding of unreasonableness, ORS 656.262(9). It might be possible to interpret these statutes together to provide, as claimant argues, that any claim acceptance or denial issued beyond 60 days is per se unreasonable. We rejected that interpretation of the statutes in Zelda M. Bahler, 33 Van Natta 478, 479-80 (1981), rev'd on other grounds, 60 Or App 90 (1982):

> "Definition of what constitutes reasonable and unreasonable carrier conduct is primarily this Board's responsibility. McPherson v. Employment Division, 285 Or 541 (1979).
>
> * * * *
>
> "Where time loss payments are being made during the period of time that the denial is overdue, it is possible there is no actual harm to the claimant. The obligation to pay temporary total disability compensation until denial, even for what proves to be a noncompensable claim, is, in itself, in the nature of a penalty which provides an incentive to process claims expeditiously.
>
> "But at some point, despite the claimant's continued receipt of temporary total disability compensation, another consideration arises: The right of the worker and all other interested parties to know whether the claim is going to be accepted or denied. It is only when this right-to-know interest is violated that an express penalty should be imposed in addition to the de facto penalty of continued time loss payments. Stated differently, a tardy denial is not unreasonable within the meaning of ORS 656.262(9) if time loss is paid until denial unless the denial is so delayed as to violate the worker's right-to-know interest.
>
> ". . . we will presume that a denial is up to 25 days late does no violence to the right-to-know interest, i.e., is not unreasonable, and a denial that is more than 25 days late does violence to the right-to-know interest, i.e., is unreasonable. It is thus the worker's burden to prove prejudice when the denial is up to 25 days late and time loss is being paid in the

interim, and it is the employer's burden to prove lack of prejudice when the denial is over 25 days late."

In this case, the denial was sixteen days late, interim compensation was being paid during the period of the delay and claimant has shown no prejudice to his right-to-know interest. Under Bahler, it is not appropriate to assess a penalty.

The final issue involves attorney fees. Claimant challenges the amount of the fee, $300, awarded against Argonaut. However, in view of our conclusion that claimant is not entitled to penalties from Argonaut, the real question becomes entitlement to any fee pursuant to ORS 656.382(1). In Mary Lou Claypool, 34 Van Natta 943 (1982), the employer had failed to comply with the terms of a disputed claim settlement, which we regarded to be the equivalent of "an order of a referee, board or court" within the meaning of ORS 656.382(1). In that context, i.e., noncompliance with a litigation order, we concluded that an attorney fee could be assessed under ORS 656.382(1) even when no penalty was assessed under ORS 656.262(9). However, as our discussion in Claypool makes clear, 34 Van Natta at 948-49, we regarded that result to be an exception to the general rule that an attorney fee cannot be assessed under ORS 656.382(1) unless a penalty is assessed under ORS 656.262(9). That general rule is applicable here. Since claimant is not entitled to penalties from Argonaut under ORS 656.262(9), he is not entitled to attorney fees from Argonaut under ORS 656.382(1).

Claimant also challenges the amount of the fee, $100, awarded against SAIF because of its tardy first payment of interim compensation. SAIF's first payment of interim compensation should have been made on about January 3, 1980, but was not made until about January 17, 1980, roughly two weeks late. The delay is unexplained and justifies a penalty. No issue is raised about the amount of the penalty assessed by the Referee or the period of time during which the penalty was assessed.

The only issue involves attorney fees. Claimant argues the $100 fee is insufficient, referring to the $3,000 maximum allowable fee pursuant to OAR 438-47-020(1). That rule is applicable when a claimant prevails on a denied claim. That rule is thus inapplicable here inasmuch as the Referee upheld both insurer's denials. Moveover, we do not believe that a "penalty-type" attorney fee pursuant to ORS 656.382(1) should be gauged by the maximum allowance of OAR 438-47-020. Instead, this kind of attorney fee is tied to the nature and extent of the insurer's misconduct in question. Bahler, supra, 33 Van Natta at 479.

In view of the length of the delay in paying interim compensation in this case (about two weeks) and the absence of any satisfactory explanation, we conclude that the Referee's imposition of a $100 attorney fee is deficient. We increase that fee to $300.

ORDER

The Referee's order dated April 27, 1981 is affirmed in part, reversed in part and modified in part. That portion that assessed a penalty and attorney fee against Argonaut Insurance Company is reversed. That portion that assessed a $100 attorney fee against the SAIF Corporation pursuant to ORS 656.382(1) is modified, and that fee is increased to $300. The remainder of the Referee's order is affirmed.

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FANNIE L. STATEN, Claimant
Myrick, Coulter et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-06232
January 18, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant requests review of Referee Brown's order which affirmed the Determination Order dated June 26, 1981 which did not award any permanent disability. The issue is whether the thoracic impairment claimant suffers is due to her compensable back injury of February 28, 1979, as opposed to underlying spondylosis.

The claimant contends that the medical evidence, taken as a whole, shows that her compensable work injury materially aggravated her underlying thoracic spondylosis, and that she has been placed under permanent lifting, bending and stooping restrictions as a result. These restrictions prevent her from returning to her job as a dietary cook. The insurer contends that early in the course of the claimant's treatment Dr. Kelly, general practitioner, opined that claimant would not suffer permanent impairment as a result of her back injury. It further contends that although Dr. Sullivan, neurologist, later placed restrictions on the claimant's activities, the doctor never specifically related the restrictions to the compensable back strain, as opposed to the preexisting spondylosis.

We find that the compensable back strain of February 28, 1979 materially aggravated claimant's spondylosis condition and that the work restrictions now imposed on her are due to that aggravation and are permanent in nature.

At the time of her lifting and twisting injury, the claimant had been employed as a dietary cook in a nursing home for eight years. Her duties included lifting five gallon containers of soup and food-filled steam table inserts out of an oven and into a steam table. This work involved frequent lifting, bending, stooping and twisting. Claimant performed it without thoracic symptoms until the day of the compensable injury. Afterwards she attempted to return to work, but was unable to continue due to a recurrence of back symptoms. Further, since her injury, strenuous activities at home also have also produced thoracic symptoms. Dr. Sullivan recommended vocational rehabilitation for the claimant and instructed her to avoid activities that increase her thoracic pain -- specifically bending, lifting, stooping or twisting.

Although Dr. Kelly indicated early in treatment that he would not expect permanent impairment, he also indicated he deferred to Dr. Sullivan's opinion, who subsequently treated claimant. Dr. Sullivan reported:

> "* * * The lifting associated with her kitchen work very definitely aggravated her condition and caused a recurrence of her symptoms. She complains of pain in her back predominantly just below the right scapula. I believe that this is referred pain secondary to the significant

spondylosis that she has in her thoracic spine.

"On examination she does have tenderness in the musculature inferior to the right scapula. She does not have tenderness over the thoracic spine.

"IMPRESSION: Thoracic spondylosis, aggravated by her occupation as a kitchen worker.

"COMMENT: The patient has been unable to work since March 18th [1980] and will be permanently unable to return to usual work. She is being told that she is going to have to find something to do that will not involve any bending or lifting. * * *"

Taking into consideration the claimant's age of 59, her eighth grade education, her vocational rehabilitation training as a typist (20-25 wpm), her work experience as a dietary cook cafeteria worker, cashier, crops worker and motel maid, her present lifting restriction of ten pounds and the mild disabling pain in the right thoracic area of her back, we find that claimant is entitled to 48° for 15% unscheduled permanent partial disability compensation.

ORDER

The Referee's order dated April 2, 1982 is reversed. Claimant is awarded 48° for 15% unscheduled permanent partial disability compensation. The claimant's attorney is allowed 25% of the increased compensation granted by this order. Pursuant to the parties' stipulation, the insurer may offset its overpayment of $914.70 against the increased compensation granted by this order.

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MARY J. TREANOR, Claimant
Galton, Popick et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04681
January 18, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Shebley's order which set aside SAIF's denial of claimant's aggravation claim. The Referee found that, as a result of claimant's psychological problems her pain symptomatology materially worsened, and that this worsening was causally related to claimant's 1974 industrial injury. He concluded that claimant suffers from a psychological disorder which is the responsibility of the employer and its insurer and remanded the aggravation claim to SAIF for acceptance and payment of benefits. SAIF contends that the condition or conditions arising out of claimant's compensable injury have not worsened since the last award or arrangement of compensation, and that claimant's psychological problems were not materially caused or worsened by her 1974 industrial injury. Although we agree with the Referee's ultimate conclusion that claimant is entitled to reopening of her claim pursuant to ORS 656.273 for a worsened condition resulting from her original injury, we arrive at that conclusion by different reasoning.

I

After requesting review of the Referee's order, SAIF moved the Board to remand the case to the Referee pursuant to ORS 656.295(5) for further evidence taking, alleging that the Referee's finding that claimant suffered from a compensable psychological condition was totally unexpected in view of the fact that claimant had never submitted a claim for compensation for a psychological condition resulting from her original injury. SAIF seeks remand in order to allow the Referee to consider medical reports bearing upon the relationship between claimant's industrial injury and her present psychological problems, most of which were not obtained by SAIF prior to the hearing and none of which were submitted at the hearing because, SAIF now contends, claimant's request for hearing and the hearing proceedings gave no indication that the Referee would rule on the compensability of claimant's psychological problems. Many of the reports were obtained in response to the Referee's order and thus, SAIF argues, were not obtainable with due diligence before the hearing.

By interim order the Board reserved ruling on SAIF's motion for remand until the time of Board review. Because of our disposition of this case, we find that remand to the Referee is unnecessary and therefore deny SAIF's motion for remand.

II

In September, 1974 claimant sustained a compensable injury to her left arm, lumbar and cervical spine while working on the green chain for this employer. Claimant's original claim was first closed by Determination Order in July of 1977, which awarded claimant 25% unscheduled permanent partial disability for injury to her neck and low back. This Determination Order was subsequently set

aside by a Referee's order issued in September of 1978, which also found that claimant had sustained a left knee condition as a consequence of her original injury. The claim was again closed by Determination Order in March of 1979, which awarded claimant 30% unscheduled permanent partial disability for injury to her low back and 15° of scheduled permanent disability for a 10% loss of her left leg. Another Determination Order was entered in September of 1979 upon claimant's completion of a vocational rehabilitation program. Claimant requested a hearing after this Determination Order and, prior to the scheduled hearing, the parties entered into a stipulated settlement whereby claimant was awarded an additional 10% unscheduled permanent partial disability for her neck and low back and an additional 10% scheduled disability for her left leg condition. This Stipulation, dated May 21, 1980, brought claimant's total award of compensation to 40% unscheduled permanent disability for her neck and low back and 20% scheduled permanent disability for her left leg and is the last award of compensation for purposes of this case.

In June of 1980 claimant went to work as a secretary for the Department of Vocational Rehabilitation on a part time basis, working eight hour days, two days one week and three days the next week. She testified that at that time she was experiencing headaches and was receiving treatment from her chiropractic physician, Dr. Oliver, approximately once a month. Her headaches had been a continuing problem since her original injury in 1974. She was also receiving palliative treatment from an osteopathic physician, Dr. Simmons, for symptoms of pain in her lumbosacral area and posterior cervical area on the left. As of December 16, 1980 Dr. Simmons diagnosed chronic cervical myositis, chronic lumbosacral strain, chronic musculoligamentous strain, all with periodic exacerbations and remissions of symptoms.

While performing her regular work activities one day in January of 1981, claimant began experiencing increased neck pain. She identified the onset of this pain with a protracted period of typing. She testified that the pain in the neck became so severe that she contacted Dr. Oliver and arranged to see him for treatment that same day. She also saw Dr. Simmons for treatment, and he subsequently reported that during this period of time her pain seemed to worsen somewhat, and the ultrasound treatment that had previously afforded claimant relief from her symptoms no longer gave any relief. Dr. Simmons reported on March 10, 1981 that claimant was unable to work due to pain, and that he had administered trigger point injections with only slight improvement. Dr. Simmons reported that, although claimant was gradually becoming more comfortable with her conditions, during her last few visits she had indicated some paresthesia in her left arm, because of which Dr. Simmons referred claimant to Dr. Aversano for a neurological consultation and evaluation.

Dr. Oliver, in a March 4, 1981 report, stated that claimant's left leg, low back and neck conditions had aggravated as of approximately January 15, 1981, and that her most severe symptoms were debilitating headaches which caused severe nausea. The headaches and nausea were apparently attributable to problems associated with claimant's left upper cervical spine area, and Dr. Simmons reported that any repetitive activity such as typing caused claimant

increased distress and created a spasm in her left shoulder muscles. He stated that this aggravated condition was a continuation of claimant's 1974 industrial injury. In his March 10, 1981 report, Dr. Simmons stated that claimant's condition had aggravated since May 21, 1980.

After January 23, 1981, claimant went to work for four half-days in April or May and did not return to work thereafter.

III

We agree with the Referee's finding that from January, 1981 until early August, 1981 claimant experienced continuing chronic pain in her neck and acute pain in her left arm and shoulder. Her lower back and left knee were also a source of some discomfort, but did not intensify or worsen significantly during this period of time.

At the request of SAIF, claimant had been examined three times by Orthopaedic Consultants -- on February 16, 1979, February 20, 1980 and, most recently, April 24, 1981. After their most recent examination, they concluded that claimant's condition had not changed since their last examination of February, 1980. When Orthopaedic Consultants examined claimant in 1979, their report was that claimant's neck pain was not at that time constant, but she had some discomfort practically on a daily basis. They reported that claimant had no referred pain to the upper extremities, and they concluded: "We do not think she has a disability in her neck." The Consultants' February, 1980 examination indicated that at that time claimant's primary complaint was her left knee, her chronic headaches associated with a popping sensation in her neck were still a continuing problem, and her low back difficulty was the least of her problems. Their overall conclusion was that based upon their findings on physical examination and claimant's statements, her condition had improved slightly since their last examination. When the Consultants examined claimant in April, 1981, she indicated that her primary problem at that time was pain in her left upper trapezius muscle.

Dr. Oliver reviewed the Orthopaedic Consultants' April, 1981 report, indicating that based upon his assessment of claimant's condition when he last treated her in March, 1981, he would agree with their findings, except that subjectively, symptoms in claimant's neck, left shoulder and arm had progressively worsened. Dr. Simmons reviewed the Consultants' report and in a letter report to SAIF indicated that, for the most part, he agreed with the Consultants' assessment that most of claimant's orthopedic problems were medically stationary in the sense that further medical treatment would not alleviate her problems completely. He went on to state that claimant was continuing to have exacerbations and remissions of her symptoms of the orthopedic problems, particularly the cervical problem with radiation into her left shoulder area, which could at times be alleviated by physical therapy. As to the Consultants' diagnosis of "severe functional overly", Dr. Simmons commented:

> "I do not feel that the pain that the patient exhibits is totally a functional overlay. The chronic pain, which is a direct result of the chronic orthopedic

> problems, continues to seriously affect this patient on a day-to-day basis. This pain, as with any chronic pain, has caused a depression in this patient, which has progressively worsened, especially over the last several months to the point of affecting this patient's life, both domestically at home and at work."

After the onset of increasing pain in January of 1981, the first clear indication of possible depression is in a March 10, 1981 report from Dr. Simmons to claimant's attorney. He characterized claimant's mood as "greatly disturbed and depressed" because of her inability to work, despite her desire to do so, as a result of her continuing chronic pain. At that time he identified pain in her cervical, lumbosacral and knee areas. Dr. Simmons' earlier chart notes in January and February of 1981 also referred to depression. Dr. Simmons referred claimant to Dr. Higley, an osteopathic physician who apparently specializes in psychology. Dr. Higley diagnosed involutional depressive reaction, which we understand to mean that claimant was suffering from a reactive depression, i.e., depression caused by some external situation which is relieved when that situation is removed. In July of 1981 Dr. Oliver referred claimant to Dr. Leonard, a neurologist, who commented that claimant's condition had not improved in spite of repeated treatments over a long period of time.

> "She has become increasingly depressed and frustrated since losing her job, and now her pain is even more severe. I do not believe that conventional chiropractic, osteopathic and medical treatment modalities are going to solve her problems, and she is going to need a multidisciplinary approach to dealing with her pain syndrome."

In Dr. Leonard's opinion, it was appropriate to enroll claimant in some type of pain program, or at least a psychotherapy program with a competent therapist. After having an opportunity to review all three Orthopaedic Consultants' reports, Dr. Leonard commented upon the examiners' finding of "severe functional overlay" in each report. As did Dr. Simmons, Dr. Leonard essentially agreed with the Consultants' findings, but explained that he defined claimant's "functional overlay" in terms of a generalized chronic pain syndrome and depression.

SAIF referred claimant to Dr. Stolzberg, a psychiatrist, for an independent psychiatric examination at the end of August, 1981. Dr. Stolzberg diagnosed claimant as having a personality disorder, mixed type. She agreed with the diagnosis of personality disorder previously made in 1975 by a psychologist, Dr. May, shortly after claimant's original industrial injury. Dr. May had reported that claimant had a character disorder which was chronic in nature and unrelated to her injury. He stated: "The most that can be attributable to the injury is mild to moderate focus on physical problems."

In her September 1, 1981 report, Dr. Stolzberg indicated that people with claimant's personality tend to have chronic difficulty with somatic symptoms, general tension, depression and anxiety.

She concluded: "At that time I would say that Mrs. Treanor's psychological complaints are more a product of her personality and life pattern than a direct result of her 1974 injury."

We do not find dispositive Dr. Stolzberg's conclusion that claimant's psychological complaints, if any, are a product of her personality as opposed to a direct result of her industrial injury. We find, however, that claimant's complaints of intractable pain are not "psychological complaints"; rather, they are complaints associated with a chronic pain syndrome, the etiology of which is basically physiological and an outgrowth of claimant's original industrial injury. See Juanita M. DesJardins, 34 Van Natta 595 (1982).

Although we agree with the Referee's ultimate conclusion that claimant is entitled to have her claim reopened pursuant to ORS 656.273 due to a worsened condition related to her original injury -- the condition of her cervical spine with radiation into her left shoulder area -- it was error for the Referee to find, as he apparently did, that claimant now suffers from a psychological disorder which is a compensable consequence of her 1974 industrial injury. SAIF is correct that, so far as this record reveals, claimant has not sought compensation for a psychological disorder in relation to her industrial injury. In fact, claimant testified that, in her opinion, she had no emotional problems, and, furthermore, she was not interested in seeing a psychiatrist for treatment of her physical problems.

ORDER

The Referee's order dated December 14, 1981, setting aside SAIF's denial of claimant's aggravation claim, is affirmed. Claimant's attorney is awarded $400 as a reasonable attorney's fee on review, payable by the SAIF Corporation.

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ERNEST A. ANNETTE, Claimant
Galton, Popick et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-07108
January 21, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer/insurer requests and claimant cross-requests review of Referee Shebley's order which: (1) approved the insurer's denial of January 8, 1982 and apparently the denial of September 9, 1981 by which the insurer refused claimant's request to reopen his left knee claim beginning on July 27, 1981 and refused to accept responsibility for claimant's January 8, 1982 knee surgery; (2) found the insurer to be responsible for claimant's January 27, 1982 left leg injury incurred while claimant was en route to Dr. Quan's office for an independent medical examination arranged by the insurer; and (3) ordered the insurer to accept responsibility for claimant's post-injury psychological and emotional problems.

The insurer contends that the Referee erred in finding claimant's January 27, 1982 knee injury compensable and his psychological and emotional problems to have been aggravated by the 1978

industrial injury. Claimant argues that the medical evidence establishes that this knee condition worsened on July 27, 1981 and that the worsening and surgery of January 8, 1982 were related to the 1978 injury.

We adopt the Referee's findings of fact as our own.

I

The Referee, relying on the opinion of claimant's treating physician, Dr. Rusch, found that claimant's knee problems beginning in July of 1981 and the surgery in January of 1982 were not related to claimant's 1978 industrial knee injury. We disagree.

Due to the persistence of claimant's complaints of pain following the 1978 knee injury, Dr. Rusch performed an arthroscopy on May 3, 1979. Dr. Rusch's operative report states:

> "Through an inferior lateral portal, the standard Storz scope was introduced with exit drainage tube through the superior-lateral portal.
>
> * * *
>
> "Complete visualization of the medial and lateral compartment demonstrated no significant gross abnormalities of the medial or the lateral meniscus. Probing was carried out and no tears were noted on either meniscus."

Dr. Rusch diagnosed mild chondromalacia. Claimant continued to complain of pain. Dr. Rusch believed that claimant was exaggerating his pain in view of the lack of objective findings.

On July 27, 1981 claimant was admitted to Portland Adventist Medical Center for observation and conservative treatment after his knee "popped" and gave out on him. While at the Medical Center claimant was treated by Dr. Rusch, who noted in his report of August 7, 1981 that an arthrogram had revealed a possible horizontal tear of the meniscus. Claimant was released from the Medical Center on August 7, but was immediately rehospitalized on August 8, 1981, again complaining of knee pain and instability, the cause of which Dr. Rusch stated was undetermined, although he felt psychiatric problems played an important role.

On November 5, 1981 claimant was seen at Bess Kaiser Hospital. Dr. Levy diagnosed a torn left meniscus and Dr. Duckler subsequently diagnosed a torn lateral meniscus. On January 8, 1982 Dr. Schilperoort performed a transarthroscopic partial left medial meniscectomy, finding a torn left medial meniscus. On January 19, 1982 Dr. Schilperoort reported that:

> "I found there to be a partial thickness undersurface tear involving the posterior and middle third of the left medial

> meniscus. * * * As regards to the relationship of the pathology found at surgery to the alleged on-the-job injury, the mechanism of his injury is compatible with those findings found at surgery. In the absence of intervening significant injury, I would assume there to be a direct cause and effect relationship between the two."

In his February 3, 1982 report, Dr. Schilperoort explained how he was able to find the tear on claimant's meniscus and why it could have been missed on previous arthroscopy.

> "Mr. Annette's pathology is difficult to diagnose. First he has an exceedingly tight medial collateral ligament. This precludes easy access to the posterior aspect of the medial meniscus for all except the smallest of arthroscopic instrumentation. Secondly, Mr. Annette's tear was diagnosed only by use of a hook probe, the hook probe having been used to enter into the undersurface tear and drawing the meniscus forward. Utilizing the small needle scope (2.2 mm. in diameter) and the hook probe I believe the only manner in which I was able to diagnose the meniscal injury. I can categorically state that without hesitation that the failure to use a hook probe and/or use of an arthroscope of 3.5 mm. in diameter or greater would fail to recognize the meniscus tear. * * * The appearance of the tear edges would imply that the tear was greater than six months of age."

After examination of the medical reports concerning claimant's operation, Dr. Rusch reported on February 12, 1982 that he felt it medically improbable that tears of either the medial or lateral meniscus existed in claimant's knee at the time of the May 3, 1979 arthroscopy he had performed. Dr. Rusch believed the tear of claimant's medial meniscus was related to some trauma or excessive use of the leg subsequent to the 1979 arthroscopy and also subsequent to the August, 1981 arthrogram, which had revealed only a questionable tear of the lateral meniscus. Dr. Rusch replied further on March 15, 1982; apparently he seems to express some afterthoughts concerning the matter. Dr. Rusch stated that in 1979 he probed both the medial and lateral menisci of the claimant's left knee. He stated that he was uncertain what size of scope was used in the arthroscopy; however, we note that the 1979 operative report does say that a standard Storz scope was used. He additionally stated that a posterior medial portal examination of the knee was probably not carried out in the 1979 arthroscopy since there was no such notation in the report, and that he agreed with Dr. Schilperoort's comments with regard to the need to use a hook probe and a smaller scope in certain instances, although he would not be so categorical. Nevertheless, Dr. Rusch still felt that the degree of claimant's complaints over the years were not characteristic of a torn meniscus and that, therefore, he did not feel the tear to be the result of the 1978 injury.

Although Dr. Rusch had been claimant's treating physician since the 1978 injury, we are more persuaded by Dr. Schilperoort's opinion concerning causation. Dr. Schilperoort, who actually viewed the meniscus tear upon surgery, offers a cogent explanation of why the tear could have gone undetected by the 1979 arthroscopy. Dr. Rusch did not convincingly counter this opinion; in fact, he ended up basically agreeing with Dr. Schilperoort regarding the use of the smaller arthroscope. Dr. Rusch also noted that he did not perform an examination of the posterior medial portal, as did Dr. Schilperoort who found the tear on the underside of the meniscus. Additionally, we find Dr. Schilperoort's opinion is compatible with other facts. Claimant was in constant pain ever since the 1978 injury and had immediate relief following the surgery. Although Dr. Rusch felt that claimant's complaints of pain were not in conformance with the small size of the meniscus tear, the record is replete with references regarding claimant's tendency to exaggerate and over-focus on his pain. The nature of claimant's pain was consistent with the torn meniscus discovered at surgery; that the degree of articulated pain may have been inconsistent with the surgical findings is a slender reed under these circumstances. We are, therefore, convinced that claimant has established the compensability of his left knee condition from July 27, 1981 to January 27, 1982 and the need for causally-related surgery on January 8, 1982.

II

Following the surgery of January, 1982, the insurer arranged for the claimant to be examined by Dr. Quan, a psychiatrist. As claimant was leaving his pickup truck at the doctor's office, he put his crutches on the pavement, slipped on some wet leaves, fell and injured his left leg. A medial femoral cortical fracture was diagnosed and claimant was fitted with a long leg cast. The Referee held the insurer responsible for the leg injury based on Wood v. SAIF, 30 Or App 1103 (1977). The Referee stated that, although Wood involved a worker injured during a vocational training program, he felt it reasonable that the same rule apply as well to workers injured on their way to an independent medical examination. The insurer argues that, since the Referee found claimant's psychological condition not compensable, an injury incurred while en route to an independent psychiatric examination could not be considered a "direct and natural consequence of the original injury." Wood, 30 Or App at 1108.

Although there is possible support for the Referee's analysis, see Juanita Skophammer, 18 Van Natta 18 (1976), we find it unnecessary to address that exact issue since we have found claimant's surgery of January 8, 1982 compensable. Since claimant was using crutches which were necessitated by the 1978 injury and 1982 surgery, his consequential injury suffered as a result of his use of those crutches is clearly compensable as a direct result of the industrial injury. Eber v. Royal Globe Insurance Co., 54 Or App 940 (1980).

III

The Referee, relying on Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972), concluded that claimant's preexisting

underlying psychological condition was significantly aggravated and that the industrial injury was a material contributing cause of that aggravation. Although it is a close question, we agree with the Referee.

The principal opinions on this matter come from Drs. Achord and Quan, psychiatrists, and Dr. Colistro, a psychologist. At the insurer's request, claimant was examined by Dr. Quan on August 27, 1979. Dr. Quan diagnosed a probable personality disorder which was unrelated to claimant's industrial injury, and which would not prevent him from returning to work. In 1981 claimant was examined by Dr. Achord, who reported on August 14, 1981 that claimant had a great deal of marital difficulty in the past which resulted in several psychiatric hospitalizations, the last being in approximately 1973, but that claimant had experienced no further problem since that time. Dr. Achord diagnosed possible borderline personality disorder (as did Dr. Quan), with chronic characterologic factors, and stated that:

> "All of these characterologic problems have been markedly complicated by his difficulty maintaining steady employment and severe marital difficulty that he has chronically experienced.
>
> * * *
>
> "At present the patient's chronic emotional problems are undoubtedly aggravating his present problems with pain."

We note that the history which the claimant related to Dr. Achord varied considerably from that given to Dr. Quan.

Claimant was next examined by Dr. Colistro, who administered several psychiatric tests and prepared an exhaustive report. Dr. Colistro found the claimant to be suffering from several psychological disturbances, the major one being acute agitated depression:

> "Mr. Annette's agitated depression is seen as being caused by an interaction between injury-related stresses and pathological facets of his underlying personality structure.
>
> * * *
>
> "The primary diagnosis is Mr. Annette's depression which is related to the industrial injury inasmuch as it has been caused principally by the claimant's greatly diminished self-concept which has in turn been due to his physical impairment and loss of employment at Boeing. That is, since Mr. Annette derived a great deal of his self-esteem from his work, his loss of that position as well as his general impaired employability due to his physical limitations has greatly eroded his self-esteem.

> * * * The claimant's paranoid personality disorder is an underlying condition. It was not caused by the industrial injury but appears to have been significantly worsened by it because it has had a profoundly negative impact upon the claimant's self-image."

Claimant was again examined by Dr. Quan on March 1, 1982. On this occasion claimant furnished Dr. Quan with a history substantially more consistent with that given to Drs. Achord and Colistro. Dr. Quan reported:

> "Mr. Annette's personality disorder preexisted his industrial injury and he had previous difficulties related to it no doubt. In no way can his personality dysfunction be attributed to his industrial injury. I view Mr. Annette's emotional instability and difficulties with depression and anger as a natural excursion of the disorder rather than a new psychiatric condition. Environmental factors including financial difficulties, lack of a job, his physical condition, his marriage, etc. all contribute as stress which increase the symptoms of his impairment. I cannot attribute his industrial injury as the single most important cause of the patient's psychiatric difficulties."

Despite Dr. Quan's initial statement that claimant's psychiatric problems are not related to his industrial injury, he goes on in the remainder of the above-quoted paragraph to say the exact opposite. It, therefore, appears that Dr. Quan's initial statement with regard to causation is more of a legal than a medical conclusion. It is not necessary for claimant's industrial injury to be the "single most important cause" of his condition, and the factors mentioned by Dr. Quan as causing claimant's difficulties are nearly all the result of his circumstances caused by the industrial injury. We find Dr. Quan's opinion to be generally supportive of compensability, as did the Referee, and Dr. Colistros' most certainly is. Dr. Achord's opinion is basically noncommital.

The insurer cites Partridge v. SAIF, 57 Or App 163 (1982), in support of its argument that claimant was simply reacting to his injury in the same fashion as he reacted to other life stresses, and thus that the underlying condition itself has not worsened. We find it difficult to accept this proposition in view of the fact that we have virtually no evidence in the record concerning claimant's previous psychiatric problems through which we could gauge the accuracy of the insurer's assessment. The evidence that is in the record concerning claimant's previous psychiatric problems is not supportive of the insurer's argument; on the contrary, it establishes that claimant's underlying psychiatric difficulties were aggravated by his industrial injury. While we are a bit unsure about the procedural import of Partridge considered against the backdrop of other Court of Appeals decisions, we agree with the Referee on this issue.

ORDER

The Referee's order dated April 6, 1982 is affirmed in part and reversed in part. The insurer's denials of September 9, 1981 and January 8, 1982 are set aside and the claim is remanded to the insurer for the provision of compensation according to law. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded an additional attorney's fee of $1,000 for services before the Board and at the hearing in connection with the overcoming of the denials of September 9, 1981 and January 8, 1982.

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WARREN C. BACON, Claimant
Carney, Probst & Cornelius, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-00875
January 21, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer requests review of Referee Gemmell's order awarding claimant permanent total disability. The issues are extent of permanent disability and whether a 1976 Determination Order awarding claimant no permanent disability for an injury to his low back conclusively establishes, based upon principles of res judicata, that claimant has no preexisting disability attributable to a condition of his low back.

The claimant had worked for this employer as a warehouseman for over 30 years when he sustained an injury to his right shoulder in February of 1979. This injury resulted in a rotator cuff tear. The claim was first closed in August of 1979 by a Determination Order awarding temporary total disability only. In September of 1979 claimant was advised by his physician, Dr. Tilson, that he should refrain from all work activity for at least two weeks, which advice claimant followed. Dr. Tilson subsequently reported that it was his opinion that claimant would no longer be physically capable of performing heavy work activity because of arthritis in his cervical spine and a tear of a tendon in his right shoulder. He specified claimant's work limitations to be no lifting, pushing or pulling of objects weighing in excess of 20 pounds and no work activity at or above shoulder level for more than ten minutes per hour.

Dr. Tilson referred claimant for an examination by Dr. Duckler in November of 1979. Dr. Duckler reiterated and confirmed the work restrictions previously stated by Dr. Tilson and opined that claimant was capable of performing light work activity. Dr. Duckler reported that, due to the condition of claimant's cervical spine and a documented tear of his right rotator cuff, claimant was permanently disabled "to the extent of 30%." Dr. Duckler indicated in his November 1979 report that claimant's employer would not allow claimant to return to work on a light to moderate work schedule or with the limitations imposed by Dr. Tilson.

Claimant was examined by Dr. Pasquesi for an independent medical examination in December of 1979. Although Dr. Pasquesi diagnosed claimant's medical problem as chronic tendinitis with

secondary myositis, he was probably unaware that an arthrogram had confirmed that claimant had sustained a rotator cuff tear. Dr. Pasquesi opined that due to chronic moderate to severe pain, claimant had sustained impairment of his right upper extremity equivalent to 15% of the upper extremity and that claimant would probably continue to experience difficulties in direct proportion to his activity, particularly heavy lifting and repetitive motion of his right upper arm.

> "In my opinion, within these restrictions of limited motion of the right arm almost to the point that he would have to perform most of his work with the left hand, I feel that the patient could return to work if such work were available."

In a December, 1979 letter report, Dr. Duckler explained the difficulty in ascertaining the relationship between claimant's cervical arthritis and the pain he experienced subsequent to his right shoulder injury. He indicated that although the arthritis existed before the injury, it may have contributed to the severity of the pain claimant experienced due to the injury.

In January of 1980 a second Determination Order awarded claimant additional temporary total disability and 19.2° of scheduled permanent partial disability for a 10% loss of claimant's right arm. The record contains an interoffice memorandum from claimant's employer dated January 17, 1980 stating:

> "After reviewing your medical records showing you have a 10% loss of use of your right arm, this would indicate you would not be able to perform your regular work required at the plant. We do not have positions classed as light duty which you could perform."

The memorandum is apparently signed by the employer's plant manager.

Claimant was interviewed and evaluated at his attorney's request by a vocational consultant in January of 1981. The consultant reported that claimant's testing showed he would have difficulty acquiring new skills through formal training and that claimant possessed very few transferrable skills and abilities that would allow him to pursue vocational opportunities consistent with his physical restrictions.

> "Short of being reabsorbed into the employment of Kaiser Cement in a makeshift job role with modifications to [accommodate] his physical and vocational limitations, I would opine that he was not generally employable in this labor market at the time of my assessment . . ."

At the time of the hearing, claimant was 61 years old. He has an eighth grade education and for the past 30 years had worked with this employer as a plant handyman and freight loader. Claimant's

job was classified as warehouseman and involved a great deal of heavy lifting, such as loading and unloading 95 pound bags of cement. It is abundantly clear that claimant is no longer capable of performing this type of work activity. It is equally as clear that his employer of 30 years is either unwilling or unable to place claimant in a modified job situation. Claimant attempted to locate other employment. He went to his union and was advised that no warehouse in Portland would hire for limited duty. With the assistance of an Employment Division office, claimant attempted to locate suitable employment in a warehouse, but all the jobs seemed to entail heavy lifting which he would not have been physically capable of performing. Claimant testified that he had contacted two or three employers within the three months preceding the hearing.

Prior to working for this employer as a warehouseman, claimant had been employed in shipyards, had performed some work in furniture upholstery and performed various miscellaneous work activities, all of a generally unskilled nature.

Based upon the medical evidence alone, claimant is not permanently and totally disabled. However, when considering the pertinent social/vocational factors together with claimant's physical restrictions, including preexisting disability, we find that claimant is permanently and totally disabled. We also find that claimant's job search, which was limited to efforts to obtain employment as a warehouseman, was reasonable taking into consideration the fact that, for the greatest portion of claimant's working life, he was employed as a warehouse worker. As he testified, that is all he knows. Considering the evaluation of the vocational consultant, indicating that claimant had very few transferrable skills or abilities which would allow him vocational opportunities consistent with his physical restrictions, it would very likely be futile to require claimant to make any further search for employment opportunities. Cf. Looper v. SAIF, 56 Or App 437 (1982); Livesay v. SAIF, 55 Or App 390 (1981); Petersen v. SAIF, 52 Or App 731 (1981); Morris v. Denney's, 50 Or App 533 (1981).

The employer has raised an issue concerning evidence of claimant's preexisting low back disability. Claimant sustained an industrial injury to his lower back in May of 1976 when he was lifting the cover of a silo. His claim was closed with an award of only temporary total disability and no hearing was requested within the period allowed by law. The Determination Order issued July 12, 1976, therefore, became final by operation of law one year later. Claimant testified at the present hearing that, from the time of this May 1976 back injury until the February 1979 shoulder injury now in question, he continually experienced lower back pain with physical activity. In response to questioning from his attorney, claimant testified that since he returned to work following the 1976 injury, his back condition had not changed. Claimant testified that due to the condition of his lower back, he was not able to perform any lifting.

The employer objected to any testimony concerning claimant's physical restrictions attributable to lower back impairment, claiming that it was an attempt to litigate the issue of permanent disability arising out of claimant's 1976 injury. It is the

employer's position that claimant is foreclosed, by principles of res judicata, from relying on any permanent disability attributable to claimant's 1976 injury in establishing that he is presently permanently and totally disabled, because the 1976 Determination Order establishes as a matter of law that this injury did not result in any permanent disability.

In evaluating the extent of claimant's permanent disability, the Referee relied upon the evidence of claimant's preexisting lower back problem as well as claimant's preexisting arthritis of his cervical spine, noting that, under ORS 656.206(1)(a), preexisting disabilities are to be considered in determining whether a worker is permanently and totally disabled.

We find it unnecessary to address the employer's res judicata argument. It appears from our review of the extensive medical record that, for several years prior to claimant's 1976 injury to his lower back, he was experiencing symptoms of low back pain which were apparently attributable to degenerative changes of claimant's lower spine. We conclude that claimant's testimony concerning his physical limitations attributable to his lower back are not the result of any permanent impairment or disability arising out of his 1976 injury but are more probably limitations more directly attributable to degenerative changes of claimant's spine which are due to the aging process. It is, therefore, appropriate to consider the evidence of claimant's low back impairment as a preexisting disability which contributes to his overall disability, pursuant to ORS 656.206(1)(a). It is also interesting to note that Dr. Tilson, who expressed the opinion that claimant was permanently incapacitated from performing heavy labor, did not attribute this disability to claimant's lower back problems. Dr. Tilson identified claimant's cervical spine arthritis and the tear of a tendon in claimant's right shoulder as the causes of claimant's severe work restrictions. We leave to another case with a different record resolution of the issue raised by the employer. See James B. Johnson, WCB No. 81-03979, 35 Van Natta 47 (decided this date).

ORDER

The Referee's order dated July 14, 1981 is affirmed. Claimant's attorney is awarded $450 as and for a reasonable attorney's fee for services on Board review.

★★★★★★★★★

ZELDA M. BAHLER, Claimant
L. Leslie Bush, Claimant's Attorney
David O. Horne, Attorney
Gary D. Hull, Attorney
Wolf, Griffith et al., Attorneys

WCB 79-06095
January 21, 1983
Order on Remand

On review of the Board's Order on Reconsideration dated October 30, 1981, the Court of Appeals reversed that portion of the Board's order that failed to award claimant's attorney an attorney's fee for prevailing on the issue of compensability, and remanded to the Board for an award of a reasonable attorney's fee pursuant to ORS 656.382(2).

Now, therefore, claimant's attorney is awarded $400 for services on Board review for prevailing on the issue of compensability.

IT IS SO ORDERED. ★★★★★★★★

VERNON D. ELLIS, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-06304
January 21, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Gemmell's order which granted claimant compensation for permanent total disability effective December 20, 1980.

We adopt the Referee's findings of fact with the following exceptions and qualifications:

(1) The Referee found: "claimant's impairment is described as 'severe' by his treating doctor." (Emphasis added.) We understand this to be a reference to Dr. Bert's report dated August 11, 1981. Dr. Bert actually states in that report that claimant is "severely disabled." (Emphasis added.) Impairment and disability are far from synonymous. See OAR 436-69-601: "The physician does not rate disability, but describes impairments." (We discuss the reports submitted by Dr. Bert in greater detail below.)

(2) The Referee found: "Claimant has been retrained and found by vocational experts to be unemployable in the field for which he has been trained." This retraining was a two-year course of study at a community college in forestry. Although the Referee's finding is ambiguous, if the intended meaning was that claimant is "unemployable due to physical limitations," we disagree. Sue McCauley's report dated December 20, 1980 clearly links claimant's inability to find work in a forestry position to the depressed condition of the wood products industry.

(3) The Referee found that claimant's "condition has deteriorated" since the date of a prior litigation order awarding claimant 75% unscheduled permanent partial disability. This is the ultimate issue in this case and the issue to which we now turn.

On September 21, 1978, in a prior proceeding, WCB Case No. 78-01925, Referee Danner issued an order that rejected claimant's argument that he was permanently and totally disabled and, instead, awarded 75% unscheduled permanent partial disability for the effects of claimant's back injury. No appeal was taken from that order. The parties and Referee Gemmell in this case correctly approached the issue as being whether claimant's condition has changed since the date of that prior litigation order. See James B. Johnson, WCB Case No. 81-03970, 35 Van Natta 47 (decided this date).

Dr. Campagna, who performed low back surgery in 1975, reported in 1980 that claimant "feels his condition is becoming worse" but that: "No neurological treatment is indicated. Only symptomatic orthopedic treatment is indicated."

Also in 1980, Dr. Bert referred claimant for pain center treatment. Responding to questions in a letter from SAIF dated November 20, 1980, Dr. Bert explained that the referral was for treatment of chronic pain, that he did not believe that claimant's condition has worsened and that he still believed claimant's condi-

tion to be medically stationary. Dr. Bert did not submit any additional reports of significance until his August, 1981 report mentioned above.

> "It is my feeling that the patient is indeed severely disabled. I feel that his disability is severe and permanent. He is approaching total disability. I could envision very few jobs that he could do that would require an eight hour day that he could do continuously. There are perhaps part time jobs of a low skill nature, such as a watchman job, where he could sit or stand at his own convenience that he might be able to do but even then this is difficult to predict without actually giving him a trial at such work, which is, of course, difficult to find."

Drs. Reynolds and Duvall reported on claimant's December, 1980 pain center treatment. The essence of their reports is that claimant was an ideal patient, cooperated fully in the program and achieved significant relief from his pain as a result.

Dr. Grewe examined claimant in March of 1981. He stated that claimant's "neurological findings are relatively mild" and reported the "impression that he has residual aching type pain affecting his low back and lower extremeties, as a result of his laminectomy and two spinal fusion."

Claimant testified that he believes his condition is now worse than it was in 1978 at the time of the prior hearing and elaborated by explaining the things he could do then that he does not feel able to do now.

Assessing the medical evidence, we conclude that neither Dr. Campagna nor Dr. Grewe document any change or worsening of claimant's condition since the 1978 hearing. Rather, the findings of both are at most consistent with the level of impairment that Referee Danner found to exist at that time. The reports of Drs. Reynolds and Duvall about claimant's pain center treatment certainly would support the conclusion that claimant's condition has improved, which is hardly any reason to grant him a greater disability award than he was granted in the prior proceeding.

This leaves the reports from Dr. Bert, who claimant and the Referee referred to as the treating physician, although this record does not indicate the nature or extent of treatment since 1978. Responding to specific questions in November of 1980, it was Dr. Bert's position that claimant's condition had not worsened. Nine months later, in August of 1981, Dr. Bert submitted another report from which it could be inferred that the doctor believed that claimant's condition had worsened. However, we are not persuaded to draw that inference from Dr. Bert's more general (and less medical) August, 1981 comments in light of his contrary and more specific November, 1980 comments -- especially when the only relevant intervening event was claimant's pain center treatment that, according to all the evidence, produced at least a temporary reduction in claimant's pain symptoms.

Claimant testified that his low back and radiating leg pain was worse and more disabling than it was at the time of the prior hearing, and the Referee in this case found that claimant was a credible witness. We have no reason to question the Referee's credibility finding with the one exception that we tend to think that claimant's testimony understated the degree of relief he obtained from pain center treatment; the objective fact of the matter is that before that treatment he had to take drugs to control his pain and since that treatment has stopped taking drugs.

In any event, because of our assessment of the medical evidence, if the Referee's award of total disability can be sustained, we think it has to be solely on the basis of claimant's testimony. And testimony about pain being "more disabling" is always difficult to weigh. Here that testimony is very inconsistent with the reports of Drs. Reynolds and Duvall who believed their treatment had provided "significant" relief. And that testimony is somewhat inconsistent with the reports of Drs. Campagna and Grewe which more strongly suggest a basic continuity of symptoms from 1978 to the present. Finally, that testimony is inconsistent with Dr. Bert's opinion as of November, 1980 that claimant's condition had not worsened. Considering all of the evidence, we are not persuaded that claimant is more permanently disabled now than he was at the time of the prior hearing.

ORDER

The Referee's order dated February 24, 1982 is reversed and the Determination Order dated July 7, 1981 is reinstated and affirmed.

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JAMES B. JOHNSON, Claimant
Olson, Hittle et al., Claimant's Attorneys
John Snarskis, Defense Attorney

WCB 81-03979
January 21, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The claimant requests review, and the insurer cross-requests review, of Referee Howell's order which granted and denied the following relief: (1) affirmed the insurer's denial of claimant's low back condition; (2) awarded claimant an additional 60° scheduled permanent partial disability, for a total award of 105° or a 70% loss of claimant's left leg; (3) awarded claimant 128° or 40% unscheduled permanent partial disability for injury to claimant's right shoulder; and (4) awarded claimant temporary total disability compensation for the period April 29, 1980 through July 21, 1980.

Claimant contends that his low back condition is compensable, either as a direct result of his 1977 injury or as a consequence of his compensable knee injury. Claimant also argues that he is permanently and totally disabled. The insurer contends that the Referee's award of unscheduled disability for claimant's right shoulder is improper and that the Referee erred in admitting four exhibits. We affirm and adopt the Referee's order on all issues raised except one: We find that it was improper for the Referee to consider claimant's right shoulder condition and award additional permanent disability based thereon.

Claimant injured both his right shoulder and left knee in a single compensable fall in January of 1977. The shoulder injury led to surgery; the knee injury was treated conservatively. His claim was first closed by a Determination Order dated May 20, 1980 which awarded 20% scheduled disability for loss of his right arm (shoulder) and 15% scheduled disability for loss of his left leg (knee). Pursuant to ORS 656.304, claimant requested and received a lump sum payment of the permanent disability awarded by that Determination Order. Subsequently, the insurer reopened claimant's claim on July 23, 1980 for knee surgery. The claim was again closed by Determination Order of April 6, 1981 with an award of an additional 15% scheduled disability for loss of claimant's left leg (knee). Claimant's request for hearing on that Determination Order gave rise to this proceeding.

The employer objects to the Referee's consideration in this case of the extent of claimant's permanent partial disability attributable to his right shoulder on two grounds. First, the employer contends that claimant's acceptance of the lump sum payment of the permanent disability awarded by the May 20, 1980 Determination Order prohibits what the employer characterizes as a collateral attack on the adequacy of the award granted by that Determination Order. Second, the employer correctly notes that there is no evidence that claimant's shoulder disability has worsened since the last award of compensation and argues that, because the claim was reopened solely for left knee surgery, it was improper to grant an increased award for claimant's shoulder under these circumstances.

The Referee disagreed, reasoning:

> "ORS 656.304 bars a hearing on the award for which a lump sum payment is received. When the claim was reopened it was reopened with respect to all compensable consequences of claimant's industrial injury. When claimant was awarded no additional compensation for loss of the shoulder by the April 6, 1981 Determination Order he had a right to appeal that finding."

Because we basically agree with the employer's second argument, we need not address at length the employer's first argument about the effect of ORS 656.304 concerning hearing rights after receipt of a lump sum payment. We only note that we have considerable doubt about the Referee's analysis -- which permits something to be done indirectly that could not be done directly. Also, it would seem to be bad policy to discourage voluntary reopening of claims by insurers, but the Referee's analysis that claim reopening circumvents the limitation of ORS 656.304 could have that effect.

The more general issue of what questions are ripe for litigation or relitigation after a claim has been reopened and reclosed has become a chronic problem. We have considered that problem in both this case and in Steven E. Moffet, WCB Case Nos. 81-11445, 81-06929 and 80-11650, 35 Van Natta 56 , Warren C. Bacon, WCB Case No. 80-00875, 35 Van Natta 41 , and Vernon D. Ellis, WCB Case No.

71-06304, 35 Van Natta 45 , (all decided this date). We take this opportunity to offer clarification on this chronic problem.

The problem is highlighted by the facts of this case. Claimant injured his right shoulder and left knee. He received permanent disability awards for both body areas in the 1980 Determination Order which is not here in issue. Then his claim was reopened for left knee surgery and reclosed by the 1981 Determination Order with an increased award for left knee disability. Claimant's shoulder condition has not proven in this proceeding to be any different or worse than it was in 1980 at the time the prior Determination Order was issued. Does claim reopening for knee surgery "reopen" for litigation or relitigation the question of the extent of claimant's shoulder disability?

This claim was reopened on an aggravation basis and the employer argues that the aggravation statute contains a negative answer. ORS 656.273(1) states that "an injured worker is entitled to additional compensation . . . for worsened conditions resulting from the original injury." (Emphasis added.) We think that ORS 656.273(1) is some support for the employer's position that entitlement to additional compensation is directly linked to and depends upon a worsening of any condition in issue. However, the fact remains that there is one school of thought to the effect that a claim is reopened "for all purposes" meaning, as applied by the Referee in his case, that after a claim is reopened because one condition has worsened it is possible to grant additional compensation for all compensable conditions, including ones that have not worsened since the last award of compensation.

It is true that Board decisions have stated that claims are reopened "for all purposes." But that (possibly misleading) expression has never been given the meaning applied to it by the Referee in this case. For example, in Jess Campbell, 15 Van Natta 146 (1975), after claimant's claim was reopened because one compensable condition had worsened, claimant sought a determination of the extent of permanent disability on one of his other compensable conditions that was medically stationary. We concluded claimant's effort was premature: "When claimant's claim was reopened it was reopened for all purposes [and] thus the issue of permanent partial disability can only be considered after the claimant becomes medically stationary." 15 Van Natta at 147. Campbell and several other cases containing the "reopened for all purposes" expression are not direct support for what the Referee did in this case.

Fred Hanna, 34 Van Natta 1271, 1277 (1982), is more closely analogous and points in the opposite direction:

> "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.
>
> * * *
>
> "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."

It has been suggested that what we said in Hanna is inconsistent with what the Court of Appeals said in Brown v. Balzer Machinery Co., 20 Or App 144 (1975). One passage in Brown implies that, after a claim is reopened, prior determinations about extent of disability are completely irrelevant, with all levels in the decision and review process being "free to award claimant any permanent partial disability that is warranted by the evidence, unfettered by any prior award, Determination Opinion, Order or Judgment." 20 Or App at 148. That passage, however, is quoted by the Court of Appeals from the trial court's decision and it appears to us that the Court of Appeals did not completely embrace the trial court's reasoning. Instead, the Court of Appeals actually held in Brown only that the prior award in question in that case had been made at a time when the claimant was not medically stationary and was thus premature and invalid. 20 Or App at 148. Thus interpreted, Brown does not reject all res judicata reasoning if a prior award was valid at the time it was made.

Furthermore, the "unfettered by any prior award" language from Brown is inconsistent with subsequent decisions at both levels of the appellate courts. In Harris v. SAIF, 292 Or 683 (1982), Gettman v. SAIF, 289 Or 609 (1980), and Bentley v. SAIF, 38 Or App 473 (1979), the appellate courts referred in one way or another to the concept we expressed in Hanna -- "the emphasis in this kind of situation has to be on changed circumstances since the last rating of permanent disability." 34 Van Natta at 1277. The courts' comments along these lines were made mainly in contexts that involved the possible reduction of a prior disability award. But we cannot imagine that the appellate courts intended to create dual standards, requiring changed circumstances before a prior award can be reduced while permitting an increase "unfettered" by a prior award.

We adhere to the position we stated in Hanna. We think the better policy position in this kind of situation is to limit the cognizable extent issues after reclosure of a claim to conditions and circumstances that have changed since the prior claim closure. In so stating:

(1) We assume that the prior decision about extent of disability, whether by Determination Order or by litigation order, has

become final by passage of time without appeal to a higher level. See Steven E. Moffett, WCB Case Nos. 81-11445, 81-06929 and 80-11650, 35 Van Natta 56 (decided this date).

(2) We appreciate that the compensable consequences of an industrial injury are not always easy to separate into component parts. While we think it is quite clear in this case that claimant's knee condition worsened while his distinct shoulder condition did not worsen, in other cases it could be a question of fact whether a single condition or multiple conditions are involved. Cf. Ohlig v. FMC Rail & Marine Equipment Div., 291 Or 586 (1981).

(3) And we do not intend to limit the changed-circumstances approach to the reason a claim was reopened. To illustrate, although the reason for reopening claimant's claim was for knee surgery, if there had also been evidence that his shoulder condition had worsened since the last award of compensation, then we think that additional compensation because of the worsened shoulder condition would have been appropriate.

There is one final issue. Claimant suggests that all the Referee did in this case was to reclassify his shoulder disability from scheduled to unscheduled. At the time claimant's claim was first closed by the May 20, 1980 Determination Order, the Workers Compensation Department followed its administrative rules then in effect and treated claimant's shoulder injury as an injury to a scheduled area. Subsequently, the Court of Appeals ruled that the relevant Department rule was invalid and that a shoulder injury leads to an award for unscheduled disability. OSEA v. Workers Compensation Dept., 51 Or App 55 (1981). Under these circumstances, we would have no quarrel with a Referee honoring a request and merely noting for the record that claimant's shoulder disability should be regarded as unscheduled notwithstanding the 1980 Determination Order. See David S. Hunter, 33 Van Natta 273 (1981).

The Referee did more in this case. The 1980 Determination Order awarded claimant 38.4 scheduled degrees for his shoulder disability. The Referee's order in this case awards claimant 128 unscheduled degrees for his shoulder disability. This is not merely a "reclassification"; it is a more than three-fold increase in compensation benefits in a case in which claimant's brief on Board review concedes that his shoulder condition has not changed since the 1980 Determination Order.

ORDER

The Referee's order dated February 11, 1982 is modified. The award of 40% unscheduled permanent partial disability for claimant's right shoulder condition is vacated and set aside. The remainder of the Referee's order is affirmed.

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R.L. MATTHEWS, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-02686
January 21, 1983
Order on Review

Reviewed by the Board en banc.

The self-insured employer has requested review of Referee Gemmell's order which granted claimant compensation for permanent total disability. The ultimate issue is extent of disability. With one exception noted below, we affirm and adopt the Referee's order subject to the following comments.

Briefly, the facts are that in 1960 claimant sustained severe injuries while working as a logger. As a result of that injury, claimant was awarded 100% permanent scheduled disability for his left arm and, apparently, 80% unscheduled disability for damage to his neck and shoulder. Claimant subsequently became reemployed with the same employer as a chain saw chain repair person. Claimant had been performing this job for 19 years when, in July of 1979, he struck his left hand with a hammer and fractured his wrist. He underwent multiple surgeries to correct the residuals of that fracture as well as other conditions in the left arm that had worsened since claim closure in 1962. In January, 1980 claimant attempted to return to work, worked 30 minutes, quit and never returned to work. In December, 1980 claimant filed an occupational disease claim alleging right arm involvement arising from his use of his right arm in his work. That claim was denied on the ground that claimant's right arm conditions were not occupationally related. Claimant did not appeal that denial. The 1979 injury claim was closed with an award of time loss only. Claimant appealed that Determination Order.

The Referee found that claimant had left and right arm problems which preexisted the 1979 injury and included both in her determination that claimant was permanently and totally disabled. We agree with the employer that whatever problems claimant had with his right arm and hand before the 1979 injury did not disable claimant in any way. In order to be considered for permanent total disability purposes, a preexisting condition must be disabling at the time of the work activity or incident giving rise to the claim. ORS 656.206(1)(a); Emmons v. SAIF, 34 Or App 603 (1978); Frank Mason, 34 Van Natta 568 (1982), aff'd without opinion, 60 Or App 786 (1982). It follows that the Referee erred to the extent that she considered claimant's right arm and hand conditions in her determination.

The employer defends the Determination Order's award of no additional permanent disability on the ground that the award of 100% scheduled disability for the left arm arising from the 1960 injury precludes any further award where there is medical evidence that the 1979 injury did not, as our physician (Dr. Holbert) put it, "materially change the industrial capacity of the left upper extremity, which was totalled out by" claimant's 1960 injury. However, Dr. Holbert's opinion is at variance with claimant's testimony.

The Referee found claimant to be a credible person and we have no reason to question that determination. Claimant testified that his left shoulder and hand were worse now than they were before the 1979 injury; that he could move his fingers before the 1979 injury and now he cannot; that he could shrug his shoulders before the 1979 injury and now he cannot; that before the 1979 injury he could use his left hand to help pick up chain saw chains and position them for sharpening and repair and now he cannot; that the pain he felt in his neck and left arm and hand is now substantially worse than it was before the 1979 injury; and that now allowing his arm to hang without use of a sling can cause him to blackout whereas before the injury he was able to use his arm in his work without a sling. Thus, it is apparent that claimant sustained increased loss of function in a scheduled member as well as increased impairment in the form of disabling pain in unscheduled areas of the body.

The fact that claimant previously received an award of 100% scheduled disability for the left arm arising from the 1960 injury does not foreclose a determination that claimant has sustained loss of function as a result of the 1979 injury. ORS 656.206(5) and 656.325(3) allow reductions in previous awards of permanent disability in contemplation of the fact that conditions originally thought to be disabling at a certain degree can become less disabling due to the passage of time, treatment or a claimant's efforts to reduce his or her disability. The uncertainties of medical science being what they are, a determination that an injured woker is medically stationary at a given point in time with a specified amount of disability is not always an accurate prognostication of a worker's future disability. For that reason, the workers compensation law provides for a means to adjust the amount of compensation due a claimant for conditions that worsen, ORS 656.273, as well as conditions that improve, ORS 656.206(5) and 656.325(3).

It is apparent from this record that "by luck or pluck", claimant was able to regain some use of his left arm and hand, that the regained use enabled him to be employed competitively and that, as a result of the 1979 injury to his left wrist, claimant has lost the function in his left arm and hand that previously he had regained. Moreover, the unscheduled parts of his body have also worsened due to increased and disabling pain. It is appropriate to consider the increase in unscheduled disability and scheduled loss of function in determining the current extent of claimant's disability. Hannan v. Good Samaritan Hospital, 4 Or App 178 (1970); Green v. SIAC, 197 Or 160 (1952).

Pursuant to reason and ORS 656.222, we also consider the previous determination of extent of disability arising from the 1960 injury and the receipt of money therefrom, Hannan v. Good Samaritan Hospital, supra, but we do not necessarily engage in a strict mathematical computation, Green v. SIAC, supra, Cascade Steel Rolling Mills v. Madril, 57 Or App 398 (1982). Considering claimant's age (now 58 years), education (he did not complete the first grade of school and is functionally illiterate), his work experience (virtually no transferrable skills), his preexisting disabilities (which do not include his right arm/hand conditions) and the increased disability arising from the 1979 injury, we con-

clude that claimant is permanently and totally disabled.

ORDER

The Referee's order dated February 2, 1982 is affirmed. Claimant's counsel is awarded $250 as and for a reasonable attorney's fee for successfully defending on review the Referee's award of disability, payable by the employer.

Board Member Barnes Dissenting:

We have previously relied upon guidance from the Uniform Jury Instructions in the performance of our de novo factfinding function. Edwin Bolliger, 33 Van Natta 559 (1981), aff'd 58 Or App 222 (1982). One of the most elementary jury instructions is:

> "You are not to allow bias, sympathy or prejudice any place in your deliberations, for all parties are equal before the law. Neither are you to base your decisions on guesswork, conjecture or speculation."

The majority violates these standards in this case by engaging in rampant speculation to reach a purely sympathetic result.

The specific injury that gave rise to this proceeding was a left wrist fracture in July of 1979. The majority speculates that claimant's wrist fracture caused shoulder and neck impairment. There is not one iota of medical support in this record for such a finding. I do not think that claimant's testimony that his shoulder/neck hurt more after his wrist fracture is sufficient proof that the latter caused the former. Whether a wrist fracture can cause shoulder/neck impairment is, to say the least, a complicated medical question that requires expert evidence. There is none in this record; the majority's finding that claimant's 1979 wrist fracture caused his subsequently-worse shoulder and neck pain is sheer speculation.

The majority's assessment of claimant's left arm disability both speculates on the facts and tortures the law. Although there are no documents in the record relating to the closure of claimant's prior 1960 industrial injury claim, I agree with the majority's inference that claimant received the maximum possible award for loss of his left arm when that claim was closed. Putting aside for a moment the question of permanent total disability, could claimant now be awarded increased permanent partial disability for loss of use of his left arm? The majority seems to say "yes." The cases say "no." Surratt v. Gunderson Brothers, 259 Or 65 (1971); Jones v. Compensation Department, 250 Or 177 (1968); Hill v. SAIF, 38 Or App 13 (1979); Rafferty v. SAIF, 21 Or App 860 (1975); Rencken v. SAIF, 17 Or App 210 (1974); Trent v. Compensation Dept., 2 Or App 76 (1970); but see Green v. SIAC, 197 Or 160 (1953). And the administrative rules, which the majority chooses to ignore, emphatically state that an injured worker cannot be awarded more than the statutory maximum for loss of use of a scheduled member:

"(5) At no time will the rating of disability in a scheduled area exceed the statutory allowance for an amputation at the most proximally involved level.

(6) At no time will any combination of losses in a scheduled area result in an allowance in excess of 100% loss of use of the most proximally involved radical scheduled body part." OAR 436-65-500.

The reference in OAR 436-65-500(5) to the maximum possible award being the statutory maximum for an amputation clearly reveals the fallacy in the majority's reliance on claimant's diminished left hand/finger strength, dexterity and mobility. The legislature has specified what award is appropriate for the ultimate loss, that being amputation, of an at arm or above the elbow, OAR 656.214(2)(a), and we have all determined that claimant has previously received that award. It is impossible for there to be any additional compensable loss. The majority's contrary approach results in double recovery; claimant was compensated for the effects of his 1960 injury at the highest possible rate than would have been applicable even if he no longer had a left hand, and now is compensated for the effects of his 1979 injury based on the majority's findings of additional loss of use of the left hand. If the majority wants to reach a sympathetic result, it would be better to say nothing than to rely on that "explanation."

In summary, despite his severe injury in 1960, claimant returned to work and continued working until 1979. He obviously was not totally disabled during that period. As a matter of fact, claimant's 1979 wrist fracture here in issue has not been proven to have caused any increased unscheduled impairment. And, as a matter of law, any increased loss of use of claimant's left fingers, hand or arm cannot be the basis of an increased award for permanent disability because claimant has previously received the maximum possible award for all possible forms of finger, hand and arm disability.

If claimant is now unable to work at a gainful occupation, it is because of the combined effects of his left arm and right arm disability. However, I agree with the majority that claimant has not established he had any preexisting right arm disability within the meaning of ORS 656.206(1)(a).

I also sympathize with claimant. But because I believe our role does not include deciding cases on that basis, I would reverse the Referee's order and reinstate and affirm the Determination Order dated March 5, 1981.

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STEVEN E. MOFFET, Claimant
Doblie & Francesconi, Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys

WCB 80-11650, 81-06929
& 80-11445
January 21, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests review of Referee Wolff's order which awarded claimant 60% scheduled permanent disability for loss of his right leg (knee) and 25% scheduled disability for loss of his left leg (knee). The employer contends that the Referee's left knee award is excessive and, with respect to claimant's right knee, the Referee committed a legal error by rating the entire disability of the claimant's knee as it existed at the time of the hearing, rather than determining the increased permanent disability since the last award or arrangement received by claimant.

A review of the procedural history of this claim discloses that the employer's assignment of legal error is unpersuasive. Claimant was originally injured in March of 1979 when he sustained an injury to his right knee. After surgery claimant's claim was closed by a Determination Order which granted him 5% scheduled permanent disability for loss of use of his right leg. Claimant requested a hearing on this Determination Order. The hearing was held on February 13, 1981 and, by an order dated March 13, 1981, the Referee increased claimant's award of scheduled disability for the injury to his right leg to 15%. Claimant had been experiencing continuing difficulty with his right knee even as his case proceeded to hearing, and his claim was reopened effective March 4, 1981 for a second right knee surgery. Claimant soon developed difficulties with his left knee and, in May of 1981, claimant's physician performed left knee surgery. The employer accepted responsibility for claimant's left knee condition as a compensable consequence of claimant's 1979 right knee injury. Subsequent to claimant's left knee surgery, two Determination Orders issued on July 14, 1981. The Determination Order relative to claimant's right knee awarded no additional compensation for permanent partial disability in excess of that granted by the Referee's order of March 13, 1981. The Determination Order relative to claimant's left knee awarded claimant 10% scheduled permanent disability for loss of his left knee. Claimant requested a hearing on the extent of his permanent partial disability.

That request led to this proceeding before Referee Wolff, with the employer taking the position that Referee Wolff was required to limit himself to consideration of evidence of claimant's condition subsequent to the last arrangement of compensation in order to determine whether claimant was entitled to an additional scheduled award of permanent disability due to a worsened condition. The employer, therefore, objected to any testimony regarding activities prior to the injury, inasmuch as that had been considered by another Referee at the prior February 13, 1981 hearing. The employer's argument on review is that principles of res judicata prohibit relitigation of the circumstances existing prior to the March 13, 1981 order relative to claimant's right knee condition.

We believe that the flaw in the employer's position is that prior to expiration of the 30-day appeal period following the Referee's March 13, 1981 order, claimant's claim had been reopened for further surgery on the right knee. In fact, even before the Referee issued that order in the prior proceeding, claimant's claim was reopened on March 4, 1981. Since the claim was reopened, the Referee's order probably would not have been reviewed by the Board, as a matter of Board policy. Cf. Gilbert Zapata, 8 Van Natta 99 (1972); Henry A. Kleeman, 7 Van Natta 70 (1971); Roberta Davis, 6 Van Natta 251 (1971). The Referee's March 13, 1981 order, therefore, has no res judicata effect. If the Referee's order could be given res judicata effect, we would be faced with a situation similar to that addressed in James B. Johnson, WCB Case No. 81-03979, 35 Van Natta 47 (decided this date), and we would review the record for evidence of changed circumstances relative to claimant's right knee. For the reasons stated, however, this is not the case.

Turning to the extent of claimant's scheduled permanent disability, we affirm the Referee's award for claimant's left knee and modify the Referee's award for claimant's right knee.

Claimant's right knee has undergone two partial medial meniscectomies. These resulted in mild residuals of a constant low grade ache which develops into sharp pain upon stress. The pain prevents claimant from squatting or pivoting while carrying weight. He is also limited from prolonged climbing on rough terrain, prolonged squatting or kneeling and prolonged lifting from the squatting position, all being about 23% impairment under OAR 436-65-555(6)(c). He also has knee joint instability of a mild nature that occurs when he is standing with the knee fully extended or slightly in hypertension, being about 5% impairment under OAR 436-65-555(5). Finally, active flexion of his knee can only be carried out to 135°, which is a 6% impairment under OAR 436-65-550(1)(a). Using the combining formula and rounding to the next highest 5% produces a disability rating of 35%.

We affirm the Referee's award of 25% scheduled permanent disability for loss of claimant's left knee. His left knee has undergone one partial medial meniscectomy with residuals similar to the right knee, but of a lesser degree. He has pronounced snapping or popping in the joint on occasion [+14; OAR 436-65-555(6)(c)]. Knee joint instability is mild [+5; OAR 436-65-555(5)]. Active flexion of the knee can only be carried out to 128° [+8; OAR 436-65-550(1)(a)].

ORDER

The Referee's order dated December 18, 1981 is modified in part. Claimant is awarded 52.5° of scheduled permanent partial disability for a 35% loss of his right leg (knee). This award is in lieu of all prior awards of permanent disability for the injury to claimant's right knee. Claimant's attorney's fee should be adjusted accordingly. The remainder of the Referee's order is affirmed.

* * * * * * * * * * * *

CHARLES J. ZIOGAS, Claimant
Allen & Vick, Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 82-01911
January 21, 1983
Order to Vacate

The Board issued its Order on Review December 27, 1982. By Motion to Vacate, the employer has called to the Board's attention that the employer-appellant requested dismissal of its Request for Review on August 12, 1982.

The Motion to Vacate is hereby granted and the Board's Order on Review of December 27, 1982, is hereby vacated, and employer-appellant's Request for Dismissal is granted.

IT IS SO ORDERED.

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DENNIS KUROVSKY, Claimant
Michael Dye, Claimant's Attorney
Lindsay, Hart, et al., Defense Attorneys

WCB 82-00117
January 24, 1983
Order on Review (Remanding)

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of those portions of Referee Howell's order which set aside a denial of a claim for compensation related to medical treatment for a cervical strain, and set aside a Determination Order based on a finding of premature claim closure. We affirm that portion of the Referee's order which set aside the insurer's denial and reverse the portion of his order which set aside the Determination Order.

Claimant was compensably injured on August 17, 1981, at which time he sought treatment in the emergency room of Salem Hospital. The physician's report indicates that claimant was experiencing pain in his thoracic spine "and in that area", and that it hurt claimant to move his neck. It was uncomfortable for claimant to move his left shoulder, and he was unable to place his left hand behind his head because of the discomfort in that region. The emergency room physician diagnosed a strain to claimant's thoracic spine region. Claimant subsequently came under the care of Dr. Frederick Tiley, who treated claimant with injections and referred him to a physical therapist for a condition diagnosed as a "lower dorsal sprain."

By an 828 form signed September 29, 1981, Dr. Tiley indicated claimant's last date of treatment as September 15, 1981, that he estimated another month of treatment, and that claimant was released to modified work as of that date, the specified limitation being "not [too] much lifting or heavy work." An 828 form dated October 16, 1981 also indicates a September 15, 1981 release to work date, but does not note whether claimant is released to regular or modified work. This form contains a remark that Dr. Tiley had not seen claimant after September 15, 1981, and that claimant failed to keep an appointment on October 9, 1981. On December 14, 1981, Dr. Tiley again examined claimant, apparently at the request

of the insurer. A letter report dated December 17, 1981 released claimant for "full activities as tolerated", and stated that claim closure was appropriate at that time.

A Determination Order issued December 21, 1981, awarding claimant compensation for temporary total disability from the date of his injury through September 15, 1981. After claim closure, the insurer corresponded with Dr. Tiley's office in an effort to determine when Dr. Tiley had authorized termination of time loss payments and whether claimant was medically stationary. A notation apparently made by an employe in Dr. Tiley's office, in response to a February 5, 1982 letter of inquiry from the insurer, indicates that on September 30, 1981 claimant was released for full time work; that he failed to keep his appointment for a closing examination with Dr. Tiley on November 25, 1981; and that on December 14, 1981 claimant was medically stationary.

On March 15, 1982 claimant was examined by Dr. Poulson, who then became claimant's attending physician. The 829 form notifying the insurer of claimant's change of physician indicates that claimant was experiencing interscapular and neck pain, which was attributed to claimant's industrial injury, that the pain was constant, and that, "[in] general his condition seems to be worsening." This form, dated May 4, 1982, and signed by Dr. Poulson, states a diagnosis of "chronic cervical strain." On May 11, 1982, the insurer denied payment of medical services for treatment of claimant's cervical strain condition.

In a letter report dated June 4, 1982 Dr. Poulson responded to inquiries from the insurer, expressing his opinions that his diagnosis of chronic cervical strain, although contradictory to Dr. Tiley's diagnosis, related to the same condition for which Dr. Tiley had been treating claimant, and that the difference in diagnoses was attributable to "a matter of opinion as to the derivation of the pain." In this report, Dr. Poulson relates his treatment to claimant's original injury, expressing the opinion that claimant's condition "apparently was worsening" prior to receiving treatment by Dr. Poulson. He reported that claimant was not yet medically stationary, and that claimant might be in need of further diagnostic work up.

We find that Dr. Poulson's treatment for a chronic cervical strain is consistent with the complaints recorded in the emergency room record, indicating an injury to the thoracic spine area and pain upon movement of claimant's neck. The medical reports and claimant's credible testimony establish a sufficient relationship between claimant's injury and the treatments rendered by Dr. Poulson, and we find that Dr. Poulson's treatment of a diagnosed chronic cervical strain is treatment for the same condition for which Dr. Tiley previously treated claimant. We, therefore, affirm that portion of the Referee's order which set aside the insurer's denial of payment for benefits related to claimant's cervical strain.

We disagree with the Referee's conclusion that the December 21, 1981 Determination Order was premature. The Referee found that Dr. Tiley had released claimant for regular work on September 30,

1981, and that in the doctor's opinion, claimant was medically stationary on December 14, 1981. In setting aside the Determination Order, the Referee relied upon claimant's testimony that, subsequent to December 14, 1981, he continued to suffer disabling symptoms of his original injury. The Referee found claimant was not medically stationary on December 21, 1981 when the Determination Order issued; however, he did not award temporary total disability compensation for the period after September 30, 1981 and before March 29, 1982 (the date the Referee found Dr. Poulson determined claimant to be temporarily and totally disabled), based upon a finding that claimant had failed to prove that he was disabled from performing his regular work activity during that period of time.

ORS 656.268(1) provides that a worker's claim shall not be closed nor temporary disability compensation terminated if the worker's condition has not become medically stationary. "Medically stationary" is defined in ORS 656.005(17) to mean "no further material improvement would reasonably be expected from medical treatment, or the passage of time." We are dealing with a medical condition; therefore, "the proof must rest on competent medical evidence." Pratt v. SAIF, 29 Or App 255, 258 (1977); Austin v. SAIF, 48 Or App 7, 12 (1980). Although a claimant must satisfy his burden of proof by competent medical evidence, a physician's report does not have to state in so many words that a claimant is not "medically stationary"; claimant's burden of proving that he is not medically stationary may be satisfied by "circumstantial", as well as direct, medical evidence. Austin v. SAIF, supra; Harmon v. SAIF, 54 Or App 121, 125 (1981).

The present statutory definition of medically stationary was added to ORS Chapter 656 by 1979 legislation. Prior to this 1979 Act, the statute did not contain a specific definition of medically stationary. Pratt v. SAIF, supra, relied upon the definition of medically stationary stated by the Supreme Court in Dimitroff v. SIAC, 209 Or 316 (1957):

> "[An injured worked is medically stationary] when he reaches the stage at which his restoration to a condition of self-support and maintenance as an able bodied workman is found . . . on the basis of expert medical opinion to be as complete as it can be made by treatment." 209 Or at 333; Pratt v. SAIF, supra, 29 Or App at 258.

In Pratt the Court of Appeals further refined the Supreme Court's definition of medically stationary by stating:

> "In this context the term has two aspects; (1) that the treatment provided has succeeded in returning the worker to the work force or (2) that further treatment will be unsuccessful in accomplishing that aim and the worker would be considered permanently disabled. The medical evidence must be analyzed and evaluated in terms of the purposes expressed in ORS 656.268(1):

> 'One purpose of this chapter is to restore the injured workman as soon as possible and as near as possible to a condition of self support and maintenance as an able bodied workman. * * *'"

Pratt v. SAIF, supra, 29 Or App at 258.

We cannot say that there is even circumstantial medical evidence that claimant's condition was not medically stationary when the Determination Order issued on December 21, 1981. Although we do not take issue with the Referee's finding that claimant's testimony on the subject is credible, we are bound by the cited decisions requiring some medical evidence in satisfaction of claimant's burden of proving that his condition was not medically stationary at the time of claim closure. See also Brown v. Jeld-Wen, Inc., 52 Or App 191 (1981); Logue v. SAIF, 43 Or App 991 (1979). Dr. Poulson's reports beginning in March, 1982 do not support the conclusion that claimant's condition was not medically stationary on December 21, 1981. In fact, Dr. Poulson's statements can be interpreted to support a claim for worsening of claimant's condition since the time of claim closure. See ORS 656.273. This is inconsistent, however, with claimant's testimony that his condition remained the same until he underwent treatment with Dr. Poulson. In order to be entitled to temporary disability benefits after December 21, 1981, claimant must establish either that his claim was prematurely closed or that his condition worsened. Roy McFerran, Jr., 34 Van Natta 621 (1982), aff'd without opinion, McFerran v. SAIF, 60 Or App 786 (1982). No claim for a worsening of claimant's condition after December 21, 1981 is being made in this case, and, considering the medical evidence as a whole, we are not persuaded that claimant's claim was prematurely closed by the December 21, 1981 Determination Order.

The Determination Order awarded claimant compensation for temporary total disability from the date of his injury through September 15, 1981. The Referee extended this award to September 30, 1981, and refused to award claimant any additional temporary disability prior to March 29, 1982, reasoning that although claimant was not medically stationary during this period, he had failed to prove that he was disabled from performing his regular work activity during that period.

We find that on September 15, 1981, claimant was released to return to modified work; that he returned to his employer, seeking modified work; that the employer had no such work available for him at that or any other time; and that there is no clear release to return to regular work until Dr. Tiley's examination of December 14, 1981, at which time he not only found claimant medically stationary but also released him to return to full activities as tolerated. We are not persuaded by the statements from Dr. Tiley's office (generated after September, 1981) to the effect that claimant was released to full work activity in September, 1981 due to the fact that claimant's last examination by Dr. Tiley was September 15, 1981, at which time he estimated one month of addi-

tional treatment, and Dr. Tiley did not again see claimant until December, 1981. Dr. Tiley's opinion relative to claimant's ability to perform regular work activity prior to his examination of December 14, 1981, was rendered without the benefit of a contemporaneous examination. We, therefore, find it to have been speculative; and, in the face of the 828 form indicating work restrictions as of September 15, 1981, as well as claimant's testimony, we find this opinion unpersuasive.

Since claimant was not released to return to his regular work until his medically stationary date, it follows that he is entitled to receive compensation for temporary total disability benefits up until the date that he was medically stationary. Therefore, we modify the Determination Order accordingly.

Claimant raised the issue of the extent of his unscheduled permanent disability, if any, attributable to his industrial injury. The Referee set aside the Determination Order as premature; this issue, therefore, was not reached. Having found that claimant's condition was stationary as of December 21, 1981, claimant is now entitled to have his permanent disability evaluated. Based on the record before us, we decline to do so, and we remand this case to the Referee for this purpose.

ORDER

The Referee's order dated July 13, 1982 is reversed in part. That portion of the order which set aside the December 21, 1981 Determination Order and awarded claimant temporary total disability compensation beginning March 29, 1981 until claim closure pursuant to ORS 656.268 is reversed. The aforementioned Determination Order is hereby reinstated and modified to award claimant compensation for temporary total disability from August 17, 1981 through December 13, 1981.

The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $300 for services on review in defending the Referee's order insofar as it set aside the insurer's denial of May 11, 1982.

This case is remanded to the Referee for a determination of the permanent disability attributable to claimant's industrial injury, if any.

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JUDY A. McALPINE, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Joseph D. Robertson, Defense Attorney

WCB 81-01762
January 24, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Seifert's order which upheld the employer's denial of claimant's aggravation claim.

On May 15, 1978 claimant lacerated her left middle finger while working for Boise Cascade, a self-insured employer. She was awarded compensation for a 15% loss of use in her middle finger by an October 30, 1978 Determination Order. A second Determination Order on April 19, 1979 gave claimant an additional award for a 5% loss of use in her left hand as a result of the injury.

Apparently claimant wrote to her employer in December of 1980 requesting that her claim be reopened for an aggravation of the 1978 finger injury. Claimant testified and the medical evidence indicates that claimant's finger has been tender and very sensitive to cold since the injury. Claimant's treating physician, Dr. Miller, has recommended further surgery on the finger to alleviate some of the sensitivity and correct the deformed appearance of the finger. However, neither claimant nor Dr. Miller have stated that the finger is any worse now than it was at the time of the last award of compensation in April of 1979. In fact, claimant seems to concede that her finger condition has not worsened.

ORS 656.273 states that an injured worker is entitled to additional compensation for "worsened conditions resulting from the original injury." The undisputed evidence in this case is that claimant's finger is essentially the same as it was at the time of the last award of compensation. Under these facts, claimant is not entitled to have her claim reopened for an aggravation. The need for further medical treatment does not necessarily require reopening of a claim. Willard B. Evans, 34 Van Natta 490 (1982).

The record does indicate, however, that the recommended surgery is necessary and that Boise Cascade is responsible for the costs of such surgery under ORS 656.245.

ORDER

The Referee's order dated November 10, 1981 is modified.

Boise Cascade's denial of aggravation of January 22, 1981 is affirmed.

Boise Cascade is ordered to pay for medical expenses associated with the recommended finger surgery pursuant to ORS 656.245.

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LOIS E. MILLER, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-01310
January 24, 1983
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests and the claimant cross-requests review of Referee Menashe's order which granted claimant 25% scheduled permanent partial disability for loss of use of her left foot. SAIF contends that the 10% award granted by the March 24, 1981 Determination Order was adequate. Claimant contends that she is entitled to vocational assistance.

We adopt the Referee's findings of fact as our own.

Considering first the vocational assistance issue, the Referee discussed and the parties argue whether the administrative rules in effect at the time of injury govern, or instead whether the current version of those rules are applicable. In Ray D. Dezellem, 34 Van Natta 213, 214-15 (1982), we concluded that the vocational rehabilitation rules in effect at the time of injury

were controlling. Our analysis in Dezellem was rather cryptic and the Attorney General has since opined based on considerably more extensive analysis that amendments to the vocational rehabilitation rules can be made applicable to all claimants and all claims. (See unpublished Attorney General's opinion, dated September 27, 1982, rendered to Roy Green, Director, Workers Compensation Dpartment.) However, we find it unnecessary to reconsider Dezellem in this case because we agree with and adopt the Referee's conclusion that claimant has not proven entitlement to vocational assistance under either version of the rules.

Consideration of claimant's left foot condition would indicate that the Referee's award was excessive. The Referee cited claimant's testimony with regard to restrictions and limitations as the reason for the increased award. In Clyde V. Brummel, 34 Van Natta 1183 (1982), we stated our understanding of the interplay between OAR 456, Division 65 and Boyce v. Sambo's Restaurant, 44 Or App 305 (1980), in relation to the rating of scheduled disabilities:

> "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, . . . illustrates application of this methodology." 34 Van Natta at 1183-84.

Brummell and Ray require that forms of impairment other than those noted in the rules be specifically identified. Even considering claimant's testimony in the current case, it is impossible to identify any such extra-rule factors which support the Referee's award. All types of impairment are provided for under the rules.

The most recent range of motion findings (Dr. Wisdom's report of December 9, 1981) would indicate an impairment of approximately 5%. Claimant also complains of a stiff big toe, weakness resulting from a limp, swelling and pain. Based on a totality of the evidence, in light of OAR 436-65-545, we conclude that claimant would be more properly compensated with an award equal to 20.25° for 15% loss of the left foot.

ORDER

The Referee's order dated April 9, 1982 is modified. Claimant is granted compensation equal to 20.25° for 15% loss of the left foot. This award is in lieu of that granted by the Referee. Claimant's attorney fee should be adjusted accordingly. The remainder of the Referee's order is affirmed.

Board Member Lewis Dissenting:

I respectfully dissent from that portion of the majority opinion evaluating the extent of claimant's disability.

The medical evidence in this case documents a loss of range of motion in claimant's foot. There also are medical reports

indicating that claimant should avoid prolonged standing. In addition, claimant testified that because of the inflexibility in her foot, she has difficulty descending stairs; that she experiences chronic pain in her left foot and increased pain in the left foot when engaged in prolonged standing or walking; and that she experiences weakness and instability in her left foot which causes her to limp and interferes with her weight bearing ability. The Referee found claimant to be credible and I see no reason to disturb that finding.

OAR 436-65-545 provides guidance for the evaluation of loss of range of motion in the foot. The Evaluation Division found 9% impairment based on loss of range of motion and the insurer does not contest that determination. It is unclear to me whether compensation for loss of range of motion was intended to compensate for the functional consequences of a loss in range of motion such as the difficulty claimant experiences descending stairs. In the absence of legislative, administrative, or judicial guidance indicating otherwise, I assume that it does and would find no additional impairment attributable to claimant's difficulty climbing stairs.

OAR 436-65-555(2) provides guidance for the evaluation of disabling pain. Claimant testified that because of the increased pain that such activities produce, she is unable to engage in prolonged standing or walking. There is medical evidence further documenting this type of impairment. Again, it is unclear to me whether the administrative rule applicable here was intended to result in compensation for the functional effects of disabling pain, as in this case, an inability to tolerate certain prolonged activities. In the absence of legal authority indicating otherwise, I assume that it was so intended. It appears from claimant's testimony that the pain is mildly to moderately disabling, thus, an impairment rating of 10% attributable to pain is not unreasonable.

Although the Evaluation Division's disability evaluation worksheet contains spaces for rating "instability" and "weakness", there do not appear to be administrative rules for rating these factors (other than instability in the ankle joint). Claimant testified that she experiences instability and weakness in her left foot which causes her to limp and experience difficulty in weight bearing. These factors justify a finding of additional impairment not otherwise recognized in the disability evaluation rules. Boyce v. Sambo's Restaurant, 44 Or App 305 (1980), Clyde V. Brummel, 34 Van Natta 1183 (1982).

Although the Referee did not identify the "extra-rule" factors supporting his award of scheduled disability with as much specifity as we might prefer, his order reflects that he considered the same factors as I have discussed here. Combining the values assigned to all the relevant factors reveals that the Referee correctly determined claimant's scheduled disability at 25% of the (left) foot.

I would affirm the Referee's order in its entirety.

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JEFFREY D. NEWTON, Claimant
Fadeley & Fadeley, Claimant's Attorneys

Case No. CV0144500
January 24, 1983
Order--Crime Victims Act

The above entitled matter came before the Board pursuant to claimant's appeal and request for a hearing under ORS 147.155. A hearing was held in this matter on December 13, 1982 in Salem, Oregon before James Nass, appointed by the Board to serve as a hearing officer for the purpose of receiving evidence and making recommended findings of fact and conclusions of law.

At the hearing, claimant appeared in person and through his attorney, Charles N. Fadely. The Victims of Crime Compensation Fund, administered by the Department of Justice, appeared by and through Leonard Pearlman, Assistant Attorney General for the State of Oregon.

We have reviewed the record herein consisting of Exhibits 1 through 60 (the documentary evidence considered by the Department of Justice in rendering its decision below), Exhibit 61 (an affidavit offered by claimant in lieu of testimony from a witness), the transcript of the hearing at which claimant and his witness, Paul Edgerly, testified and the Hearing Officer's recommended findings of fact and conclusions of law.

ISSUE

The ultimate issue in this case is the compensability of claimant's claim for Crime Victims Compensation benefits. Resolution of that issue depends on a determination whether claimant is ineligible for benefits because his injuries are substantially attributable to his own wrongful act or to substantial provocation of his assailant.

FINDINGS OF FACT

Claimant was stabbed in the abdomen with a knife in the course of an altercation between claimant and his assailant after claimant intervened in a confrontation between the assailant and claimant's nephew, Paul Edgerly. The assault took place in the parking lot behind a tavern in the early morning hours of November 28, 1981.

The confrontation began inside the tavern when the assailant grabbed Edgerly by the front of his coat and shirt and threw him out the tavern's rear exit. The assailant reportedly claimed that Edgerly and claimant had been "bothering" the assailant's female friend and other women at the tavern by repeatedly asking them to dance. Claimant and Edgerly testified that various women had been asked to dance but that none of them had been "bothered" by claimant or Edgerly.

There is a landing outside the rear door of the tavern and four to five steps down to the parking lot located adjacent to the tavern. As Edgerly went out the back door, the assailant further pushed him down the steps. Edgerly fell in the parking lot, struck the bumper of a parked car, and sustained injuries to his ear and back. At that point, claimant came running out the door

of the tavern and observed Edgerly on the ground. It was claimant's impression that Edgerly was hurt and frightened. As claimant came out the door, he continued on down the steps. The assailant partially turned toward claimant, and, as claimant came down the steps, claimant either grabbed the assailant or collided with him. The assailant struck at claimant, missed him and the two of them then engaged in a wrestling type scuffle for approximately two to three minutes. During this time, Edgerly either participated in the scuffle or attempted to break up the fight between claimant and the assailant.

Eventually, a point was reached in the fight at which both claimant and Edgerly were knocked or thrown down on the ground and remained there for a few seconds. The assailant then drew a five-inch folding knife from a sheath on his belt, unfolded the blade (3-1/4" in length) and held it beside his leg. The evidence is conflicting concerning exactly what happened next as to whether claimant merely stood up or stood up and advanced toward the assailant. We find from the preponderance of the evidence that claimant was getting up from the ground when the assailant thrust upward with the knife, cutting claimant's thumb and stabbing him in the abdomen. Claimant and Edgerly then retreated from the scene and sought medical care for claimant.

The Department of Justice as administrator of the Victims of Crime Compensation Fund in its Order on Reconsideration denied claimant's application for benefits on the ground his injuries were the result of his own wrongful conduct. The Department concluded that Edgerly was the person who instigated the initial verbal and physical confrontation between him and the assailant. We reach the opposite conclusion. We are not persuaded that Edgerly was "bothering" anyone, but even if he was, it was the assailant who approached Edgerly, demanded that he leave and initiated physical contact with him. There is no evidence that Edgerly was engaged in any conduct justifying the assailant's use of physical force to protect the premises, himself or any other person. ORS 161.209; 161.225.

Police reports summarizing interviews with the assailant and a hospital nurse suggest that, from the assailant's point of view, once in the parking lot, the assailant himself was set upon by more than one person, that he was struck with a glass object and sustained multiple contusions and lacerations to his head and neck and that he was trying merely to fend off claimant when claimant inadvertently was stabbed. We note that the stab wound was to claimant's abdomen, that claimant's thumb was cut in the same thrust of the knife that put the blade of the knife into claimant's abdomen and that the blade apparently went several inches into the abdomen. In order for this to have happened, claimant's hand would have had to have been below his waist at the time of the knife thrust and that the knife must have been thrust with considerable force to inflict the extent of damage documented by the medical evidence. The assailant's story that he was fending off claimant and inadvertently stabbed him is inconsistent with this evidence.

We find that the assailant was the initial aggressor in the

altercation. We further find that claimant reasonably believed that Edgerly was the victim of a continuing assault and that claimant was justified in going to Edgerly's defense. Lastly, even assuming the assailant was at some point justified in using physical force to defend himself against claimant and Edgerly, we find that at the point in the altercation where both claimant and Edgerly were down on the ground, the assailant could have withdrawn or attempted to withdraw from the conflict. ORS 161.215(2). Instead, the assailant escalated the fight by drawing a deadly weapon, thereby forfeiting whatever claim to self-defense he might have had.

In making these findings, we note that the assailant is 5'10" in height and weighs 210 lbs. and was armed with a five-inch knife in a sheath on his belt. By contrast, claimant and Edgerly were unarmed and, from the observation of them at the hearing, are about 5'6" or 5'7" in height and weigh approximately 165 pounds. Furthermore, we find claimant and Edgerly to be credible witnesses. By contrast, several statements attributed to the assailant by the police reports are contradicted by other evidence. For instance, the assailant claimed he was employed by the band performing at the tavern to protect their instruments, when at best it appears that he was an associate of one of the band members and a follower of the band.

We have not ignored the evidence suggesting that the assailant sustained injuries in the course of the altercation. Nor have we ignored the evidence indicating that the case was presented to the grand jury and the grand jury declined to return a true bill, apparently on the ground of self-defense. With respect to the grand jury's action, no evidence was presented concerning what information the grand jury had before it at the time it made its decision. Grand jury decisions are entitled to weight as evidence, but are not conclusive or binding as to whether a crime occurred. We find that the inferences to be drawn from the fact that the assailant apparently sustained injuries in the altercation and that the grand jury refused to return a true bill against the assailant are outweighed by other credible and persuasive evidence in the record.

It has been said that discretion is the better part of valor. It may have been better judgment on claimant's part to refrain from interjecting himself into the confrontation between Edgerly and the assailant. However, at the time he did so, claimant reasonably believed Edgerly, without provocation, had been and was about to be again assaulted by the assailant. Under these circumstances, claimant's conduct was neither unreasonable nor wrongful.

ORDER

The Department of Justice's Order on Reconsideration dated April 21, 1982 is reversed, and this claim is remanded to the Department for the payment of compensation in accordance with law.

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NORMA J. ROBINSON, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 79-06844
January 24, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The claimant requests review of Referee Pferdner's order which affirmed the Determination Order of June 4, 1979 finding the claimant has suffered 160°, or 50%, unscheduled permanent partial disability due to a compensable low back injury of August 13, 1973. The claimant contends that she is permanently and totally disabled and that more emphasis should be placed on the fact that she lives in an area where employment opportunities are limited and transportation outside the area is inconvenient or difficult.

We affirm and adopt the Referee's order having found that proper weight was given to labor market conditions when rating the claimant's disability.

ORDER

The Referee's order dated June 2, 1982 is affirmed.

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LAWRENCE D. ROGERS, Claimant
Doblie & Francesconi, Claimant's Attorneys
Gilah Tennenbaum, Defense Attorney

WCB 81-03975
January 24, 1983
Order on Review

Reviewed by the Board en banc.

The employer requests Board review of that portion of Referee St. Martin's order which granted claimant compensation for 25% loss of use of the right hand. The sole issue is the extent of claimant's permanent disability.

Claimant's industrial injury of October 30, 1980 was to the right hand, including a fracture of the right fifth finger. The Determination Order granted claimant compensation for 5% loss of the right hand.

The parties agreed at the hearing that claimant's loss of motion in his right hand constituted 7.25% impairment, as reported by Dr. Nathan on September 21, 1981 and subsequently agreed to by Dr. Hauge, claimant's treating physician. The problem is how to assess the alleged additional forms of impairment which cannot be measured as precisely. The Referee identified the additional forms of impairment as: "the loss of quickness, the loss of grip [strength], the effect of the pain and . . . the factor of endurance." We generally agree with the Referee's enumeration, but assess the effects of these problems differently.

Claimant's best performance on a grip strength test indicated 75 pounds on the injured right and 125 pounds on the uninjured left. Dr. Hague testified that the reliability of such test results depends on the cooperation of the patient in taking the test. Claimant testified that he cooperated fully in taking the grip strength test. The Referee found: "I do not find loss of

grip strength to the extent subjectively measured." While we are far from sure about the Referee's intended meaning, it is possible that the Referee was finding claimant's testimony about full cooperation to be not credible. In any event, we agree with what we think the Referee probably ultimately meant: that claimant has some compensable loss of grip strength, although it is difficult to assess the exact amount of the loss on this record.

Virtually all references in the medical reports and in claimant's testimony to disabling pain are linked to grip strength. As the Referee put it: "Claimant also complained of occasional sharp pains in the dorsum of the hand especially precipitated by forceful grip." (Emphasis added.) We do not doubt the existence of some disabling pain, but apparently most pain is experienced when trying to grip with more than a certain amount of force. On this record, it would appear that to increase claimant's disability award because of both loss of grip strength and disabling pain would be compensating claimant twice for what is basically the same form of impairment.

We attach very little weight to the "loss of quickness" and "loss of endurance" factors mentioned by the Referee. Claimant had not returned to work as a mechanic at the time of the hearing and thus there was little empirical basis upon which to assess things like endurance and quickness. Claimant had been doing some engine and body work for friends and neighbors out of his home. From the description of these activities in the testimony, it appears to us that claimant retains more than 75% use of his right hand.

It is established that loss of motion represents 7.25% loss of use. We conclude that the other factors involved, loss of grip strength, disabling pain, loss of quickness and loss of endurance, equal about the same amount of loss of use. Therefore, claimant would be more properly compensated with an award for 15% loss of use of his right hand.

ORDER

The Referee's order dated March 8, 1982 is modified. Claimant is granted compensation for 15% loss of use of the right hand. This award is in lieu of that granted by the Referee's order. The attorney's fee should be adjusted accordingly.

The remainder of the Referee's order is affirmed.

Board Member Lewis Dissenting:

I respectfully dissent and affirm the Referee's order because, like the Referee, I do not feel that Dr. Nathan did include the disabling pain or the loss of grip strength. For these reasons, I would affirm the 25% loss of the right hand and award $150 as an attorney's fee on Board review.

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JAMES M. TORNOW, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-02702
January 24, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of that portion of Referee St. Martin's order which found that claimant's September, 1979 industrial injury was no longer a material contributing cause of claimant's disability or need for surgery after an intervening January, 1980 at-home injury.

We affirm and adopt the Referee's order with the following additional comments. In his deposition, Dr. Tsai expresses opinions that would support either conclusion in this case. However, we find that the basis of Dr. Tsai's opinions is either unexplained or, to the limited extent that they are explained, those opinions are based in significant part on claimant's history to Dr. Tsai. The Referee found that claimant was not credible and, under these circumstances, we are not persuaded by any of the various opinions that Dr. Tsai expressed.

ORDER

The Referee's order dated March 4, 1982 is affirmed.

Board Member Lewis Dissenting (In Part):

I respectfully dissent. I would reverse that portion of the Referee's order which affirmed the employer's denial of liability for claimant's back surgery.

There is no doubt in my mind that the at-home fall of January 8, 1980 was a material contributing factor giving rise to the subsequent back surgery. However, under Grable v. Weyerhaeuser Co., 291 Or 387 (1981), the fact that an off-the-job incident contributes independently to a condition is not determinative. The test of compensability is whether, notwithstanding an off-the-job incident, the compensable injury continues to be a material contributing factor, in this case, to the need for surgery.

Claimant's treating orthopedic surgeon, Dr. Tsai, testified that claimant had scarring and intermittent herniation on the left side of L5-S1 as a residual of the compensable injury. It is unquestioned that claimant has some, albeit minor, permanent impairment at L5-S1 due to the compensable injury. It also appears from evidence that after being declared medically stationary following the original injury, but before the January, 1981 at-home fall, claimant experienced pain radiating into his left leg. As I read Dr. Tsai's testimony, he is saying that a fall of the type claimant experienced at home could cause a herniation requiring surgery, but that, because of the residual weakness and partial herniation present in claimant's back following the compensable injury, in this particular case, the residuals of the industrial injury were a material contributing factor to the need for surgery.

I will readily concede that claimant's credibility is extremely suspect with respect to his testimony and behavior at the hearing concerning the extent of his permanent disability. For that reason, I would affirm the award of 5% unscheduled disability based solely on objective range of motion tests. However, I believe that the history claimant gave to his treating physician on the day after the at-home fall is an accurate history. It seems to me that if claimant were going to give an incorrect history in order to obtain compensation benefits, he would not have reported an at-home fall. The fact that claimant is not a sympathetic person because of the manner in which he attempted to exaggerate his extent of permanent disability does not detract from the evidence indicating that his compensable injury was a material factor contributing to the need for surgery.

For these reasons, I would affirm the award of permanent disability, but reverse that portion of the Referee's order affirming the denial of compensability of the surgery.

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ROBERT DELEPINE, Claimant
Marcy Leskela, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05413
January 25, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Knapp's order which upheld the SAIF Corporation's denial of authorization of low back surgery, additional temporary and permanent disability compensation and penalties and attorney's fees for unreasonably delaying acceptance or denial of claimant's aggravation claim.

The primary issue on review involves SAIF's refusal to authorize a surgical procedure recommended by Dr. Berkeley, a neurological surgeon. At the time of the hearing claimant had not submitted to the surgery. Four months after the Referee's order issued, the surgery was performed by Dr. Berkeley. Claimant has moved the Board for an order remanding this case to the Referee for consideration of the operative report and other medical reports generated as a result of the surgery. The Board deferred ruling on claimant's motion for remand until the time of review and, by an interim order, directed claimant to submit copies of the proposed additional evidence, which has been considered solely for the purpose of determining whether claimant's motion for remand should be granted, and has not been considered as part of the record on review.

I

A motion for remand will be granted only upon a showing that material evidence was not obtainable in the exercise of due diligence prior to a hearing, or prior to the time the evidentiary record of a hearing is closed. Ora M. Conley, 34 Van Natta 1698 (1982); Robert A. Barnett, 31 Van Natta 172, (1981). In an affidavit in support of claimant's motion for remand, claimant's attorney states that, although surgical treatment for claimant's low back was in issue at the hearing, and Dr. Berkeley's reports recommending surgery were before the Referee, surgery was postponed:

> ". . . awaiting the referee's decision on claimant's request for further medical treatment of the injury, specifically, authorization to proceed with surgical treatment. . . .At that time, claimant was attempting to not jeopardize the evidence regarding the nature of the initial injury, its progress, its relationship to the existing symptoms, and the degree of permanent disability absent surgical treatment. Claimant was mindful of SAIF's potential argument that by proceeding with the surgery absent authority to do so, prior to the hearing, he was intentionally worsening his medical condition."

We first note that this is not a situation in which, prior to examination by Dr. Berkeley, claimant's physicians had failed to diagnose any objective cause for claimant's pain, as in Egge v. Nu-Steel, 57 Or App 327 (1982), where the court reversed the Board's order denying remand and stated: "At the time of the hearing, claimant had no reason to know that further medical examination would yield a different diagnosis, so there was no basis for his requesting postponement or continuation of the hearing." 57 Or App at 329.

We secondly note that, contrary to the implication of the affidavit supporting remand, as early as two months before the hearing convened claimant stated to his vocational rehabilitation counselor that he intended to undergo the surgery recommended by Dr. Berkeley regardless of whether or not SAIF would pay therefor. Claimant testified to the same effect at the hearing.

Third, we are not persuaded that submitting to surgery pre-hearing could have created any defenses that would not otherwise exist. "When elective major orthopedic or neurological surgery is recommended, the insurer may require an independent consultation with a physician of their choice." OAR 436-69-501(2). If an insurer exercised the right to an independent medical examination, it seems to us that it could not possibly have any reasonable objection to a claimant proceeding with surgery. If an insurer failed to exercise the right to an independent medical examination, any argument that the claimant's act of proceeding with surgery created some new defense would be singularly unpersuasive.

In sum, we find our reasoning in Barnett and Conley dispositive:

> "We appreciate that the course of an injured worker's recovery can be protracted and dynamic, with medical treatment and vocational training, etc., starting, stopping and starting again. In many cases, this dynamic process undoubtedly presents the practical problem of when are matters stable enough to litigate disputed issues at a hearing. The Board expects the parties to make that decision. Under current practice,

no hearing is scheduled until the parties file an application to schedule. Thus, the parties more than the Board now control when a hearing is held. In ongoing medical treatment or vocational training situations -- situations that frequently give rise to motions to remand -- the parties should decide when they want disputed issues resolved based on the available evidence and not rely on motions to remand based on subsequently obtained evidence as a fallback possibility." Barnett, 31 Van Natta at 174.

"In an agency that has received an average of over 1,000 hearing requests per month through the first nine months of this year, the alternative of allowing attorneys to prepare for hearings after they are conducted does a greater harm to a greater number of people who must then be forced to wait longer for their own hearings." Conley, 34 Van Natta at 1701.

Claimant's motion for remand is denied.

II

On the merits, we affirm and adopt the Refereee's order on all issues except penalties and attorney fees.

The Referee declined to impose a penalty and associated attorney's fee, as requested by claimant, for SAIF's late denial of claimant's aggravation claim. We find that Dr. Berkeley's letter report of July 24, 1981, indicating that claimant "is at present totally disabled," constitutes an aggravation application which obligated SAIF to accept or deny within 60 days. SAIF failed to do so, and in fact did not deny the claim until October 26, 1981. The fact that SAIF promptly complied with its obligation to commence payment of interim compensation benefits does not excuse its failure to issue a timely denial of the aggravation claim. The delay is unexplained and unjustified and, based upon the criteria discussed in Zelda M. Bahler, 33 Van Natta 478, 480 (1981), reversed on other grounds, 60 Or App 90 (1982), claimant is entitled to the maximum penalty of 25%, to be assessed on the interim compensation payable between the sixtieth day and the date of the denial; an attorney's fee is also appropriate. Norman J. Gibson, 34 Van Natta 1583, 1584 (1982).

ORDER

The Referee's order dated January 19, 1982 is reversed in part. The SAIF Corporation is directed to pay to claimant, as and for a penalty, 25% of the interim compensation payable from September 25, 1981 through October 25, 1981; and $150 to claimant's attorney as a reasonable attorney's fee pursuant to ORS 656.382(1). The remainder of the Referee's order is affirmed.

* * * * * * * * * * *

DAVID S. MATHEWS, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06365
January 25, 1983
Order on Review

Reviewed by the Board en banc.

SAIF Corporation requests review of that portion of Referee McCullough's order which reversed SAIF's denial of claimant's claim for payment of medical expenses under ORS 656.245. This case presents the issue of which of two potentially liable employers and their respective insurers is responsible for medical services following successive injurious exposure episodes with different employers.

We adopt the Referee's findings of fact, and, with one exception noted below, adopt his order.

In brief, the facts are that claimant sustained a low back injury in February, 1978 while employed by Giustina Brothers Lumber Company, insured by SAIF. This claim was accepted and processed to closure with an award of time loss only. Claimant subsequently became employed by Carothers Sheet Metal Co., and in August, 1978 he experienced low back pain sufficient to cause him to seek medical care. Claimant filed an aggravation claim with SAIF which was denied by a notice containing the following language:

> "Aggravation is the natural worsening of the condition caused by the injury without a new accident or incident.
>
> "It appears that you re-injured your back on August 18, 1978. Under the circumstances, your request to reopen your claim because of aggravation is denied. This is the primary reason that SAIF must deny reopening of your claim, but this letter is not to be construed as a waiver of any other grounds for denial."

Claimant did not appeal this denial but did file a new injury claim with Carothers Sheet Metal. The 801 form claimant submitted to Carothers indicates that his claim was accepted as a non-disabling injury. Claimant testified, however, that neither Carothers nor its industrial insurer ever responded to his claim.

In June, 1981 claimant experienced another incident of back pain, sought medical care and filed a second aggravation claim, which was denied on the ground that the aggravation was related to the August, 1978 "new injury." Claimant requested a hearing on that denial and apparently also filed another claim with Carothers Sheet Metal. In December, 1981 claimant entered into a disputed claim settlement with Carothers Sheet Metal's insurer.

SAIF contends and the Referee agreed that claimant's failure to appeal its denial of the first aggravation claim acts not only as res judicata as to that aggravation claim but collaterally estops claimant from denying that he sustained a new injury with

the subsequent employer. The cases cited by the Referee, Gwynn v. Wilhelm, 226 Or 606 (1961), and Buck v. Mueller, 221 Or 271 (1960), are authority for the proposition that the principle of res judicata applies to the extent that by failing to appeal the denial of the first aggravation claim, claimant is barred from litigating that claim. However, neither case cited by the Referee, nor any other judicial decision of which we are aware, supports the proposition that failure to appeal a denial operates as an admission of allegations set forth by way of defense.

One prior Board decision does support the Referee's analysis. In Lewis Twist, 34 Van Natta 290 (1982), we considered the possible situations in which res judicata might bar successive aggravation claims. We concluded the general rule was that res judicata does not bar successive claims. We also discussed two possibilities presenting exceptional circumstances in which a subsequent aggravation claim might be barred.

> "As a second illustration of res judicata bar in aggravation litigation, suppose there were an original injury followed by a first aggravation claim which was denied followed by a second aggravation claim. If the first aggravation claim were denied on the basis that the claimant had suffered a new intervening injury, then as we understand Crosby v. General Distributors, 33 Or App 543 (1978), there would be no possibility of asserting any further aggravation claims in connection with the original injury." 34 Van Natta at 292-293.

See also Roger Ballinger, 34 Van Natta 732 (1982), as clarified in Paul Gill, 34 Van Natta 1471 (1982).

However, the above excerpt from Twist is dicta and, in retrospect, appears to have been ill-advised. To the extent that ill-advised dicta needs to be disavowed, we hereby disavow it. To the extent that Ballinger and Twist purport to stand for the proposition that the sole determinative factor in cases such as these is whether the most recent injury claim has been accepted as a new injury (or denied on the basis of a new injury) to the same body part, irrespective of an analysis whether the most recent injury contributed independently to the present condition, such a proposition is inconsistent with the last injurious exposure rule, Wills v. Boise Cascade Corp., 58 Or App 636 (1982), National Farmers' Union Insurance v. Scofield, 54 Or App 804 (1982), and Crosby v. General Distributors, 33 Or App 543 (1978), and is hereby disavowed.

Instead, the question under the court's decisions in Wills, Scofield and Crosby and our prior decision in Paul Gill is whether the August, 1978 episode contributed to claimant's subsequent disability. Based on our review of the record, we are convinced that the August, 1978 episode did not contribute materially or even slightly, to claimant's back condition as it existed in June, 1981. We agree with the Referee that claimant's back condition

giving rise to the aggravation claim of 1981 is traceable solely to the February, 1978 injury. Under these circumstances, SAIF is the responsible party.

ORDER

The Referee's order dated May 11, 1982 is affirmed. Claimant's attorney is awarded as and for a reasonable attorney's fee $300, payable by the SAIF Corporation.

Board Member Barnes Dissenting:

The chronology of pertinent events in this case is:

February, 1978: Claimant sustained an initial low back injury while in the employ of Guistina Brothers Lumber Company, insured by SAIF; the claim is accepted and closed with an award of time loss for three days.

August, 1978: Claimant has changed employers and while working for Carothers Sheet Metal (insured by Mission Insurance Company), experienced low back pain for which he sought medical attention in September, 1978.

By a physician's report dated September 19, 1978, indicating a need for further medical treatment, claimant files an aggravation claim with SAIF, the physician's report indicating an aggravation of claimant's February, 1978 injury.

By letter of October 27, 1978 SAIF denies claimant's "aggravation claim" on the basis that claimant sustained a new injury on August 18, 1978.

December 8, 1978: Claimant submits an 801 form to Carothers Sheet Metal claiming a new injury on August 18, 1978.

December, 1978: The new injury is accepted by Carothers Sheet Metal's insurer as a non-disabling injury claim.

In June of 1981 claimant experiences low back and left leg pain, for which he seeks chiropractic treatment. The physician's report is submitted to SAIF by an 827 form dated June 16, 1981.

June 29, 1981: Mission Insurance Company receives a letter from claimant's attorney, indicating the claimant's intent to claim an aggravation of the injury previously accepted by Mission Insurance Company in August of 1978.

July 9, 1981: SAIF denies responsibility for claimant's "claim for aggravation", alleging the August, 1978 incident in the employ of Carothers Sheet Metal as the incident responsible for claimant's 1981 back condition.

September 2, 1981: Mission Insurance denied claimant's "aggravation claim", alleging that claimant's 1981 medical problems result from the earlier February, 1978 injury while working for Giustina Brothers Lumber, SAIF's insured.

In December of 1981 claimant enters into a disputed claim settlement with Mission Insurance Company disputing out that insurer's responsibility for "medical and disability benefits in reference to the original [August, 1978] or aggravation/re-opening claim [June, 1981] of claimant's alleged back condition and any pain allegedly related thereto which is specifically denied and continued to be denied."

Claimant subsequently asserted the claim for medical services here in issue. Notwithstanding the intervening August, 1978 injury at Carothers Sheet Metal and resulting claim accepted by Mission Insurance Company, the majority holds that current medical services are the responsibility of SAIF as a consequence of the February, 1978 Giustina Brothers injury and claim. I disagree for three reasons.

I

I see no policy reason, and the majority does not offer any, to overrule the relevant portion of Lewis Twist, 34 Van Natta 290 (1982). In Twist we discussed the situation in which a first aggravation claim is denied on the grounds of a new intervening injury and then the claimant attempts to assert a second aggravation claim. Suppose the first aggravation denial was litigated and upheld by litigation order based on a finding that the claimant had really suffered a new injury to the same body part. Since, by definition, a new injury contributes to subsequent disability, it seems obvious to me that such a litigation order would cut off all possible future responsibility of the insurer against which the aggravation claim had been asserted. To that extent, at the very least, I would adhere to Twist.

It is a closer question whether an unappealed denial of an aggravation claim, denied on the basis of a new injury, should be accorded the same finality as a litigation order finding a new injury. Two considerations persuade me that question should be answered in the affirmative.

First, we are dealing with the law of insurer responsibility, a group of "rules of convenience", the utility of which "lies not in their achievement of individualized justice but rather in their utility in spreading liability fairly among employers by the law of averages and in reducing litigation." Bracke v. Baza'r, 293 Or 239, 248 (1982) (emphasis added). The admittedly "litmus paper" approach of Roger R. Ballinger, 34 Van Natta 732 (1982) -- that the insurer on the risk at the time of a second industrial injury to the same body part is always responsible for all subsequent compensation -- clearly advances the goal of reducing litigation, and spreads liability among employers by the law of averages in a manner that I regard as fair. We need only look at our docket to know that the alternative of trying to weigh the relative contribution of prior injuries to current disability is certainly not reducing litigation, especially when each insurer in this kind of dispute can usually cite supportive precedent. Given the stated purposes of the law of insurer responsibility, when an aggravation claim is denied on the grounds that the worker sustained a new injury to the same body part, when that denial is not appealed, and

when the alternative new injury claim is accepted, I suggest we would be miles ahead if we held the second employer/insurer was always responsible for all subsequent disability, compensation, medical services, etc.

Second, in concluding that the August, 1978 Carothers Sheet Metal/SAIF incident did not contribute even slightly to claimant's subsequent disability, the majority is really engaged in a collateral attack on SAIF's October 27, 1978 denial which has long since become final by operation of law. If the August incident did not contribute even slightly to claimant's subsequent disability, then the majority necessarily concludes that claimant had a valid aggravation claim against SAIF at that time. The majority offers a distinction between the October, 1978 denial, which is final, and the reason stated for that denial, which is irrelevant; but, in the context of this case, the distinction is too subtle for me to comprehend.

II

My second area of disagreement with the majority involves assessment of the evidence in this case. Without explanation, the majority states that claimant's August, 1978 injury "did not contribute . . . even slightly" to his subsequent disability and that his subsequent disability "is traceable solely to the February, 1978 injury." I submit that the evidence does not support those conclusions.

I find the most relevant evidence in Exhibits 17a and 19, the latter being a videotape deposition of Dr. Gorman, who treated claimant after both the February and August, 1978 injuries. Considering these two exhibits together, Dr. Gorman reports as follows. After the February injury, Dr. Gorman provided chiropractic treatment at twelve office visits between March 8 and April 26. Claimant was medically stationary with no permanent disability and no work restrictions in early May. Claimant then returned to heavy labor and was engaged in heavy labor when reinjured in August at Carothers. Claimant did not seek any additional medical care between April 26 and the reinjury in August. As of May, 1978 Dr. Gorman reports claimant had no muscle spasm, decreased motion or radiating leg pain; various reports since the August, 1978 injury recite all of those symptoms. When claimant returned to Dr. Gorman after the August injury, the doctor advised him to change to a job that did not involve heavy physical labor. Finally, in what I suggest is the most cogent single comment, Dr. Gorman states that claimant's condition materially worsened after the August incident.

Dr. Gorman's ultimate opinion is that all of claimant's disability since February of 1978 is causally related to his injury at that time while working for Giustina Brothers and all subsequent problems, including the August, 1978 incident, have been "aggravations" of that injury. However, in literally dozens of cases we have noted that doctors rarely use the term "aggravation" with the same meaning the word has as a term of art in workers compensation law. And in this case it should be fairly obvious that, as "aggravation" is used as a term of art, the more specific information from Dr. Gorman is inconsistent with the doctor's ultimate opinion.

After the earlier February injury, claimant returned to heavy work with no impairment, no symptoms and no continuing medical treatment. Since the later August injury, claimant has been unable to do heavy work, has experienced a variety of fairly chronic symptoms and has required continuing medical treatment. It is difficult for me to imagine a case in which it would be clearer that a second injury contributed at least "slightly" to a claimant's subsequent disability; and I am at a loss in this case to even guess what evidence the majority might be relying on in concluding that the second injury here did not contribute even slightly to claimant's subsequent disability.

Just a few days ago, in another case, we found the second insurer responsible for subsequent medical care on facts that do not support that conclusion as strongly as do the facts in this case. Eugene Thomas, WCB Case Nos. 81-07043 and 81-07044, 35 Van Natta 16 (January 14, 1983):

> "We here conclude that the second insurer, Argonaut Insurance, is the responsible insurer because the 1981 incident contributed at least slightly to claimant's subsequent disability. Although the claimant continued to suffer intermittent back and right leg pain between closure of the EBI claim in February, 1979 and the March, 1981 incident, his pain was at a manageable level in that he was able to perform his regular work, was not limited to light duty, and he did not need medical treatment. He occasionally needed to take time off from work due to his back, but was always able to return in two or three days. His back problem, though not entirely asymptomatic, was relatively stable throughout that period."

But then, as I said, each insurer in a responsibility dispute can usually cite supportive precedent.

III

There may be an unarticulated explanation for the Referee's and the majority's decision. If my view of the law or my view of the facts prevailed, claimant would have to look to Mission Insurance Company, the insurer for Carothers Sheet Metal, for payment of the medical services here in issue. But claimant could not do so because of the provisions of the disputed claim settlement he executed with Mission, which absolves Mission of any further responsibility for medical treatment for claimant's back condition. So, since SAIF is the only industrial insurer with any potential exposure, perhaps it seems equitable at some level of consciousness to make SAIF provide continuing medical treatment.

I assess the equities differently. The disputed claim settlement claimant signed with Mission Insurance recites:

> "Claimant contends and maintains that his

claim for workers compensation benefits for his alleged back condition and the radiation of pain as a result thereof is due to his employment with Carothers Sheet Metal on August 18, 1978 for activities performed previous thereto or thereafter, that said claim was timely reported and that his present condition is a result of his employment with Carothers Sheet Metal such that his claim(s) are compensable under the workers compensation law of the State of Oregon."

Claimant asserted that position and obtained almost $3,500 from Mission. Now the Referee and the Board majority in this case have permitted claimant to assert the exact opposite position -- that his condition is August, 1978 was really an aggravation of his February, 1978 injury -- in order to obtain medical benefits from SAIF.

Both this Board and the Court of Appeals have ruled that a disputed claim settlement with one insurer is not valid when the only issue is which of two insurers is responsible. Robert DeGraff, 29 Van Natta 893 (1980), aff'd in part, rev'd in part, J. C. Compton Co. v. DeGraff, 52 Or App 317 (1981), modified on reconsideration 62 Or App 1023 (1981). When the claimant in this case entered into a disputed claim settlement with Mission, he was in a situation in which the only issue was insurer responsibility. But we need not go so far as to invalidate the disputed claimant settlement (indeed, I doubt that we could because Mission is not a party to this proceeding). Nor need we go so far as to say that claimant cannot now assert a position against SAIF that is inconsistent with the position he asserted against Mission. All that we need say is that the equities do not compel finding a way to conclude that claimant's disability is "traceable solely" to his February, 1978 injury.

For the foregoing reasons, I would reverse the Referee's order and, therefore, respectfully dissent.

* * * * * * * * * * *

JOHN L. PRIAN, Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-09695
January 25, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Leahy's order which awarded claimant 55% unscheduled permanent disability. Claimant contends he is entitled to a greater award of permanent disability. In its brief, the insurer contends that the Determination Order award of 40% disability should be reinstated.

We adopt the Referee's findings of fact and affirm his order with the following comments.

In discussing the labor market findings factor of the disability evaluation rules (OAR 436-65-600 et seq), the Referee stated:

> "Lakeview is a one-industry town to which claimant has not been returned to his regular occupation [sic]. Even in normal times claimant would find at least a moderate restriction in openings."

He went on to assign a positive value rather than the negative value assigned by the Evaluation Division.

In the context of a permanent, total disability case wherein the work search requirement of ORS 656.206(3) was at issue, we indicated that a claimant in a small, remote, one-industry town has an obligation to seek work outside that community. Raymond Orsborn, 34 Van Natta 576 (1982). That holding is a variation of the general principle that disability rating is based upon the inability to find and retain employment in the broad range of occupations existing in a hypothetically normal labor market. OAR 436-65-608, 2 Larson, Workmen's Compensation Law, §57.51, Ford v. SAIF, 7 Or App 549, 552 (1972). See also dicta in Harris v. SAIF, 292 Or 683, 695 (1982) and Wilson v. Weyerhaeuser Co., 30 Or App 403, 408-409 (1977). But see Bentley v. SAIF, 38 Or App 473, 478 (1979), which refers to "employability in the current labor market" (emphasis added). The fact that an injured worker lives in a community with a smaller number of potential occupations only bespeaks that the worker may have to seek work outside his community and be willing to relocate, if necessary, to find suitable work. It does not indicate that the worker is more disabled than a worker living in a densely populated part of the state.

Additionally, the recession Oregon's economy has experienced over a period of the last several years gives cause to wonder what "normal" may mean in the phrase "hypothetically normal labor market." However, in the absence of evidence to the contrary, we assume that the relative distribution of sedentary, light, medium, etc. jobs remains the same. It follows that the statistical information contributing to the labor market findings factor (see the supplementary guidelines to OAR 436-65-608) remains valid regardless of periodic economic booms and recessions.

The employer contends that the medical reports by independent examining physicians predating claimant's last surgery should be disregarded because the last surgery resulted in substantial improvement in claimant's condition. The record indicates that the last surgery substantially improved claimant's leg problem (and may well have obviated an award of scheduled disability for that leg), but it did nothing to relieve claimant of his low back disability. Considering the number of surgeries claimant has undergone together with the resulting loss of range of motion, loss of stamina and disabling pain, we find greater impairment than that allowed by the Evaluation Division and the Referee.

In summary, we find greater impairment than that allowed by the Referee, but we also find that the Referee erred in the number of points he assigned in the labor market findings area. These errors offset each other. Applying the disability evaluation rules, including the formula that takes into account negative

factors, we conclude that the Referee's award accurately reflects claimant's loss of wage earning capacity due to the industrial injury.

ORDER

The Referee's order dated April 12, 1982 is affirmed.

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MICHAEL A. RATLIFF, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10580
January 25, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Nichols' order which reversed its denial of a claim for aggravation of a 1978 injury and awarded claimant's attorney a reasonable attorney's fee. Relying upon the rule of res judicata, SAIF asserts that claimant's present aggravation claim is barred by a July, 1980 Referee's order finding that in August, 1979 claimant sustained a non-industrial intervening incident, the consequences of which were not the responsibility of SAIF.

Claimant was originally injured in December, 1978, sustaining a low back strain for which he was hospitalized. That claim was accepted and claimant received conservative treatment. A subsequent myelogram revealed a slight defect at the L5-S1 level on the left, but there was no clinical evidence of left S1 radicular irritation. A Determination Order issued in July, 1979 awarded claimant 5% unscheduled permanent partial disability.

On August 3, 1979 claimant tripped over a dog and fell backwards, landing on his hands and buttocks. Claimant thereafter filed an aggravation claim, which was denied by SAIF as a new intervening injury. Claimant requested a hearing and the Referee found that, although claimant's original injury may have contributed to his back condition in August, 1979, claimant's trip over the dog constituted an independent injury that worsened his condition, resulting in disability and the need for medical services. The Referee also increased claimant's unscheduled permanent disability award to 30% on review of the July, 1979 Determination Order. Claimant requested review of the Referee's order, which was affirmed by the Board. Mike A. Ratliff, 30 Van Natta 814 (1981).

Claimant received treatment for low back pain in March, 1981 while living in Arizona. SAIF refused payment for this treatment, notifying the physician of claimant's intervening incident, to which they attributed the need for treatment. No formal denial was issued at that time.

The claimant was hospitalized in Oregon in August, 1981 with complaints of low back pain. He was admitted for bed rest and traction and discharged after one week, with minimal improvement. Claimant was again hospitalized in October, 1981 for four days, receiving further conservative treatment. Claimant's attorney thereafter filed an aggravation claim in claimant's behalf. This

claim was denied by SAIF based upon the intervening, non-industrial incident in August, 1979.

In reliance upon Grable v. Weyerhaeuser Company, 291 Or 387 (1981), the Referee determined that claimant had proven a compensable worsening of his 1978 industrial injury. The Referee considered the prior adjudication of the August, 1979 incident in relation to the medical evidence of claimant's more recent condition, concluding that claimant's 1978 industrial injury remained a material contributing cause of the claimant's condition:

> "The dog fall incident was found at the previous hearing to be an intervening incident for which there was need of medical treatment. There is not, however, medical evidence that the dog fall incident resulted in permanent disability nor that it became the material factor causing the claimant's deterioration. * * * There is no . . . medical evidence in the file to support SAIF's contention that the dog fall absolves them from any further responsibility in this matter . . ."

On review, SAIF contends that the Referee erred by failing to properly consider the res judicata effect of the adjudication of claimant's 1979 aggravation claim. SAIF relies upon the Board's order in Lewis Twist, 34 Van Natta 290 (1982), and, particularly, the following passage:

> "As a second illustration of res judicata bar in aggravation litigation, suppose there were an original injury followed by a first aggravation claim which was denied followed by a second aggravation claim. If the first aggravation claim were denied on the basis that the claimant had suffered a new intervening injury, then as we understand Crosby v. General Distributors, 33 Or App 543 (1978), there would be no possibility of asserting any further aggravation claims in connection with the original injury." 34 Van Natta at 292-293.

The prior adjudication establishes that in August, 1979 claimant sustained an intervening non-industrial injury. SAIF contends that, as a matter of law, that determination forever bars claimant from filing this, or any future, aggravation claim.

Assuming, arguendo, that this language from Twist is applicable to the issue presented in this case, which we doubt, we have diavowed this portion of our order in Twist in David S. Mathews, WCB Case No. 81-06365, 35 Van Natta 75 (decided this date). SAIF's argument based thereon, therefore, fails.

Having decided that claimant is not barred from filing the present aggravation claim because of the unfavorable adjudication of his earlier aggravation claim, we must decide whether claimant's

compensable condition has worsened since his last award or arrangement of compensation. ORS 656.273. The last award of compensation was the Referee's order of July 30, 1980 which awarded claimant 30% unscheduled low back disability. We agree with the Referee's findings that claimant's current condition is causally related to his original industrial injury. Claimant's treating physician testified that claimant's back condition has continued to deteriorate since his 1978 injury, and that the progression of claimant's low back condition is typical of individuals who sustain an injury of this nature. The medical evidence is that claimant's 1978 industrial injury is a material contributing cause of the progressive deterioration in claimant's condition since July, 1980. This evidence is uncontroverted. Accordingly, we affirm the Referee's finding that claimant's aggravation claim is compensable.

ORDER

The Referee's order dated May 28, 1981 is affirmed. Claimant's attorney is awarded $450 as a reasonable attorney's fee on Board review, payable by the SAIF Corporation.

* *

LLOYD E. BRISTER, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 82-0247M
January 27, 1983
Own Motion Order

Claimant, by and through his attorney, has requested the Board exercise its own motion authority pursuant to ORS 656.278 and reopen his claim for an alleged worsened condition related to his April 19, 1974 industrial injury. The Board, by order of October 8, 1982, referred the own motion request to the Hearings Division to be heard in consolidation with WCB Case No. 82-07570.

Hearing was held by Referee Williams on October 12, 1982. Referee Williams has recommended to the Board that claimant's claim for a psychological condition not be reopened as it would, in his opinion, "work to the claimant's ultimate disadvantage." This opinion was based on a report by Dr. Alice Shannon, a psychiatrist.

The Board has thoroughly reviewed the exhibits, the transcript of the hearing, and the "briefs" filed by the parties involved. We note, first, that claimant's back condition remains stationary (based on a preponderance of the evidence before us). The sole question remaining is whether claimant's psychological condition has worsened and whether his claim should be reopened.

The consensus of the medical opinion is that claimant's psychological condition has worsened. The majority of the doctors involved appear to be impressed with the progress being made and the improvement in claimant's attitude about returning to work. Claimant has been in contact with a rehabilitation counselor who commented on claimant's desire to become a productive individual again. After thorough consideration of the evidence, the Board is persuaded that, in this particular case, the Referee's recommendation would be the most advantageous way to proceed. Claimant's medical expenses (including psychological care) will continue to be paid under ORS 656.245. However, claimant's request for own motion reopening should be denied.

IT IS SO ORDERED. * * * * * * * * * * * *

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

WCB 79-08055
January 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer has requested review of Referee Foster's order which reversed its denial of claimant's May, 1979 aggravation claim. The sole issue is the compensability of that aggravation claim.

We affirm and adopt the Referee's findings of fact and conclusion, subject to the following comments.

This claim involves a 1960 industrial injury to claimant's low back followed by two back surgeries in the early 1960's. Claimant filed a low back injury claim in 1973 and another in 1975. All three of these claims were based on incidents occurring in the course of claimant's employment as a janitor for the employer school district. The latter two claims were treated as new injuries and processed to closure as such. Pursuant to Determination Orders arising from the 1960 and 1973 claims, claimant was awarded 40% unscheduled disability. The 1975 claim was closed in September, 1976 with no award of permanent disability. The current litigation arises from an aggravation claim filed in May, 1979.

The ultimate issue is the compensability of that aggravation claim. However, the insurer has raised an issue that could be dispositive of the aggravation issue based upon the "discovery" of evidence of an off-the-job incident suggesting that the 1973 claim may have been fraudulent or, at the very least, that the off-the-job incident constituted an independent and superceding cause of claimant's condition.

The evidence in question was "discovered" in the course of deposing claimant's treating physician on the issue of whether there had been a worsening of claimant's condition since the last arrangement of compensation in 1976. The physician's chart notes dated the day after the alleged 1973 industrial incident contain an entry reading, "She tripped over cats and fell down the back porch." The entry was made apparently before the physician's examination of claimant, by the physician's nurse. Claimant testified that on the day in question she had injured herself at work lifting benches and cleaning under them, that she drove herself home in great pain and that as she went up the steps to her house she stumbled over a cat and went down but did not fall off the porch. Based on this information, in its closing argument before the Referee, the insurer suggested that the previously accepted 1973 and 1975 claims were not compensable because of this intervening, off-the-job incident. In its brief on Board review, the insurer purports to formally deny compensability of the 1973 and 1975 claims.

We decline to consider the insurer's attempt for the first time on Board review to deny the compensability of the 1973 and 1975 claims. These issues were not raised prior to the hearing, despite ample time on the insurer's part to do so. The purported denials do not comply with the requirements of ORS 656.262(7) and

OAR 436-54-305(3), nor did the parties stipulate at hearing that these issues could be litigated notwithstanding the absence of a formal, more timely denial. The issue framed by the parties at the hearing was the compensability of claimant's 1979 aggravation claim; no mention was made at that time concerning compensability of the 1973 and 1975 claims. Although we may have the authority to reach those issues, Larsen v. Taylor & Company, 56 Or App 404 (1982), we believe that it would be inappropriate for us to do so here where claimant may have marshalled new or different evidence had the 1973/1975 claims compensability issues been raised earlier. Neely v. SAIF, 43 Or App 319 (1979), Edwin L. Mustoe, 34 Van Natta 659 (1982), affirmed without opinion, 61 Or App 296 (1983), Victoria Napier, 34 Van Natta 1042 (1982), and Yvonne C. Fish, 34 Van Natta 1038 (1982). Cf. Mavis v. SAIF, 45 Or App 1059 (1980).

Assuming that the 1973 and 1975 claims remain in accepted status until properly and finally denied, two questions remain: (1) has claimant's condition worsened since the last arrangement of compensation; and (2) is the worsening attributable to either or both of the 1973 and 1975 industrial injuries? See Saxton v. Lamb-Weston Co., 49 Or App 887 (1980); and Dorothy Swift, 34 Van Natta 1059 (1982), which stand for the proposition that acceptance of a claim does not estop the insurer/self-insured employer from later contending that the claimant's present symptoms are not related to the previously accepted condition.

We are satisfied that claimant established a worsening. Although her leg was symptomatic prior to closure of the 1975 claim, the symptoms were limited to radiating pain and numbness. Since that time claimant's leg has begun to give out, causing claimant to fall. The issue whether the worsening relates to either of the two claims (1973 or 1975) is more difficult. The medical evidence strongly suggests that claimant's current difficulties are more related to the predictable effects of the 1960 injury and the ensuing back surgeries, and that the 1973 and 1975 incidents were just two of many on-the-job and off-the-job recurrences arising from the effects of the original injury. However, the medical evidence also indicates that the 1973 and 1975 incidents contributed to some degree to the overall worsening of claimant's condition and that the amount of contribution was material.

ORDER

The Referee's order dated April 29, 1982 is affirmed. Claimant's counsel is awarded $500 as a reasonable attorney's fee, payable by the insurer.

* *

ROBERT COX, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Minturn et al., Defense Attorneys

WCB 81-08800
January 28, 1983
Order on Review

Reviewed by the Board en banc.

The employer requests review of Referee Daron's order which awarded claimant 65% unscheduled permanent disability for injuries to claimant's pelvis, low back, and genito-urinary system, and 10% scheduled disability for injuries to his left leg. The employer contends that the award of unscheduled disability is excessive, and that claimant is not entitled to any scheduled disability. Claimant contends that the award of unscheduled disability is insufficient.

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

While the record is not free from doubt on this issue, we conclude that the evidence preponderates in favor of a finding that claimant sustained some residual loss of function in his leg attributable to the industrial accident, and that the Referee's award of scheduled disability is justified.

With respect to the award of unscheduled disability, under the administrative rules for the evaluation of unscheduled disability (OAR 436-65-600 et seq), an award of permanent disability is appropriate if the claimant's residual impairment, in combination with social/vocational factors, indicates that claimant is foreclosed from a portion of the labor market formerly available to him. Post-injury earnings are relevant to but not determinative of an appropriate award of unscheduled permanent disability. Ford v. SAIF, 7 Or App 549 (1972); Jacobs v. Louisiana-Pacific, 59 Or App 1 (1982).

In this case, the majority of claimant's unscheduled impairment is due to his orthopedic problems. The Evaluation Division's worksheet supporting the Determination Order's award of 30% unscheduled permanent disability indicates 5% impairment of the whole person attributable to claimant's genito-urinary injuries. This modest amount of impairment reflects the toll taken on claimant's body by the multiple major surgeries required to treat the condition. That amount of impairment, in combination with the more significant amount of residual impairment from claimant's orthopedic conditions, together with claimant's social/vocational factors, justifies the Referee's award of 65% unscheduled disability.

ORDER

The Referee's order dated March 26, 1982 is affirmed. Claimant's attorney is awarded $600 as a reasonable attorney's fee on review, payable by the insurer.

Board Member Barnes, dissenting in part:

I disagree with those portions of the Referee's and Board's

orders that: (1) Conclude claimant is entitled to an award for 65% unscheduled disability; (2) based in part on claimant's genito-urinary impairment.

Claimant's genito-urinary impairment, which resulted from his compensable injury, is serious and unfortunate. However, I understand the law to be that awards for permanent disability can only be based on physical impairments that have some negative impact on a worker's wage earning capacity. I cannot find any basis in this record for concluding that claimant's genito-urinary condition has any negative impact on his wage earning capacity. I would, therefore, not include that condition in an assessment of unscheduled disability.

The only reasons the majority states for the contrary conclusion are: (1) A reference to the fact that the Evaluation Division included claimant's genito-urinary impairment in its calculation of claimant's disability; and (2) a reference to "the toll taken on claimant's body" by surgery. The former seems inconsistent with our holding in Michael Harth, 34 Van Natta 703 (1982), endorsed by the Court of Appeals in SAIF v. Baer, 61 Or App 335 (1983), that no presumption of validity attaches to a Determination Order. The latter seems to adopt a pain-and-suffering standard, which has not previously been part of the law applicable to disability awards for industrial injuries.

Although Dr. Carroll has submitted reports that seem inconsistent, from all the medical evidence I conclude that claimant does have permanent low back/pelvic impairment as a result of his industrial injury. Considering this impairment together with the relevant social/vocational factors, I believe claimant would be properly compensated by an award for 45% unscheduled permanent partial disability and would modify the Referee's order accordingly.

* * * * * * * * * *

SYLVIA M. EVEY, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02461
January 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer has requested review of Referee Quillinan's order which affirmed the insurer's denial of compensability of an injury allegedly occurring in October or November, 1980, but which found that claimant sustained a new injury in January, 1981 and remanded that injury for acceptance by the insurer.

We adopt the Referee's findings of fact, except that we do not adopt the finding that claimant sustained a new injury in January, 1981. The issue as framed at the outset of the hearing was compensability of an injury that allegedly occurred on either October or November 12, 1980 for which claimant first sought treatment in January, 1981. No issue was raised whether an incident or activities in January constituted a new injury or gave rise to a new claim. It was error for the Referee to have decided an issue not raised by the parties. Michael R. Petkovich, 34 Van Natta 98 (1982); Marlene L. Knight, 34 Van Natta 278 (1982); and Dorotha L. Oyler, 34 Van Natta 1128 (1982).

ORDER

The Referee's order dated June 2, 1982 is modified. That portion of the order remanding a January, 1981 injury to the insurer for processing is reversed. The remainder of the order is affirmed.

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GUY FINCHAM, Claimant
Steven Huff, Claimant's Attorney
Dennis Graves, Defense Attorney

WCB 81-04246
January 28, 1983
Order on Remand

On review of the Board's Order dated March 31, 1982, the Court of Appeals reversed the Board's Order.

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

IT IS SO ORDERED.

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JEANETTE B. GODIN, Claimant
Jerry E. Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-08842 & 81-08843
January 28, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Mongrain's order which affirmed SAIF's denial of compensability of claimant's headache/neck/shoulder/arm symptoms and reversed another SAIF denial insofar as it related to claimant's current low back symptoms.

The issues are the compensability of claimant's head/neck/shoulder/arm symptoms and her low back condition.

At all relevant times herein claimant was employed as a meat counter clerk in a grocery market and/or delicatessen concern. Claimant sought treatment for headache, neck, left shoulder and left arm pain which was precipitated by a particularly strenuous day's work on April 27, 1979. It does not appear whether this incident resulted in a claim, but it was noted at that time that claimant complained of some low back pain.

A second incident for which a claim was filed occurred on December 13, 1979, in which claimant injured her low back while lifting meat from a shopping basket. Claimant experienced acute low back and bilateral leg pain, diagnosed as "acute, severe lumbar strain." Claimant was off work for six weeks but ultimately returned to work, and the claim was closed with no award of permanent disability.

A myelogram taken in July, 1980 revealed a "defect" at C5-C6. The nature of the defect is not developed in the record.

On March 9, 1981 claimant slipped and fell at work. This incident caused acute low back pain and increased the pain she had continually experienced in her head, neck and upper extremities. However, claimant did not miss any work and the claim was accepted

as nondisabling. On July 11, 1981 claimant's neck pain and headache increased with such severity that she sought treatment at a hospital emergency room. No incident precipitated the increase in pain. Dr. Maukonen, claimant's treating physician at that point, noted that claimant had "a history of chronic neck pain[,] headaches and dysesthesias into both [upper] extremities from industrial injury." Dr. Maukonen's emergency room report discussed primarily the neck and head symptoms, but noted that claimant had some tenderness over her tail bone and pain with prolonged sitting, but no radicular or other symptoms.

Two days later, on July 13, 1981, when claimant arose from bed, she experienced severe pain in her lower back radiating into both legs. Claimant again sought treatment at the hospital emergency room and was diagnosed as having sustained an "acute mechanical back strain." There is no indication that this incident affected claimant's head/neck/upper extremity symptoms. Dr. Maukonen reported that:

> "In view of the fact that there was no associated injury and she previously had injury to her back with similar symptoms, it is my opinion after reviewing her old records and having seen her current x-ray that [t]he current problem is a flare-up of her previous back problem....I feel she does deserve time loss payments relative to her back and due to the injury of 12/13/79."

On September 10, 1981, SAIF issued a denial in material part stating as follows:

> "Reports now in file indicate the current need for treatment is due to an intervening incident and is not related to the industrial injury of March 9, 1981."

On September 11, 1981, SAIF issued a second denial in material part stating as follows:

> "The file shows that your original injury was a low back strain from which you enjoyed a complete recovery and a successful return to work. Reports submitted for your claim for aggravation indicate that the current problem is the result of an intervening incident. Therefore, the current problems and need for treatment seem to preclude any relationship with the December 13, 1979 injury."

(We assume the reference to an "aggravation claim' in the latter notice refers to the July 13, 1981 incident, since it resulted in time loss whereas the July 11, 1981 incident was nondisabling.)

In December, 1981 Dr. Campagna, who was claimant's treating physician at the time of the April and December, 1979 incidents, examined claimant again, and opined that claimant's present cervi-

cal and lumbar strain conditions were "secondary to industrial accident of 3/9/81."

Exercising our de novo review authority and based on the evidence referred to herein, we conclude that both of SAIF's denials should be reversed. All of the medical opinions in the record that address the issue of causation relate claimant's headaches and neck and upper extremities pain to industrial incidents. There is no contrary medical evidence. Claimant's neck, head, and shoulder problems have persisted in varying degrees of severity since the industrial incident of April, 1979. The incident of March 9, 1981 resulted in substantially increased pain in those areas as well as a low back injury. There is no evidence whatsoever that the July 13, 1979 bed incident involved any injury to claimant's head, neck, or upper extremities, and no basis for concluding that the bed incident constituted a supervening event as to those symptoms.

With respect to claimant's low back condition, we recognize that it is medically possible that a simple maneuver like getting out of bed could constitute a supervening injury. We also recognize that claimant experienced some low back pain prior to the December, 1979 incident. However, both the December, 1979 incident and the July 13, 1981 incident involved acute low back pain radiating into both legs. Claimant's treating physician at the time of the 1979 injury and her treating physician at the time of the July, 1981 incident stated that there was a causative relationship between the two events. If the record were silent as to the relationship between the two incidents, or if the evidence was conflicting on that point, there would be a basis for finding that the July 13, 1981 incident was an unrelated, noncompensable event. The medical evidence in this case is that it was not. To find that the bed incident in this case was a supervening event in light of unanimous medical opinion to the contrary would be sheer speculation on our part.

For these reasons, we conclude that both of SAIF's denials should be reversed.

ORDER

The Referee's order dated May 3, 1982 is reversed.

With respect to WCB Case No. 81-08842, SAIF's denial of September 11, 1981 is reversed and the claim is remanded for accptance and payment of compensation in accordance with law.

With respect to WCB Case No. 81-08843, SAIF's denial of September 10, 1981 is reversed in total and the claim is remanded for continued payment of compensation in accordance with law.

Claimant's attorney is awarded $1200 as a reasonable attorney's fee for his services at hearing and on review. This award of attorney fees is in lieu of the Referee's award.

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ELMER C. GREGORY, Claimant
Malagon & Velure, Claimant's Attorneys
Henderson & Molatore, Defense Attorneys

WCB 82-00428
January 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant has requested review of Referee Brown's order which dismissed claimant's request for hearing. Claimant asserts that his employer unreasonably resisted paying compensation and thus is subject to assessment of a penalty and attorney fees.

Claimant suffered a compensable injury to his back on July 29, 1980. Since the injury, he has received treatment about once a month from Dr. Blandino, a chiropractor. On January 5, 1982 the employer sent claimant the following letter:

> "We have just recently received another billing from [Dr. Blandino]. Our office feels that a year and one half should be sufficient for treatment from this injury, and therefore must request before your having any further treatments from [Dr. Blandino] we must ask that you obtain written authority from our office.
>
> "If you feel you should have further medical assistance for this ailment please contact our office and we will be happy to assist you or perhaps make a referral or an appointment for you with another physician."

Despite this letter, claimant has continued to receive treatment from Dr. Blandino without any form of additional authorization from the employer, and the employer has paid all of the doctor's bills submitted to it. We agree with the Referee that, based on these facts, there has been no unreasonable resistance in the payment of compensation and that the employer cannot be penalized.

In addition to penalty-type attorney fees that we have authority to assess under ORS 656.382, we have authority to assess attorney fees under ORS 656.386 when a claimant prevails on a denied claim. The parties argue at great length about whether the employer's January 5 letter quoted above was or was not a denial of medical services. Based on the evidence presented at the hearing, the Referee concluded that letter was not intended to be a denial. We agree. However, we think claimant could have reasonably interpreted the employer's letter as a denial of further medical benefits. Claimant was thus required to obtain legal representation and seek a hearing. At the hearing claimant "prevailed" on the "denial" in the sense that the employer "clarified" that it never intended to deny further chiropractic treatment. We conclude that this situation is sufficiently similar to the situation literally contemplated by ORS 656.386 to justify the same treatment, that is, assessment of an employer/insurer-paid attorney fee for "prevailing" on a "denied" claim. See Edward M. Anheluk, 34 Van Natta 205 (1982).

We think the amount of the fee should be quite modest in these circumstances. In Walter C. Phillips, 33 Van Natta 505 (1981), and Warren Collins, 17 Van Natta 236 (1976), we affirmed or awarded attorney fees of $50 based on the following reasoning:

> "[The Referee] awarded a minimal attorney fee to cover claimant's first visit to his attorney and a reasonable allowance for the estimated time the attorney should have spent contacting the company and working out a conclusion to this extremely minor matter without the necessity of a formal hearing." Collins, supra, 17 Van Natta 237, quoted in Phillips, supra, 33 Van Natta at 507.

The same reasoning is applicable here. To the extent that claimant was confused about the employer's January 5 letter and sought only a clarification, it seems to be a matter that could have been resolved by a phone call without the need for a formal hearing. We award an attorney's fee with that in mind.

ORDER

The Referee's order dated April 30, 1982 is modified. Claimant's attorney is awarded $250 pursuant to ORS 656.386 for services rendered at the hearing and Board levels, payable by the employer. The remainder of the Referee's order is affirmed.

****

SUZANNE A. HOLLAND, Claimant
Malagon & Velure, Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 81-01225
January 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer requests review of Referee Foster's order which found claimant entitled to temporary total disability benefits from January 9 through May 18, 1981 inclusive. The employer argues that the Referee erred in allowing claimant's motion to reopen the record for the purpose of admission of new evidence produced by Dr. Smith.

We adopt the Referee's findings of fact as our own.

We conclude that the Referee's action of reopening the record for reconsideration of his opinion in light of the new evidence submitted by the claimant was proper. OAR 436-83-480 allows the Referee to reopen the record and reconsider his decision prior to the filing of an appeal of his decision or prior to the expiration of the appeal period. Subsection (2) of the rule requires that the request or motion state:

> "(a) The nature of the new evidence; and
>
> "(b) An explanation why the evidence could not reasonably have been discovered and produced at the hearing."

See Robert A. Barnett, 31 Van Natta 172 (1981), aff'd, 59 Or App 133 (1982).

The hearing was held on September 22, 1981. Claimant underwent surgery on September 16, 1981. The challenged report from Dr. Smith is about that surgery. In it Dr. Smith states that the condition for which claimant underwent surgery was "in all medical probability" present at the time of the closing examination on January 9, 1981. Dr. Smith felt that claimant was, therefore, not medically stationary at that time. We agree with claimant's attorney that it is generally too much to expect a physician to be able to produce and transmit a medical report one week post-surgery. We also note that the Referee published his first order only 16 days after the hearing. We are satisfied with claimant's explanation as to why the evidence could not have "reasonably been discovered and produced at the hearing."

ORDER

The Referee's Order on Reconsiderastion dated February 24, 1982 is affirmed.

Claimant's attorney is awarded a fee of $325, payable by the employer.

****

CARL HUTSON, Claimant
Des Connall, Claimant's Attorney

Case No. CV0135600
January 28, 1983
Order of Dismissal--
Crime Victims Act

This matter is before the Board on claimant's request for a hearing pursuant to ORS 147.155. The claimant and the Department of Justice, Administrator of the Victim's of Crime Compensation Fund, have entered into a settlement providing for the payment of certain benefits and an agreement that the Board may dismiss with prejudice claimant's request for a hearing.

ORDER

Claimant's request for a hearing received by the Board on June 14, 1982 is dismissed with prejudice.

****

HENRY C. JORDAN, Claimant
Allan Coons, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 81-01698
January 28, 1983
Order of Abatement

The Board issued its Order on Review in the above entitled case on December 30, 1982. The employer/insurer, by and through its attorney, has requested we reconsider our order. To allow us time to give this case proper consideration, we hereby abate our Order on Review.

IT IS SO ORDERED.

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HUGH J. McLEAN, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-04232
January 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review and the self-insured employer cross-requests review of Referee St. Martin's order which awarded claimant 75% unscheduled permanent partial disability for an injury to his low back. The Referee's award constitutes an additional 60% permanent disability over that granted by Determination Order. Claimant contends that he is permanently and totally disabled; the self-insured employer argues that the Referee's award is excessive.

We accept the Referee's findings and adopt them as our own, subject to the following additional comments. We agree with the Referee's assessment that a major portion of claimant's impaired ability to return to regular and gainful employment is due to his heart attack, which is unrelated and subsequent to his industrial injury. This subsequent non-compensable heart attack is not relevant in determining the extent of claimant's permanent disability. Emmons v. SAIF, 34 Or App 603 (1978).

Considering claimant's remaining medical problems as contributing to his preexisting disability within the meaning of ORS 656.206(1)(a), in addition to the residual effects of his low back injury, we find that claimant is not permanently and totally disabled based upon medical factors alone. Claimant contends that the pertinent social/vocational factors, in conjunction with his medical problems, indicate that he has no reasonable expectation of being able to sell his services to an employer; and that, therefore, he is excused from the requirement of ORS 656.206(3), to make reasonable efforts to obtain employment. See Looper v. SAIF, 56 Or App 437 (1982); Livesay v. SAIF, 55 Or App 390 (1981). We disagree. Although he is seriously disabled as a result of his compensable injury, in combination with his other various medical problems preexisting his injury, we do not find that claimant is so disabled as to be excused from the requirement of ORS 656.206(3). See Dixie Fitzpatrick, 34 Van Natta 974 (1982), and cases cited therein; cf. Home Insurance Company v. Hall, 60 Or App 750 (1982); Willamette Poultry Company v. Wilson, 60 Or App 755 (1982).

Claimant has made no effort to obtain employment, and our assessment of the evidence indicates that he would be capable of performing light work which enables him to periodically alternate between sitting and standing and which does not require excessive bending, kneeling or twisting. We find that, although claimant may have experienced some difficulty in performing the modified job to which he returned for one day, the record does not establish that his failure to return to that modified position was due to his low back injury. Rather, the most reasonable reading of all the evidence is that claimant did not return to work after that day because of a diagnostic procedure related to a problem in his throat, and claimant thereafter suffered his heart attack. Although this is an unfortunate turn of events, it does not excuse claimant's failure to satisfy his obligation to make a reasonable effort to return to the labor force in a capacity suited to the physical limitations attributable to his industrial injury. We

agree with the Referee's assessment of the testimony and report of the vocational consultant who appeared at the hearing in claimant's behalf, and we have accordingly weighed his opinion regarding claimant's potential for reemployment and retraining.

We also find it significant that, even if the disabling consequences of claimant's heart attack were to be considered, his cardiac physician, an internist, specified that claimant would be capable of performing a sedentary job.

Having decided claimant has not proven he is permanently and totally disabled, ORS 656.206(3), we turn to the employer's contention that the Referee's award of permanent partial disability is excessive. We agree. Our review of the record results in our finding that a 20% impairment rating accurately reflects the degree of physical impairment attributable to claimant's low back injury, which has been diagnosed as a musculoligamentous strain superimposed upon preexisting degenerative disc disease. Claimant completed the eighth grade, having dropped out of school in the course of his ninth year. He has been a boilermaker for many years, performing primarily welding and pipefitting work. He worked with this employer for 14 years prior to this injury, and during some of this time he acted in a supervisory capacity as a foreman, performing manual labor that would generally be considered in the category of heavy work. The specific vocational preparation ("SVP") entry for boilermaker is 5. We find that claimant will be unable to return to this job as a result of his compensable injury. His lifting limitation, as indicated by Dr. Puziss, is 35 pounds, and claimant testified that he generally would not attempt to lift more than 10 to 15 pounds. We find that claimant's residual functional capacity ("RFC") permits him to perform light work. See OAR 436-65-605. Before his injury, claimant was able to perform heavy work, and now he is only able to perform light work; his eighth grade education results in a general education development ("GED") level of 2; his SVP is 5. Utilizing the informal guidelines published by the Workers Compensation Department, used to assist the evaluation of disability based upon an analysis of occupational employment trends in Oregon, we find these factors indicate claimant could be expected to obtain and hold 15% of the occupational opportunties normally available in the state of Oregon. OAR 436-65-608.

Considering these findings, claimant's age, experience and training, his subjective complaints of pain, and other cases in which we have evaluated the impairment of a worker's earning capacity, we find that claimant would be appropriately compensated for the permanent loss of earning capacity due to his industrial injury by an award of 50% unscheduled permanent partial disability.

ORDER

The Referee's order dated May 18, 1982 is modified. Claimant is awarded 50% unscheduled permanent partial disability for injury to his low back. This award is in lieu of all prior awards. Claimant's attorney's fee should be adjusted accordingly.

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DONNA M. SKINNER, Claimant
Malagon & Velure, Claimant's Attorneys
Brian Pocock, Defense Attorney

WCB 80-3100
January 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Nichols' order(s) which: (1) set aside that portion of the denial of July 27, 1981 which denied responsibility for claimant's condition on the ground that her work activity only resulted in temporary symptomatology and had no permanent effect on claimant's preexisting underlying condition; (2) approved that portion of the denial as it related to Dr. Smith's request to reopen the claim; (3) awarded claimant 20% unscheduled permanent partial disability, that being an increase of 10% over and above the Determination Order of June 1, 1979; (4) ordered SAIF to pay claimant interim compensation for the period from April 9, 1981 to July 27, 1981; and (5) awarded claimant's attorney a fee of 25% of the increased permanent partial disability compensation and $2,000 payable by SAIF. With the exception of the finding regarding claim reopening, SAIF asserts that the Referee erred on all issues.

I.

In 1965 claimant was involved in a non-work related automobile accident in which she sustained injuries to her head and neck. No x-rays were taken following this incident. Claimant was treated for a variety of medical problems between 1965 and 1972, none apparently involving her neck. Claimant began working on a green chain for the Murphy Company in 1969. On February 16, 1972 claimant signed an 801 form indicating that she strained her neck at work. She was treated by Dr. Maier and released to return to work on March 13, 1972. A Determination Order of April 18, 1972 allowed no permanent partial disability. On August 19, 1974 claimant completed another 801 form indicating that she strained her shoulder and neck at work. Claimant was released to return to work on September 3, 1974 and the Determination Order of November 20, 1974 allowed time loss benefits only. On March 18, 1977 claimant signed yet another 801 form regarding a neck pain she suffered when she turned her head suddenly at work. The Determination Order of June 22, 1977 allowed approximately five weeks of temporary total disability benefits.

On September 1, 1977 claimant filed another 801 form indicating that she again sustained an injury when turning her head at work. X-rays taken by Dr. Quinn revealed degenerative changes with subluxation of C-5 on C-6. Dr. Golden agreed and suggested that a tomogram be obtained. The tomogram was performed by Dr. Filarski on November 2, 1977. Dr. Filarski suspected an interspinous ligament tear but found no evidence of subluxation. Claimant was released to return to work on January 18, 1977. On February 2, 1978 claimant was again complaining of pain, but by February 16, 1978 was feeling better. The Determination Order of March 1, 1978 allowed additional time loss benefits. On March 21, 1978 claimant returned to Dr. Eaves again complaining of neck pain secondary to turning over in bed at home. By May of 1978 claimant was again suffering increased pain and was referred to Dr. Baker.

On May 23, 1978 Dr. Baker reported that he unquestionably felt claimant's symptoms to be due to subluxation of C-5 on C-6, but that "I have never seen or heard of this happening spontaneously with a voluntary right turning of the head . . . " On August 25, 1978 Dr. Baker performed an arthrodesis C5-6 with internal fixation. Dr. Baker released claimant to return to work on January 8, 1979. Claimant failed to do so, apparently due to the occurrence of shocklike sensations in her body (Lhermitte's sign). A myelogram was performed by Dr. Golden on March 12, 1979 and other than a minimal defect at C6-7, the cervical spine was normal. On April 16, 1979 Dr. Golden recommended claim closure. A Determination Order issued on June 1, 1979 allowing claimant 10% unscheduled permanent partial disability for injury to the neck.

On August 31, 1979 claimant returned to Dr. Eaves complaining of neck pain. Dr. Eaves referred her to Dr. Baker for reevaluation. Dr. Baker reported on September 19, 1979 that claimant was overreacting a great deal to mild subjective complaints and stated that he advised the claimant to put the experience behind her and to return to as normal a life as possible, but that: "She is so fixed and so apprehensive about her disability that I doubt that she will ever be able to accept this." Claimant was subsequently enrolled at Lane Community College for a vocational rehabilitation program; however, the program authorization was revoked in October of 1980 due to claimant's lack of interest. Time loss benefits ceased when the program was terminated.

On December 30, 1980, at the request of her attorney, claimant was examined by Dr. Smith, who did not prepare a written report until February 17, 1981. Although the objective findings were minimal, Dr. Smith stated that he felt the claim should be reopened with arrangements made for hospitalization of the claimant for the purpose of further diagnostic and possible surgical procedures. Claimant was subsequently reevaluated by Dr. Baker at the request of SAIF. Dr. Baker stated in his report of May 1, 1981 that Dr. Smith's evaluation was probably accurate, but that under no circumstances would he consider operating on the claimant's neck again. Claimant was also examined by Drs. Hockey, Golden and Phifer at the request of SAIF. Dr. Hockey could find no indication that surgery was necessary; Dr. Golden was surprised that any examiner would recommend surgery on claimant's neck since it was asymptomatic.

On June 6, 1981 in response to several questions posed by defense counsel, Dr. Baker indicated that it was medically probable that claimant's cervical condition and resulting surgery was caused by the 1965 automobile accident and that the head-turning incidents which occurred at the Murphy Company produced only transitory symptoms and had no effect on claimant's preexisting condition. A back-up denial of the claim by SAIF followed on July 27, 1981. On August 6, 1981 Dr. Golden indicated his agreement with Dr. Baker's responses to the questionnaire from SAIF.

The matter proceeded to hearing on August 12 and September 16, 1982. The Referee concluded that the February 17, 1981 report of Dr. Smith constituted a valid claim for aggravation which SAIF was required to respond to with the payment of interim compensation. Having failed to do so, the Referee found SAIF liable for such benefits from the date of receipt of Dr. Smith's report to the date

of the denial. The Referee concluded that, considering the opinions of Drs. Baker, Hockey, Phifer and Golden, claimant had not proven a compensable aggravation claim. The Referee also concluded that although the medical evidence established that claimant had a preexisting underlying condition, her work incidents at the Murphy Company resulted in a worsening of that condition. Apparently the Referee discounted Dr. Baker's opinion because she felt he reversed his position when testifying at the hearing.

II.

This is an extremely complicated case from a factual standpoint. Two hearings were necessary, the first of which was nine hours long, 106 exhibits were received and Dr. Baker produced medical testimony covering 77 pages of transcript. We believe that if the Referee had had the benefit of a written transcript (particularly with regard to Dr. Baker's testimony), which we have found to be essential in this case, she would have affirmed SAIF's denial in its entirety.

The most important evidence concerning compensability of claimant's condition was produced by Dr. Baker (claimant's treating physician) at the hearing. Close scrutiny of that testimony reveals, as defense counsel asserts, that Dr. Baker did not reverse his position, but was in fact consistent throughout his testimony.

Dr. Baker's opinion concerning claimant's condition can be summarized as follows. Claimant had suffered an interspinous ligament tear in her neck which upon surgery he found to be healed, albeit improperly. It is not medically probable that the simple head turning incidents at the Murphy Company could have torn the ligament:

> "Because it takes considerable force to rupture these ligaments. They are very dense tough ligaments. And simply by turning one's head, it's, it would be extremely unusual to do this injury in that manner."

Dr. Baker stated that a flexion-extension incident would be the most probable cause of the ligament tear and that this type of injury was often sustained in automobile accidents. He felt this was the most likely cause of claimant's torn ligament. Dr. Baker indicated further that one of the purposes of the interspinous ligaments was to maintain the proper alignment of the vertebral bodies and that, once the ligament tears and heals improperly, the prospect for future subluxations of the vertebral body are significantly enhanced:

> "The pain results from the position of one vertebra on the other as the vertebra subluxes or shifts. That's what causes the pain. And then it shifts back to its normal position and the pain is relieved."

The Referee felt that Dr. Baker testifed that each episode of subluxation (which the ligament tear made likely) left claimant in

a position where additional future subluxations would be more likely to occur and would occur with greater frequency and that Dr. Baker then reversed this position when questioned later. We do not believe that to have been the case. On cross-examination, the following exchange took place:

> "Q. * * * Do I understand you correctly that you feel what happened in March of 1977 was that, predisposed to subluxation by the stretched or lengethened ligament, then Donna Skinner had a subluxation when she turned her head; is that your interpretation of that event?
>
> "A. Yes.
>
> "Q. Your testimony indicated that, once this event occurs and is reduced again to its proper position, there is no increased likelihood that it will happen again.
>
> "A. No, that's not correct. Once it has happened, it will occur again and again." (Emphasis added.)

It seems apparent that Dr. Baker was assuming that "this event" still meant the original ligament injury. Dr. Baker was then asked:

> "Q. And would it also be true that when it, on a given occasion, gets out of place further than its ever been out of place before, that would facilitate the likelihood that at some future occasion it would get that far out of place again?
>
> "A. Yes."

Although it is less clear here, it appears that Dr. Baker is still referring to the original ligament tearing injury. This interpretation seems confirmed by further testimony:

> "Q. Well, basically, your testimony, if I understood it correctly, Doctor, has been that once we get this vertebral body dislocated --
>
> "A. -- or subluxed --
>
> "Q. -- or subluxed, seriously out of place, even though it may reduce again, go back where it belongs it's more likely then that it, or it's easier for it, then, to go back and sublux again. Have I correctly understood that?
>
> "A. Yes.
>
> "Q. * * * But whenever she tore the

ligament, . . . we've got a 40-year-old woman with no known significant subluxation event until March of 1977. * * * And I'm just asking, doesn't that tend to confirm the notion that once this thing gets out of place, that it's much more likely to get out of place again?

"A. Yes, I believe it does. I was trying to make more out of that than there was I'm sorry." (Emphasis added.)

Again, it appears likely that Dr. Baker is referring to the original ligament tearing incident. This is further confirmed on redirect examination:

"A. I think that, whether or not a person is subluxed on an intermittent basis, I think anything is possible to increase the likelihood of that happening again and again in the future. I think, in this particular incident, incident -- the March '77 episode probably did not make her more likely to sublux.

* * *

"Q. And what about the other two episodes? Would you say they didn't make --

"A. I think they had no effect either."

and:

"I think the episode of March, 1977 possibly predisposed to it happening more often in the future. I think in this particular instance, in this particular instance, that's not probable."

We believe that Dr. Baker's testimony did not vary and that he consistently maintained the opinion that the original ligament tear predisposed claimant to further subluxations, but that none of the additional incidents of subluxations worsened the condition or made further subluxations more likely. Alternatively, we think the doctor's testimony is ambiguous in response to ambiguous questions like "this event" and "this thing gets out of place"; but we do not think it is fair or accurate to say that possible unclear responses to such questions establishes that a doctor reversed his position, as the Referee seems to have affirmatively found. Without benefit of a transcript however it is not difficult to understand how the testimony could be misperceived.

It is established within a reasonable medical probability that claimant did not sustain the ligament injury at work. The instability resulting from that ligament injury produced incidents of subluxation and reduction of the vertebral body. The only result of those incidents was temporary pain experienced until the

subluxation self-reduced. The subluxation which occurred as a result of incidents at work had no effect on claimant's underlying condition. Dr. Baker testified that the surgery was performed for the purpose of correcting the instability and was not due to any particular subluxation incident. The medical evidence thus summarized makes the question concerning compensability more clear. Since claimant did not injure her ligament at work, and since the work incidents did not contribute in any way to the condition or need for surgery, claimant's employer could not possibly be responsible. Autwell v. Tri-Met, 48 Or App 99 (1980). SAIF's denial of compensability must, therefore, be affirmed and the June 1, 1979 Determination Order must be set aside. With regard to the opinions of Drs. Smith and Luce, we generally agree with the comments in appellant's brief.

Claimant cites Keefer v. SIAC, 171 Or 405 (1943) for the proposition that the employer must accept the worker as he finds him. That is correct; however, it does not mean an employer is responsible for conditions totally unrelated to a claimant's employment and to which the employment made no contribution.

III.

Claimant additionally asserts that SAIF may not in 1981, deny a claim that was accepted in 1977 and processed to closure by Determination Order in 1979. The Court of Appeals seems to believe otherwise. See Townsend v. Argonaut Insurance Company, 60 Or App 32 (1982).

With regard to the issue concerning claim reopening, we agree with the Referee. We also agree with her conclusion that SAIF was required to provide claimant with interim compensation from April 9, 1981 to the date of denial.

ORDER

The Referee's order dated March 12, 1982 and interim order dated August 19, 1981 are affirmed in part and reversed in part.

Those portions of the order(s) which set aside SAIF's denial of July 27, 1981 which denied responsibility for claimant's cervical condition are reversed and SAIF's denial is reinstated and affirmed in its entirety. Those portions of the order which allowed claimant an additional 10% unscheduled permanent partial disability over and above the June 1, 1979 Determination Order are reversed and the Determination Order is set aside. Those portions of the Referee's order allowing claimant's attorney an attorney's fee of $2,000 payable by SAIF are reversed. The remainder of the Referee's order is affirmed.

★★★★★★★★★★

EUGENE SZABO, Claimant
Alan R. Unkeles, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-07103
January 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The claimant requests review of Referee Neal's order which found that claimant's occupational disease claim for calcaneal tendinitis was not compensable because he did not file it within 180 days following the date he was disabled or informed by a doctor he was suffering from an occupational disease.

Claimant's claim started simply enough with a right ankle injury in November of 1978. It has grown considerably more complex over the years since then and, the parties now seem to agree, at some point evolved into a distinct occupational disease claim for tendinitis in both of claimant's ankles/feet. While the matter is not free from doubt, we conclude the occupational disease claim for tendinitis was first asserted in July of 1981, but that claimant had been informed of this condition and its possible work connection in July of 1979. The claim was thus untimely under ORS 656.807. However, the courts have concluded that the exceptions in ORS 656.265(4) apply to occupational disease claims. Inkley v. Forest Fiber Products Co., 288 Or 337 (1980). Invoking one of those exceptions, claimant argues that his claim should not be time barred because his employer was not prejudiced by the late filing. In the context of this case, in which some kind of claim for some kind of ankle/foot condition has been processed since late 1978, claimant's no-prejudice argument seems cogent. The SAIF Corporation does not present any argument to the contrary. We conclude that claimant's occupational disease claim is not time barred because late filing did not create any prejudice.

We turn to the merits of the claim, which the Referee did not reach. One doctor has specifically opined that claimant's calcaneal tendinitis "does not seem to be job related." Viewing the other evidence in the light most favorable to the claimant, the most that can be said is that claimant's standing at work on cement floors and metal rollers made the tendinitis condition symptomatic, i.e., caused pain, but was not the major cause of the onset of that condition or of any worsening of that condition. On this record, we do not believe that claimant has established compensability. See Douglas S. Chiapuzio, 34 Van Natta 1255 (1982); William C. Schneider, 34 Van Natta 520, aff'd 59 Or App 772 (1982).

We thus reach the same conclusion as did the Referee, albeit for different reasons.

ORDER

The Referee's order dated May 27, 1982 is affirmed.

****

GEORGE A. TILLERY, Claimant
Doblie & Francesconi, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07576
January 28, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review and the SAIF Corporation cross-requests review of Referee Braverman's order which granted claimant compensation for 20% unscheduled disability due to bilateral thoracic outlet syndrome. Claimant contends the award is low; SAIF requests that the Referee's award be affirmed.

After de novo review, the Board affirms the conclusion reached by the Referee. This decision was reached after consideration of claimant's case in light of OAR 436-65-600 et seq. Several discrepancies appear after a comparison of our evaluation with that submitted by claimant in his brief on review. Claimant's job as a spreaderman/core feeder has a "specific vocational preparation" of 3 for an impact value of +3 (not +8 as claimant contends). In the Dictionary of Occupational Titles, this job is classified as medium work, rather than heavy. Based on the lifting restrictions placed on claimant by his doctors, claimant is now able to perform light work for a value of +5. Under the "labor market findings" section of OAR 436-65-600 we chart claimant with a GED of 4 (high school education), an SVP of 3 and in the light of work category. This results in 17% of the general labor market still available to him for a value of 0. Combining these factors with the other factors which were agreed upon by claimant's attorney and the Board, we conclude that claimant has been adequately compensated by the 20% award granted by the Referee.

ORDER

The Referee's order dated June 10, 1982 is affirmed.

* * * * * * * * * * *

BROCK WEIDMAN, Claimant
Richard Condon, Attorney
Noreen Saltveit, Attorney

WCB 81-04440
January 28, 1983
Order on Remand

On review of the Board's Order dated February 26, 1982, the Court of Appeals reversed the Board's Order.

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

IT IS SO ORDERED.

* * * * * * * * *

MARTA WILLIAMS, Claimant
Doblie & Francesconi, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10519
January 28, 1983
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Galton's order which set aside its November 10, 1981 claim denial. The only issue for review is compensability.

The facts are relatively simple. Claimant was employed at the Milwaukee Care Center for about 2 months when, on August 12, 1981, she allegedly strained her back while assisting a patient. Claimant advised her employer who recommended that she see a doctor. Claimant, however, filed no claim, sought no medical services nor lost any time from work.

On or about September 25, 1981 claimant suffered low back and sharp right leg pain when bending over to lift her child. The claimant did seek medical care following this incident. The few medical reports in the record indicate that claimant was bending over at the waist in order to lift her child, and felt a pop in her back. The diagnosis was low back sprain. A claim was filed and was denied by SAIF on November 10, 1981 on the grounds that the medical treatment and time loss incurred were the result of the child lifting incident and not an on-the-job injury. SAIF indicated correctly that no claim had ever been filed for the August 12, 1981 incident.

The Referee stated that a compensable injury under ORS 656.005 is an accidental injury arising out of and in the course of employment which requires either medical services or results in disability or death. It would, therefore, appear that claimant did not sustain a compensable injury prior to the September, 1981 incident. Despite this, however, the Referee stated that this issue was not before him and that there was also no issue before him regarding the September child-lifting incident.

We disagree. We believe that these were the exact issues before the Referee. Claimant filed a claim for medical services and time loss incurred following an off-the-job lifting incident. SAIF, not having any previous claim filed against it, denied the claim. The issue, therefore, is: are the medical services and time loss suffered by the claimant in September of 1981 the result of a compensable injury? We believe this to have been the issue before the Referee and the answer is obvious. Claimant has not established this to be the case. There is no medical evidence so indicating and, in point of fact, what evidence there is implicates the September of 1981 off-the-job lifting incident.

ORDER

The Referee's order dated July 2, 1982 is reversed. SAIF's denial of November 10, 1981 is affirmed.

Board Member Barnes Dissenting:

The majority recasts what the parties agreed at the time of hearing was the issue in this case. At the conclusion of the testimony the Referee asked whether the "only issue" was whether there was a compensable at-work injury on August 12, 1981. SAIF's attorney responded in the affirmative. The Referee decided the issue so framed on credibility grounds and I agree with his decision.

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TIMOTHY R. WRIGGLESWORTH, Claimant
Steven Finlayson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01967
January 28, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Seymour's order which awarded the claimant 35% unscheduled permanent partial disability for his low back injury. A Determination Order dated October 11, 1979 had awarded no permanent disability compensation. SAIF contends that the award is excessive and that a more reasonable award would be 10% unscheduled disability.

Like the Referee, we find that the claimant has suffered some permanent disability as a result of his low back injury. However, applying the facts of this case to the rating guidelines found at OAR 436-65-600 et seq., we find that the more reasonable award would be 64° or 20% unscheduled permanent partial disability.

ORDER

The Referee's order dated May 10, 1982 is modified. Claimant is awarded 20% unscheduled permanent partial disability. Claimant's attorney's fee should be adjusted accordingly.

****

NOLAND BENDER, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-02532
January 31, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer has requested review of Referee Danner's order which reversed its denial of claimant's accidental injury claim. The issue is whether the injury occurred in the course of his employment. We reverse.

Except as inconsistent with our findings herein, we adopt the Referee's findings of fact. Briefly, those facts are that claimant, then 14 years of age, was employed as a custodian on a part-time basis at the school he attended. His wages were paid through the Comprehensive Employment and Training Act (CETA) program. During the fifteen minute work break, claimant and his supervisor regularly played basketball in the gymnasium. On the evening of his injury, however, claimant's supervisor was not present and claimant and another CETA student employee were shooting baskets. They brought out a springboard and were using it to gain sufficient height to "dunk" the basketball through the hoop. During one such attempt, claimant fell, breaking his arm and sustaining other injuries.

But for one additional factor, we would find this claim to be compensable inasmuch as the injury took place on the employer's premises, on a break required by the conditions of employment, and while engaged in an activity, to all appearances, condoned by claimant's supervisor. The decisive factor is that claimant testified that he was aware that use of the springboard while

playing basketball was specifically disapproved. He testified that as a participant in the school's basketball program he personally observed other students using the springboard in the fashion described and being warned by the coaches to cease engaging in such activity.

We recognize that, at the time, claimant was only 14 years of ge and that the knowledge that springboards were not to be used while playing basketball was acquired while claimant was in his status as a student, not as an employee. Nevertheless, we find that he knew that the employer did not consent and, in fact, expressly disallowed, the conduct in question. It follows that claimant's injuries were sustained while claimant was engaged in conduct outside the course of his employment. Clark v. U.S. Plywood, 288 Or 255, 266 (1980).

ORDER

The Referee's order dated June 25, 1982 is reversed. The insurer's denial of March 14, 1980 is reinstated and affirmed.

****

JACK BROWN, Claimant
Magar E. Magar, Claimant's Attorney
John Snarskis, Defense Attorney

WCB 81-02709
January 31, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer has requested review, and the claimant cross-review, of Referee Gemmell's order which awarded 40% unscheduled permanent disability but denied any additional temporary total disability. The insurer contends that the Evaluation Division's award of 10% permanent disability was sufficient and that the Referee erred in failing to allow offset of an overpayment of temporary total disability. As respondent on review, claimant defends the Referee's award of permanent disability. As cross-appellant, claimant further contends that the Referee erred in failing to award temporary disability retroactive to 1978. In connection with this contention, claimant has requested the Board to exercise its own motion authority under ORS 656.278(2) to change or modify the award of time loss from a 1978 Determination Order.

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

We decline to exercise our own motion authority in the manner requested by claimant, and we affirm the Referee's conclusion concerning claimant's entitlement to time loss retroactive to 1978. Apart from all other legal and factual considerations, viewing the record as a whole, we are simply not persuaded by claimant's post hoc medical report or other evidence that he was not medically stationary and unable, totally or partially, to work during the time periods in question.

With respect to the overpayment issue, at least insofar as the record before us reflects, the insurer made no request at hearing for an offset against an award of permanent disability. However, the issue was raised by virtue of a stipulation in the

record to the effect that there was an overpayment of time loss in the amount of $250. The insurer having now requested acknowledgment of the right to assert an overpayment and the claimant having expressed no disagreement therewith, we will allow an offset against the award of permanent disability.

The parties have briefed the extent of permanent disability issue at length. Considering the parties' arguments and based on our de novo review of the record, we arrive at the following findings and conclusions. Claimant's residual functional impairment is in the minimal range, justifying assignment of a +5 value for that factor. Claimant is now 31 years of age, for a -3 value. He has a graduation equivalency diploma (GED) which yields a neutral value. His community college education (building inspector program) is too specialized to justify assigning a negative value for the education factor. The specific vocational preparation (SVP) level for claimant's occupation at the time of his injury (carpenter) to which he cannot return is 7, resulting in a +10 value in the work experience area.

We find that prior to his injury, claimant was capable of doing heavy work and is now restricted to medium work; therefore, a value of +5 point is warranted for the adaptability factor. We find the mental capacity and emotional/psychological factors unremarkable, yielding no points, plus or minus, for those factors. With respect to the labor market findings, assuming a residual functional capacity for medium work, a general educational development value of at least 4 and an SVP of 7, at least 78% of the labor market is still open to claimant, yielding a -25 value for the labor market findings factor.

Combining and computing the combined values in the manner set forth in the OAR 436-65-601 results in a disability rating of 15%. Considering the record as a whole and the awards of permanent disability in similar cases, we believe that an award of 15% unscheduled permanent disability accurately reflects this claimant's present loss of wage earning capacity arising from his compensable injury.

ORDER

The Referee's order dated July 14, 1982 is modified. Claimant is awarded 15% unscheduled permanent disability, subject to an overpayment of temporary disability in the amount of $250. This award of permanent disability is in lieu of all prior awards. Claimant's attorney's fee shall be adjusted accordingly. Claimant's motion requesting the Board to exercise its authority under ORS 656.278 is denied.

* * * * * * * * * *

DAVID CHENEY, Claimant
Pozzi, Wilson et al., Claimant's Attorney
Keith Skelton, Defense Attorney

WCB 81-01812
January 31, 1983
Order on Reconsideration

The insurer has requested that the Board reconsider that portion of its Order on Review dated January 18, 1983 which remanded claimant's aggravation claim "for payment of compensation for temporary total disability effective November 28, 1980 and for processing in accordance with law." The insurer's point is well

taken. Unless the insurer is able to submit the claim for closure and obtain a Determination Order within 14 days after the Board's order, the effect of the order is to award claimant over two years of temporary total disability in a lump sum regardless of whether claimant was medically stationary during that period. Moreover, depending on whether and how much permanent disability ultimately may be awarded herein, the insurer may or may not be able to recoup an overpayment.

The Board was confronted with a similar situation in Clyde M. Hargens, 34 Van Natta 751 (1982). In Hargens the time elapsing between the aggravation claim reopening date and the date of the Board's order reversing the denial was some two years. We noted that it was inequitable to order that much temporary total disability which may greatly exceed the amount of time loss otherwise payable. Here we note that the case has been pending before the Board since December 1981, and it appears from the evidence that claimant may have been released by his treating physician to return to work on August 7, 1981, that claimant returned to work on August 20, 1981, and that he was declared medically stationary by his treating physician. Under these circumstances, as in Hargens, it would be inequitable to order time loss payable up through the date of the order.

The solution arrived at in Hargens was to enter a provisional order granting time loss for a discrete period but also providing that the order was not binding on the Evaluation Division which would be free to establish an earlier or later date by which claimant's entitlement to temporary disability should end. Payment or recoupment of an overpayment of compensation could be made accordingly.

In this case, as noted above, claimant was released to return to work, found medically stationary and actually returned to work, all in the late summer and early fall of 1981. Resolving doubt in claimant's favor, considering the evidence as a whole, we believe that the ends of justice would be served by ordering temporary total disability from the date of claim reopening through the date on which claimant apparently returned to work, subject to the Evaluation Division's independent assessment at such time as the claim is ultimately closed. See Hargens, supra.

ORDER

The Order on Review dated January 18, 1983 is amended in part. That part of the order remanding the claim to the insurer for payment of compensation and processing in accordance with law is modified. The claim is remanded for processing and payment of benefits as provided by law, except that the insurer shall only pay claimant for temporary total disability between November 28, 1980 and August 20, 1981, less time worked, if any, unless and until otherwise ordered when this claim is closed pursuant to ORS 656.268. The remainder of the Order on Review is readopted and republished.

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LEE B. PLANT, Claimant
Charles Robinowitz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-08499, 82-00107 & 82-00108
January 31, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer has requested review of Referee Mannix's order which, in relevant part, found claimant's aggravation claim compensable and awarded temporary total disability effective the date of the medical report forming the basis of the aggravation claim (March 28, 1980). The insurer contends that whatever worsening claimant experienced was attributable to the natural progression of an underlying, noncompensable condition and not related to the accepted condition. The insurer further contends that if the aggravation claim is compensable, the Referee erred in not establishing a medically stationary date for purposes of terminating claimant's entitlement to temporary total disability effective May 16, 1980, resulting in a $15,000 gift to claimant.

We affirm and adopt the Referee's order subject to the following comments. We agree that the aggravation claim is compensable, and we agree that the Referee correctly established March 28, 1980 as the date of that claim for purposes of entitlement to temporary total disability. The insurer's argument that the Referee should have gone ahead and established a medically stationary date for purposes of terminating entitlement to temporary total disability is based on claimant's contention at hearing that the Referee should exercise his discretion under OAR 436-83-525 and rate extent of disability if he found the aggravation claim compensable.

The contention that claimant was medically stationary as of a specific date was exactly that, a contention pertaining to the claimant's position that the Referee should exercise his discretion to rate extent of disability. The Referee felt that some of the medical reports were too stale to justify rating extent of disability at that time, so he declined to exercise that discretion. Significantly, at the outset of the hearing in framing the issues, the insurer specifically urged the Referee, if he found the claim to be compensable, to not rate extent of disability but to remand the claim for further processing. The insurer at that time did not argue that the Referee should decide the medically stationary date. The insurer cannot have it both ways. Either the Referee correctly declined to rate extent of disability (which would necessarily require him to establish a medically stationary date), or he should have rated the extent of disability. By urging the Referee not to rate extent of disability, the insurer cannot now be heard to complain that the Referee failed to establish a medically stationary date.

SAIF's argument that the effect of the Referee's order bestows a $15,000 gift on the claimant (which apparently is the amount of time loss payable from the date of claim reopening to the date of closure) assumes that claimant will be found medically stationary at some point remote in time from the date of the determiation order ultimately establishing a medically stationary

date, and that there will be no award or an insufficient award of permanent disability to recoup an overpayment. Both matters are too speculative to warrant granting the relief the insurer requests.

This order should not be read to mean that Referees (or the Board) should never establish a medically stationary date for purposes of terminating entitlement to time loss while declining to rate extent of disability. In Clyde Hargens, 34 Van Natta 751 (1982), for example, some two years had elapsed from the date of the aggravation claim until the Board's order finding the claim to be compensable and the delay in bringing the litigation to a conclusion was, in large part, attributable to the claimant. There was evidence in Hargens that at some point prior to hearing the claimant had been released to work, therefore, we entered an order establishing a finite period of temporary total disability. However, we specifically provided in that order that the date we chose was not binding on the Evaluation Division and it was free to find an earlier or later date, and the insurer could adjust the compensation accordingly. In this case, considering the position the insurer took at hearing and the other equities present here as contrasted with those in Hargens, we decline to search the record to establish a medically stationary date.

ORDER

The Referee's order dated April 13, 1982, as amended by the Referee's order dated April 26, 1982, is affirmed. Claimant's counsel is awarded $550 as a reasonable attorney's fee for his services on review, payable by the insurer.

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ELBERT E. QUALLS, Claimant
Joel B. Reeder, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Cowling & Heysell, Defense Attorneys

WCB 80-09903 & 81-08303
January 31, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

This is an aggravation versus occupational disease claim case. The employer on the risk at the time of the initial injury, SWF Industries, has requested review of Referee Mongrain's order which found that claimant had sustained an aggravation, and assigned responsibility to that employer. The Referee also denied SAIF's motion to dismiss it as a party (SAIF being the insurer on the risk at the time of the subsequent injurious exposure), but affirmed SAIF's denial of responsibility. In its brief on review SAIF has renewed its motion. Lastly, subsequent to submission of the briefs herein, SWF Industries requested the Board to consider newly discovered evidence.

Thus, the issues are whether to consider the proffered evidence, whether SAIF should have been dismissed as a party to this proceeding and whether the Referee correctly assigned responsibility to SWF Industries.

Because of the provisions of ORS 656.295(5), requests made on review to consider newly discovered evidence are treated as motions

for remand to the Referee. As such, the moving party must demonstrate that the evidence is material and that it could not have been obtained prior to the hearing. Robert A. Barnett, 31 Van Natta 172 (1981), Ora M. Conley, 34 Van Natta 1698 (1982). The evidence in question is a report from claimant's treating physician apparently in response to a request from the Workers Compensation Department's Field Services Division requesting commentary on the effect of claimant's current work activities on his cervical condition. It appears that the Division's request was made, and the physician's report prepared, long after the hearing record was closed. Thus, the report itself was not available prior to the hearing. However, it also appears that the information contained in the report could have been solicited and obtained well in advance of the hearing. SWF Industries does not explain why, in the exercise of due diligence, it did not seek and obtain the information. Therefore, we decline to remand the case to the Referee.

With respect to SAIF's motion, originally made at hearing and renewed on review, to dismiss SAIF as a party, we affirm and adopt the Referee's findings, reasoning and conclusion.

With respect to the Referee's assignment of responsibility to SWF Industries, we affirm and adopt the Referee's findings, reasoning and conclusion, with the following comments. SWF Industries contends that the "could have" test of Inkley v. Forest Fiber Products Co. 288 Or 337 (1980), operates to shift liability to the subsequent employer and its insurer. Inkley was a case of incremental hearing loss where the evidence was insufficient to allow a determination as to which period of employment caused or materially contributed to the ultimate hearing loss claimant experienced. In order to relieve the claimant in Inkley of the impossibility of determining which period of employment caused his hearing loss where it was clear that the employment in the aggregate caused the hearing loss, the Court held liable the insurer on the risk at the time of the last period of employment that could have contributed, materially and independently, to the claimant's hearing loss. See also Mathis v. SAIF, 10 Or App. 139 (1972). By contrast, here it is known that claimant's 1977 industrial injury contributed materially to his neck condition. The 1977 neck injury claim was accepted as compensable, processed to closure, and resulted in an award of permanent disability. The medical evidence in the case before us is to the effect that the residuals of that injury continued to be a material factor at the time the aggravation claim was filed. There is no need to apply the "could have" test here, as in Inkley, to substitute for proof of actual causation or contribution.

Signifanctly, in Bracke v. Baza'r, Inc., 293 Or 239 (1982), the Supreme Court assigned responsibility to the employer for whom claimant was working when she first experienced symptoms and sought medical care for what turned out to be "meat-wrappers" asthma. Even though claimant subsequently worked as a meat wrapper for other employers, the Court assigned responsibility to the employer at the time of the onset of disability and refused to shift responsibility to one of the subsequent employers merely because the subsequent employment was of a type that could have contributed to the condition. The Court stated:

> "According to the evidence believed by the Court of Appeals, the employment subsequent to Baza'r did not contribute to the cause of, aggravate, or exacerbate the underlying disease. Had that occurred, a later employer would be liable under the last injurious exposure rule of liability, see n. 5. Rather, claimant's subsequent employment only activated the symptoms of a pre-existing disease, a difference we discussed in Weller v. Union Carbide (cite omitted), and need not repeat. Liability for the disability caused by the underlying disease is fixed when the disability arises. A recurrence of symptoms which does not affect the extent of a continuing underlying disease does not shift liability for the disabling disease to a subsequent employer."

Where there is a prior accepted claim coupled with proof that the accepted condition continues to be a material contributing factor to the claimant's present condition, responsibility for that condition does not shift to a subsequent employer merely upon a showing that the subsequent employment could have caused or contributed to the condition. There must be proof of actual contribution to the condition from the subsequent employment. Here, the evidence indicates that the subsequent employment did not contribute to the underlying condition, but merely exacerbated its symptoms. Under these circumstances, the first employer remains liable. See also Johnson v. SAIF, 54 Or App 620 (1982), Wills v. Boise Cascade Corp., 58 Or App 636 (1982).

The phraseology of our holding here has the potential for raising the following issue: if the claimant merely proves a worsening of symptoms without establishing a "pathological worsening" a la Weller v. Union Carbide, 288 Or 27 (1979), has a compensable worsening of the condition been proven under ORS 656.273? Neither the Board nor, to our knowledge, the Court has explicitly addressed this issue. The Court in both Johnson and Wills apparently assumed that a worsening of symptoms is enough to establish compensability under ORS 656.273. SWF Industries, the "aggravation" employer here, denied responsibility and did not deny compensability. Therefore, there is no need to decide the issue. We mention it only to caution that this case should not be cited as authority for the proposition that to establish compensability under .273 a claimant need only show a worsening of symptoms.

ORDER

SWF Industries' request to consider new evidence, treated as a request for remand, is denied. SAIF's motion to dismiss it as a party is denied. The Referee's order dated January 15, 1982 is affirmed.

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BARBARA SEELYE-BARBOUR, Claimant
Jerry Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-10379
January 31, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Mongrain's order entered on May 27, 1982 which affirmed the Determination Order of April 6, 1981. The Determination Order granted temporary total disability from December 31, 1980 through February 25, 1981 inclusive, and temporary partial disability from February 26, 1981 through March 1, 1981 inclusive.

The claimant requests on review: (1) An award of permanent partial disability, the amount to be determined by the Board; or (2) in the alternative, that the Board remand to the Referee to take further evidence to satisfy the Referee as to the extent of claimant's disability; and (3) attorney fees for services rendered on review.

The issue is the extent of permanent disability resulting from a compensable injury to claimant's right eye.

Claimant was injured December 9, 1980 when a tetherball struck the right side of her face while she was working as a teacher's aide. The injury caused blurry vision in her right eye and frequent headaches, neither of which she had experienced before the injury. However, prior to the accident claimant did have visual problems in her left eye and problems with numbness and tingling in her left side, attributable to what at least two doctors have diagnosed as multiple sclerosis. Additionally, prior to the accident, claimant had complained of pain and twitching in and around her right eye, beginning around March 1980. Since the accident, claimant has continued to complain of blurry vision in her right eye and of headaches.

We agree with the Referee that there is an absolute lack of medical evidence of specific visual measurements showing visual acuity impairment as required by ORS 656.214; consequently, the degree of claimant's impairment cannot be determined.

We, too, emphasize and are inclined to believe the February 1981 report of Dr. William T. Shults, a neuro-opthalmologist. Dr. Shults noted that the "relationship of exacerbations of multiple sclerosis to intercurrent trauma" is well accepted but not well understood; thus, although the injury precipitated claimant's optic neuritis in the right eye, the doctor could not state whether claimant would have developed the optic neuritis had the tetherball not hit her. Further, we are also inclined to believe Dr. John T. Weisel, an opthalmologist, who reported that claimant had a history of retrobulbar neuritis and multiple sclerosis and that her right eye symptoms represented retrobulbar neuritis unrelated to the injury.

Claimant submits that if there was a need for further evidence as to the amount of disability, the Referee should have requested such additional evidence. We would point out that the

burden of going forward with the evidence and the burden of proof is on the claimant, not the Referee. Claimant has failed to prove by medical evidence that the tetherball injury more probably than not caused permanent disability in her right eye, as required by Gormley v. SAIF, 52 Or App 1055, 630 P2d 407 (1981). Here, as in Gormley, there are at least two plausible explanations for claimant's disability: That the tetherball injury caused the optic neuritis in claimant's right eye, or that the optic neuritis would eventually have occurred anyway as a result of her multiple sclerosis. But here, as in Gormley, claimant must prove more than just the possibility of a causal connection. The doctrine of liberal construction of the Workers Compensation Act is not transferable to the fact finding process to adjust the burden of proof. Raines v. Hines Lbr. Co., 36 Or App 715, 719, 585 P2d 721 (1978). Claimant requests that the case be remanded for the purpose of procuring medical evidence as to claimant's permanent disability. However, claimant offers no reason why, in the exercise of due diligence, such evidence was not obtainable prior to the hearing or prior to the time the evidentiary record of the hearing closed. Ora M. Conley, 34 Van Natta 1698 (1982). Robert A. Barnett, 31 Van Natta 172 (1981). Thus we decline to remand to the Referee.

In conclusion, it is well known that loss of vision is capable of almost exact scientific measurement, as the court in Orr v. State Industrial Acc. Com., 217 Or 249, 342 P2d 136 (1959), pointed out. The claimant should have produced expert evidence bearing upon the extent of the disability; otherwise, our order would of necessity be based on conjecture and pure speculation.

ORDER

The Referee's order dated May 27, 1982 is affirmed.

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SHIRLEY SHELTON, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-11795
January 31, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

SAIF Corporation requests review of Referee Nichols' order dated June 14, 1982 which determined that claimant was entitled to more disability than the Determination Order awarded. The Determination Order, dated July 17, 1981, awarded 30% unscheduled disability for injury to claimant's low back; the Referee awarded 60% unscheduled disability. The issue is the extent of claimant's disability.

We agree with the Referee's assessment of the factors as listed in OAR 436-65-600, et seq., except that of impairment. The worksheet with the Determination Order showed an assessed impairment at a +10 value; we are unable to discern what value the Referee assigned the impairment factor; however, our assessment of the impairment factor results in an impairment figure of +17 which would then result in a 50% unscheduled disability applying the disability guideline formula of OAR 436-65-601 and based on 436-65-620 and similar cases.

ORDER

The Referee's order dated June 14, 1982, is hereby modified. The award of unscheduled permanent partial disability is reduced from 60% to 50%. This award is in lieu of that granted by the Referee. Claimant's counsel's attorney's fee is adjusted accordingly.

* * * * * * * * * * *

GARY L. CLARK, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 80-04402 & 80-04403
February 3, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of Referee Pferdner's order which: (1) held SAIF responsible for providing medical services and temporary total disability compensation on an aggravation theory; (2) affirmed a denial by Fireman's Fund of claimant's alternative new injury claim; (3) assessed a 25% penalty against SAIF for unreasonable resistance; (4) assessed an additional 25% penalty against SAIF for unreasonable refusal, for a total penalty assessment of 50%; and (5) ordered SAIF to reimburse claimant's attorney for the cost of a medical report. The only issue raised by SAIF involved penalties and the cost of the medical report. Claimant's brief advises, however, that SAIF has since paid the cost of the medical report, so we deem that issue moot. Alternatively, we agree with the Referee for the reasons stated in Exhibit 31B. Thus, the sole viable issue involves penalties.

Claimant made a claim for a condition involving both of his wrists in 1975 while employed by Paramount Bedding, insured by SAIF. At that time the right wrist condition was the more serious and was partially corrected by surgery. Medical reports from the period between 1975 and 1977 suggest all doctors foresaw the possibility that claimant's left wrist condition would worsen to the point that it would require surgery. The 1975 claim was eventually closed with an award of permanent disability for both wrists.

Claimant changed jobs and was working for Diesel Service Company, insured by Fireman's Fund, when these claims arose in early 1980. Claimant began experiencing more severe problems with his left wrist. On February 26, 1980 he filed a new injury claim with Diesel Service Company. On March 4, 1980 claimant's attorney filed an aggravation claim with SAIF.

The nature of that claim needs to be precisely identified. As we stated in Mary Ann Hall, 31 Van Natta 56 (1981):

> ". . . a claim for ORS 656.245 medical services is processed procedurally, as an aggravation claim during the five year aggravation period. It does not follow,

however, that a claim for ORS 656.245 medical services results in aggravation reopening of a claim."

This situation is somewhat like that in Hall. Claimant was not seeking and could not seek temporary total disability compensation when he made his alternative new injury/aggravation claims because both his 801 form and his testimony at the hearing establish that he continued to work after making those claims. Instead, claimant was seeking future additional medical services in the form of authorization for surgery on his left wrist, surgery which had long been foreseen as possibly necessary.

This situation also illustrates a distinction we discussed in Billy J. Eubanks, WCB Case No. 81-07465, 35 Van Natta 131 (decided this date) -- the distinction between a "claim" for medical services in the sense of a bill for services that have already been rendered and a "claim" for future medical services, for example, a request that surgery be authorized as in this case.

In Eubanks we concluded that a prospective claim for medical services is "more akin to an initial claim, that is, the claimant has an interest in knowing the position, either way, of the insurer or employer" and: "Therefore, the appropriate responses are to inform the claimant and the medical provider either that the proposed medical services will be paid for or that the proposed medical services will not be paid for."

SAIF's attorney's opening statement to the Referee, questions to claimant and brief on Board review all state that SAIF was willing to accept responsibility for the surgery and resulting time loss. The problem is that statements of counsel are not evidence and the evidence in this record fails to show any acceptance by SAIF of claimant's claim between when it was made in March, 1980 and when the hearing was held in November, 1980, or at any other time. This delay is unexplained and unexcused in this record. The maximum possible penalty is warranted.

We conclude, however, that the Referee imposed more than the maximum possible penalty. ORS 656.262(8) permits imposition of a penalty for unreasonable delay in paying or refusal to pay compensation. ORS 656.382(1) permits imposition of a penalty for unreasonable resistance to payment of compensation. The Referee imposed a 25% penalty for unreasonable refusal and a 25% penalty for unreasonable resistance, for a total penalty of 50%. The Referee's apparent reasoning was that delay, refusal and resistance were all separate "offenses," i.e., that in a case where all three were present the maximum possible penalty would be 75%.

We disagree. In criminal law there is copious authority for distinguishing between an offense and the different means of committing an offense. For example, in State v. Jim/White, 13 Or App 201 (1973), the court held that to take, withhold, appropriate, etc., the property of another were not different offenses which could be separately punished, but merely different

means of committing the single offense of theft; and in State v. Miller, 14 Or App 396 (1973), the court held that transportation and possession of illegal drugs were not different offenses that could be separately punished, but merely different means of committing the single offense of criminal activity in drugs. While analogy between criminal law and workers compensation law might be unusual, certainly the penalty provisions of workers compensation law share some philosophical and functional characteristics with criminal law.

We believe that the overall statutory scheme of the penalty provisions in ORS ch 656 creates only a single "offense," that for want of a better term we call unreasonable claims processing, that can be committed by a variety of means, that is, unreasonable refusal, delay or resistance in the payment of compensation. ORS 656.262(9); 656.382(1). We reject the Referee's apparent belief that these separate forms of unreasonable claims processing are separate "offenses." It follows that the maximum penalty that can be imposed for any or all of the various forms of unreasonable claims processing is 25% of the compensation "then due." ORS 656.262(9).

The "then due" language of ORS 656.262(9) leads to another issue. The Referee ordered in this case that SAIF pay 50% "of all accrued and unpaid compensation due as of the date of this Order" as a penalty. This is very vague. See Zelda M. Bahler, 31 Van Natta 139, 140 (1981): "The Board expects greater precision in orders of Referees imposing penalties." It must be remembered that the claim here was purely prospective; claimant wanted authorization for future left wrist surgery and associated time loss when the surgery was performed; at the time of hearing, nothing was yet due.

Although we think that SAIF's failure to respond to claimant's request within 60 days or at any time before the hearing was outrageous, the legislature has not authorized us to assess penalties on that basis alone. Rather, authority to assess penalties for what we have called unreasonable claims processing is directly linked to the amount of compensation "then due." ORS 656.262(9).

A strong case could be made for interpreting "then due" to mean "then claimed." If penalties could be assessed based on amounts claimed, at least in this context of a claim for future medical benefits, that would put real teeth in the statutory duty of the insurer/employer to respond within 60 days. We conclude, however, that any change along these lines is a matter for the legislature, not for us.

The existing interpretations of the existing statute are to the effect that, if no compensation is "then due" at the time any acts of unreasonable claims processing, there is no amount upon which to assess a penalty. E.g., Kosanke v. SAIF, 41 Or App 17, 21 (1979). That rule is applicable and controlling here. Although, as stated above, we think SAIF's conduct in this case should make it subject to the maximum possible penalty, we reluctantly conclude that no penalty is possible under the "then due" concept in the statutes. The same would be true in any other

case involving a claim for future medical services in which interim compensation was not payable pending acceptance or denial of the claim. If, however, interim compensation was payable, then in this kind of case a penalty for a late denial could and should be based on the interim compensation paid after the sixtieth day after the claim was asserted. Norman J. Gibson, 34 Van Natta 1583 (1982).

ORDER

The Referee's order dated December 1, 1980 is affirmed in part and reversed in part. Those portions that assessed penalties against the SAIF Corporation are reversed. The remainder of the Referee's order is affirmed.

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PATRICIA M. DEES, Claimant
Bloom, Marandas & Sly, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-03172
February 3, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review and claimant cross-requests review of Referee Pferdner's order which upheld SAIF's denial of claimant's aggravation claim (interpreted as a claim for medical services) but assessed a penalty for failure to properly process the claim. SAIF challenges the penalty assessed; claimant argues the claim is compensable.

In the early 1970's, claimant's claim for her psychological condition was found to be compensable and she was awarded permanent disability. In the fall of 1977 claimant discovered that she was pregnant and, due to fears about the possible effects on her fetus, she substantially reduced the amount of medication she was taking for her psychological condition. Probably due to this reduction in medication, in 1978 claimant was again hospitalized with a psychiatric dysfunction.

SAIF then issued a denial, the effect of which is disputed:

> "As you are aware, your claim for an industrial exposure of August 30, 1974, was found compensable and the State Accident Insurance Fund did accept the claim for that condition.
>
> "Recently, we have received knowledge of your being hospitalized on April 4, 1978. The information we have obtained does not support your current psychological condition as being a result of your August 30, 1974 occupational exposure, while employed at Childrens Services Division as a caseworker.

"The State Accident Insurance Fund hereby denies your request for reopening of your claim. We deny the present treatment or disability relating to your psychological problems."

Claimant requested a hearing on this denial but later withdrew the hearing request and the denial thus became final.

On February 22, 1980 claimant's attorney submitted the aggravation claim that led to this proceeding:

"Enclosed find Dr. Pidgeon's report of June 13, 1979.

"This letter constitutes a demand that the claim be re-opened for the payment of medical bills and expenses relating to her treatment by Dr. Pidgeon."

Dr. Pidgeon's enclosed report states in full:

"I have reviewed Mrs. Dees' history of mental illness and also again discussed her past history with the patient. Mrs. Dees states that she worked for approximately four years as a social worker for the Washington Department of Public Assistance. She was working with families who were on welfare. She entered St. Joseph's Hospital in Tacoma in 1970 for treatment of a serious mental illness. After one month's treatment there she was transferred to Western Washington State Hospital and was treated for a period of three months in that hospital. After leaving Western State Hospital she had no psychiatric treatment. She had no previous psychiatric treatment or counselling before her hospitalization in 1970. After a hiatus of about one year she resumed working as a case worker for the Childrens Service Division in Portland. She worked there for approximately four years before becoming severely mentally ill again in September of 1974. She was then hospitalized in Dammasch State Hospital for approximately two months. On that occasion she was treated with both medication and electro-convulsive therapy. From the time of discharge from Dammasch State Hospital until she was rehospitalized, in April of 1978, at Holladay Park Hospital this lady continued in supportive psychotherapy and chemotherapy. Her medication was considerably reduced when it was discovered that she was pregnant due to the possible

danger to the fetus. Even before the delivery of her second child, her condition started to deteriorate and she became more anxious, depressed and had unusual ideas. She was hospitalized at Holladay Park Hospital for approximately four weeks in April of 1978. At that time she received both electro-convulsive therapy and medication.

"Mrs. Dees' mental condition never improved to the state that it was previous to the time she worked for the Children's Service Division in Oregon."

A SAIF Claims Representative responded to claimant's attorney's letter on March 26, 1980. That response notes SAIF's 1978 denial, quoted above, and concludes: "It appears that your request for reopening involving benefits that have been denied on August 23, 1978 cannot be considered." No copy of this response was sent directly to the claimant, and the response did not include notice of hearing rights. Claimant nevertheless requested a hearing on April 7, 1980.

As noted above, the principal issues involve the merits of SAIF's current denial and penalties. Those issues raise other subsidiary issues.

I

Although a letter from claimant's attorney can be a valid aggravation claim, Stevens v. Champion International, 44 Or App 587 (1980), we do not think that counsel's February, 1980 letter and/or Dr. Pidgeon's June, 1979 letter constituted a proper aggravation claim in this case. First, although counsel's letter refers to claim reopening, no claim for interim compensation or time loss benefits is really being asserted because there never was any medical verification of inability to work; instead, all parties and the Referee have treated this as an aggravation claim for medical benefits only. Second, as discussed more fully in Billy J. Eubanks, WCB Case No. 81-07465, 35 Van Natta 131 (decided this date), claims for medical benefits usually take the form of either a bill for medical services that have been rendered or a request for authorization to render some form of treatment in the future. There is no medical services claim in either sense in this case. Dr. Pidgeon's letter does not even come close. The first paragraph merely summarizes claimant's medical history since the onset of her psychiatric illness. The second paragraph states that claimant's "mental condition never improved to the state it was previous" to claimant's original workers compensation claim -- which belabors the obvious because it was precisely for that reason that claimant was awarded permanent disability in connection with her original claim.

In Douglas Dooley, WCB Case No. 79-08349, 35 Van Natta 125 (decided this date), we concluded:

". . . the employer or insurer is required to process a claim as one for aggravation

> when the information received from claimant, claimant's physician or claimant's attorney is sufficient to give reasonable notice that claimant is requesting further medical services or additional compensation for worsened conditions related to or resulting from the worker's original injury of disease."

Judged by these standards, claimant never made an aggravation claim that triggered any duty to respond in any way because there was no request for further medical services.

II

Apparently the Referee regarded SAIF's March, 1980 response to claimant's "claim" to be inadequate, presumably because it was not sent to claimant and did not contain notice of hearing rights. We disagree. Assuming there was a claim that required a response, SAIF's response was adequate as a denial under our reasoning in Angela V. Clow, 34 Van Natta 1632, 1635 (1982):

> "In Stroh v. SAIF, 261 Or 117 (1972), the issue was whether the circuit court had jurisdiction to hear a case if the appeal was sent by regular mail instead of by certified mail as required by the statute in effect at that time. The Supreme Court ruled that even though there was not literal compliance with the statute, the fact that the appeal had been actually received was sufficient for the purposes of the statutory notice requirement. In this case claimant's counsel understood that the employer was denying the aggravation claim since he amended the original hearing request to put that in issue. Therefore, all parties were aware that the insurer had denied reopening of the claim and proceeded to take the matter to hearing. Although the literal requirements of the statute were not complied with, we find that all parties had adequate notice of the insurer's position and that the deviation from the statutory requirements was harmless. To conclude otherwise would be to elevate form over substance."

Likewise, in this case, claimant had sufficient notice of the insurer's position after receipt of its March response to file a hearing request on April 7, 1980. Either the denial was sufficient or the hearing request was premature and there is no jurisdiction under Syphers v. K-W Logging, Inc., 51 Or App 769 (1981).

III

The theory stated in SAIF's March, 1980 denial of the current

aggravation claim is that it had previouly denied the same benefits in 1978, i.e., a res judicata theory. We disagree with that theory.

The 1978 denial, quoted above, refers to claimant's "current condition," "present treatment" and "present problems." It would be hard to imagine a denial that more clearly related to medical treatment at the time of the denial and did not in any way deny future treatment.

Even if the 1978 denial were more ambiguous, for policy reasons we would be inclined to interpret it as a denial of only treatment at that time. Certain denials of treatment necessarily relate to all treatment, present and future. For example, if a worker with a compensable leg injury fell down, injured his arm and claimed that treatment for the injured arm was a compensable consequence of the industrial leg injury, then a denial of present arm treatment would necessarily also be a denial of all future arm treatment. But such situations are exceptional. The more normal denial of medical services relates to and, in the very nature of things, can only relate to some aspect of then-current treatment. Therefore, when questions arise (primarily in a res judicata context) about how to interpret a prior denial of medical services, we believe any doubt should be resolved in favor of interpreting such a denial as only involving then-current medical treatment.

This rule of interpretation dovetails with the analysis of the effect of the doctrine of res judicata situations involving successive aggravation claims that we stated in Lewis Twist, 34 Van Natta 52, 34 Van Natta 290 (1982). A second claim for the exact same medical services that were previously denied would be barred by res judicata. A second claim for arm treatment in the hypothetical stated above would be barred by res judicata if the first denial were on the basis of no causal relationship to the compensable leg injury. However, most successive claims for medical services involve new, different or additional treatment that was not and could not have been in issue at the time of a prior denial; and in the event of any doubt we will so interpret a denial of medical services; and as so interpreted, res judicata would not bar successive claims for medical services.

IV

In addition to the res judicata theory articulated in SAIF's denial, this matter proceeded to hearing on the question of whether there was a causal relationship between claimant's present psychological treatment and her original claim for her psychological condition. On that issue, we confront a void in the record. There is no medical evidence about what claimant's current treatment consists of, and no medical evidence that relates current treatment, whatever it is, to claimant's original claim. As stated above, no viable claim for current medical services was made; alternatively, no claim for current medical services was proven.

SAIF may be contending that claimant's 1978 hospitalization

for psychological dysfunction after reducing her medication during pregnancy was a superseding event that cut off all of its responsibility to provide any continuing medical benefits in connection with claimant's original claim. If that is SAIF's position, we expressly do not adopt it. In accordance with our discussion of interpretation of denials, we understand the present case to involve only the question of responsibility for current treatment and not to involve the question of responsibility for all future treatment. We note, however, that if SAIF was paying for a given type and amount of prescription medication before the 1978 hospitalization, from the very limited information in this record it would be difficult to appreciate any argument that it was not still responsible to pay for the same type and amount of medication after that hospitalization.

V

What we have already said is sufficient to dispose of the penalty issue. Since there was no proper claim established, SAIF cannot be penalized for its claims processing. Or if claimant's attorney's letter of February, 1980 is regarded as a proper claim, SAIF's March, 1980 response was adequate to serve as a denial under the facts and circumstances of this case and was issued within the time permitted by law.

ORDER

The Referee's order dated March 30, 1981 is affirmed in part and reversed in part. That portion that assessed a penalty and associated attorney's fee against the SAIF Corporation is reversed. The remainder of the Referee's order is affirmed.

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DOUGLAS DOOLEY, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 79-08349
February 3, 1983
Order on Reconsideration

The SAIF Corporation has requested reconsideration of the Board's Order on Review, dated April 2, 1981. That order has been abated by further order entered May 8, 1981. The Board has reconsidered its former order and, with the following additional comments, adheres thereto.

The basis for SAIF's request for reconsideration is that the August 31, 1979 letter report of Dr. Abel "does not state that the claimant's condition has worsened or that the doctor finds a relationship between the claimant's headaches and the industrial injury." In their request for reconsideration, SAIF contends that a "request for reopening must be a request due to 'worsened conditions,' a statement necessitated by ORS 656.273(1);" and that an "aggravation claim can only be established if there is a 'worsened condition' due to the industrial injury." SAIF's contention is that there was no adequate claim for aggravation in this case.

SAIF appears to be confusing two distinct issues: what is required to adequately file an aggravation claim on one hand; and the requirements of establishing or proving a compensable claim

for an aggravated condition on the other hand. Although Dr. Abel's report may not be considered sufficient to prove that claimant was suffering a compensable worsening of his industrial injury, we reaffirm our holding that Dr. Abel's report did constitute a valid claim for aggravation under ORS 656.273(3).

The Court of Appeals has considered the minimum requirements for making a claim of aggravation and, particularly, what information in a physician's letter or report to an insurer satisfies ORS 656.273(3). In Hewes v. SAIF, 36 Or App 91 (1978), one of claimant's treating physicians wrote to SAIF summarizing the results of his examination of claimant since the claim closure. He concluded:

> "I would request that this lady's claim be reopened for further study. I would like to obtain neurological consultation for her and myelogram to determine whether or not she has a herniated invertebral (sic) disc at this time. I believe she has an aggravation to her previous condition." 36 Or App at 93.

The court held that this letter was sufficient to constitute a claim of aggravation under ORS 656.273(3).

In Clark v. SAIF, 50 Or App 139 (1981), the court considered whether information submitted to SAIF in an 827 form was sufficient to constitute a proper filing of a claim for aggravation. Almost a year after filing her original claim, the claimant in Clark sustained another injury to her back. In the 827, the chiropractor who examined and treated claimant for the consequences of the subsequent incident reported that her injury was "a 'reaggravation" of her earlier injury", that her condition was not stationary and that she was in need of further chiropractic treatment prior to being released for work. 50 Or App at 141. The court held that under ORS 656.273(3) claimant's filing of her aggravation claim had been perfected:

> "The report is clearly sufficient notice to SAIF. It uses the term 'reaggravation' and notes the prior injury and the need for continued medical attention." 50 Or App at 142. (Citation omitted.)

In response to SAIF's contention that the report did not "indicate" an aggravation in accordance with the statute, the court stated that "the statute does not require. . . . that claimant adduce medical facts sufficient to show an aggravation; it need only show the need for further treatment of the injury." 50 Or App at 142.

The aggravation claim in Clark was not sufficient to prove a compensable aggravation. See 50 Or App at 142-43. Essentially, this is the argument that SAIF has made on review and in support of its request for reconsideration in this case. As did the court in Clark, however, we reject the notion that claimant must prove his or her case of aggravation when filing the claim with the

employer or insurer. It is sufficient if the form of the claim, whether it be from the claimant or from the claimant's physician, gives reasonable notice to the employer or insurer that the worker is claiming further medical services or additional compensation for worsened conditions related to or resulting from the worker's original injury or disease. Clark v. SAIF, 50 Or App at 142. See also Silsby v. SAIF, 39 Or App 555, 563 (1979), ("Usually verification [of inability to work in connection with an aggravation claim] need go no further than to state that there is a worsened condition arising out of the original injury or disease.") and Stevens v. Champion International, 44 Or App 587 (1980), (Letter from claimant's attorney requesting that his client's claim "be reopened" accompanied by a report by a clinical social worker was held to be a valid claim for aggravation.).

In Wetzel v. Goodwin Brothers, 50 Or App 101 (1981), the court held that no aggravation application had been perfected under either subsection (2) or (3) of ORS 656.273. Neither claimant nor his attorney had filed a claim for aggravation under subsection (2). The physician's report that claimant relied upon in support of his contention that he had made an aggravation claim was simply a doctor's chart note, which was in response to a phone call from the insurer, recommending that claimant be enrolled for treatment in a pain center. Included on the same page as the chart note was a statement by the doctor, dated approximately one month earlier, indicating that claimant's condition was "not changing." 50 Or App 105-05. This statement, in conjunction with the fact that the recommendation concerning the treatment at the pain center was initiated by the insurer and not the claimant, led the court to conclude that the physician's report did not constitute a claim for aggravation. 50 Or at 105.

SAIF's reliance upon the Board's order in Victor Stewart, 30 Van Natta 472 (1981), is unwarranted, inasmuch as the issue there was whether claimant had proven a compensable worsening, not whether claimant had made an adequate claim for aggravation. Likewise, although the court in Anderson v. West Union Village Square, 44 Or App 685, 687 (1980), stated that a "physician's report recommending reopening for worsened condition constitutes a claim for aggravation," the court did not consider the adequacy of the physician's report that was submitted. As noted above, this was the issue with which the court was concerned in Hewes v. SAIF, Clark v. SAIF and Wetzel v. Goodwin Brothers. Furthermore, the language relied upon by SAIF from Anderson v. West Union Village Square, -- that it is "not sufficient merely to show that the claimant, once injured, got worse," 43 Or app at 297, and that a causal connection must be established -- is again concerned with proof of an aggravation claim.

We conclude that the employer or insurer is required to process a claim as one for aggravation when the information received from claimant, claimant's physician or claimant's attorney is sufficient to give reasonable notice that claimant is requesting further medical services or additional compensation for worsened conditions related to or resulting from the worker's original injury or disease.

The physician's report in this case was a letter report from claimant's treating physician addressed to claimant's attorney, as follows:

> "The above named patient was seen by myself today, complaining of persistent and worsening headaches which he feels are related to his on the job injury of September, 1977, at which time he sustined a head trauma and laceration. Mr. Dooley had complained of these persistent headaches, last evaluated in February of this year, at which time he had an electroencephalogram, which was interpreted as normal. Due to the patient's persistence of symptoms and complaints I would recommend that his case be reopened and neurological evaluation be obtained. We have scheduled him for a neurological evaluation with Doctor Jones on October 11th."

This report is sufficient notice to SAIF of a request for reopening of claimant's claim, due to "consistent and worsening headaches", indicating a need for continued medical attention. The fact that the doctor's statement was to the effect that claimant attributed his problems to his original injury, as opposed to a statement of the doctor's own opinion, is insignificant inasmuch as claimant could have made an aggravation application on his own under ORS 656.273(2). In all probability this report would not, in and of itself, suffice to prove a compensable worsening; however, it is adequate for purposes of filing a claim for a compensable worsening.

SAIF's request for reconsideration articulates very well the serious practical difficulties that insurers and employers confront in distinguishing between requests for additional medical services only pursuant to ORS 656.245 and requests for claim reopening pursuant to ORS 656.273:

> "Without a statement of worsening or relationship, the treatment must, perforce, be considered treatment rendered pursuant to ORS 656.245. To apply the law in the manner suggested by the Referee would make ORS 656.245 completely meaningless, requiring that every statement from a physician indicating that he plans to perform tests or administer treatment must be met by a notice of acceptance or denial of aggravation on the part of the insurer. Absent the statement that it is a worsened condition and requires active treatment (as opposed to diagnostic testing), there can be no claim for aggravation pursuant to ORS 656.273."

It is implicit in our conclusion that the physician's letter

in this case was not devoid of any statement of worsening. Moreover, SAIF's argument seems to assume that there is no duty to respond to a request for medical services pursuant to ORS 656.245 by issuing notice of acceptance or denial. We generally concluded to the contrary in Billy J. Eubanks, WCB Case No. 81-07465, 35 Van Natta 131 (1983).

Nevertheless, SAIF's basic point about the uncertainty of how to interpret doctors' reports of ongoing treatment is certainly valid. Physicians must comply with substantial reporting requirements in the course of treatment of industrially injured workers. OAR 436-69-101. We are aware from numerous cases in which the issue has arisen, directly or indirectly, that there is a chronic problem, as SAIF argues, with ambiguous post-closure medical reports: Do they merely report ongoing treatment that should be handled under ORS 656.245, or are they aggravation claims under ORS 656.273?

The genesis of this problem is in those statutes. We discussed them in Mary Ann Hall, 31 Van Natta 56 (1981):

> "The first issue is variously described in the record as a claim for medical services, ORS 656.245, and a claim for aggravation, ORS 656.273. That ambiguity in the record is explained in part by an ambiguity in the statutes. ORS 656.245 provides that injured workers shall receive 'medical services for conditions resulting from the injury for such a period as the nature of the injury or the process of the recovery requires.' Standing alone, ORS 656.245 provides for on-going medical care. The aggravation statute, ORS 656.273, also refers to medical care: 'An injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury.'
>
> "Interpreting these two statutes together, a claim for ORS 656.245 medical services is processed, procedurally, as an aggravation claim during the five year aggravation period. It does not follow, however, that a claim for ORS 656.245 medical services results in an aggravation reopening of a claim. Aggravation reopening results in payment of temporary total disability until claim closure and the possibility of an increased award of permanent disability at that time. By contrast, in this case, there is no suggestion that claimant is entitled to payment of temporary total disability because there is no suggestion she is unable to work because of the bald

spot on her scalp, at least until she is hospitalized for surgery. Nor is there any conceivable basis for an increased award of permanent disability because of that bald spot. Rather, this case illustrates a situation that, although processed as an aggravation claim, cannot result in aggravation reopening, but only an order to provide requested medical services."

We subsequently elaborated on Hall in Willard B. Evans, 34 Van Natta 490, 491 (1982):

> "Amendments adopted by the legislature in 1981 reinforce the conclusions we reached in Mary Ann Hall. ORS 656.273(2) continues to provide: 'To obtain additional medical services or disability compensation, the injured worker must file a claim for aggravation . . .' (Emphasis added.) A 1981 amendment to ORS 656.245 added subsection (2) which provides: 'When the time for submitting a claim under ORS 656.273 has expired, any claim for medical services
>
> referred to in this section shall be submitted to the insurer or self-insured employer.' (Emphasis added.) We think this statutory language makes it even clearer that the substantive right to medical services is governed by ORS 656.245, while the applicable procedures for a medical services claim are the aggravation procedures spelled out in ORS 656.273.
>
> "It is thus possible for an aggravation claim to involve issues of entitlement to three distinct forms of relief: (1) medical services; and/or (2) temporary total disability compensation; and/or (3) increased permanent disability compensation."

Because the generic term, "aggravation claim", can include requests for such different forms of relief, it is understandable that legitimate confusion can arise about what is being claimed and thus about the appropriate manner in which to respond.

This potential confusion was not created by the Board, but is part of the statutory scheme, and thus we feel there is little that we can do about it. Another feature of the statutory scheme is that insurers have a duty to process claims, and we think that includes developing procedures to clarify what is being claimed, if that is unclear. Just as an example, in a situation hypothesized by SAIF's request for reconsideration in which it is unclear whether the claimant seeks additional medical treatment only or seeks claim reopening, an insurer could state in response something like: If the claimant is requesting additional medical

treatment, the claim is accepted; if the claimant is requesting claim reopening, it is denied due to insufficient information, and the claimant is requested to more specifically state what is sought. Although the principal burden of processing claims falls on insurers, we have noted that claimants are expected to cooperate in furnishing information essential to claims processing. E.g., Kathie L. Cross, 34 Van Natta 1064 (1982); Jeri Putnam, 34 Van Natta 744 (1982); Frank G. Gonzales, 34 Van Natta 551 (1982). It is probably unrealistic to expect that such clarification can often be obtained before the fourteenth day when the insurer must decide whether to issue a check for interim compensation, but some problems simply defy solution.

ORDER

Except as modified herein, the Board readopts and republishes its Order on Review dated April 21, 1981.

* * * * * * * * * * * * * * * * * * * *

BILLY J. EUBANKS, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07465
February 3, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of Referee Mannix's order which required it to pay the disputed portions of bills for claimant's chiropractic treatment rendered following his compensable injury. SAIF argues: (1) the Referee erred in ruling that an insurer must issue a formal denial in response to claims for medical services which it is not willing to pay; and (2) the claimant did not prove a need for more than two chiropractic treatments a month as required by former OAR 436-69-320(2), which was in effect at the material times.

Disputes about what constitutes a "claim" for medical services and what the proper procedures are for processing such "claims" have arisen in numerous recent cases. Questions about proper claim processing procedures often lead to additional questions about penalties and attorney fees. We have considered these interrelated problems in this case and in Gary L. Clark, WCB Case Nos. 80-04402 and 80-04403, 35 Van Natta 117 Richard Kirkwood, WCB Case No. 80-03825, 35 Van Natta 140 Patricia M. Dees, WCB Case No. 80-03172, 35 Van Natta 120 and Doulgas Dooley, WCB Case No. 79-08349, 35 Van Natta 125 (1983).
We present some of our conclusions in this case.

I

The statutes are not conclusive on the question of whether and when notices of acceptance or notices of denial must be issued regarding medical services obtained by an injured worker after the worker's initial claim has been accepted.

ORS 656.005(7) defines a "claim" as a written request for compensation from a subject worker or from someone acting on the worker's behalf, which obviously and frequently includes workers' physicians. ORS 656.005(9) defines "compensation" as including all benefits and specifically medical services. ORS 656.265(2) further defines a claim; it must be written, but need not be in any

particular form, and can include a report or statement from a worker's doctor "concerning an accident which may involve a compensable injury." These three statutes, read together, contemplate: (1) clearly, that a request for medical services is a claim; (2) clearly, that such a claim can be made by a doctor on a worker's behalf; and (3) fairly clearly, that each separate doctor's bill submitted to an industrial insurer is a separate and distinct claim.

Other statutes could raise doubt about that final conclusion. ORS 656.262(6) and (7) require that the industrial insurer issue written notice of acceptance or denial of a claim to both the claimant and his or her employer. From the detail in these subsections, it is apparent that all or most of the legislative attention was focused on the initial acceptance or denial of a claim. For example, notification "whether the claim is considered disabling," ORS 656.262(6)(a), "of employment reinstatement rights," ORS 656.262(6)(c), and of job site modification assistance, ORS 656.262(6)(d), hardly makes sense as part of the required response to each and every doctor's bill.

ORS 656.313(2) is the only statute that expressly recognizes that most medical services questions arise in the context of partial denials: "If an insurer or self-insured employer denies the compensability of all or any portion of a claim submitted for medical services . . ." (Emphasis added.) And it is the only statute that expressly addresses the procedures for a denial of medical services: ". . . the insurer or self-insured employer shall send notice of the denial to each provider of such [i.e., denied] medical services." (Emphasis added.) There is no stated requirement of notification to the claimant of such a denial of medical services.

But the legislature must have assumed that a claimant would be notified of a denial of medical services when it enacted ORS 656.245(2) because otherwise it would be impossible to invoke the hearing rights specifically mentioned in that section:

> "When the time for submitting a claim under ORS 656.273 has expired, any claim for medical services referred to in this section shall be submitted to the insurer or self-insured employer. If the claim for medical services is denied, the worker may submit to the board a request for hearing pursuant to ORS 656.283."

We do not think that any of these statutes, individually or in combination, are completely dispositive on the question of whether, when or to whom notice of acceptance or denial must be issued in connection with ongoing medical treatment after the initial acceptance of a claim.

II

Statutory interstices are often filled by administrative rules. There are several rules of the Workers Compensation Department which are or may be relevant.

OAR 436-54-245(3) and 436-54-305 basically just repeat the relevant content of ORS 656.245, 656.262 and 656.313 summarized above. OAR 436-54-310 deals with timely payment of compensation benefits. Subsections (7) and (8) provide:

> "(7) Timely payment of medical services or goods shall be deemed made when paid within 45 days of the receipt of statement. When there is a dispute over the amount of a bill or the necessity of services rendered, the insurer or self-insured employer will pay the undisputed amount. Resolution of the disputed amount will be made in accordance with OAR 436-69.
>
> "(8) The insurer or self-insured employer shall notify the claimant or provider of service in writing when compensation is paid of the specific purpose of the payment. When applicable, the notice shall indicate the time period for which the payment is made and the reimbursable expenses or other bills and charges covered. If any portion of the claim is denied the notice shall identify that portion of the claimed amounts that is not being paid."

OAR 436-69-501 governs elective surgery. Subsection (1) requires the attending surgeon to give advance notice of proposed surgery. Subsection (2) authorizes the insurer to obtain a second opinion on the need for surgery. Subsection (3) provides that upon receipt of such a second opinion, "the insurer shall promptly notify the physician whether payment will be made for the proposed surgery."

OAR 436-69-801(5) and (7) repeat the requirement that bills for medical services that have been rendered be paid within 45 days:

> "(5) Insurer shall pay bills for medical services within 45 days of receipt of the bill, if the billing is submitted in proper form and clearly shows that the treatment is related to the accepted compensable injury or disease. Failure to do so shall render them liable to pay a reasonable monthly service charge after the 45th day, if the provider customarily levies such a charge to the general public."
>
> "(7) In the event of a dispute over portions of a billing, the insurer shall pay within 45 days the undisputed portion of the bill."

Considering all of these rules we find the same ambiguity that is present in the statutes -- no one rule directly and simply

states the procedures an insurer or self-insured employer is expected to follow in responding to "claims" in the form of ongoing medical care following acceptance of a claim in the first instance. OAR 436-54-245(3), 436-54-305, 435-54-310(7) and 436-69-801(7) all recognize denials of medical services and partial denials of medical services. The apparent thrust of the rules is that such a denial should be sent to the medical service provider; this is specifically stated in OAR 436-54-305(5) and implicitly stated in OAR 436-69-501(3). The only reference to notice to the claimant is stated in OAR 436-54-310: "The insurer or self-insured employer shall notify the claimant or provider of service in writing when compensation is paid of the specific purpose of the payment." (Emphasis added.) At first blush, we thought the use of "or" was mistaken; that "and" was more likely intended. But the rules include the concept of claimants directly submitting requests for reimbursement for things like travel, see OAR 436-54-270(1); thus, the "or" in OAR 436-54-310 must mean notice to a medical service provider who submits a bill or notice to a claimant who submits a request for reimbursement.

We do find one valuable distinction in the rules. A bill for medical services that have already been rendered is subject to one set of requirements (generally, payment of clear and undisputed bills within 45 days); a request for prospective authorization to provide medical services, e.g., elective surgery, is subject to different requirements (the insurer "shall promptly" -- not defined -- respond). Other than this distinction, which we discuss more fully below, we find little guidance in the administrative rules on the question of the procedures applicable to ongoing medical care following initial acceptance of a claim.

III

We thus feel constrained to construct an answer ourselves. We will do so following the lead of State v. Welch, 264 Or 388, 393-94 (1973), in which the Supreme Court stated, "We have to admit that the legislature probably never considered our present problem in adopting the language of the statute," and then proceeded to fashion the rule it believed the legislature would have adopted had it considered the specific problem.

One thing we are quite sure the legislature would desire is notice to the claimant, with information about hearing rights, when a claim for medical services is denied or partially denied. We thus deem the reference in ORS 656.313(2) to notice of such denials being sent to a medical service provider as not being an expression of the only intended recipient of such notification but, rather, an expression of an additional intended recipient.

Another thing we are almost as sure the legislature would desire is to avoid a literal mountain of paperwork in the form of specific notices of claim acceptance every time an insurer pays a medical bill without question or challenge. OAR 436-69-201(2)(a) recognizes a "usual range of the utilization of medical services" to be up to 24 office visits within the first 60 days following an injury. Suppose a doctor who treated an injured worker to that extent submitted 24 separate bills to the industrial insurer.

Although the statute can be interpreted to mean that every bill is a claim and to mean that every claim triggers a duty to issue notice of acceptance or denial, such a literal construction of the statutes in the context of ongoing medical care would only aid companies that manufacture paper and filing cabinets. When a claimant's initial claim is accepted, remains in accepted status and the worker is receiving compensable medical care as a part of his accepted claim, it simply makes no sense to require any further notice of acceptance every time a medical bill is paid.

IV

Putting our thoughts about what the legislature would likely desire together with the distinction between claims for rendered medical services and claims for future medical services, the rules that emerge are as follows:

(1) Claims for rendered medical services: The appropriate responses are to either pay the bill or to issue notice of denial or partial denial to the claimant and the medical provider. Such a denial should advise the claimant of his or her hearing rights. If the insurer or self-insured employer has previously issued notice of claim acceptance, it need not issue any additional notice of acceptance every time it pays a medical bill.

(2) Claims for future medical services: Such claims are more akin to an initial claim, that is, the claimant has an interest in knowing the position, either way, of the insurer or employer. Therefore, the appropriate responses are to inform the claimant and the medical provider either that the proposed medical service will be paid for or that the proposed medical service will not be paid for. A response in the affirmative need only be that; there is no reason to have to comply with all of the technical notice requirements stated in ORS 656.262(6) as applicable to an initial notice of claim acceptance. A negative response should be in the form of a denial or partial denial and should specifically advise the claimant of his or her hearing rights.

(3) All claims for medical services: The statutory response time for all claims is 60 days. Thus, claims for rendered medical services should be paid or denied within 60 days and claims for future medical services should be accepted or denied within 60 days. We have no reason to question the shorter, 45-day response time that the Department has created in certain circumstances; we just think the violation of that regulatory standard is a matter between the regulatory agency, the Workers Compensation Department, and the regulated insurers, but is not relevant to contested cases before this adjudicatory agency.

V

Applying these concepts in this case, we first note there is some dispute whether SAIF's denial was only a refusal to pay for medical services that had been rendered or instead was also intended to deny future chiropractic care in excess of two office visits per month. We need not resolve that dispute because, under our conclusions stated above, the result is the same in either event: A refusal to pay for rendered medical services or a

refusal to authorize future medical care must be communicated to the claimant by way of a denial or partial denial with notice of hearing rights. We conclude that the Referee was correct in so ruling and, for the reasons stated above, we reject SAIF's argument that there is no duty to issue a proper denial to the claimant in connection with ongoing medical care following the initial acceptance of a claim.

VI

On the merits of whether claimant established a need for more than two chiropractic treatments per month, we affirm and adopt the Referee's order finding that claimant so established. We specifically find that the additional treatment was for increased symptoms produced by claimant: (1) driving 70 miles per day, five days a week to participate in a vocational rehabilitation program; and (2) sitting in a classroom half the day, five days a week as part of that program. The additional palliative treatment for claimant's low back pain was justified and reasonable.

ORDER

The Referee's order dated December 14, 1981 is affirmed. Claimant's attorney is awarded $500 for services rendered on Board review, payable by the SAIF Corporation.

* *

KENNETH E. GULICK, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Keith Skelton, Defense Attorney

WCB 81-10359
February 3, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Seifert's order which awarded him 80% unscheduled permanent partial disability, that being an increase of 25% over and above the Determination Orders of April 20, 1978 and October 30, 1981. Claimant contends that he is permanently and totally disabled.

We adopt the Referee's findings of fact as our own.

The Referee found that, while the evidence established that claimant suffers from a serious disability, the medical evidence in combination with the social/vocational evidence was insufficient to establish permanent and total disability. Specifically, the Referee found that claimant had failed to make a reasonable effort to seek employment pursuant to ORS 656.206(3) and that he was not sufficiently disabled to be relieved of that burden under the various court cases we discussed in Dixie Fitzpatrick, 34 Van Natta 974, 977-78 (1982).

We agree with the Referee's determination. Claimant has made virtually no attempt to return to or find employment since his 1976 injury. Although claimant is precluded from returning to heavy labor which constitutes his past work experience, this fact alone does not result in permanent total disability. The vocational report of November 20, 1979 relates:

"Also, Mr. Gulick felt that he has limited education, and that any job that would require the use of those skills would be extremely difficult for him. He further claimed that he would not like to take a desk job and considers himself an outdoor man. He would not like to work inside on an 8 hour a day basis, especially for an immediate supervisor. He claimed that all of his life he had worked independently, and being in a position where he would be subject to direct supervision and production would not seem to suit his character.

"Mr. Gulick is living comfortably financially at this point and time, and jeopardizing his Social Security and health for perhaps a minimum wage job would not be to his advantage."

In short, we find, as did the Referee, that the record demonstrates that the claimant is basically satisfied with his financially secure life style, has decided to retire from the labor force and will make no efforts to seek employment which might jeopardize his position. It is certainly claimant's prerogative to do so. That decision, however, does not relieve him of the statutory requirements if he seeks permanent total disability. Dixie Fitzpatrick, supra; Bohnke v. Employee Benefits Ins. Co., 55 Or App 977 (1982); Home Ins. Co. v. Hall, 60 Or App 750 (1982); Willamette Poultry Co. v. Wilson, 60 Or App 755 (1982).

ORDER

The Referee's order dated May 13, 1982 is affirmed.

Board Member Lewis Dissenting:

I respectfully dissent. I believe that claimant has established that he is permanently and totally disabled.

Claimant has sustained three traumatic injuries to his low back; one in 1973, another in 1975 and the last one in May, 1976 which gave rise to this litigation. All three injuries resulted in back pain which radiated into the right leg. The last injury led to a discectomy and a laminectomy. Claimant's physical impairments include the residuals of the two surgeries, degenerative spinal changes, cervical pain, hypertension, muscle contraction headaches, obesity and poor body mechanics. Occasionally claimant's right leg buckles, causing claimant to collapse. His psychological profile includes mild depression with sleep disturbance and irritability, passive-dependent orientation, tendencies toward overcompensatory hypomania and somatization of stress and tension, and hysterical conversion reaction. As a result of his physical impairments and underlying psychological conditions, claimant experiences chronic and severe pain, primarily in the low back.

Claimant is now 52 years old. He has completed the eighth grade in school and has no specialized education or formal training. He possesses an average intellectual capacity which may be somewhat functionally impaired because of his underlying emotional problems which tend to interfere with his ability to attend and concentrate. His work history consists primarily of moderate to very heavy work as a miner, green chain offbearer and automobile salvage mechanic. Claimant is now restricted by virtue of his physical impairment to sedentary work. The employer's vocational expert concluded that claimant has few transferable skills and that what skills he does have are unusable because of his physical limitations.

Claimant's medical history has been characterized by startling recoveries and disappointing setbacks. Whenever claimant makes substantial progress as a result of treatment, including participation in pain clinic programs, eventually his leg buckles, resulting in a fall which disables him again. Claimant's treating orthopedic surgeon, Dr. Padel of Redding, California, who has followed his progress from May, 1977 to the present, ultimately opined that claimant's disability was permanent and total. I agree that claimant is not totally incapacitated from a medical point of view, so Dr. Padel's opinion, most likely referring to claimant's medical condition plus his other handicapping social/vocational factors, is weighed accordingly.

In assessing the evidence, the Referee indicated that all social/vocational factors contributed to greater disability except one. The Referee felt that claimant's failure to demonstrate efforts to find employment and his "voluntary" retirement from the work force required assessment of a negative value in the emotional and psychological factors portion of the disability evaluation process.

I believe that if any weight is to be given to the emotional and psychological factors portion of the disability evaluation rules, it should be a positive value. The record is clear that claimant is not consciously fabricating or creating pain or impairment. While he apparently derives what is referred to as secondary gain from his disability status and has become adjusted to the role of a disabled person, the consensus of psychological opinion is that claimant does so unconsciously and as a function of his moderate to severe psychological problems. Claimant is not a malingerer; he simply has no insight into how his psychological make-up is contributing to his level of disability. Claimant's work history is characterized by very strenuous work. He previously led an active life off the job including such pursuits as hunting. Although claimant believes he is adjusting to his disability, the psychological evidence indicates that really he is not, and he experiences greater pain and disability as his way of expressing the tension and anxiety he has because of his physical disabilities.

Most of the professionals who examined claimant commented that given claimant's attitude concerning the extent of his disability they would not expect claimant to return to employment. Claimant made one brief attempt to return to work as an automobile salvage mechanic which resulted in a flare-up of back and leg pain. The

chronic pain claimant experiences is very real to him and, therefore, must be considered in the evaluation of extent of claimant's disability. Juanita M. DesJardins, 34 Van Natta 595 (1982). Claimant cooperated fully with all treatment programs, including participation in pain clinic programs. He did not refuse vocational assistance or any proffered employment, nor did he "refuse" to seek work. Given the feedback that claimant has received from the professionals who have examined him, particularly his treating physician and the vocational expert who interviewed claimant at the insurer's request, claimant had no reason to expect that a search for work would be successful. Under these circumstances. I believe that claimant has satisfied the requirements of ORS 656.206(3), and has established that he is permanently and totally disabled from any suitable employment. Looper v. SAIF, 56 Or App 437 (1982); Peterson v. SAIF, 52 Or App 731 (1982); Morris v. Denny's Restaurants, 50 Or App 533 (1981); Butcher v. SAIF, 45 Or App 313 (1980).

It is unfortunate that the employer's vocational expert expressed concern with claimant's financial security and referred to whether an attempt to return to work was in claimant's "best interests." For better or worse, what is in the claimant's "best interests" is irrelevant to the determination of extent of disability. The issue is whether claimant is capable of returning to suitable, regular employment. Notwithstanding this flaw in the vocational expert's report, I believe that, considered as a whole, it was the opinion of the insurer's vocational expert that claimant was physically unable to perform on a sustained basis any job for which he had transferable skills and that claimant was not retrainable for other jobs. No contrary vocational evidence appears in the record. We must recognize that even poorly motivated workers or workers who are deriving "secondary gain" from their disability status nevertheless can be permanently and totally disabled.

I believe that claimant should be determined permanently and totally disabled as of September 29, 1981, the date of Dr. Padel's report.

In the employer's brief, the accusation is made that claimant engaged in a pattern of behavior calculated to maximize the award of disability. Claimant is accused of moving to California to escape surveilance and examination by Oregon physicians. Claimant is further accused of undergoing surgeries twice in order to enhance his disability claim. There is not one iota of evidence in the record that remotely supports either accusation. I find such "argument" very unpersuasvie. From time to time, broad accusations and characterizations of workers, insurers and the workers compensation system, have found their way into briefs submitted on behalf of claimants, insurers and employers alike. Such material, if divorced from the facts of the case, is equally unpersuasive. I would encourage parties to refrain from inserting such material in their briefs.

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

WCB 80-03825
February 3, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Foster's order which concluded that chiropractic treatments received by claimant are not the SAIF Corporation's responsibility under ORS 656.245 and denied claimant's request for penalties and attorney fees. We reverse.

I

On the merits, there are three possibilities: (1) That claimant has established that his need for chiropractic care in 1980 is causally connected to his accepted industrial injury of November 1977; or (2) that the chiropractic care in question is solely related to the natural progression of claimant's underlying spondylolisthesis condition; or (3) that it is impossible to separate the effects of the industrial injury from the effects of the spondylolisthesis, in which case claimant would not have proven a causal link between the prior injury and his current treatment.

Claimant's compensable 1977 injury occurred when he slipped while walking down a trailer tailgate in the process of unloading a tractor from the trailer. He felt immediate pain in his back. These symptoms became more severe when, in December, he pulled on a toolbox and experienced a popping sensation in his back. Dr. Spady hospitalized claimant for conservative care for lumbosacral pain radiating to the outer left thigh.

Approximately three months after hospitalizing claimant, Dr. Spady performed a closing examination. Dr. Spady noted that claimant "certainly does not have the dramatic pain that he had immediately after his injury, but he does have a little more trouble than he had before his injury." The doctor recommended that the "claim be closed with an appropriate disability award commensurate with the existing impairment of function." The 1977 claim was closed by a Determination Order dated May 8, 1978, which awarded compensation for temporary total disability only. No appeal was taken from that order.

On March 20, 1980 claimant reported to Dr. Peterson, a chiropractor, complaining of left leg numbness and neck discomfort. Dr. Peterson provided treatment. A bill for these treatments, totalling $270, was forwarded to SAIF for payment. SAIF has neither paid the bill nor issued a formal denial of this claim for medical services.

SAIF referred claimant to Dr. Spady, who felt that claimant's 1980 symptoms were "on the basis of the previously existing spondylolisthesis." This suggestion apparently resulted in SAIF asking its medical consultant, Dr. Norton, for an assessment. Dr. Norton submitted an impressive report that discusses the

nature of spondylolisthesis in great detail. Dr. Norton concludes that claimant's 1977 industrial accident resulted only in an exacerbation of symptoms, which is characteristic of spondylolisthesis, but did not cause any permanent worsening of that underlying condition. SAIF submitted a copy of Dr. Norton's report to Dr. Spady, who agreed with Dr. Norton's opinions.

While we have no reason to disagree with the diagnosis from Drs. Norton and Spady, we do not find their 1980 diagnosis of claimant's 1977 injury dispositive of this case.

Claimant testified that the pain in his left leg and hip never really went away after the 1977 injury. He continued to experience pain in these areas during the two years preceding his March 1980 visit to Dr. Peterson. In a deposition taken after the hearing, Dr. Spady testified that when he performed the closing examination in March of 1978 he expected that claimant would continue to experience pain, and that when he again examined claimant in 1980 at SAIF's request, claimant was suffering from the same pain he had been experiencing two years earlier.

Comparing Dr. Spady's 1978 and 1980 reports and considering claimant's testimony, we are satisfied that claimant has proven entitlement to the disputed medical services in question. At the time the original claim was closed, Dr. Spady forecast continuing symptomatology. At the time the question of additional medical services arose, Dr. Spady found continuing symptomatology. Claimant testified, consistent with Dr. Spady's opinions, that he has continued to experience pain since his 1977 injury. These symptoms are different in nature and degree than any symptoms he experienced prior to the 1977 injury. Whereas previous pain was "self-limiting," claimant's post-injury symptoms of radiating pain never completely resolved.

Dr. Norton's treatise on spondylolisthesis creates some doubt about whether claimant's treatment was for the natural progression of that condition; nevertheless, we are more persuaded that the contested treatment would not have been rendered but for claimant's 1977 industrial injury.

II

Although SAIF never issued a denial of this claim for medical benefits, the Referee declined to impose a penalty, reasoning: "I do not believe this necessitates a denial letter or warrants any penalties or attorney fees for failure to issue a formal denial."

In Billy J. Eubanks, WCB Case No. 81-07465, 35 Van Natta 131 (1983), we concluded that when there is a claim for rendered medical services in the form of a bill therefor, as in this case, the required responses are to either pay the bill within 60 days or to issue a denial with notice of appeal rights within 60 days. SAIF did not do either.

In Eubanks we also discussed the distinction between a claim for medical services in the sense of services that have already been rendered and a prospective claim for medical services, such as a request for authorization for future surgery. In Gary L.

Clark, WCB Case Nos. 80-04402 and 80-04403, 35 Van Natta 117 (1983), we considered the issue of penalties in the context of a prospective claim for medical services and concluded that there was no compensation "then due" within the meaning of ORS 656.262(9) at the time of SAIF's belated acceptance upon which to base a penalty. The same problem does not exist in this case involving a claim for rendered medical services. We conclude that SAIF is liable for a 25% penalty calculated on Dr. Peterson's bills for chiropractic treatment that had not been paid by SAIF at the time of hearing. And since SAIF's unreasonable conduct consists of total inaction, we will impose an attorney's fee pursuant to ORS 656.382(1) in addition to a penalty.

ORDER

The Referee's order dated April 23, 1981 is reversed. Claimant's claim for compensation in the form of medical services is remanded to the SAIF Corporation for acceptance and payment of benefits pursuant to ORS 656.245. In addition, SAIF is ordered to pay claimant 25% of the amount of bills for medical services outstanding at the time of hearing as and for a penalty for failure to accept or deny claimant's claim within 60 days, or at any time.

Claimant's attorney is awarded $600 as a reasonable attorney fee for services rendered before the Referee and Board in prevailing on the denial of medical services, payable by SAIF. In addition, SAIF is ordered to pay claimant's attorney a fee of $500 for services rendered in connection with its unreasonable failure to accept or deny in the manner required by law.

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DARYL A. McCLURE, Claimant
Frank J. Susak, Claimant's Attorney
Schwabe et al., Defense Attorneys

WCB 79-05227 & 79-2099
February 3, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer has requested review and the claimant has cross-requested review of Referee St. Martin's order which reversed the insurer's denial of claimant's left knee condition, affirmed a denial of claimant's heart attack, affirmed a denial of certain bills for psychological services, and awarded attorney's fees for prevailing on the denied knee condition claim.

The issues are the compensability of claimant's heart attack and left knee condition, the insurer's liability for certain psychological services bills and whether and to what extent claimant is entitled to attorney's fees. Except as inconsistent with our findings herein, we adopt the Referee's findings of fact.

Based on our review of the record, we agree with the Referee that claimant's heart attack is not compensable. For the reasons stated in the insurer's brief, we find and conclude that claimant's left knee condition is not compensable.

With respect to certain bills for psychological services rendered by Dr. Fleming, apparently it is the insurer's position that at the time the denial was issued it reasonably appeared from Dr. Quan's report that psychological services were not necessary. We believe that the record amply demonstrates that claimant was in need of psychological services arising from the industrial injury. The record reflects the possibility that there was duplication of services since claimant may have been seeing other mental health professionals at the time. However, it also appears that there may have been some confusion between the Field Services Division and the insurer and that claimant was caught in the middle. Considering claimant's emotional state at the time, we cannot fault claimant for receiving the services in question.

Because of our disposition of the compensability issues, it is necessary to adjust the award of attorney's fees. Claimant's counsel is entitled to an insurer-paid fee for services at hearing and on review only on the psychological services bills issued commensurate with the amount at issue.

ORDER

The Referee's order dated March 4, 1982 is reversed in part. That portion of the order reversing the denial of claimant's left knee condition is reversed, and the insurer's denial is reinstated and affirmed. That portion of the order denying payment of Dr. Fleming's bills totalling $195 is reversed, and the claim is remanded for payment of those bills. Claimant's counsel is awarded $200 as a reasonable attorney's fee for his services at hearing and on review, in connection with the denial of payment for Dr. Fleming's services. The remainder of the Referee's order is affirmed.

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DONALD J. YOUNG, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-00503
February 3, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Leahy's orders which dismissed his request for hearing with prejudice and denied his motion for reconsideration. This case involves the proper application of OAR 436-83-400(3), the Board's administrative rule requiring a party to submit to a Referee and provide the opposing party with documentary evidence not less than 10 days prior to a hearing.

A hearing convened pursuant to claimant's request, and the issue to be resolved was the extent of claimant's disability. As is customarily the practice, the Referee and the parties engaged in a discussion concerning the exhibits that would comprise the evidentiary record. The Hearings Division file contained no exhibits, and it is apparent from the reported transcript of the proceedings that, upon being informed of this fact, claimant's attorney was taken somewhat by surprise. SAIF's attorney advised that, although SAIF had provided claimant's attorney with claims information, see OAR 436-83-460, he had not compiled a list of exhibits to be submitted by SAIF for purposes of this hearing, due

to the fact that there were no exhibits upon which SAIF intended to rely. Claimant's attorney thereupon offered to make photostatic copies of the documents with which he had been provided; however, SAIF's attorney objected to the admission of any documentary evidence based upon the failure to submit them within the provisions of the Board's administrative rule. The Referee ruled that he would not allow any documents to be submitted at that late date, noting that the Board recently had indicated its preference for strict enforcement of the administrative rule. Claimant's attorney elected not to proceed with the hearing without the benefit of documentary evidence in the form of medical reports, whereupon the Referee dismissed the proceedings.

The Referee's order dismissed claimant's request for hearing with prejudice. Claimant requested reconsideration, and in the alternative, asked that the Referee withdraw his order of dismissal and allow claimant to voluntarily withdraw his request for hearing. Claimant's motion was denied, and claimant requested Board review.

On review claimant contends that it was error for the Referee to refuse to allow claimant's attorney to submit copies of the documents which previously had been provided claimant by SAIF, and that the Referee abused his discretion in doing so. Claimant also contends that a dismissal with prejudice was improper, and that he should have been allowed by the Referee to withdraw his request for hearing and proceed at a later date. SAIF's reply is that the Referee's strict application of the Board's administrative rule is supported by prior Board decisions, and that the proper application of this rule to the circumstances of this case requires the result reached by the Referee.

OAR 436-83-400 is the Board's administrative rule governing the preferred form of medical and vocational evidence, and the procedure for submitting such documentary evidence. In pertinent part the rule provides:

> "(3) As soon as practicable and not less than 10 days prior to the hearing each party shall file with the assigned referee and provide all other parties with legible copies of all medical reports and all other documentary evidence upon which the party will rely except that evidence offered solely for impeachment need not be so filed and provided.
>
> "(4) At the hearing the referee may in his discretion allow admission of additional medical reports and other documentary evidence not filed as required by (3) above."

A related rule, providing for the employer/insurer's obligation to provide claims information to workers upon demand provides:

> "Upon demand of any claimant requesting a hearing, the [employer or insurer] and its representatives shall within 15 days of mailing said demand furnish to claimant or

> his representative, without cost, copies of all medical and vocational reports and other documents relevant and material to the claim which are then or come to be in the possession of the [employer or insurer] or its representatives, except that evidence offered solely for impeachment need not be so disclosed. Failure to comply with this section may be considered unreasonable delay or refusal under ORS [656.262(9)]." OAR 436-83-460.

In defense of claimant's failure to submit the documentary evidence upon which he intended to rely at hearing, claimant's attorney relies upon the usual custom and practice of employers and their insurers to compile documentary materials which are relevant and material to a claim and submit these documents to the Hearings Division under cover of a list indexing the exhibits submitted. We take notice of the fact that this has been the usual and customary practice in workers compensation hearings, and that claimants generally rely in part, if not entirely, upon the exhibits submitted by the employers or insurers, with the submission of additional reports generated by and at the expense of claimants. In addition to his reliance upon custom and practice, claimant's attorney also relies upon a memorandum from the Presiding Referee, dated January 29, 1982, which was intended by the Presiding Referee to clarify procedures for the conduct of hearings. The memorandum primarily addresses the order of submission of documentary evidence upon which the parties intend to rely at hearing. It states an objective previously articulated by the Board, which is the selective submission of exhibits to include only those which are material to the issues to be resolved at hearing. It states guidelines to be followed by the parties in complying with OAR 436-83-400(3), stating the "obligation" of the employer or insurer to submit, not less than 20 days before a hearing or within 7 days of mailing of notice of hearing, a packet of all exhibits deemed material by the employer or insurer. The memorandum states that the proposed exhibits are to be presented in chronological order, contains suggestions for pagination, and states that the exhibits are to be accompanied by an index listing the exhibits. The memorandum goes on to state that not less than 10 days before the scheduled date of hearing or within 7 days of the employer or insurer's mailing, the claimant is to file "a packet of any additional exhibits which the claimant wishes to offer in evidence," accompanied by a supplemental exhibit index. The Presiding Referee's memorandum incorporates OAR 436-83-400(4), stating: "At the hearing the referee may in his discretion allow admission of documentary evidence not submitted per the above." This memorandum was addressed and distributed to workers compensation practitioners.

Claimant's attorney contends that this memorandum has the full force and effect of an administrative rule requiring the employer or its insurer to submit documentary evidence which is material and relevant to the issues to be resolved at a hearing. This contention is without merit. The Board's administrative rules are adopted in accordance with ORS Chapter 183 and the Attorney General Model Rules of Procedure. See WCB Admin. Order No. 1-1982 (effec-

tive March 4, 1982), OAR 438-10. Although claimant's attorney may have relied upon the Presiding Referee's memorandum as a guideline incorporating the long-standing usual custom and practice in workers compensation proceedings, counsel could not have reasonably relied upon the memorandum as having the full force and effect of an administrative rule.

There is thus no requirement for employers or their insurers to submit exhibits in advance of hearing. The only requirement under OAR 436-83-400(3), regarding the submission of exhibits, is that both parties provide the agency and each other with copies of documents upon which they intend to rely at hearing no later than 10 days prior to the hearing.

SAIF apparently complied with its obligation to disclose claims information pursuant to OAR 436-83-460. There were no exhibits upon which SAIF intended to rely at the hearing; therefore, under OAR 436-83-400(3), SAIF was under no obligation to submit proposed exhibits. Claimant's attorney failed to comply with the literal provisions of the administrative rule; and the question is, under the facts and circumstances of this case, is the claimant's failure excusable and did the Referee abuse his discretion by refusing to allow claimant's attorney to submit exhibits on the day of hearing? We find that the Referee did not abuse his discretion; however, we find that it was error for the Referee to dismiss claimant's request for hearing with prejudice, under the facts and circumstances of this case.

The "10 day rule", as OAR 436-83-400(3) is commonly referred to, is not a rule which can be applied to the letter in all cases. The Board's administrative rules recognize that, in the exercise of discretion, a Referee is permitted to make an exception to the letter of the rule. OAR 436-83-400(4).

In its application of the 10 day rule, the Board has held that it is "a simple, unambiguous rule which is designed to effectuate the entire hearings process," encouraging a strict application of the rule. Minnie Thomas, 34 Van Natta 40, 41 (1982); Ronald Bronski, 34 Van Natta 612 (1982); Darryl G. Warner, 34 Van Natta 634 (1982). The question is, and has always been, whether a Referee has abused his or her discretion in admitting or refusing to admit a proffered exhibit which is offered in violation of the 10 day rule. A strict application of a rule does not exclude the possibility of an exception to the rule, particularly where application of the letter of the rule is to be tempered by the exercise of discretion.

In Minnie Thomas, supra, the employer argued that the Referee had abused his discretion in refusing to admit a proposed exhibit where the employer had mailed a copy of the exhibit to the Referee and claimant's attorney one judicial day prior to the scheduled hearing date, the report was not received by either claimant's attorney or the Referee by mail, and the first opportunity for claimant's attorney to see the report in question was the date of hearing. In finding that no explanation had been offered for the insurer's delay in furnishing the report to the Referee and opposing counsel, where the report had been available 17 days prior to the hearing, the Board stated that the "[d]elay in furnishing the report to the Hearings Division and opposing counsel can only

be due to, so far as we can guess, inefficiency or withholding of the report." 34 Van Natta at 41.

In Darryl G. Warner, supra, the claimant submitted a proposed exhibit by mailing it to the Hearings Division well within the 10 days required by OAR 436-83-400(3); however, claimant's attorney failed to furnish SAIF with a copy. SAIF objected to the introduction of this exhibit on the basis that it had not been furnished a copy, and the Referee sustained the objection. In upholding the Referee's ruling, the Board stated: "The ten-day rule. . . expresses the Board's judgment that full prehearing disclosure of evidence expedites adjudication, promotes settlement and simplifies the presentation of evidence at the hearings." 34 Van Natta at 635. Claimant contended that "substantial justice" would be served by remanding the case to the Referee for introduction of the excluded exhibit. Claimant's attorney had had the medical report in issue six or seven months prior to the date of the hearing. The Board found that substantial justice would not be promoted by remanding the case to the Referee for consideration of the excluded medical report, reasoning that "[s]ubstantial justice for one claimant can. . . create substantial injustice for other claimants awaiting hearing." 34 Van Natta at 635.

In Ronald Bronski, 34 Van Natta 612 (1982), counsel for SAIF had mailed 40 exhibits to claimant's attorney and to the Referee five days before the hearing, and on the date of hearing, SAIF offered an additional exhibit. At hearing claimant's attorney objected to the admission of seven of these exhibits, alleging that he previously had obtained 34 of the exhibits and was prepared to respond to them, but that he was surprised and prejudiced by the late receipt of the other seven exhibits. The Referee sustained claimant's objection to these seven exhibits and admitted the remainder. SAIF argued that the Referee should have excluded all of the exhibits submitted in violation of the 10 day rule, and that it was unfair of the Referee to exclude those exhibits that were harmful to claimant's case while admitting those that were helpful.

The Board found that SAIF's late submission of documents violated OAR 436-83-460 as well as the 10 day rule:

> "The criteria employed by the Referee to determine admissibility was not whether the exhibit objected to helped or harmed claimant's case, but whether claimant was surprised and prejudiced by receiving the exhibits at such a late date. We find that claimant was surprised and prejudiced by late submission of the seven exhibits in question." 34 Van Natta at 613.

SAIF also argued that it was unfair to exclude the exhibit offered on the date of the hearing because it had not been received until the day preceding the hearing. The Board found that there was no showing as to why, in the exercise of due diligence, the report could not have been requested or received sooner than it was. The Board also found that some of the exhibits in question had been in SAIF's possession six to ten months before the hearing, and there was no explanation as to why SAIF failed to send these reports to

the claimant and the Referee more than 10 days prior to the hearing. The Board upheld the Referee's ruling excluding the exhibits objected to by claimant.

In Fred Hanna, 34 Van Natta 1271 (1982), 97 exhibits were admitted at the hearing. Subsequently, SAIF's attorney tendered two additional exhibits, which were marked as exhibits 98 and 99. In her order the Referee ruled that exhibits 98 and 99 would not be admitted because they were submitted in violation of the 10 day rule. The Board found that many of the exhibits that were admitted as exhibits 1 through 97 were submitted in violation of the 10 day rule. There had been no objection from claimant's attorney concerning admission of these exhibits, and the Board stated: "[W]e 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." 34 Van Natta at 1272.

The Board also noted that of the late exhibits that were admitted, most were generated between 1967 and 1978 and were in existence long before the date of hearing, obviously in time to be submitted in compliance with the 10 day rule. Exhibits 98 and 99 were in existence prior to the date of hearing; however, it was unlikely that they were in counsel's possession by the time of hearing.

> "It was impossible to submit these exhibits in compliance with the 10 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." 34 Van Natta at 1272.

The Board concluded that exhibits 98 and 99 should have been admitted and considered them in its review.

The obligation of the employer or insurer to make a full disclosure of claims information is related to, but separate and distinct from, the considerations that arise under OAR 436-83-400(3), the 10 day rule. OAR 436-83-400(3) is primarily intended to advise opposing parties and the Referee of which documents a party intends to rely upon at hearing. The rule is not specific with regard to the order of submission of documents; i.e., which party is first to submit its documentary evidence. The practice that has become usual and customary is for the employers or insurers to submit documentary evidence in their possession in the first instance, with the claimant supplementing these submissions to the extent deemed appropriate. This agency has attempted to discourage the submission of an entire claims file for purposes of a hearing, since much of the information in a claims file may be irrelevant to the issues at hearing. It makes much sense to require claimants

to make the initial submission of documentary material, inasmuch as the claimant is generally in the best position to know which issues will be litigated, and it is the claimant's burden of proving entitlement to the benefits claimed. This presupposes that the employer or insurer has made a full and complete disclosure pursuant to OAR 436-83-460. See generally Rose E. Pederson, 34 Van Natta 1658 (1982). Our existing administrative rules, however, do not contain any provision requiring one party to submit proposed exhibits as a condition upon the other party's obligation or ability to submit copies of documents that will be relied upon as exhibits.

The present requirements in this regard are set forth in OAR 436-83-400. If a party does not intend to rely on exhibits, that party has no obligation to submit exhibits. Where a party intends to rely upon documentary evidence, other than impeachment evidence, the documents must be submitted in accordance with the rule. Exceptions should be allowed where there is justification for the late submission. See, e.g., Fred Hanna, supra, 34 Van Natta at 1272. We hold that, as general rule, the provisions of OAR 436-83-400(3) should be strictly applied by the Referees, subject to limited exceptions where it appears that, in the exercise of due diligence, the late submission could not reasonably have been made available at an earlier date, or was not timely filed with the Hearings Division and provided to opposing counsel due to forces beyond the control of the party offering the exhibit. The party's explanation should be recorded in the record of the proceedings in order to allow a reviewing body to determine whether the Referee's decision to admit or exclude the document constitutes an abuse of discretion where the Referee's ruling is assigned as error on review.

The state of the record in this case is very different from the other cases in which this issue has arisen, due to the fact that SAIF apparently decided to use this case as a "test case" to establish the outer limits of the Board's application of the 10 day rule. When the Referee ruled that claimant would not be permitted to submit copies of the documents previously provided him by SAIF, claimant's attorney refused to proceed without benefit of the medical reports he apparently expected had been filed with the Referee, and upon which he apparently intended to rely in order to substantiate claimant's claim for an award of permanent partial disability. Under the facts and circumstances of this case, we cannot say that the claimant's refusal to proceed further was unreasonable. Cf. Candee v. SAIF, 40 Or App 567, 573 (1979).

We do not find that the claimant's failure to submit copies of the documents upon which he intended to rely at hearing is excused under the standards set forth hereinabove; however, we find that a dismissal with prejudice, under the peculiar facts and circumstances of this case, is an exceedingly harsh disposition of this claimant's request for hearing. Claimant should have been permitted to withdraw his request for hearing. Although this is not the standard to be applied to future cases involving violations of OAR 436-83-400(3), it is a fact that it was the claimant who was surprised when the hearing convened because of SAIF's sudden departure from a usual and customary practice which it had followed

for many years, and this departure was made without advance notice to claimant's attorney. Under these facts and circumstances, it was error for the Referee to enter an order of dismissal with prejudice.

ORDER

The Referee's orders of July 30, 1982 and August 9, 1982 are modified. Claimant's request for hearing dated January 18, 1982 and amended request for hearing dated February 10, 1982 are dismissed without prejudice.

Board Member Barnes Dissenting:

I agree with much of what the majority says, which in simple terms I understand to be: (1) OAR 436-83-400(3) means what it says -- "the parties" (plural) generally must submit copies of proposed exhibits at least 10 days pre-hearing; (2) there is no requirement in the rule or in anything else that has the force of law that the employer/insurer has to take the first step in the process of submitting proposed exhibits; and (3) the Referees have discretion to admit exhibits offered in violation of the procedural requirements of OAR 436-83-400(3), but there must be a reasoned exercise of that discretion, meaning there must be some articulated reason for admitting an exhibit offered in violation of OAR 436-83-400(3).

I part company with the majority when it states -- over and over, as if repetition made it more true -- that the "usual custom and practice" in workers compensation cases has been for the insurer to always initiate the process of submitting all proposed exhibits pre-hearing. Indeed, the majority cites four Board cases, and others could be cited, from the last couple of years in which there has been a question about the admission of exhibits that were not submitted at least 10 days pre-hearing. If the "usual custom and practice" that the majority believes to exist actually existed, why would issues about violation of the "10 day rule" arise with such frequency?

In this case we issued a Notice of Hearing on June 4, 1982, advising the parties that the hearing was set for July 22, 1982; that Notice stated, in terms that I think are unambigious: "Each party shall file with the assigned Referee all documentary evidence and provide copies thereof to the other parties as soon as practicable and not less than ten days prior to the hearing." Notwithstanding these clear instructions, claimant appeared at the time of hearing without having submitted any documentary evidence in the required manner. The Referee was thus confronted with a situation in which the party with (at least theoreticaly) the burden of proof had not submitted any proof in accordance with the requirements of the Board's rules. Under these circumstances, I believe the Referee properly dismissed with prejudice. I would both affirm and, as we did in Minnie Thomas, 34 Van Natta 40 (1982), applaud the Referee's order.

* *

DANIEL LOPEZ, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02579
February 4, 1983
Amended Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Mulder's order awarding 20% scheduled permanent disability for loss of the left arm in lieu of the October 1, 1980 Determination Order award of 10% loss of the left hand. SAIF also contends that the Referee erred in admitting two medical reports submitted in violation of OAR 436-83-400(3).

Exhibit 81, the exhibit in question, consists of two medical reports, one dated February 16, 1981, the other dated June 2, 1981. Neither report was provided to SAIF or submitted to the Hearings Division prior to the hearing date, April 13, 1982. It appears that, in the exercise of due diligence, these reports could have been provided to SAIF and submitted to the Referee in satisfaction of the requirements of OAR 436-83-400(3), and no explanation was offered by claimant's attorney as to why these reports were not submitted in a timely fashion. It was, therefore, error for the Referee to allow the introduction of Exhibit 81. See Donald J. Young, WCB Case No. 82-00503, 35 Van Natta 143 (1983).

We have not considered this exhibit in our review. Nevertheless, we find, based upon the remaining medical evidence and claimant's credible testimony, that claimant has satisfied his burden of proving that he sustained permanent loss of use or function as a result of his elbow injury, and we agree with the Referee's determination concerning the extent of claimant's permanent disability. We, therefore, affirm the Referee's conclusion.

ORDER

The Referee's order dated May 11, 1982 is affirmed. Claimant's attorney is awarded $450 as a reasonable attorney's fee for services rendered on Board review, payable by the SAIF Corporation.

This order replaces our order of February 3, 1983.

Board Member Barnes Dissenting:

I agree that the Referee abused his discretion in admitting Exhibit 81 because it was submitted in violation of OAR 436-83-400(3) without explanation. However, I would find that error to be harmless because there is nothing of substance in Exhibit 81 that is not repeated elsewhere in the record.

Turning to the merits, I first note that the Determination Order dated October 1, 1980 which led to this proceeding awarded claimant "15° loss of your left hand." (Emphasis added.) The Referee's order awarded claimant "38.4° (20%) loss of the left arm." (Emphasis added.)

Thus, the first question is whether claimant's disability is more properly rated as loss of a hand or loss of an arm. Once that is answered, the second question is the extent of loss.

Claimant's injury was at the elbow and led to surgery at that location. This suggests an arm injury. See OAR 436-65-501(4): "The arm begins with the elbow joint and includes all structures of the upper extremity proximal thereto . . ." However, virtually all of claimant's impairment is in the ulnar nerve distribution in his hand and fingers.

I do not believe that the location of an injury is controlling. Rather, I think the location of the resulting permanent impairment determines upon which body part or parts a disability award should be based. Cf. Julia I. Hicks 33 Van Natta 497 (1981), aff'd, 57 Or App 838 (1982).

Dr. Laubengayer's closing report states:

> "Mr. Lopez continues to complain of problems with his left hand and left elbow. He states that he still occasionally gets very sharp pains in his left elbow which nearly immobilize him they are so severe. He describes this as a 'catching' pain. He also states that his strength is not normal, and when he uses his left hand a great deal he gets a feeling of cramping in the left hand.
>
> "The examination of the left elbow demonstrates normal flexion and extension and normal pronation and supination. There is no popping or catching and there are no areas of tenderness. There is no Tinel's sign present at elbow. There is good elbow joint stability. Examination of the left hand demonstrates a normal range-of-motion of the wrist and fingers. There is excellent grip strength. There is slight weakness in abduction of the fingers; however, there is excellent pinch strength. There is still some slight hypesthesia in the hand or forearm. The patient now has nearly normal strength for his nondominant hand and arm."

This same information is repeated in several subsequent reports, including Exhibit 81. There is no different or additional assessment of claimant's impairment.

I would find that claimant has hand impairment in the form of sensory loss and weakness. I would find that claimant has arm (elbow) impairment in the form of disabling pain. Based on these findings and OAR 436-65-532(4), claimant's award should be expressed in terms of loss of an arm. That rule states: "When two or more radicals are involved within an extremity, the impairment of each radical is converted to the corresponding impairment value in the most proximally involved radical, and these corresponding values are combined." In other words, claimant's hand impairment is converted to arm impairment and

combined with (not added to) claimant's arm (elbow) impairment. The formula converting hand impairment to arm impairment is stated in OAR 436-65-524.

I would find all forms of claimant's impairment to be minimal. That is certainly the thrust of Dr. Laubengayer's report; and I believe the testimony at the hearing about the things claimant has been able to do with his injured hand/arm suggests that claimant's impairment is very minimal.

I suggest the appropriate calculus would be: About 4% loss of use of the hand due to sensory loss; about 4% loss of use of the hand due to weakness; when converted from hand values to arm values pursuant to OAR 436-65-524, this presents about 6% loss of use of an arm; to be combined with about 4% loss of use of the arm due to disabling pain. The final figure would be 10% loss of use of an arm. I would modify the Referee's order accordingly.

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LIESELOTTE DAVIS, Claimant
Black & Hansen, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10225
February 8, 1983
Supplemental Order

The Board issued its Order on Review herein on January 11, 1983 modifying in part the Referee's order. Claimant's attorney thereafter moved the Board for an allowance of an attorney's fee payable out of the increased compensation granted by the Board's order.

That portion of the Referee's order directing SAIF to pay claimant "temporary total disability benefits from October 20, 1981 to . . . such date as may be authorized by Determination Order," could result in approval of SAIF's unilateral termination of time loss benefits if a subsequent Determination Order authorizes termination as of the date SAIF actually did terminate claimant's benefits. If SAIF so interpreted the Referee's order, in spite of the Referee's statement that it was obligated to continue regular payments of temporary disability until a return to work, a release to return to regular work, or entry of a Determination Order, the Board's order directing SAIF to pay claimant temporary total disability "from October 20, 1981 until the date of a Determination Order reclosing the claim pursuant to ORS 656.268, less time worked," does constitute an increase in compensation, which would entitle claimant's attorney to an attorney's fee payable out of the increased compensation obtained in claimant's behalf. To the extent that the Board's order does, in fact, result in payment of temporary disability benefits in addition to those paid under the terms of the Referee's order, claimant's request for an attorney's fee is allowed.

ORDER

The Board's Order on Review dated January 11, 1983 is supplemented to provide for an allowance of an attorney's fee payable to claimant's attorney, in the amount of 25% of the additional compensation claimant receives under the terms of the Board's order, if any.

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DANIEL D. GRIGGS, Claimant
Cash Perrine, Claimant's Attorney
Minturn et al., Defense Attorneys

WCB 81-05101
February 8, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Howell's order which granted compensation for 80% unscheduled disability in lieu of the award of 55% disability in the challenged Determination Order. Claimant argues that he is permanently and totally disabled.

We affirm and adopt the Referee's order with the following additional comments. We place more emphasis than the Referee may have on claimant's failure to satisfy the seek-work requirement of ORS 656.206(3). In this regard, we note that Orthopaedic Consultants reported in September of 1978 that claimant "was offered a job to do clerical work or office work . . . but apparently he turned it down thinking it would require too much sitting." Although this report dates from before claimant's most recent compensable surgery, there is nothing in the record from a later date suggesting that claimant was even willing to try employment that might be within his physical limitations.

ORDER

The Referee's order dated May 18, 1982 is affirmed.

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IRENE PENIFOLD, Claimant
Peter McSwain, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 78-09826
February 10, 1983
Order on Remand

On review of the Board's Order dated December 31, 1981, the Court of Appeals reversed the Board's Order.

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

IT IS SO ORDERED.

* * * * * * * * * * * * * * * *

DENISE DAVIS, Claimant
Frank J. Susak, Claimant's Attorney
David Horne, Defense Attorney

Own Motion 82-0175M
February 15, 1983
Interim Own Motion Order

The Board issued an Own Motion Order on January 7, 1983 which reopened claimant's claim as of September 12, 1982. The primary reason for reopening this claim was due to claimant's need for additional surgery.

The insurer, by and through its attorney, has requested the Board to reconsider its order. While they agree that surgery should be performed, they feel that certain prerequisites must be met before surgery can take place. It has been medically verified that claimant must lose weight before the doctors would be willing

to operate. Both the insurer and her doctors are concerned about claimant's lack of motivation to prepare herself physically and mentally for surgery. The history of this claim would indicate that claimant has been less than cooperative with efforts to decrease her disability.

Claimant's response to the insurer's request was that she had just recently lost some weight and was making an effort to prepare herself for the recommended surgery.

A thorough review of the evidence submitted by both parties persuades us that time loss payments should be suspended until such time as claimant is hospitalized for the recommended surgery. The insurer is hereby directed to terminate temporary total disability benefits as of the date of this order. On the date claimant is hospitalized for surgery, they will commence making payments of time loss benefits which will continue until closure under ORS 656.278.

Claimant's attorney remains entitled to a fee equal to 25% of the amounts paid to claimant as a result of the January 7, 1983 order and this order.

IT IS SO ORDERED.

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QUINTEN S. HARGRAVES, Claimant
Richardson, Murphy et al., Claimant's Attornys
John Snarskis, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-07859
February 15, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Presiding Referee Daughtry's order which granted the SAIF Corporation's motion to dismiss it as a party to claimant's appeal of a Determination Order.

In WCB Case Nos. 81-00662 and 81-00663, claimant litigated the question of which of two insurers, Industrial Indemnity or SAIF, was responsible for his condition as either a new injury or aggravation of a previous injury. By order dated March 12, 1981, Referee Pferdner found Industrial Indemnity to be the responsible insurer. A request for Board review of that order followed. While this request for Board review was pending, a Determination Order was issued after claimant completed a program of vocational rehabilitation. Claimant requested a hearing on that Determination Order and named Industrial Indemnity and SAIF as parties. SAIF moved for dismissal of the request for hearing against it. This motion was granted.

Claimant contends that since the issue of responsibility is on appeal to the Board, and since the Board could overturn the Referee's determination on the issue of responsibility, that SAIF should not be dismissed as a party to the hearing on extent of disability.

Assuming that the Presiding Referee's order of dismissal is a final order and that we have jurisdiction to review that order prior to a determination of the case on its merits, we affirm based upon our agreement with Referee Pferdner's determination of the underlying responsibility issue in Quinten Hargraves, WCB Case Nos. 81-00662 and 81-00663, 35 Van Natta 156 (1983).

ORDER

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

* * * * * * * * * * * * * * * * *

QUINTEN S. HARGRAVES, Claimant
Richardson, Murphy et al., Claimant's Attorneys
John E. Snarskis, Defense Attorney
SAIF Corp Legal, Defense Attorney
Reviewed by the Board en banc.

WCB 81-00662 & 81-00663
February 15, 1983
Order on Review

Industrial Indemnity, as insurer for Bechtel Power Corporation, requests and the SAIF Corporation cross-requests review of Referee Pferdner's order which set aside Industrial Indemnity's February 5, 1981 denial and upheld SAIF's December 31, 1980 denial. The Referee also ordered SAIF and Industrial Indemnity to pay claimant a penalty of 25% of the temporary total disability compensation accrued and not paid by either insurer between October 16, 1980 and March 12, 1981 for unreasonable resistance to the payment of compensation by refusal to participate in an order pursuant to ORS 656.307.

Industrial Indemnity takes issue only with the Referee's finding that claimant suffered a new injury on October 16, 1980 for which it is responsible. SAIF argues that the Referee erred in assessing penalties against it since it paid claimant interim compensation from the date of notice of the claim until the date of its denial.

We adopt the Referee's findings of fact as our own. Further, we agree with the Referee's analysis and conclusion that claimant sustained a new injury while employed by Bechtel Power Corporation on October 16, 1980.

The issue with regard to penalties is more difficult, and a summary of the facts relative to this issue is appropriate. Claimant was originally injured on August 9, 1977 while working for an employer insured by SAIF. A hearing was eventually held and claimant was awarded 40% unscheduled permanent partial disability by a Referee's order dated February 11, 1980. On October 27, 1980 SAIF received a narrative report from Dr. Smith which was correctly interpreted as a claim for aggravation. SAIF commenced payment of interim compensation pursuant to ORS 656.273(6) and continued to do so until December 31, 1980 when it denied the claim on the grounds that claimant sustained a new injury while employed at Bechtel. SAIF's denial of the claim was 5 days late.

On or about November 14, 1980 claimant filed a new injury claim with Bechtel. Industrial Indemnity as insurer for Bechtel did not commence payment of interim compensation nor did it deny the claim until February 5, 1981, some 83 days later. Although somewhat ambiguous, the denial appeared to be based on the contention that claimant was suffering an aggravation of his previous injury and did not sustain a new injury with Bechtel.

Claimant's attorney requested the Director to issue an order designating a paying agent pursuant to ORS 656.307. Industrial Indemnity and SAIF informed the Department's representative that they were also contesting the compensability of the claim, thus preventing the issuance of such an order. OAR 436-54-332(7).

When the hearing convened on March 6, 1981, neither of the insurers contested the compensability of the claim and only litigated the responsibility question. The Referee found the refusal of both insurers to participate in the issuance of an order pursuant to ORS 656.307 to have been unreasonable and assessed a penalty against both insurers in the amount of 25% of the temporary total disability compensation benefits owed and not paid claimant from October 16, 1980 to the date of his order of March 12, 1981.

We generally agree with the Referee's determination that both insurers were unreasonable in processing these claims. Neither insurer attempted to litigate compensability at the hearing and the medical evidence gives no legitimate support to such a position. SAIF attempts to argue that it had reasonable grounds to deny compensability based on claimant's 1953 Korean War injury and a reference in the Orthopaedic Consultants report of January 5, 1981 to degenerative joint disease. Standing alone, we could accept SAIF's argument. However, when viewed in context of the remainder of the record, those are indeed slender reeds upon which to rely. Coupled with the fact that SAIF failed to present these arguments to the Referee at the hearing and raises them for the first time before the Board, we feel secure in stating that SAIF presents us with no persuasive argument in support of its position that its compensability denial was reasonable.

Industrial Indemnity justifiably does not take issue with the Referee's assessment of penalties against it. Aside from the issue of Industrial Indemnity's failure to participate in a .307 order, the penalty is totally justified by Industrial Indemnity's failure to pay interim compensation and failure to accept or deny the claim within 60 days. See Darrell Messinger, WCB No. 81-03898, etc., 35 Van Natta 161 (1983).

The penalty issue with respect to SAIF presents additional problems. In Margaret L. Harris, 34 Van Natta 558 (1982), we affirmed the Referee's order finding United Pacific Insurance to be responsible for a claim on the basis of new injury and agreed with the assessment of a penalty against Aetna for its unreasonable denial of compensability of the claim:

> "Considering the medical evidence as a whole, it does not admit of any reasonable conclusion but that the claim is and was

> compensable. Aetna's failure to concede compensability until the hearing was unreasonable." 34 Van Natta at 559.

In Patrick Elliott, 32 Van Natta 155 (1981), we affirmed the Referee's assessment of a penalty against one of two insurers in an aggravation/new injury context. We stated:

> ". . . EBI had full knowledge that a situation existed which required both insurers to request the Compliance Division to issue a '307' order, but that it failed to take appropriate action . . . to insure that the worker receive compensation benefits in a timely manner." 32 Van Natta at 159.

On reconsideration, the Board determined that it had erred in assessing the penalty since version of the rule relevant to .307 orders in effect at the material time did not require the insurers to apply for such an order. In reversing the penalty, however, the Board spoke in terms of EBI's denial not having been unreasonable. 32 Van Natta 295.

Harris and Elliott are representative of the two theories upon which penalties have been assessed by both the Board and the Referees in this kind of case, as well as the general confusion over which theory to utilize. See also Darreld W. Rayle, 34 Van Natta 1204 (1982). There has generally been little consistency in choice of theory or manner of application, and there is little in the way of guidance from the courts. Although Elliott has made its way to the Court of Appeals, the court's decision does not directly address the issue. Elliott v. Loveness Lumber Co., 61 Or App 269 (1983).

In view of the confusion surrounding this issue, we feel that some clarification is in order. As noted above, the rules provide that the Director may not issue a .307 order if any of the potentially liable insurers or employers refuse to admit that the claim is compensable. A situation where the insurers/employers admit the compensability of a claim, but simply refuse to participate in an order pursuant to ORS 656.307 could conceivably occur; however, no such case has ever come to our attention and it seems that, if it were to occur, it would be a matter to be addressed by the Director. See OAR 436-54-981. Thus far, all .307 cases that have come before the Board have involved situations where one or more potentially liable insurers/employers has at some point denied compensablity of the claim. It is therefore conceptually erroneous to refer to such situations as unreasonable refusal to participate in an order pursuant to ORS 656.307. There is no actual refusal to participate. The party denying the compensability of the claim is simply making further consideration of the possible issuance of such an order impossible. We conclude that it is more appropriate to examine such situations in the same manner as was done in Harris. The appropriate question is whether the insurer/employer had a reasonable basis for denying compensability. If not, penalties are assessable on that ground alone without regard to the fact that the unreasonable denial of compensability also had the effect

of blocking the possibility of a .307 order. Stated differently, we think the conduct of any insurer/employer in denying the compensability of a claim in a multiple-claim context should be examined in the same manner as if it were a single employer/insurer claim situation.

For the reasons stated above, we believe that SAIF's denial of compensability in this case was unreasonable. We therefore agree with the Referee's assessment of a penalty against SAIF, but do so on the ground of unreasonable denial of compensability rather than unreasonable refusal to participate in a .307 order.

ORDER

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

* * * * * * * * * * * * * * * *

FLOYD HEWITT, Claimant
Eric R. Friedman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07248
February 15, 1983
Order on Remand

On review of the Board's order dated November 18, 1980 the Court of Appeals reversed the Board's order and remanded with instructions to order acceptance of this claim pursuant to ORS 656.226. On review of the Court of Appeals decision, the Supreme Court affirmed.

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

IT IS SO ORDERED.

* * * * * * * * * * * * * * * * *

HERBERT J. IREY, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-09633
February 15, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The employer requests review of Referee Mulder's order which affirmed the Determination Order of June 25, 1981 on the grounds that the employer had not sustained its burden of proving that there had been a significant change in the claimant's condition which would justify a reduction of his previous permanent total disability award. See ORS 656.206(5), 656.325(3). We affirm.

The claimant suffered a compensable injury in 1975. He was awarded permanent total disability status in 1976. The permanent total disability determination was hotly contested and was ultimately affirmed without opinion by the Court of Appeals. The Supreme Court denied review.

The burden of proof where a party to a disability compensation award seeks to have the award modified or terminated is upon the party seeking to have the award modified. Gettman v. SAIF, 289 Or 609 (1980); Bentley v. SAIF, 38 Or App 473 (1979). "Thus, where the insurer or employer seeks to reduce or terminate

a claimant's disability compensation award, it is incumbent upon it to establish sufficient change of circumstances." Harris v. SAIF, 292 Or 683, 690 (1982). In this case the employer has failed to sustain its burden of proving that circumstances have changed sufficiently to justify any modification of the claimant's permanent total disability award.

The employer argues that Orthopaedic Consultants' report of May 19, 1981 established a sufficient change in claimant's condition to warrant termination of claimant's permanent total disability status. It points to certain differences between the May 1981 report and reports from 1976 and 1977 by Orthopaedic Consultants. It is true that there appears to be some improvement in the claimant's mobility evidenced by the 1981 report. However, we are not convinced that these differences are material.

> "[W]hether this claimant is permanently totally disabled must be decided upon conditions existing at the time of decision, and his award of compensation for permanent total disability can be reduced only upon a specific finding that the claimant presently is able to perform a gainful and suitable occupation." (Emphasis added.) Gettman v. SAIF, supra, 289 Or at 614 (1980).

The differences between the 1981 report and the 1976 and 1977 reports are not sufficient to justify a finding that the claimant is presently able to perform a gainful and suitable occupation.

The vocational evidence supplied by the claimant establishes the contrary, that claimant is not presently able to perform a gainful and suitable occupation.

ORDER

The Referee's order dated May 14, 1982 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney's fee, payable by the insurer.

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KENNETH T. LEIGH, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 82-02469
February 15, 1983
Order Denying Dismissal of Request for Review

The Board, having considered the Employer/Respondent's Motion to Dismiss claimant's request for Board review upon the basis that claimant's request was not timely filed, hereby denies said motion. The Board records indicate the Referee's Opinion and Order was issued on December 20, 1982, and claimant's Request for Board review was postmarked January 19, 1983. We, therefore, find said request to be within the provisions of ORS 656.289(3).

IT IS SO ORDERED.

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SHIRLEY (GORDON) LINDSEY, Claimant
Kenneth Colley, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10162
February 15, 1983
Order on Remand

On review of the Board's order dated December 31, 1981 the Court of Appeals reversed that portion of the Board's order which held that SAIF is not responsible for the cost of claimant's water bed.

Now, therefore, that portion of the above noted Board order holding that SAIF is not required to pay for claimant's water bed pursuant to ORS 656.245 is vacated, and claimant's claim for reimbursement of such cost is remanded to SAIF for acceptance and payment.

IT IS SO ORDERED.

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DARRELL MESSINGER, Claimant
Doblie & Francesconi, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Miller, Nash et al., Defense Attorneys
Wolf, Griffith et al., Defense Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-03898, 81-04590,81-06577, 81-06093,81-06094, 81-06095, 81-06096 & 81-06578
February 15, 1983
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation as insurer for three employers, D. W. Fugman Company, Hoffman Construction Company and Reimers & Jolivette, has requested, and the claimant and Bingham Construction Company, which is insured by EBI, have cross-requested review of Referee Neal's order which upheld the denials issued by all employers except Bingham Construction Company, set aside that denial and ordered D. W. Fugman, Hoffman Construction and Reimers & Jolivette to pay claimant interim compensation benefits from the dates they received notice of the respective claims filed by the claimant until the dates of denial of the claims and assessed a 10% penalty on such compensation and a separate attorney's fee of $100 for unreasonable delay in the payment of compensation.

SAIF accepts the Referee's order other than that portion which apparently requires two of its insureds to pay claimant interim compensation for the same period of time; thus, SAIF argues, impermissibly resulting in double interim compensation. Bingham Construction contends that the Referee erred in assigning it responsibility for the claim rather than claimant's last employer, Reimers & Jolivette (hereafter "R & J"). The other parties have submitted briefs in support of the Referee's order.

Claimant, who is 33 years old, has been employed as a carpenter by numerous different employers since he was 16 years old. Among his first employers were Hickory Homes, J. S. Savage and Architectural Contractors. He first noticed problems with his right arm about nine years prior to the hearing. The difficulty mainly involved pain and numbness while he was engaged in heavy

framing work. Claimant lost no time from work and filed no claim. In 1976, while doing framing work for D. W. Fugman, he began experiencing pain severe enough to cause him to wake up at nights. He continued to lose sleep at nights due to pain after taking a job with Walsh Construction in 1978, although he lost no time from work and filed no claim.

Claimant thereafter worked for Hoffman Construction (for whom he had previously worked) through February of 1979 with few arm problems. He was next employed by Bingham Construction in 1979 and 1980. Claimant's arm symptoms became noticeably more severe after a job which required him to frame an entire small office building in a single day. He began to experience constant pain thereafter. Nevertheless, claimant continued to work until he took a vacation in August of 1980. A few weeks after his return from vacation he began working for R & J. Claimant's work at R & J involved using a heavy mallet to drive steel stakes up to two feet in length into concrete, eight hours per day. His symptoms increased to the point where his arm became so painful and numb that he felt he could not continue working and finally sought medical attention.

Claimant was examined by Dr. Jennart on November 20, 1980. Dr. Jennart diagnosed right carpal tunnel syndrome. On April 15, 1981 a right carpal tunnel release was performed. Approximately one week prior to the surgery, claimant worked for another contractor, Bernard and Kinney, because he was without funds. No claim has been filed against Bernard and Kinney.

There is no conflict in the medical evidence. Drs. Jennart, Waldram and Stolzberg all felt that claimant's work as a framer was the major cause of his carpal tunnel problem. No parties to this appeal contend that claimant's condition is not compensable. Claimant filed claims against all of his former employers except Bernard and Kenney. All claims were denied and claimant received no interim compensation. The various filing dates are as follows:

Employer	Filed	Denied
R & J (SAIF)	1-11-81	3-25-81
Bingham (EBI)	4-23-81	5-11-81
Walsh (EBI and SAIF)	4-23-81	7-2-81 (EBI) 7-10-81(SAIF)
Fugman (SAIF)	4-23-81	7-9-81
Hoffman (SAIF)	6-3-81	7-10-81

Apparently claims were also filed with J. S. Savage, Hickory Homes and Architectural Contractors. Filing dates of those claims are not reflected in the record, and the insurers of those employers, if any, are apparently unknown. They were not parties to the hearing. None of the present parties complain about their absence.

The Referee found that the medical evidence, although unequivocally relating claimant's carpal tunnel condition to all of his work as a carpenter, indicated that no particular employment could be singled out as the specific work exposure resulting in that condition, and that it was medically impossible to do so. The Referee stated that the last injurious exposure rule does not necessarily require assignment of responsibility to the last in a series of employers if it is clear that the last employment only produced symptoms and did not in fact worsen the compensable condition. The Referee found the responsible employer to be Bingham Construction based upon Dr. Waldram's opinion that claimant's condition became disabling during his employment with Bingham Construction, Dr. Stolzberg's statement that carpal tunnel could not arise in a three week period, and claimant's testimony that he felt the work at Bingham produced the worst pain.

We disagree with the Referee's assignment of responsibility to Bingham Construction. In Bracke v. Baza'r, 293 Or 239, 248 (1982), the Supreme Court stated:

> "The primary difference in occupational disease cases is that the onset of disability rather than the occurrence of injury is the critical event in the application of the rules. Under the last injurious exposure rule of assignment of liability in cases of successive employment, each of which has contributed to the totality of the disease, the potentially causal employer at the time disability occurs is assigned liability for the cumulative whole."

The Bracke court also stated:

> "According to the evidence . . . the employment subsequent to Baza'r did not contribute to the cause of, aggravate, or exacerbate the underlying disease. Had that occurred, a later employer would be liable under the last injurious exposure rule of liability, see n 5. Rather, claimant's subsequent employment only activated the symptoms of a pre-existing disease . . . A recurrence of symptoms which does not affect the extent of a continuing underlying disease does not shift liability for the disabling disease to a subsequent employer." 293 Or at 250.

It is clear under Bracke that, if claimant's last and brief pre-claim employment at R & J only produced symptoms and had no other effect on claimant's carpal tunnel syndrome, the Referee's assignment of responsibility for the condition to Bingham would be correct. However, we believe that the evidence does not indicate

that claimant only suffered additional symptoms while employed at R & J. The work at R & J was clearly of the type that could have contributed to claimant's condition. He indicated that, after driving steel stakes all day for R & J, his entire arm would be numb the following morning. In fact, it was on this job that claimant first missed time from work due to what was subsequently diagnosed as carpal tunnel syndrome. Although Dr. Waldram's opinion is otherwise convincing, he is clearly incorrect in his belief that claimant's last employment before becoming disabled was with Bingham. Moreover, Dr. Stolzberg did not state that carpal tunnel could not arise in two or three weeks, but only that:

> ". . . it is obvious that neither his neck pain nor his carpal tunnel syndrome are problems that arose in any single three-week period. He does state that he became symptomatic to the point where he could no longer work when he had to pound steel stakes. This is obviously one of those situations where this was the straw that broke the camel's back and is obviously a legal and not a medical question as to who pays for the camel under the circumstances."

We think Dr. Stolzberg is stating in a refreshingly clear manner that all of claimant's employments were of a type that could contribute to his condition and no honest physician can identify any specific employment as causative. This is the general medical consensus in this case. In the face of this medical evidence, we are unwilling to rely on the claimant's testimony with regard to the question of whether his employment at R & J only resulted in symptoms or had a pathological effect on his condition.

Since the medical evidence does not establish that claimant suffered only symptoms as a result of his employment at R & J, and since it was the type of employment which could have contributed to his condition, it is clear under Bracke that responsibility for claimant's condition must be mechanically assigned to R & J despite the fact that claimant's employment at R & J was of short duration. It is not the relative amount of the contribution that is weighed once the requirement of contributory exposure is met.

II

The second issue for review is set forth by SAIF in its brief as follows:

> "May a Referee legally order two employers to each pay interim compensation and penalties to claimant for the same period of time?"

The Referee found that D. W. Fugman and R & J failed to accept or deny the claims filed against them within 60 days and failed to pay claimant interim compensation. Although Hoffman Construction was found to have issued a timely denial, the denial was not

issued within 14 days of the date of notice and it also failed to pay claimant interim compensation. The Referee concluded that, under Jones v. Emanuel Hospital, 280 Or 147 (1977), all of the employers had a duty under ORS 656.262 to either accept or deny the claim within 14 days or pay claimant interim compensation and accept or deny the claim within 60 days. D. W. Fugman, Hoffman Construction and R & J were ordered to pay claimant interim compensation from the dates of receipt of notice of the claim to the date of their respective denials. The Referee also assesed penalties and attorney's fees against all three.

Reference to the various claim and denial dates stated above indicates that the effect of the Referee's order is to require both Hoffman Construction and D. W. Fugman to provide claimant with interim compensation for the period of time from June 3, 1981 to July 9, 1981. SAIF contends that such a result is improper and legally impossible. It argues that ORS 656.210(1) limits time loss compensation:

> "When the total disability is only temporary, the worker shall receive during the period of that total disability compensation equal to 66-2/3 percent of wages, but not more than 100 percent of the average weekly wage . . ." (Emphasis added.)

This issue is not unique. In Kenneth Taylor, 23 Van Natta 479 (1978), the claimant argued that, regardless of which of two insurers was found responsible for his claim, both insurers had violated the statutory requirements concerning payment of interim compensation. We stated:

> "The Board finds that although the Fund is liable for claimant's present condition, nevertheless the decision of the Oregon Supreme Court in Jones v. Emanuel Hospital, 280 Or 147, requires that both carriers pay claimant 'interim compensation' and both carriers are subject to the assessment of penalties and award of payment of an attorney's fee." 23 Van Natta at 482

We agree with that conclusion and reaffirm the continuing vitality of Taylor.

SAIF argues that such a result will allow a claimant to receive double compensation. There is certainly support for that argument. See Candee v. SAIF, 40 Or App 567 (1979); Gilroy v. General Distributors, 35 Or App 361 (1978). However, double, triple or even more compensation is only one of the alternatives we confront in this "choice of evils" problem. When a claimant files simultaneous or nearly simultaneous claims against numerous employers, the first possibility is to require all employer/insurers to pay interim compensation. Unquestionably this will produce a windfall for a claimant who will be receiving considerably more in compensation benefits while not working than he would be receiving in wages had he been working. The second possibility is illustrated by the facts of this case: A claimant files claims against several in a series of employers, none of

which pay interim compensation. Unquestionably this will produce a serious hardship for a claimant left without resources until the matter is settled at a hearing; and, again invoking this case as an illustration, left without compensation benefits for a clearly compensable condition until the complex issue of insurer/employer responsibility is resolved.

In Anthony A. Bono, WCB Case No. 80-11418, 35 Van Natta 1 (1983), we examined the purposes behind the statutory requirement of the payment of interim compensation in the context of a claimant who was employed full-time at his regular job at the time of and subsequent to filing his claim. We stated that one of the purposes of interim compensation is:

> ". . . to protect the claimant and his or her family, and to prevent total loss of health and home, while the employer or insurer decides whether to accept or deny the claim."

See also Silsby v. SAIF, 39 Or App 555, 561-62 (1979).

There is no attractive alternative. One potentially overcompensates the claimant, and provides a claimant who has had numerous employers with greater benefits than another claimant who has only had one employer. The other alternative potentially undercompensates the claimant, leaving him with no funds upon which to survive. We believe the overcompensation is the lesser of these two evils. We conclude that when there are simultaneous multiple claims against multiple employers, each must provide the claimant with interim compensation.

We do not believe that Candee and Gilroy are at odds with our decision here. In Candee, the claimant actually did receive at least partial interim compensation paid directly by the non-complying employer. In Gilroy, the court did not directly address the issue and simply affirmed the order which allowed assessment of penalties and attorney fees against the insurer who was found not responsible for the claim, but who also failed to pay interim compensation. Assessment of penalties and attorney fees, while punishing the recalcitrant insurer after the fact, does nothing for the claimant when he is most in need of compensation benefits.

We note that an insurer can always avoid the payment of interim compensation by denial of the claim within 14 days of notice or knowledge. ORS 656.262. While this too would leave the claimant without funds, it would at least serve the purpose, as noted by the court in Jones, of promoting a speedier resolution of the matter.

Better solutions are probably possible, but we believe this is a matter for appropriate legislative action. We merely interpret the existing statutes and choose the option that we believe better comports with the realities of a claimant's position at the time of claim filing, stimulates employers and insurers to rapid action and most likely is most consistent with the general legislative intent.

With regard to SAIF's argument concerning ORS 656.210, we do not believe that this statute has any bearing on the present issue. This statute merely provides for the manner by which time loss compensation is calculated. It has no effect on the period of compensation nor on the issue of who is required to pay that compensation. See Silsby, supra, 39 Or App at 561. We conclude that under Jones all employers against whom claims are filed must either deny the claim within 14 days or pay claimant interim compensation with no exceptions other than those instances where the claimant is not a subject worker, Bell v. Hartman, 289 Or 447 (1980), or, as in Bono, the claimant is employed full-time at his regular job.

ORDER

The Referee's order dated September 30, 1981 is affirmed in part and reversed in part. Those portions of the order which set aside EBI's denial issued on behalf of Bingham Construction are reversed. EBI's denial dated May 11, 1981 is reinstated and affirmed. The SAIF Corporation's denial dated March 25, 1981 on behalf of Reimers & Jolivette is set aside, and the claim remanded for acceptance and the payment of compensation according to law. SAIF shall reimburse EBI for all compensation paid in reliance on the Referee's order. SAIF shall also pay claimant's attorney fee for services rendered at the hearing in overcoming the denial. The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded $300 for servces rendered on Board review, payable by the SAIF Corporation.

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ROBERT L. MONTGOMERY, Claimant
Flaxel, Todd et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-11049
February 15, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Quillinan's order which awarded claimant 15% unscheduled permanent partial disability, that being an increase of 5% over and above the Determination Order of August 10, 1981, and which found the SAIF Corporation not responsible for payment of the October 28, 1981 CT scan performed on claimant. Claimant contends that he is entitled to additional permanent partial disability and that the Referee erred in considering the question of claimant's entitlement to payment for the CT scan.

We adopt the Referee's findings of fact as our own, and affirm and adopt those portions of her order relating to the extent of claimant's disability.

With regard to the issue concerning payment for the CT scan procedure, the Referee found that the claimant presented no evidence which would substantiate his position that SAIF was responsible for payment of that bill. We agree. Dr. Smith reported on June 15, 1981 that subsequent treatments would be related not to claimant's industrial injury, but to a subsequent automobile accident. The Referee also stated:

"It may be that medical verification of the need for this treatment will be forthcoming in the future. If that be the case, then claimant assuredly has the right to resubmit to the insurance carrier his claim for medical benefits."

Although we affirm the Referee's determination regarding this issue, we do not in any way embrace the above-quoted passage. That passage may be inconsistent with elementary res judicata concepts, but we see no need to reach that issue at this time.

ORDER

The Referee's order dated June 17, 1982 is affirmed.

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CHARLES H. TAYLOR, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys

WCB 81-07834
February 15, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of that portion of Referee Quillinan's order which affirmed the November 25, 1980 Determination Order which had granted claimant compensation for 15% loss of the left hand. Claimant contends that this award is inadequate.

Claimant's May 6, 1980 injury was to the fourth and fifth fingers on his left hand and claimant's permanent impairment is primarily in these two fingers. As the self-insured employer's brief correctly points out, an award for 15% loss of the hand would have been appropriate if the fourth and fifth fingers had been completely amputated, which they were not. Claimant argues, however, that he has additional hand impairment in the form of loss of grip strength. We find little evidence on that point, but we infer that claimant's loss of grip strength is due to the impairment in his two injured fingers; at least, we find no persuasive basis for inferring that claimant has a greater loss of grip strength than would be a natural consequence of the impairment in his two injured fingers. Thus, the maximum possible award for loss of those fingers compensates claimant for natural consequences of such a loss.

With that one additional finding, we affirm and adopt the Referee's order.

ORDER

The Referee's order dated June 16, 1982 is affirmed.

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STEPHEN R. EARLY, Claimant
Kennedy, Bowles et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-02043
February 17, 1983
Order on Reconsideration

The Board issued an Order on Review on July 30, 1982. That order was abated on August 26, 1982 and the parties were requested to submit additional briefs. Having received and considered those additional briefs and having again reviewed the record, we vacate our Order on Review dated July 30, 1982 and substitute the following.

Claimant requests and the employer cross-requests review of Referee Nichols' order. Claimant challenges those portions of the order that awarded compensation for 20% loss of use of his right arm and failed to award unscheduled disability for his psychological condition; claimant argues he is entitled to a greater scheduled award and also an unscheduled award. The employer challenges that portion of the Referee's order that awarded claimant temporary partial disability from February 15, 1980 to January 22, 1981.

At the age of 22, claimant sustained compensable crushing and burn-type injuries to his right arm when he caught it in a rock-crushing machine. He underwent three surgeries involving multiple skin grafts and a partial resection of the elbow. Following a recovery period, claimant was declared medically stationary and the extent of impairment in the injured arm evaluated by two physicians. Claimant has lost 10° to 20° of range of motion in his elbow in both extension and flexion. He has patchy loss of sensativity to touch in his forearm and hand and atrophy in the triceps. Claimant feels that his grip strength in his right hand is reduced; the medical evidence indicates that grip strength in that hand is "grossly normal" but that there is a loss of gripping function due to loss of sensation. Overall, the amount of impairment to claimant's elbow was rated as "moderately severe".

Considering the medical evidence together with the testimony concerning claimant's reduced use of his right arm and hand, we believe that an award of 35% scheduled disability more accurately reflects the loss arising from the compensable injury.

What issue is before us regarding claimant's psychological condition is obscure at best; at various points the parties discuss it as a compensability issue, while at other points it is discussed as an extent-of-disability issue. Assuming the issue to be compensability, we have no doubt that claimant's arm injury was the material cause of at lease some of the onset, or at least some of the worsening, of the psychological problems; thus, at least to some extent, that condition is compensable.

The insurer's independent examining psychiatrist, Dr. Parvaresh, noted that claimant experienced certain social, medical and emotional problems as a teenager and young adult. He concluded that claimant had a basic personality disorder coupled with substance abuse, and that claimant's present irritability, social/emotional withdrawal and moodiness were due to this personality disorder and substance abuse.

On the other hand, the record indicates that after graduating from high school, claimant had two terms of college work in civil engineering and participated in a Job Corp program. The record further indicates that claimant married, served as a responsible husband to his wife and father to his two stepchildren and one natural child and enjoyed several years of stable employment. Claimant's treating psychiatrist, Dr. Maletzky, believed that claimant's present psychological and emotional problems were attributable in large part, if not exclusively, to the industrial injury.

Our impression of the evidence Dr. Parvaresh relies on as indicating a personality disorder indicates little more than the normal vicissitudes of teenage years. It appears to us that, having survived his teenage years, claimant enjoyed several years of stable emotional well-being, marital accord and regular employment and that his arm injury significantly changed all that, at least temporarily. We are statisfied that claimant's present psychological condition is causally related to his traumatic injury.

If, however, the issue before us is whether claimant has suffered any permanent reduction in wage earning capacity due to his psychological condition -- which appears more likely to be the specific issue -- we are not persuaded that claimant has established this. While claimant's emotional problems have disrupted his home life, they do not appear to have affected his employment performance. Therefore, an award of unscheduled disability is not justified.

Regarding the challenge to the Referee's award of temporary partial disability raised by the employer, we affirm and adopt the relevant portions of the Referee's order.

ORDER

The Referee's order dated April 30, 1982 is modified. Claimant is awarded 67.2 degrees for 35% scheduled disability for loss of use of his right arm. This award is in lieu of all prior awards. Claimant's attorney's fee agreement is approved and claimant's attorney is allowed 25% of the increased compensation granted by this order. In all other respects, the Referee's order is affirmed.

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JESSE E. HARDY, Claimant
Bottini & Bottini, Claimant's Attorneys
Minturn, VanVoorhees et al., Defense Attorneys

WCB 82-00018
February 17, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of Referee Peterson's order which awarded claimant compensation for permanent total disability. The only issue is the extent of claimant's disability.

Claimant, who was 55 years of age at the time of the hearing, was employed as a sheetrock taper when, on July 26, 1979, he sustained a back injury after he stepped on a piece of pipe and fell. Claimant was referred by his family physician to Dr. Kendrick, a neurosurgeon, who has remained his primary treating physician. Dr. Kendrick diagnosed a back strain with pre-existing severe spondylolisthesis with slippage of the L5 vertebra onto the S1 vertebra with a solid natural fusion. Dr. Kendrick believed that claimant could return to gainful employment, although return to heavy manual labor was not indicated. On January 18, 1980 Dr. Kendrick stated that surgery was not indicated in that it would be of no benefit, and that "it is my present opinion that he is capable of work although I do not think it is likely that he will be able to return to his previous employment as a taper." He recommended no lifting over 15 pounds and found claimant to be medically stationary. A Determination Order issued on February 26, 1980 awarding claimant 15% unscheduled permanent disability. That award was subsequently increased to 30% by a stipulated order dated June 24, 1980.

Due to continuing complaints of pain, claimant was referred to Dr. Berson, also a neurosurgeon, who performed a myelogram on March 28, 1980. On April 22, 1980 Dr. Berson reported that, other than the L5-S1 defect, the myelogram demonstrated no evidence of back injury or abnormality. He stated that he informed the claimant that he could return to his regular work with appropriate limitations and that any pain or discomfort he might experience would be temporary in nature. Dr. Berson stated that he believed that claimant was not motivated to return to work.

Claimant was thereafter referred for vocational rehabilitation and participated in a course in shop welding. The emphasis of the course was later changed from welding to machine work. Claimant performed well in the program, completing two terms of the three term program.

Claimant apparently had not been seen by any physicians for a period of about one year when, in February of 1981, he suffered an exacerbation of back pain. Claimant was examined by Dr. Garrett who referred him back to Dr. Kendrick over the claimant's expressed displeasure with Dr. Kendrick. In his report of April 15, 1981, Dr. Kendrick reported that some polyneuropathy had been found which tended to explain the pain problem. However, Dr. Kendrick also stated:

> "I continue to resist the idea that the patient is permanently disabled, however, at least in a total capacity, and I continue to feel that he should have some

meaningful rehabilitation. I hasten to point out that I recognize the magnitude of the problem here since the patient has limited education, etc., but I am not entirely sure that the machine shop work which he was being trained for, . . . is really suitable for him. He tells me that that involves a great deal of bending, as well as lifting, etc., when it actually comes to doing machine shop work, and if that is the case, then I think that is a relatively poor choice for re-training him. It may well be that some type of assembly-line work in a mill or something of that type would require very little, if any, re-training and would be reasonably suitable work for him."

In April of 1981, Dr. Garrett diagnosed hypothyroidism. On May 4, 1981 Dr. Kendrick reported that claimant's pain was related to his industrial injury rather than from a worsening of his spondylolisthesis since his L5-S1 vertebrae had fused solidly and that the polyneuropathy was related to the hypothyroidism rather than the injury. Claimant was referred to Dr. Quan for a psychiatric opinion. Despite the fact that there was lay testimony to the effect that claimant was expressing depression, Dr. Quan found no evidence of any significant psychiatric disorder which would preclude his return to gainful employment. Orthopaedic Consultants examined claimant on June 12, 1981. The Consultants' findings and diagnoses were generally consistent with those of the claimant's treating physicians and claimant was found to be medically stationary. The Consultants found that claimant could not perform his previous job with or without limitations but could perform a light duty job. The total loss of function as a result of the injury was found to be mildly moderate. A pain control program was recommended. Another Determination Order issued on August 11, 1981 awarding the claimant an additional 5% permanent partial disability.

Claimant, despite some expressed disinterest, was thereafter seen at the Callahan Center by Dr. Schwan who found that claimant's work classification would be light at a slow pace, light to sedentary at a steady pace and sedentary at a rapid pace. Dr. Wise, psychologist, felt that the claimant had a tendency to convert social and emotional problems into physical symptoms and overfocus on physical problems. Claimant was discharged from the Callahan Center on December 15, 1981 on the following grounds:

"1. He does not think he can hold a full-time job or attend a community college due to his physical limitations. At the present time he stated that he has been working out of his house for the past four months building his own furniture and selling it.

"2. He doesn't feel that he needs a

vocational assessment at the Center at this time. He stated that he knows what his physical limitations are and he has confidence that he can develop his own job without our services."

With regard to the relevant social/vocational factors, the record reveals the following. As previously indicated, claimant was 55 years of age at the time of the hearing. He has received an eighth grade education with no GED and has worked as a sheetrock taper for approximately 20 years

At the hearing, claimant produced testimony from Mr. LaMotte, a vocational rehabilitation counseler. He testified that he had contacted several employers in the Bend area in an effort to find employment for the claimant, but that his efforts were unsuccessful. Mr. LaMotte admitted, however, that all of the job contacts involved machinist type work, which he was aware that claimant was not physically able to perform. In fact, the physical requirements of the lightest of these jobs involved a 50 pound repetitive lifting requirement.

We conclude that the evidence does not support an award of permanent total disability. Our summary of the relevant medical evidence establishes that not a single physician is of the opinion that the claimant is totally disabled from a medical standpoint. Claimant's principal treating physician, Dr. Kendrick, has consistently maintained the opinion that claimant is employable from a physical standpoint. With regard to claimant's pre-existing spondylolisthesis, there is no evidence that the industrial injury aggravated it in any way, and Dr. Kendrick was of the opinion that it was not causing or contributing to any of claimant's difficulties. Claimant's hypothyroidism cannot be considered when determining the extent of his permanent disability. Emmons v. SAIF, 34 Or App 605 (1978).

We are also not convinced that when the social/vocational aspects are considered along with the physical disability, that claimant is permanently and totally disabled.

Claimant has made little to no effort to establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain employment. ORS 656.206(3); Home Insurance Co. v. Hall, 60 Or App 750 (1982). Claimant has not worked since the date of his injury other than a single attempt to return to his previous job on one occasion. He testified at the hearing that he inquired about work at a furniture factory and a print shop prior to the vocational rehabilitation program, but that he made no further attempts prior to the program or subsequent to it. The evidence also indicates that claimant has met rehabilitation efforts in a somewhat resistent manner, or with unrealistic beliefs with regard to his physical capabilities, such as his insistence on only welding and machinist training. Despite claimant's professed desire to return to work, his efforts to that end have been very minimal. The belief that "it hurts too much" to seek employment does not relieve a claimant of that statutory requirement. Willamette Poultry Co. v. Wilson, 60 Or App 755 (1982).

Considering claimant's impairment, age, education and previous job experience, we find that claimant has sustained a loss of earning capacity to the extent of 70% unscheduled permanent partial disbility.

ORDER

The Referee's order dated May 28, 1982 is reversed. Claimant is awarded 70% unscheduled permanent partial disability. This award is in lieu of and not in addition to all prior awards.

Claimant's attorney is allowed an attorney's fee in the amount of 25% of the increased permanent parital disability awarded by this order. This is in lieu of and not in addition to that awarded by the Referee.

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RUBEN P. MALDONADO, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Keith Skelton, Defense Attorney

WCB 81-08683
February 17, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

The employer/insurer requests review of Referee Seifert's order which found the claimant entitled to compensation for permanent total disability. The only issue is the extent of the claimant's disability.

On December 1, 1975 claimant, who was then 50 years of age, sustained a back injury while working as a dryer grader at the employer's mill. Dr. Fitchett diagnosed musculoligamentous strain with spasm and degenerative arthritis of the lumbar spine. Claimant was released to return to work and the Determination Order of March 24, 1976 allowed claimant benefits for temporary total disability only. Dr. Fitchett continued to treat claimant conservatively, but claimant continued to experience difficulties. Claimant was referred to Dr. McGee who performed a myelogram on December 13, 1976. Dr. McGee found a herniated disc at L4-5. A laminotomy and diskectomy was performed on December 15, 1976.

Subsequent to his surgery, claimant, rather than recovering, continued to experience severe low back symptomatology. He was referred to the Callahan Center in August of 1977. Psychological evaluation found the claimant to be severely depressed and in need of psychological counseling. From a physical standpoint, claimant was found qualified for medium or light work with psychological factors contributing to his impairment. Claimant noted no improvement in his back condition following his release from the Callahan Center.

Claimant thereafter returned for treatment with Dr. McGee. Dr. McGee opined on December 1, 1977 that he considered the claimant to be permanently and totally disabled with regard to his ability to return to his former employment and from any meaningful physical work due to his chronic and unresolved back difficulties and diffuse degenerative arthritic changes in the lumbar spine. Dr. McGee felt that the arthritic problem was aggravated by

claimant's industrial injury. Claimant continued to treat with Dr. McGee who found claimant's condition to be slowly deteriorating due to the arthritic spinal changes. Dr. McGee consistently maintained the opinion that claimant was totally disabled from a physical standpoint from performing any meaningful employment. Claimant was examined by Dr. Rick on August 20, 1979 who also felt the claimant to be totally disabled.

Claimant was examined by the Orthopaedic Consultants on September 7, 1979. The Consultants concluded that claimant was medically stationary and capable of light employment. The Determination Order of October 24, 1979 awarded claimant 35% unscheduled permanent partial disability. Dr. McGee reported on February 20, 1980:

> "I certainly would agree with Orthopaedic Consultants that his condition is essentially medically stationary. However, because of his continued great amount of low back pain difficulty and compromise of range of motion of lumbar spine, it was my thought that even light meaningful work activity would not be possible."

At the request of the insurer, claimant began treating with Dr. Berger, a psychologist, in June of 1980. Claimant was also seen by a vocational consultant, Mr. Adolph, who considered claimant to be unemployable. Claimant was also examined by Dr. Colbach, a psychiatrist. Dr. Colbach found that claimant had a moderate amount of psychological impairment, although he believed that the physical complaints were out of proportion to the physical findings. A third Determination Order issued on September 15, 1981 awarding claimant an additional 15% unscheduled permanent partial low back and psychological disability. On March 9, 1982 Dr. Berger reported that he believed claimant was totally disabled.

From a physical standpoint, the medical consensus is that claimant is permanently and totally disabled. With regard to claimant's social/vocational background, the record reveals the following. Claimant was 56 years of age at the time of the hearing. He was born in Mexico where he completed schooling through the fourth grade. Although he has lived in the United States for many years, he has generally lived in Spanish speaking communities and his command of the English language is minimal. The claimant initially worked as a field laborer and cannery worker in Texas. He later moved to Idaho where he worked as a farm laborer, and thereafter to California where he worked in construction. Claimant continued to work in construction until he secured employment in a sawmill in Oregon. He then secured a job at a plywood mill as a clean-up worker, green chain puller and a dryer grader. All of claimant's vocational experience can be described as unskilled entry-level type of employment with few skills that are transferable to work that is lighter in nature.

The Referee noted that, although claimant had not made any

efforts to seek work following his injury as required by ORS 656.206(3), under Butcher v. SAIF, 45 Or App 313 (1980), he was not required to do so since the evidence indicated that claimant was completely incapacitated. We agree.

As previously noted, it appears from a medical standpoint alone that claimant is totally disabled from participating in any gainful employment. If that alone were not sufficient, the relevant social/vocational factors make that conclusion inescapable. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). The statements of the physicans, taken together with the other factors of age, education, work experience, etc., indicate that claimant is incapacitated from obtaining gainful employment. We are also satisfied that it would have been a useless gesture for the claimant to seek work considering his physical condition and the social/vocational barriers he would have confronted. We, therefore, agree with the Referee that claimant is permanently and totally disabled.

ORDER

The Referee's order dated May 3, 1982 is affirmed. Claimant's attorney is awarded an attorney's fee of $500 for services before the Board, payable by the employer.

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BILLY D. NORTON, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 82-01771
February 17, 1983
Order Denying Motion to Dismiss

The Board, having considered the Motion to Dismiss filed herein by the employer, Portland Provision Company, and its workers compensation carrier, EBI Companies, on the basis of lack of jurisdiction due to appellant's failure to send the parties a copy of the Request for Review, and having further considered claimant's Response to Employer's Motion to Dismiss, denies said motion on the grounds that the Board has previously ruled in Michael J. King, 33 Van Natta 636 (1981), and Barbara Rupp, 30 Van Natta 556 (1981), as well as the cases cited in claimant's Response, that the failure to send the parties copies of the Request for Review is not jurisdictional. The motion is denied.

IT IS SO ORDERED.

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SARAH J. POWELL, Claimant
Robert Ehmann, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-08573
February 18, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee James' order which found that she is entitled to an award of permanent disability equal to 15° for a 10% loss of the left leg (knee). That award reflects a 7.5°, or 5%, increase over the award granted by a September 4, 1981 Determination Order.

A preliminary issue is the claimant's motion for remand to the Referee, requesting that additional evidence be considered in determining the extent of claimant's disability. See ORS 656.295(5). This additional evidence refers to an exacerbation of claimant's left knee symptoms related to a July 25, 1982 fall. That fall occurred after the hearing in this case. Under these circumstances, the proper method for consideration of this evidence is for it to be submitted in conjunction with an aggravation claim to the insurer, rather than attempting to include it in the record of this case. The claimant's motion for remand is denied.

Regarding the claimant's extent of disability to her left knee, we find that the 15°, or 10%, permanent partial disability compensation awarded by the Referee adequately compensates the claimant for her mild knee instability, swelling and disabling pain. See OAR 436-65-555.

ORDER

The Referee's order dated May 27, 1982 is affirmed.

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MATTHEW J. SAMPSON, Claimant
Cash Perrine, Claimant's Attorney
Minturn, VanVoorhees et al., Defense Attorneys

WCB 81-08496
February 22, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of those portions of Referee Nichols' order which upheld the SAIF Corporation's denial of compensation for claimant's knee and neck conditions, found that the Determination Order dated October 21, 1981 was not premature and awarded claimant 10% unscheduled disability for his November, 1979 low back injury.

Claimant's contentions on review are unclear, but we understand the issues to be: (1) whether claimant's knee and neck conditions are compensable under a claim filed in connection with an August, 1979 injury; (2) whether claimant's knee and neck conditions are compensable under a claim filed in connection with a November, 1979 injury; (3) whether the Determination Order of October 21, 1981, which closed the latter claim, was prematurely issued; and (4) the extent of claimant's low back disability.

Claimant was injured on August 21, 1979 when he slipped and fell while working. On an 801 form he alleged that he "turned ankle, hit back and knee." There is some dispute over which ankle and which knee were involved. However, we do not find it necessary to decide that issue. This claim was closed by Determination Order dated November 5, 1979 which awarded claimant temporary total disability only from August 21 through October 7, 1979.

After returning to work, claimant was again injured on November 7, 1979. On an 801 form he described the injury as being to his "lower back." SAIF denied this claim.

Claimant then took two issues to hearing: (1) the denial of the November injury claim; and (2) the extent of disability awarded by the Determination Order that closed the August injury claim. In a prior proceeding, Referee Danner set aside the denial and affirmed the Determination Order.

Claimant argues that the two claims have been combined. We disagree. The August, 1979 claim was closed by the Determination Order of November 5, 1979. Referee Danner affirmed that Determination Order in the prior proceeding. No appeal was taken from that order. Under these circumstances, claimant cannot now argue that he is entitled to compensation for his knee and neck conditions based on the August, 1979 claim.

This case went to hearing on the Determination Order dated October 17, 1981 which closed claimant's claim for his November, 1979 injury. That claim was for an injury to his low back. There is no evidence in the record from which we could even stretch our imaginations to find a causal connection between that low back injury and claimant's alleged problems with his neck and knee. We agree with Referee Nichols' conclusion in this case that claimant has not proven entitlement to compensation for his neck and knee conditions.

Considering, then, only claimant's low back injury, claimant argues that the Determination Order of October 21, 1981 was premature. Beginning in March of 1980, Dr. Sulkosky repeatedly asserted that claimant's low back condition was medically stationary. The only contrary evidence is a report from a chiropractor, Dr. Lang, who states, "from a chiropractic standpoint, I believe that Mr. Sampson has latitude for improvement in a curative nature." In the same letter-report, just prior to this passage, Dr. Lang stated that he had reviewed Dr. Sulkosky's report and agreed with its conclusions. On this record, we are not persuaded that claimant was other than medically stationary at the time the October 21, 1981 Determination Order was issued.

Finally, claimant argues that he is entitled to a greater award of permanent partial disability for his low back injury than the 10% awarded by the Referee. We affirm and adopt those portions of the Referee's order finding to the contrary.

ORDER

The Referee's order dated June 2, 1982 is affirmed.

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ALLEN H. SPARKS, Claimant
Don Swink, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00286
February 22, 1983
Order on Remand

On review of the Board's order dated April 29, 1982 the Court of Appeals reversed that portion of the Board's order which held that claimant's claim for his left hip condition was not compensable.

Now, therefore, that portion of the above noted Board order holding that claimant's left hip condition is not compensable is vacated, and claimant's left hip claim is remanded to SAIF for acceptance and payment of benefits in accordance with law.

IT IS SO ORDERED.

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TERRY L. BOND, Claimant
Paul Lipscomb, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01288 & 81-04848
February 24, 1983
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Galton's order setting aside its denials and ordering SAIF to reopen claimant's claim as of March 17; 1981, imposing penalties; and awarding claimant's attorney a reasonable attorney's fee for prevailing on a denied claim and pursuant to ORS 656.382(1). The sole issue on review is the propriety of the Referee's order setting aside SAIF's denials; i.e. the compensability of claimant's claim for an aggravation of his May 20, 1976 injury.

We affirm and adopt the Referee's order, subject to two qualifications. In discussing the fact that a Determination Order closing the claim issued November 24, 1980, and that claimant's request for claim reopening was for reopening as of March 17, 1981, the Referee stated that claimant was entitled to this relief, "either on a reopening or an aggravation basis," without having to prove that his condition had worsened. We have held to the contrary, and that, in order to obtain reopening at any time, including within one year after issuance of a Determination Order, a claimant is required to prove either a worsened condition under ORS 656.273 or premature closure of the claim, which requires setting aside a Determination Order. Roy McFerran, Jr., 34 Van Natta 621, aff'd without opinion, 60 Or App 786 (1982). We are satisfied, however, that claimant's condition has compensably worsened and that claim reopening is warranted pursuant to ORS 656.273.

The later of SAIF's two denials was issued on the basis of an industrial injury allegedly sustained by claimant while working in California on or about September 13, 1980. That California injury claim was compromised and released. SAIF contends that, under the last injurious exposure rule, claimant's condition is the responsibility of the subsequent California employer, and that claimant is

estopped from asserting the present aggravation claim. SAIF concedes, however, that if the rule of law to be applied is not the last injurious exposure rule of Smith v. Ed's Pancake House, 27 Or App 361, 364 (1976) and its progeny, but rather the material contributing cause standard of Grable v. Weyerhaeuser, 291 Or 387 (1981), that it is liable for claimant's current condition. The Referee found, and we agree, that under either standard claimant's condition is the responsibility of SAIF. Cf. David S. Mathews, 35 Van Natta 75 (1983). We, therefore, do not embrace the Referee's unnecessarily expressed preference for applying the rule of Grable in these situations finding it unnecessary to decide that issue given the facts of this case. But see Wills v. Boise Cascade Corp., 58 Or App 636 (1982).

ORDER

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

Board Member Barnes Dissenting:

In the process of focusing on the decision of individual cases at the Referee, Board and Court of Appeals levels, it is quite possible to fail to note the pattern of decisions in groups of cases. There has been a significant shift in the pattern of decisions in the group of cases involving insurer responsibility -- a shift that I think is ill advised.

I feel quite safe in the observation that the pattern of decisions in these cases for many years has been to place responsibility on the second, i.e., later in time, of two potentially liable insurers. "When a subsequent [industrial] injury contributes independently to a claimant's disability, the first injury is effectively superceded and the latter insurer is solely liable for the entire resulting disability." Crosby v. General Distributors, 33 Or App 543, 545 (1978). And although it was never articulated quite this way, it could safely be generalized from numerous decisions that the independent contribution from the second injury only needed to be de minimus to shift full responsibility to the second insurer. The net result was that the vast majority of claims were found to be new injuries rather than aggravations.

Those results are consistent with resolving doubts in favor of claimants. Although most claimants seem to be indifferent whether their claim is processed as a new injury or an aggravation, to the extent that it makes any difference, finding a new injury is the more "pro-claimant" result. If there is any difference in benefits, the higher benefit levels follow from a finding of new injury. Also, a finding of new injury results in the claimant having a longer period of aggravation rights in the future.

In just the past year or so the pattern of decisions has shifted toward much more often placing responsibility on the first, i.e., earlier in time, of two potentially liable insurers. These results have been produced by the importation of the Weller rule into responsibility law by cases like Wills v. Boise Cascade Corp., 58 Or App 636 (1982); now the "fad" seems to be to find that the second injury/incident/exposure resulted merely in an increase in

symptoms without any worsening of the underlying condition, and thus the first insurer remains responsible. I think it is difficult enough to make the distinction required by Weller -- between a worsening of symptoms and a worsening of the disease that the symptoms manifest --when the issue is compensability; extending this doctrine to responsibility cases compounds the confusion. And more to the point, I believe that the net effect has been that many, probably a majority, of claims are now being found to be aggravations rather than new injuries.

That is the result the majority reaches in this case -- that when claimant made a claim for a new injury in California in September of 1980, he really did not have a new injury then but merely an aggravation of his 1976 Oregon claim for which SAIF is responsible. See also David S. Mathews, WCB Case No. 81-06365, 35 Van Natta 75 (January 25, 1983). I disgree with the Weller concepts being applied in this context and I disagree with the majority's application of those concepts in this case. Most importantly, I disagree with the trend toward less favorable results to claimants as a group illustrated by this case and other recent cases. For these reasons, I respectfully dissent.

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DOUGLAS DOOLEY, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-08349
February 28, 1983
Supplemental Order on Reconsideration

An Order on Review was issued herein on April 2, 1981. On the SAIF Corporation's request for reconsideration, the order was abated on May 8, 1981, and the Board thereafter issued an Order on Reconsideration on February 3, 1983. Through an oversight, an attorney's fee was not included therein.

ORDER

The Board's Order on Reconsideration dated February 3, 1983 is supplemented to provide for the payment of an attorney's fee in the sum of $500 for claimant's attorney's services on reconsideration, to be paid by the SAIF Corporation.

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SHARON E. GOODRICH, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-01953
February 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests review of Refereee Knapp's order and order on reconsideration which set aside its denial of claimant's occupational disease claim. The only issue for review is the compensability of claimant's epicondylitis (tennis elbow) condition.

Claimant, age 35, has been employed as a secretary for the medical staff at Providence Hospital since 1969. About 1978 she began having difficulty with her right elbow. Claimant has a long history of non-work related upper extremity problems beginning in

1974 when a right carpal tunnel release was performed. A second release was performed in 1976. Claimant underwent a first rib resection in 1977 following a somewhat tentative diagnosis of bilateral thoracic outlet syndrome.

In 1978 claimant was admitted to Providence Hospital for a right shoulder anterior acromionectomy. The report of February 5, 1978 states that claimant experienced right arm pain that was initially thought to be secondary to her previously diagnosed and repaired carpal tunnel problem. With regard to the shoulder pain, the report continues: "She states that the pain does not keep her from working at her secretarial job but it does limit her sports activity considerably which is important to her." Later medical reports seem to indicate that claimant's shoulder surgery was bilateral.

In 1979 claimant complained to Dr. Butler of right elbow pain. Dr. Butler diagnosed bilateral epicondylitis and performed a right elbow epicondylar stripping on March 23, 1979. Claimant returned to Dr. Butler on July 12, 1979, stating that she had been doing well until she took several golf swings which triggered severe pain. Claimant returned to Dr. Butler on June 16, 1980, stating that she had recurrent pain after peeling tomatoes. On December 24, 1980, claimant signed an 801 form. Previously, claimant's medical care had been paid for by her health insurance provider, to whom she stated that her condition was not work-related.

On January 13, 1981, Dr. Long, with whom claimant had also been treating, reported that he had no clear history suggesting work activities were the cause of claimant's difficulties, although work did result in symptoms. On February 3, 1981, Dr. Butler reported that he felt typing activity was an aggravating factor in claimant's condition. He reported again on May 12, 1981, that the typing activity was continually aggravating the condition, "but has not resulted in any permanent worsening of the tennis elbow. I believe once she stops typing the problem will probably resolve."

On May 13, 1981 Dr. Long reported: "The history suggests that Sharon participated in vigorous avocational activities prior to and at the time of onset of her elbow problem." He declined to offer an opinion as to the work relation of claimant's condition, if any. Dr. Butler stated in his report of July 29, 1981 that claimant's typing activity did aggravate her condition to the extent that medical treatment was required. Dr. Butler, however, very specifically stated that the typing only resulted in a temporary worsening which would resolve once the activity was stopped. Dr. Butler elaborated further in his somewhat confusing report of September 1, 1981 that symptoms do not worsen unless the underlying condition also worsens.

The Referee, relying on Neathamer v SAIF, 16 Or App 402 (1974), felt compelled to rely on Dr. Butler's opinion because it was uncontradicted. The Referee's order, however, is somewhat confusing as to just what he did find compensable. Although a reading of the transcript leaves the impression that claimant was not a very impressive witness, the Referee specifically found her to be credible.

We rejected the Referee's interpretation of Neathamer in Edwin Bolliger, 33 Van Natta 559 (1981), aff'd 58 Or App 222 (1982). There is no legal requirement that a factfinder must find in accordance with an uncontroverted expert opinion. Although we do not believe Dr. Butler to be so stating, we would find it extremely difficult to accept an opinion that typing could cause a tennis elbow condition. See Mary E. Osborne, WCB Case No. 81-03984, 35 Van Natta 186 (1983).

Although we reject any contention that claimant's typing activity could be the major causative factor in her tennis elbow condition, the evidence does establish that once claimant succumbed to the condition, whatever the cause may have been (and the evidence points most strongly to her sports activities), her continued work activity was a major aggravating factor. Dr. Butler believed that work activity caused a temporary worsening of the condition and that, once claimant ceased typing for a sufficient period of time, the condition would go into remission with no permanent disability. Such an opinion is not at variance with our experience in regard to this condition.

Claimant's employer is, therefore, not responsible for claimant's condition other than for benefits associated with the temporary worsening of the condition. As soon as the medical evidence indicates that the temporary worsening has resolved, with no permanency as a result thereof, the employer's responsibility will cease. With that understanding of the Referee's order, we affirm.

ORDER

The Referee's order dated January 29, 1982 and order on reconsideration dated February 4, 1982 are affirmed. Claimant's attorney is awarded an attorney fee of $400 for services before the Board, payable by the employer.

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DARRELL H. GREEN, Claimant
Malagon & Velure, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-01678
February 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee Nichols' order which: (1) found the claimant's cervical condition to be related to the compensable December 22, 1978 lumber truck accident thereby overturning the December 7, 1981 denial; and (2) which reopened the claimant's claim for time loss as of December 6, 1981.

We affirm and adopt that portion of the Referee's order related to the compensability of the claimant's cervical condition. We modify that portion of the order which reopened the claim for indefinite payment of time loss compensation. The evidence indicates that it would be appropriate to pay time loss compensation for the period of time the claimant was hospitalized for diagnostic testing from December 6, 1981 through December 8, 1981, but there is no medical evidence in the record that claimant has been disabled from work other than for that particular time period.

ORDER

The Referee's order dated June 17, 1982 is modified in part. The claimant is allowed temporary disability compensation for the period of hospitalization from December 6, 1981 through December 8, 1981. The remainder of the Referee's order is affirmed.

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RANDALL P. MARKIN, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-02061
February 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee Galton's order which modified the Determination Order dated January 29, 1982 by granting claimant an additional award of compensation equal to 75° for 50% loss of his right leg (knee), making the claimant's total scheduled permanent partial disability award equal to 105° for 70% loss of his right leg (knee).

The insurer contends that the medical reports of claimant's treating doctor, Dr. Hoff, and the examining doctor, Dr. Pasquesi, show that the claimant has suffered only a 50% disability in his right knee. The claimant responds that the medical reports, in addition to claimant's credible testimony as to loss of use, justify the 70% disability award.

A January 29, 1982 Determination Order awarded 20% permanent partial disability for loss of the right leg due to the knee injury. Dr. Hoff and Dr. Pasquesi have rated claimant's loss of function as being in the 50% range. The Referee felt that the Determination Order had not adequately taken into account loss of function as far as loss of range of motion, sensory change, motor loss, weakness, atrophy or disabling

Applying the facts of the case to the guidelines at OAR 436-65-550 and OAR 436-65-555 yields a loss of function to claimant's right leg in the range of 50 to 55%. This figure is derived from limited flexion to 110° (which equals 14%), sensory loss (which equals 0), stiffness, moderate to severe pain and swelling (10 to 15%), marked knee joint instability (30%), and meniscectomy (5%). Combining the above figures yields a range of 49% to 53% loss of function which rounds off to a range of 50 to 55% disability.

ORDER

The Referee's order dated August 11, 1982 is modified. Claimant is awarded compensation equal to 82.5° for 55% loss of his right leg (knee). This award is in lieu of all prior awards. Claimant's attorney's fee shall be adjusted accordingly.

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BOB D. McCOY, Claimant WCB 81-02090
Blackhurst, Hornecker et al., Claimant's Attorneys February 28, 1983
SAIF Corp Legal, Defense Attorney Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Mongrain's order which affirmed the insurer's denials dated February 2, 1981 and November 25, 1981 for claimant's headaches secondary to cervical spondylosis or any conditions related to the claimant's upper spine, neck or head.

Claimant's treating orthopedist and surgeon, Dr. Campagna, and the examining doctors of the Southern Oregon Medical Consultants have diagnosed the claimant's neck problems as post-traumatic aggravation of cervical spondylosis with cervical cephalgia. They relate that condition to the compensable injury. The insurer's medical consultant, Dr. Wayne Norton, reviewed the medical file and gave the opinion that it was more reasonable that claimant's neck pain and radicular symptoms in the right shoulder and arm were merely evidence of a natural progression of pre-existing cervical spondylosis. He based this opinion on his interpretation of the evidence that claimant suffered no direct trauma to his neck and that he did not have neck symptoms until sometime after the on-the-job injury.

Our review of the record shows continuous and consistent reports by claimant of headaches and increasing C5-6 radicular symptoms on the right beginning within four days of his back injury. The hospital emergency report showed the claimant had neck tenderness upon initial examination. Ex. 1. The claimant testified he talked to his nurse about the onset of headaches within one week of the injury while he was still in the hospital. Claimant did not return to work and engaged in relatively little activity until he was admitted to the Callahan Center about four months later. At that time the medical examiner noted "headaches of occipital nature since the time of injury." Ex. 14. The claimant testified that the activities at the Callahan Center exacerbated his neck pain and he began to notice slight radiculopathy into the right shoulder. Upon discharge from the Callahan Center on August 28, 1979, the medical summary included a diagnosis of C-6 radiculopathy on the right in addition to cervical spondylosis. Next, on September 18, 1979, Dr. Campagna recorded a history of headaches and suboccipital pain since the accident. He also noted a history of pain radiating from the neck into the right shoulder. Next, on September 18, 1979, Dr. Yamodis notes the narrowing of the disc space at C5-6. On April 1, 1980 the Southern Oregon Neurological Associates note claimant's complaint of suboccipital headache. Finally, in June of 1980, the Southern Oregon Medical Consultants record a history of constant occipital headache pain and diagnosed the condition as post-traumatic aggravation of cervical spondylosis with cervical cephalgia (headaches). Dr. Campagna agreed with this diagnosis.

The above evidence shows that headache and neck pain occurred

at the time of the injury and increased in severity with time. There is no evidence that claimant suffered pain or headaches before the work injury. Since that time, the pain has increased so much that the claimant feels he is no longer able to work. We do find that claimant's claim for his persistent neck and related right shoulder and arm complaints is supported by a preponderance of the evidence.

We reverse the Referee.

ORDER

The Referee's order dated February 4, 1982 is reversed. The insurer's denials dated February 2, 1981 and November 25, 1981 are disapproved and this claim is remanded to the insurer for acceptance. Claimant's attorney is awarded $900 as a reasonable fee for services at hearing and $550 as a reasonable attorney's fee for services on review.

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MARY E. (SOUTHWORTH) OSBORNE, Claimant
Abel & Dahlgren, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03984
February 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Quillinan's order which set aside its denial of compensability of claimant's epicondylitis (tennis elbow) condition and remanded the claim to SAIF for acceptance and payment of compensation beginning on April 15, 1981 until closure occurs pursuant to ORS 656.268. The only issue is compensability.

Claimant was employed with Adult and Family Services. In April of 1979 she began working in the capacity of production typist which involved typing on a continuous basis for her complete working shift. Claimant previously served as a clerical trainee which involved approximately three hours of typing per day. Two months after beginning her work as a production typist, claimant began experiencing pain in her right elbow.

Claimant was initially seen by Dr. Melgard who felt that she had traumatized the ulnar nerve and suggested that she not work until nerve conduction studies were performed. The conduction studies were normal and Dr. Melgard treated claimant conservatively with pain medication. Claimant was examined by Dr. Snodgrass on November 15, 1979. He noted that claimant had returned to work although she was no longer working as a production typist and was performing more varied work activities. Dr. Snodgrass felt that claimant was suffering from epicondylitis.

With regard to the question of causation, Dr. Snodgrass stated:

> "I think it is impossible for me to make a completely accurate judgement (sic). I think it is equally possible that her elbow

> is the result of non-job activity, but the corollary is that there is an equal possibility that this is the result of job activities such as continuous typing. I think that continuous typing would certainly aggravate the symptoms from any cause."

Claimant experienced a recurrence of symptoms in October of 1980. On April 15, 1981 Dr. Tiley performed a stripping of the right elbow. On April 22, 1981 SAIF revoked its previous acceptance of the claim. In response to a questionnaire from SAIF, Dr. Tiley responded on December 9, 1981 that it was "highly unlikely" that claimant's typing was the sole cause of her problem, although he felt that it would cause symptoms and was more likely:

> ". . . one aggravating factor to the symptomatology. Certainly I would agree with Dr. Snodgrass that probably other activities play a role in this. Certainly this would be my experience with treating a number of cases. However, Mrs. Osborne has been quite specific with me that she feels that typing is a significant contributory cause of her problem." (Emphasis added).

SAIF requested an opinion from Dr. Nathan. He stated that the most common causes of tennis elbow are from repetitive, forceful activities and on certain occasions it occurs following a significant physical trauma which:

> ". . . place tension on the origins of the extensor carpi radialis brevis and sometimes longus tendons going to the wrist on the same side. These tendons that dorsiflex the wrist (hyperextension) take their origin from the lateral distal portion of the humerus (epicondylar area). It has not been my experience that typing is a causative factor in the onset of tennis elbow.
>
> If the patient was a typist and there were other activities which were responsible for the onset of the epicondylitis or 'tennis elbow,' it can be that typing activities could be uncomfortable for the patient but typing certainly would not be the sole or significant cause of the onset of symptoms."

The Referee stated that: "The medical evidence in this case is somewhat vague as to causation. However, all doctors agree that repetitive activity, such as continuous typing could cause this tennis elbow syndrome as well as aggravating the overall symptom complex." The Referee concluded that, in view of the fact that there was no evidence as to what other activities claimant might have engaged in off the job, claimant established her work activity as the major contributing cause of her condition. SAIF v. Gygi, 55 Or App 570 (1982).

We disagree with the Referee's conclusion, although we do agree that the medical evidence submitted is vague as to the issue of causation and that the relevant standard is the major contributing cause test of Gygi. We disagree that all physicians stated that they felt repetitive typing could cause or aggravate tennis elbow. Dr. Snodgrass basically declined to offer an opinion and would only go so far as to state that it could aggravate the condition from a symptomatic standpoint. Dr. Tiley's opinion seems to be basically in agreement with that of Dr. Snodgrass, i.e., that the typing could possibly result in some symptomatology and that other activities probably played a role. Dr. Nathan offered the most cogent and explanatory opinion in the record concerning the etiology of epicondylitis, stating that typing was not a known causative factor of that condition. Dr. Nathan acknowledged that typing could cause symptoms, but could not be a sole or significant cause of the onset.

We think the most that the evidence establishes in this case is a possibility of a causal connection. It is not sufficient to establish major contributing cause. The Referee relied heavily on the temporal connection between the onset of claimant's symptoms and her activities as a production typist. In Edwards v. SAIF, 30 Or App 21, 24 (1977), the court stated:

> "Claimant, while recognizing the uncertainty of the medical evidence, argues that a 'natural inference,' based on the timing and location of the condition arises establishing a causal relationship between the fall and the urological conditions. In a complex and technical medical problem . . . we are not prepared to indulge a 'natural inference' where the medical evidence has failed to do so."

In view of the tremulous nature of the medical evidence in this case, we find reliance on a temporal relationship to be insufficient to prove causation.

The fact that there may be little evidence in the record with regard to what other activities claimant might have engaged in off the job does not prove claimant's case. It is not necessary for the insurer to present evidence which, as the Referee put it, "demonstrate[s] that claimant's household activities would be of such a nature as to compare in effect with the . . . activity of typing eight hours a day." In other words, we do not agree that it is the burden of the insurer to prove a claim is not compensable. See Eonia Z. Stoa, 34 Van Natta 1206, 1207 (1982): "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."

Finally, it seems logical to us to expect that, if typing caused an elbow condition, that condition would be manifested in both elbows since the two forearms are used about equally in typing. However, the present claim is only for a right elbow condition.

ORDER

The Referee's order dated April 26, 1982 is reversed. The SAIF Corporation's denial of April 22, 1981 is reinstated and affirmed.

* * * * * * * * * * * * * * * *

DAVID B. OWENS, Claimant
Blackhurst, Hornecker et al., Claimant's Attorneys
Foster & Purdy, Defense Attorneys

WCB 82-01030
February 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer/insurer requests review of Referee Brown's orders which set aside its denial in this "unexplained fall" case.

Claimant worked the swing shift as a night watchman at a lumber mill. He was found by the graveyard shift watchman in a semi-conscious state with a cut on his head. Claimant has no memory of falling, being hit or other explanation for his injury. The insurer has introduced evidence suggesting idiopathic causes of claimant's apparent fall.

The Referee discussed the problems in this type of case at length, concluding that the claim was compensable under our decision in Peter J. Russ, 33 Van Natta 409 (1981). We would be inclined to agree with that conclusion if our decision in Russ were the last word on point.

However, since the date of the Referee's order the Court of Appeals has decided Phil A. Livesley Co. v. Russ, 60 Or App 292 (1982), and Mackay v. SAIF, 60 Or App 536 (1982). Mackay summarizes the court's conclusions in both cases:

> "Claimant's evidence showed no more than that it was equally possible that the cause of claimant's fall, her buckling knee, was idiopathic as that it was [work] connected. That is not enough to satisfy her burden of proof. Without more, such a fall is not compensable." 60 Or App at 539.

We cannot affirmatively say that we are persuaded that the claimant in this case has proven more than did the claimant in the Mackay case.

Finally, the motions of the employer/insurer to strike and to remand are denied.

ORDER

The Referee's orders dated June 18, 1982 and July 16, 1982 are reversed. The denial of the employer/insurer dated January 26, 1982 is reinstated and affirmed.

* * * * * * * * * * * * * * * *

NOBLE PRICE, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-06188 & 80-05506
February 28, 1983
Order on Review (Remanding)

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee McCullough's order and Order on Reconsideration which set aside its partial denial and ordered it to accept claimant's claim for a chest pain condition. No definitive diagnosis was made identifying the origin of claimant's chest pain. Among the possibilities are coronary artery disease and a stress-induced myocardial infarction. The Referee found that claimant's chest pain, on or about March 4, 1980, was a compensable consequence of claimant's October 9, 1979 back injury. We disagree and reverse.

On October 9, 1979 claimant incurred a compensable low back strain while lifting lumber at work. He initially received chiropractic care, which afforded no relief. Claimant then came under the care of Dr. Lott, who referred him to Dr. Streitz, an orthopedic surgeon, who diagnosed degenerative arthrosis of the lumbosacral spine, discogenic low back pain, anxiety and obesity. Claimant was apparently unhappy with Dr. Streitz, and he insisted on a transfer to Sacred Heart Hospital where he was seen by Dr. Hockey, who diagnosed a lumbosacral strain embellished by considerable functional overlay. Claimant returned to the care of Dr. Streitz, who felt that claimant's recovery would be slow and somewhat complicated by his anxiety.

In a chart note dated January 25, 1980, Dr. Streitz noted that claimant did not wish to return to work at the mill, "due to his fear of various factors including job security and so on." It was Dr. Streitz's opinion at that time that, from a physical standpoint, claimant was able to work.

Claimant was interviewed on two occasions in February of 1980 by Dr. Holland, a psychiatrist. In the course of these interviews, claimant related his fear of returning to work, and that he was "scared to death" because he expected that Dr. Streitz would soon release him to return to work. Claimant described his frustration with his twenty-five or more years as a mill worker. Claimant also related his perception of Dr. Streitz's attitude as being one of diminishing interest, which contributed to his anxiety. Dr. Holland concluded that claimant was experiencing a vocational crisis:

> "I view this as a situational reaction which does not have the structure of a neurosis and I believe that the situational reaction is as much caused by his past experiences as anything else. I do not believe that the accident itself was psychologically traumatizing, nor has his medical treatment been sufficiently invasive to bring forth complications that would result in psychological ramifications.
>
> "I feel that the psychological problems

> that this worker represents do not impair him for work, and what problems that are existing are an intensification or aggravation of previously existing problems, namely, disenchantment and anger over the instability that he has experienced in his vocational life. There is evidence that he had mounting pre-accident vocational stressors which have nothing to do with the accident itself, but may very well explain why the accident occurred when it did."

Dr. Streitz released claimant to return to work. Claimant arranged to return to work on a part-time basis, working four hours a day rather than his usual eight hour day. On March 4, 1980, the second day after returning to work, claimant began to experience chest pains at the beginning of his four hour shift. He continued to work through the remainder of that shift, after which he left the mill and went to attend a class. While sitting in the classroom, claimant apparently began to experience numbness on his left side. He testified that the chest pain at work did not concern him, but that it became progressively worse as the day progressed. He left his class and sought treatment at Mercy Medical Center in Roseburg.

The history and physical examination reports state that claimant's chest pain with left arm radiation began while claimant was sitting in the classroom, that the pain was rather sudden in onset and more severe than previous chest pain, "although he has been having angina type pain with exertion over the past several years." Claimant denied this history of prior chest pain. He informed the examining physician of his anxiety associated with returning to work, and the report refers to "a lot of emotional strain related to working at the mill."

Claimant was admitted to the hospital on March 4, 1980 under the care of Dr. Lott, whose initial impression was "chest pain, rule out MI." Electrocardiograms (EKG) performed during this hospitalization were all within normal limits. Enzyme levels were elevated and Dr. Lott thus assumed that claimant did have "a little bit of cardiac damage." Claimant was discharged on March 12, 1980, the diagnosis being "myocardial infarction with subendocardial injury only."

Claimant was again hospitalized for chest pain on April 3, 1980 at which time he was seen in consultation by Dr. Sproed, a cardiologist. Two EKGs performed at this time were normal, except that the second revealed a sinus bradycardia (slowness of the heart beat). Dr. Sproed's impression was: "Chest pain of costochondritis, possible arteriosclerotic heart disease with history of recent subendocardial myocardial injury." He stated that the EKGs showed no definite evidence of myocardial infarction, that claimant had a mild sinus arrhythmia and that the possibility of arteriosclerotic vascular disease should be evaluated further. Dr. Sproed was aware of domestic problems claimant was experiencing associated with an incident involving his son, who had apparently been subject to some

physical abuse in the Army, and Dr. Sproed suggested that, in addition to treatment for costochondritis, it would be well for claimant to receive some treatment for "stress and problems." Claimant was apparently discharged on April 6, 1980.

By an inquiry dated May 13, 1980, SAIF requested Dr. Lott's opinion and explanation of any possible relationship between claimant's October 9, 1979 back injury, subsequent limited work activities or both, and his current heart/chest condition. Dr. Lott replied: "Although Mr. Price is certain that his job caused his heart attack, I cannot verify the same."

SAIF's partial denial issued on the basis of insufficient evidence relating his condition to his work activities with the employer on or about March 4, 1980.

On August 12, 1980 Dr. Lott reported that claimant was continuing to have back pain, stating that claimant is a very anxious person, which would add to his pain because of muscle spasms. On August 13, 1980 Dr. Lott opined that much of claimant's pain was in response to deep-seated anxiety and associated muscle tension, stating: "The patient is an overly tense individual. His obesity is very much against his recovery. His anxiety syndrome has prevented weight loss." This report is apparently in response to inquiries concerning claimant's orthopedic problems, and Dr. Lott concludes with the statement that a settlement of claimant's compensation claim might prove beneficial in relieving his pain because of the large emotional component.

Dr. Lott referred claimant to Dr. Bathurst, an anesthesiologist specializing in the control of chronic pain, who, in turn, referred claimant to Dr. Brown for a psychiatric consultation. Dr. Brown stated his impression of claimant as "a man experiencing anxiety reactions and who has had a long standing character problem probably best described as passive dependent." Dr. Brown's report states that the possibilities for psychiatric intervention are very limited, suggesting that claimant would benefit the most from claim closure and rehabilitative counseling.

During this period of time, while claimant was apparently receiving treatment for his chest pain from Dr. Lott, he was also receiving some form of treatment at the Veterans Administration Hospital in Roseburg. There are no medical records or reports concerning this treatment, only allusions to it in various portions of the record.

On May 12, 1981 claimant was examined by Dr. Griswold, a cardiologist. Dr. Griswold was provided with medical records concerning claimant's claim. In his evaluation of the medical records, Dr. Griswold stated that claimant was suffering from considerable disability for psychiatric reasons. He opined that, based upon all the information furnished to him, it was doubtful that claimant suffered an acute myocardial infarction with heart muscle damage on March 4, 1980. He noted the anxiety on the part of claimant and his wife, associated with claimant's effort to work and his persistent back symptoms. He stated the importance of coronary arteriograms in order to attempt to define whether claimant actually had coronary artery disease.

"I can only state that he developed chest pain while at work, that this chest pain could be related to esophageal spasm, possible angina, musculoskeletal pain or a number of causes which are not clearly discernable at this time. The most important question at this time is whether Mr. Price is disabled. . . as much psychologically as by his back. Certainly he is disabled because of recurrent chest pain which has caused repeated admissions to the Roseburg VA Hospital."

SAIF referred claimant to Dr. Romm, a cardiologist, for a cardiac evaluation. He concluded that claimant's history was compatible with a previous myocardial infarction, stating, however, that the normal EKG and minimal rise in enzymes made a diagnosis of myocardial infarction suspect.

"I cannot make this diagnosis with certainty, however, I would say there is at least a 70% chance that this is the likely diagnosis. The patient has had a variety of different kinds of chest pain all of which are not related to exertion and all of which seem somewhat atypical of coronary artery disease. The patient has had exercise tests, the result of which are not known, and if these tests are negative, I would think that this evidence would lead to some more doubt as to the original diagnosis of coronary artery disease. * * * His murmur seems to me to be nondescript and probably is functional in origin, and there are no features which suggest a diagnosis of idiopathic hypertrophic subaortic stenosis or mitral valve prolapse, two diagnoses which could lead to symptoms of chest discomfort.

"* * * [B]eing that Mr. Price was under quite a bit of stress, had been forced to return to work against his desires, and since his chest pain developed in close proximity to this stressful situation, I would think that if the patient does have coronary artery disease that this event should be regarded as due to his early return to work and the stress involved."

The results of an exercise test performed by Dr. Sproed were subsequently provided to Dr. Romm. The exercise treadmill stress test was negative. Dr. Romm, in a report dated December 18, 1981, stated that there was no evidence from the exercise test that claimant did have coronary artery disease.

"I think this particular piece of information casts further doubt as to whether or not the patient does have

serious coronary artery disease. However, the one piece of evidence which still is difficult to deny is that enzyme tests were elevated when the patient was admitted to the hospital with his severe bout of pain and thus a diagnosis of an acute myocardial infarction was made.

"I think the data that is present is somewhat conflicting, however, I still think the most likely diagnosis is that the patient does have coronary artery disease. This is a situation, however, in which I feel only a coronary angiogram would lead to a firm conclusion of the patient's diagnosis.

"I hope this information is of help to you. I am sorry I cannot be more definitive about this problem, but the difficulty is that all of the data does not support the diagnosis of coronary artery disease."

Based upon Dr. Romm's opinion and the findings on claimant's hospitalization in March of 1980, the Referee found that claimant suffered some cardiac damage in March and that this was compensably related to his employment by virtue of the stress claimant experienced in relation to his return to work and his fear of reinjuring himself or someone else, or not being able to competently perform his job duties. The Referee alternatively concluded that, if future diagnostic procedures were to reveal that claimant did not have a heart problem and that the etiology of his chest pains was solely psychological, claimant still had established a sufficient causal connection between his chest pains in March of 1980 and his back injury in October of 1979.

The Referee did not find, nor does the claimant contend on review, that his chest pains were directly caused by work activity. Claimant's sole contention is that his chest pain, which he claims constituted a "heart attack", are within the range of compensable consequences of his original low back injury. This was the Referee's finding, and claimant maintains that the evidence supports this conclusion, based primarily upon the fact that claimant was extremely anxious over the prospect of returning to work in his former capacity, feeling that he was neither physically nor mentally prepared to do so.

Professor Larson states the black letter law relative to the range of compensable consequences of an injury:

> "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct." 1 Larson, Workmen's Compensation Law, 3-348 § 13.00 (1978).

Larson states that the rules that come into play, in determining whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, are essentially based upon the concept of "direct and natural results," with the basic rule being that the subsequent "injury" is compensable "if it is the direct and natural result of a compensable primary injury." See also Donald P. Neal, 34 Van Natta 237 (1982); Eber v. Royal Globe Insurance Co., 54 Or App 940 (1981); Wood v. SAIF, 30 Or App 1103 (1977).

> "Thus, if an injury results in a phlebitis, and this in turn leads to a cerebral thrombosis, the effects of the thrombosis are compensable. If the initial injury is followed by the onset of gangrene, necessitating amputation, the amputation is of course a compensable consequence of the injury. The situation is no different when the subsequent complication takes the form of a neurosis rather than of a physical exacerbation. * * * The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications." 1 Larson, supra, 3-351 to 3-353.

In Donald P. Neal, supra, the Board found a clear chain of causation between claimant's compensable fractured ankle and an aspirin overdose, where the surgery for claimant's ankle fracture led to an excessive dispensing of prescription drugs, which caused serious impairment to claimant's cognitive abilities, which, in turn, led to a near-fatal aspirin overdose.

In Eber v. Royal Globe Insurance Co., supra, the court found that claimant's worsened pre-existing carpal tunnel syndrome was a compensable consequence of a right knee injury, because claimant's use of crutches following knee surgery was a direct and natural consequence of his original injury, and the use of his hand and wrist in supporting himself with crutches precipitated the carpal tunnel syndrome. 54 Or App at 943. See also Ernest A. Annette, 35 Van Natta 35 (1983); Florence v. SAIF, 55 Or App 467 (1982); Johnson v. SAIF, 61 Or App 286 (1983).

In each of these cases, the Board or the court found a clear chain of causation between a primary injury and a subsequent injury or condition which was alleged to have occurred as a "direct and natural result" of the primary injury. In this case, we are of the opinion that the medical evidence is insufficient to establish a sufficiently clear chain of causation between claimant's back injury and his subsequent chest pains.

The fact that there is a serious question concerning the etiology of claimant's chest pain is problematic; however, a definitive diagnosis of a myocardial infarction on March 4, 1980 or coronary artery disease would not be dispositive one way or the other. The alleged chain of causation is that claimant's back injury resulted in physical limitations which, in claimant's mind, prevented him from returning to work at the time his treating physician was of the opinion that he was able to do so; claimant

felt that he was being forced into a situation for which he was neither physically nor mentally prepared, having to return to work against his will; this created a great deal of anxiety on claimant's part; when he actually did return to work, after one half day, claimant began to experience physical symptoms for which he sought medical attention and which had apparently disabling consequences. We find, as a matter of fact, that, regardless of whether claimant sustained a myocardial infarction after returning to work, the physical symptoms complained of were the result of anxiety experienced in connection with his return to work. We do not find, however, that this anxiety is a "natural and direct result of" claimant's 1979 low back injury. Our review of the record leaves us with the impression that, even before his back injury, claimant was frustrated with and weary of his vocational situation as a plywood mill worker because of numerous layoffs, loss of seniority and financial insecurity. Although Dr. Holland's interviews with claimant preceded the onset of claimant's chest pain, we find his analysis of claimant's pre-existing feelings about his job helpful. It thus appears that, rather than being a direct and natural result of claimant's 1979 back injury, his 1980 anxiety-induced chest pain was more likely a result of his unhappy vocational situation. Stated differently, we are unable to find that claimant has proven that it is more likely than not that his chest pain on March 4, 1980 and thereafter was within the range of compensable consequences of his 1979 low back injury.

Because the Referee set aside SAIF's partial denial and ordered claimant's claim reopened in WCB Case No. 80-05506 (claimant's request for hearing on SAIF's partial denial), the Referee properly did not reach the question of the extent of claimant's disability in WCB Case No. 80-06188 (claimant's request for hearing on the Determination Order dated September 5, 1980 closing claimant's back injury claim). In view of our conclusion on the partial denial issue, it is necessary for us to remand to the Referee for disposition of the issue raised regarding the September 5, 1980 Determination Order.

ORDER

The Referee's order dated April 16, 1982 is reversed. SAIF's partial denial dated June 11, 1980 is reinstated and affirmed. This matter is remanded to the Referee for further proceedings as set forth above.

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STANLEY R. SILER, Claimant
David J. Edstrom, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10341
February 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

SAIF Corporation requests review of Referee Galton's order which: (1) affirmed its denial of claimant's claim for compensation; (2) ordered payment of interim temporary total disability benefits from July 24, 1979 through October 14, 1980, less time worked; (3) ordered that the employer pay claimant 25% penalties on the above temporary total disability benefits unreasonably

delayed, resisted and refused; and (4) ordered that it pay claimant's attorney fees of $750 for prevailing on the issues of interim temporary total disability and penalties.

SAIF asserts that claimant is not entitled to interim compensation because there was no basis for his claim that the employer had knowledge of his potential claim for compensation and because the notice of the claim was untimely filed.

Claimant asserts that the employer did have knowledge of the claim. Thus, SAIF should have commenced payment of interim compensation within 14 days after such knowledge and continued paying thereafter at 14-day intervals pending acceptance or denial of the claim. This is the only issue on review.

We agree with the Referee's findings that the employer had notice or knowledge of a potential compensable claim for an injury, which claimant testified occurred on July 23, 1979. Upon experiencing the headache and blurred vision, claimant descended to the ground and immediately reported to the company nurse; after lunch he again reported to the nurse. That day claimant also told the ground rigger (the supervisor on the job) that he did not want to go up in the air again because of the blurred vision in his left eye. The ground rigger responded by telling claimant to stay on the ground.

Claimant further testified that the very next day he saw an eye doctor. Upon returning to work he told the company nurse of that visit and that he was not to work for a week. Claimant testified that he also called the company timekeeper who informed claimant he would "take care of it and send a form to SAIF." Claimant testified that this was never done and he, therefore, called the timekeeper again a week later. When claimant still got no response, he testified that he sent a Form 801 to the main company office in Seattle, about three weeks after his loss of vision. After hearing no response from Seattle, claimant testified that he finally contacted his lawyer and sent a copy of a Form 801 to SAIF. SAIF received this on June 14, 1980.

Claimant's testimony was the only evidence offered bearing upon the issue of the employer's notice or knowledge of a potential claim for compensation. The Referee found that claimant was an entirely credible and believable witness and accepted his testimony concerning his repeated contacts with the employer. We are presented with no other evidence to rebut claimant's testimony and defer to the Referee's finding of credibility. We, therefore, conclude that the employer had the requisite knowledge of the claim.

ORDER

The Referee's order dated May 18, 1982, is affirmed.

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BONNIE R. TOLLADAY, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys
English & Metcalf, Attorneys

WCB 82-01493
February 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests review of those portions of Referee Pferdner's order which reversed its denial of claimant's bilateral carpal tunnel syndrome claim, awarded temporary total disability, imposed penalties for unreasonable failure to pay temporary total disability, and awarded attorney's fees for prevailing on a denied claim.

We are sure that one issue on review is the compensability of claimant's carpal tunnel syndrome. We are not sure whether the employer is also contesting the award of temporary total disability, or the imposition of penalties based thereon, or both. In any event we will dispose of all issues. Because of our disposition of the compensability, temporary total disability, and penalty issues, there will also need to be an adjustment in the award of attorney fees.

Claimant began working for the employer, Armour Company, in its meat packing plant in 1976. In 1977 she consulted Dr. Jay Miller with complaints of pain and other symptoms in both arms and hands. Dr. Miller could not discern any objective reason for claimant's complaints and diagnosed the problem as functional. A claim was filed and accepted, but claimant was immediately released to return to work and the claim was closed with no award of compensation. In August, 1979 claimant again consulted Dr. Miller for upper extremity symptoms, predominantly in the right arm and hand. Neurological testing suggested right carpel tunnel syndrome, but it was discovered that claimant had a cervical rib. Dr. Miller diagnosed claimant's condition as thoracic outlet syndrome secondary to the cervical rib. Surgery was performed to resect the rib.

Following the surgery, claimant obtained substantial relief from many of the symptoms she had been experiencing. Her claim was closed in June 1980 with no award of permanent disability. Upon return to work, however, claimant experienced symptoms in her hands similar to those experienced prior to surgery. These symptoms increased substantially when claimant was assigned to work night cleanup, a position which involved use of a high pressure hose. However, claimant did not seek medical treatment at that time or at any subsequent time until the employer began laying off personnel in December, 1981.

Pursuant to a collective bargaining agreement, the lay-off process involved use of a bumping system whereby, depending on seniority, certain employees were kept on but assigned to different jobs. Under the collective bargaining agreement, if an employee declined without good cause to accept the job offered to him or her, the employee forfeited the right to be considered for other positions should they become available during the lay-off period. Good cause for declining a position included medical verification of inability to do the job to which the employee was assigned.

Because of relative lack of seniority, the only position available to claimant was night cleanup. Upon learning that this was the only position available to her, claimant consulted Dr. Laderas, who prepared a report and signed a note indicating that claimant should not be assigned to a job which involved putting pressure on her right wrist. The note placing this restriction on claimant's work activities was received by the employer on December 14, 1981.

Dr. Laderas referred claimant to a neurosurgeon, Dr. Hummel, who examined claimant on December 28, 1981. In a report of that date, Dr. Hummel described the symptoms claimant had been experiencing and stated:

> "This discomfort is aggravated by certain activities at home and work involving frequent position change and use of the hands and arms. Driving a car causes an increase in her symptoms as well as working with the hands above her head or any fixed position such as holding a book, tool or moving and changing the position of objects while working as a meat packer."

Nerve conduction tests confirmed that claimant had bilateral carpal tunnel syndrome. In a report dated January 4, 1982 Dr. Hummel opined:

> "I have explained that while this abnormality [carpal tunnel syndrome] is not directly 'caused' by her employment, in individuals with an anatomic predisposition for entrapment of the nerve, certain activities can aggravate the condition and increase its symptoms presentation. I think this would be a reasonable way to express to her employer the relationship of this syndrome to her employment. I suspect that her heavy use of the extremities in repeated flexion and extension of the wrist aggravates this pre-existing anatomic abnormality."

On January 13, 1982, claimant filed a claim. In a report dated January 22, 1982, Dr. Laderas stated that

> "She has been off her regular work since December 14, 1981 up to the present time. I do feel that if she does go back to work, this will aggravate her symptoms."

At some point in late December or early January, the employer had furnished to Dr. Hummel copies of job descriptions of every position in the meat packing plant in which claimant was employed, except the night cleanup position. In a note received by the employer on January 25, 1982, Dr. Hummel reported to the effect that claimant was unemployable from December 28, 1981 until January 22, 1982, and that "she is now capable of doing any job she

chooses, including any of the job descriptions that you brought to the office." On January 25, 1982 the employer issued claimant a check for temporary total disability for the period December 28, 1981 through January 21, 1982. The employer made no further payments of temporary disability.

In February, 1982, at the employer's request, claimant was examined by Dr. Nathan. After examining claimant and touring the plant in which she worked, Dr. Nathan reported as follows:

> "It was my conclusion after visiting the plant and seeing most of the job positions that are available on the line and with further discussion with my staff, that the work that Ms. Tolladay did while on the line did not reasonably contribute to the onset of bilateral carpal tunnel syndromes. Bilateral carpal tunnel syndromes are very prevalent in females and occur whether they are or are not gainfully employed, and I believe in this particular case the relationship is one which is casual rather than causal.
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> * * * *
>
> "[T]here is no evidence that the specific work activities that she has done have accelerated or aggravated the underlying bilateral carpal tunnel syndromes."

Dr. Hummel in general concurred with Dr. Nathan's lengthy report but reiterated that "individuals with an anatomic predisposition for entrapment of the nerve can have their symptom complex aggravated by work which involves repeated flexion and extension of the wrist in conjunction with the pre-existing anatomic abnormality."

On March 31, 1982, the employer issued a denial of the claim.

I.

With respect to the compensability of claimant's bilateral carpal tunnel syndrome, we are satisfied that there is no basis for asserting that an injury or work activity at Armour Company caused the carpal tunnel syndrome itself. Carpal tunnel syndrome arises from a pre-existing, probably congenital, anatomic predisposition to nerve entrapment. The only tenable basis for finding claimant's carpal tunnel syndrome compensable is if claimant's work activities at Armour Company exacerbated the condition. As such, claimant must prove that her work activities were the major cause of the worsening. SAIF v. Gygi, 55 Or App 570 (1982).

Based on the fact that the onset of carpal tunnel symptoms took place after claimant began working at Armour and progressively worsened thereafter, plus the results of nerve conduction tests in 1979 and 1981, it is clear that there has been a cognizable worsen-

ing of claimant's condition. Far more difficult is the determination whether claimant established that the worsening was due in major part to her work activities. The evidence suggests two other possible explanations for the worsening: natural progression of the condition and exacerbation from off-work activities.

Dr. Hummel's reports explain how claimant's work activities acting on her anatomic predisposition to nerve entrapment could have caused the onset of bilateral carpal tunnel syndrome. However, the only report from Dr. Hummel which explicitly addresses whether claimant's work activities did cause an onset of symptoms also refers to certain off-the-job activities, also possibly causative. We conclude that Dr. Hummel's reports fall short of proving major causation from work exposure. When we consider Dr. Nathan's report, based as it is on an examination of claimant and observation of the jobs claimant performed in the course of her work, it becomes even more evident that claimant has failed to prove that her work activities were the major cause of her condition. For these reasons, we reverse the Referee on the compensability issue.

II.

Even though we find the claim is not compensable, claimant was entitled to interim compensation from the date of her claim to the date of the denial. Donald Wischnofske, 32 Van Natta 136 (1981), 34 Van Natta 664 (1982). The claim was filed on January 13, 1982 and denied on March 31, 1982. The only interim compensation paid was for the period of December 28, 1981 (i.e., pre-claim) through January 21, 1982.

The Referee apparently ordered that interim compensation be paid from December 14, 1981 (i.e., pre-claim and inconsistent with Wischnofske) to March 31, 1982. The Referee also imposed a penalty equal to 25% of the interim compensation due from December 14 to December 28, 1981 and 12.5% of the interim compensation due from January 21 to March 31, 1982.

The parties argue at length about whether claimant was off work in December due to her physical condition or, instead, due to the terms of the collective bargaining agreement combined with claimant's low seniority. It would be necessary to resolve this issue if claimant's claim were compensable. But having found that the claim is not compensable, under Wischnofske claimant is only entitled to interim compensation for the period following her claim.

The next issue is whether claimant is entitled to interim compensation after January 22, 1982, the date by which Dr. Hummel released claimant "to any job she chooses, including any of the job descriptions [the employer] brought to the office." We have concluded that interim compensation is not payable to a claimant who is actually working. Anthony A. Bono, 35 Van Natta 1 (1983). By parity of reasoning, possibly interim compensation is not payable to a claimant who is released for regular work.

But we find it is not necessary to reach that question in this case. We think that in January of 1982 claimant's regular work was night cleanup. The employer did not furnish the position description for that job to Dr. Hummel. Thus, Dr. Hummel's apparent release was not a full release to claimant's regular work. Alternatively, the most we can say is that the release is ambiguous, which is insufficient to operate as a release to regular work. John R. Daniel, 34 Van Natta 1020 (1982). We conclude that claimant is entitled to interim compensation to the date of the denial. Cf. Hedlund v. SAIF, 55 Or App 313 (1981).

We turn to the question of penalties. Interim compensation was properly paid through January 21, 1982. Interim compensation was improperly not paid thereafter. As we have often previously noted, the statutory standard for penalties is not merely the failure to perform certain duties; it is an unreasonable failure to do so. ORS 656.262(9). The employer argues that it acted reasonably in relying on Dr. Hummel's apparent work release in terminating interim compensation. Although we think it is the better policy to recognize very few explanations for nonpayment of interim compensation as being reasonable, in the context of this specific case we agree with the employer. We have concluded, with the benefit of hindsight, that the employer's reliance on Dr. Hummel's apparent work release was incorrect, but we cannot say that action, based on what was then known, was unreasonable. Therefore, penalties are not warranted by the failure to pay interim compensation beyond January 21, 1982.

III.

Reversing the Referee on the compensability issue means that claimant's counsel is not entitled to recover an attorney's fee for his services at hearing in connection with the denied claim issue. The Referee explicitly declined to award additional attorney's fees in conjunction with the interim compensation and penalties issues because claimant's counsel was adequately compensated by the award of fees in conjunction with the compensability issue. See Zelda M. Bahler, 33 Van Natta (1981), rev'd. on other grounds, 60 Or App 90 (1982). Since we are reversing on the compensability issue, claimant's counsel will receive no fee whatsoever unless we award a fee in connection with the interim compensation issue. Claimant's counsel is entitled to 25% of the interim compensation awarded by this order.

ORDER

The Referee's order dated May 25, 1982 is reversed. The denial dated March 31, 1982 is reinstated and affirmed.

Claimant is entitled to compensation for interim temporary total disability from January 22, 1982 to March 31, 1982. Claimant's attorney is allowed 25% of the compensation granted by this order as and for a reasonable attorney's fee.

* * * * * * * * * * * * * * * *

RICHARD E. WILKERSON, Claimant
John C. O'Brien, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-08597
February 28, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Gemmell's order which approved the SAIF Corporation's September 9, 1981 denial of claimant's request for compensation for neck and back injuries. Claimant asserts that: (1) he has proven by a preponderance of the evidence that his neck and back problems are related to his June 10, 1980 industrial injury; and (2) in the event we do not so find, that we should "reopen the records" and allow claimant to submit the medical reports of a doctor who claimant testified treated him extensively. SAIF asserts that the Referee correctly concluded claimant failed to prove by a preponderance of the evidence that his back and neck problems are related to his industrial injury; and that there is no valid basis upon which to remand to the Referee.

Based on the medical evidence and the testimony presented, we agree with the Referee that claimant has failed to prove by a preponderance of the evidence that his back and neck problems are related to his industrial injury of June 10, 1980. Perhaps if claimant had subpoenaed Dr. Parsons and/or his records, we would come to a different conclusion, just as the Referee might have done. Unfortunately, however, since claimant did not: (1) offer that evidence at the hearing; (2) did not request the Referee to keep the record open for submission of additional evidence; (3) did not request a continuance to produce such evidence; and (4) did not and has not shown why, in the exercise of due diligence, such evidence was not offered, we decline to remand to the Referee to allow claimant to accomplish now what he could have at hearing. Ora M. Conley, 34 Van Natta 1698 (1982); Robert A. Barnett, 31 Van Natta 172 (1981).

ORDER

The Referee's order dated May 21, 1982 is affirmed.

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

WCB 81-02880
February 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Mongrain's order which reversed SAIF's denial of March 23, 1981. The issues are whether the claimant's aggravation claim is barred by the doctrine of res judicata and if not, whether the claimant has suffered an aggravation.

I

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

II

SAIF argues that the claimant's present aggravation claim is barred under the doctrine of res judicata. It bases its argument on the fact that SAIF previously denied an aggravation claim on the basis that "it appears the treatment was necessitated by a subsequent injury and activity." Although this denial was litigated and eventually affirmed by the Board, it is by no means proven on this record that the issue of whether the claimant had sustained a subsequent injury was litigated.

We held in Lewis Twist, 34 Van Natta 290 (1982), that "the side that asserts the affirmative defenses of res judicata or collateral estoppel has the burden of proving what was previously litigated." SAIF has not sustained that burden.

SAIF issued its denial based on subsequent injury and activity. The claimant requested a hearing which was held by Referee Danner on July 12, 1979. The transcript of that hearing is not included in the record in this case, so we are ignorant of whether the issue of subsequent intervening injury was actually litigated at that hearing. Referee Danner's order dated August 3, 1979 makes no mention of that issue. The Referee overturned the denial on the grounds that the claimant had "carried his burden of proof to show an aggravation having occurred."

The Referee's order was appealed to the Board. The Board also failed to mention any issue of a subsequent intervening injury. The Board on de novo review reinstated and affirmed the denial, saying, "The Board, based on all the evidence, finds that the claimant has not met his burden of proof that his condition has worsened since his last award or arrangement of compensation . . . ." We are unconvinced on the basis of this record that SAIF has sustained its burden of proving that the issue of a subsequent intervening injury was actually litigated. Thus, the issue of a subsequent intervening injury is not res judicata.

III

Even assuming arguendo that the issue of subsequent injury is res judicata, the claimant generally would not be precluded from asserting a new aggravation claim. SAIF relies on Lewis Twist, supra, in support of its argument to the contrary. While it is true that there was dicta in Lewis Twist which supported the proposition that a new intervening injury precludes the possibility of any further aggravation claim in connection with the original injury, we expressly repudiated that dicta in David S. Matthews, 35 Van Natta 75 (1983). See also Michael Ratliff, 35 Van Natta 83 (1983).

IV

The Referee found that the claimant and his physician, Dr. Maurer, were credible witnesses. We have no reason to question that finding. The claimant testified concerning his symptoms from the time of his original industrial injury until the present. Dr. Maurer testified that the claimant probably suffered a protruded disc in April 1977 and that claimant's problems at the time of the

hearing were causally related to that disc protrusion. There was no contrary evidence. We agree with the Referee that the preponderance of the evidence supports a conclusion that in early 1981 the claimant suffered an aggravation of the condition resulting from his compensable injury of April 1977.

ORDER

The Referee's order dated June 21, 1982 is affirmed.

Claimant's attorney is awarded $400 as a reasonable attorney's fee on Board review, payable by SAIF.

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WILLIAM N. BEAN, Claimant
Lyle C. Velure, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-01579
March 2, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Presiding Referee Daughtry's order which dismissed the claimant's request for hearing as untimely filed because it was filed more than 180 days after the date of the denial. See ORS 656.319.

We affirm and adopt the Presiding Referee's order.

ORDER

The Presiding Referee's order dated August 3, 1982 is affirmed.

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OLIVE J. ELWOOD, Claimant
Ackerman & DeWenter, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10264
March 2, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Baker's order which upheld the SAIF Corporation's denial of claimant's occupational disease claim for mental or emotional stress. The only issue is compensability. We affirm.

Claimant had been employed as a registered nurse with McKenzie Manor Nursing Home from 1965 to April of 1976 when she terminated or was terminated from her employment. Claimant has not been employed since that time. On August 4, 1980, over four years subsequent to leaving McKenzie Manor, claimant completed and signed an 801 form, indicating that she was suffering "emotional stress" and a loss of confidence in her nursing skills as a result of a "too demanding work schedule" and her employer's action in terminating her.

Claimant completed her nursing school training in 1951 and was employed at various hospitals in California from 1952 to 1965 before taking a job at McKenzie Manor. Claimant testified that while working for McKenzie Manor, her work schedule was too demanding and that she developed frequent sore throats and gastric distress. She blamed part of this on her belief that some of the other nurses employed at the nursing home were attempting to force her to quit. Claimant believed that she was the logical choice to be promoted to the position of director of nurses, believed that the other nurses did not want this to occur and were, therefore, deliberately trying to force her to quit.

One of these "other" nurses was a Mrs. Isaacs. With regard to Mrs. Isaacs, claimant testified as follows:

> "Well, once she would--she frequently called the doctor's office in the evening and then would tell them to call me the next morning. And most of the time I didn't know what they were calling me for, and that went on and on and on and on.
>
> "About what did she call the doctors office?
>
> "Well, to tell them a patient was ill, . . .
>
> * * *
>
> "Yes, and then one day I was giving out evaluations in the medicine room and I had the door locked . . . and Mrs. Isaacs beat and banged on it and screamed and demanded it to be opened."

Another nurse claimant was troubled by was Mrs. Cough:

> "Well, she would -- when I'd give the report at 3:00 to tell the next shift, you know, what had gone on during the day or what was expected, why, she would ignore it and gaze off into space or as though like she wasn't at all interested. And when I would ask her to pay attention, why, she didn't care and --"

Mrs. Knight was the third nurse that the claimant had difficulty with:

> "Well, she worked day shift for a while. She was getting adjusted to the work schedule. And I mentioned to her one day that I had taken some Valium that morning. And then she immediately got up and left the room and I don't know what she did, but it was shortly after that that drugs started disappearing from my department, and I think it was probably set up that way."

Claimant also viewed Mrs. Taylor, a fourth co-employee, with suspicion:

> "Well, the first thing, at the Christmas party in December of '75 why, she told -- one of the girls told me that Mrs. Taylor had told them that she was after my job."

Claimant also testified about informing Mrs. Taylor that she planned to clean a particular shelf the following day but that, when she returned the next day, the shelf was cleaned. Claimant believed that Mrs. Taylor had informed the nursing home owner, Mrs. Paulson, and that Mrs. Paulson cleaned the shelf herself. Claimant related two other incidents with Mrs. Taylor, one of which involved Mrs. Taylor's use of claimant's empty drug capsule containers and another incident involved a question of who moved a Water Pik device. Claimant also believed that the other nurses had lost respect for her and that false information concerning her was being passed to the families of patients at the nursing home by the other nurses. According to claimant, she had always been an exemplary employe.

SAIF produced testimony from claimant's employer to the following effect. Claimant's work performance began to decline in about 1974 and, beginning in 1975, drugs began to disappear from claimant's department, as well as alcoholic beverages used by the residents of the home. Claimant had failed to keep adequate records and charts in conformance with state regulations; complaints were being received concerning her performance; and she was disrespectful to the administrator and one of the nursing home's physicians. Claimant was asked to resign because she was ill too often, was not interested in her job, went on vacation at the time of the hospitalization of the director of nurses and because of complaints from patients concerning the care they were receiving from claimant.

Subsequent to her termination, claimant was examined by Dr. Lawton who indicated in his April 27, 1976 chart notes that claimant felt well and that she had gained weight, but that her nicotine and caffeine consumption made her nervous. Claimant continued to treat with Dr. Lawton for various difficulties -- psychiatric disease not being one of them. Dr. Lawton reported on May 3, 1978 that claimant was not then as nervous as she had been at the time she was working. Claimant also treated with Drs. Oien, Schroeder and Teal for her numerous non-work related physical difficulties.

The first indication that claimant may have been suffering from treatable psychiatric illness after leaving McKenzie Manor is in Dr. Smulovitz's report of August 18, 1980. Dr. Smulovitz apparently specializes in endocrinology and internal medicine. Dr. Smulovitz reported that claimant was suffering from gastritis and recurrent peptic symptomatology due to an anxiety state and stated:

> ". . . the patient claims to be disabled on the basis of pressure put on her and is unable to work at her nursing profession because of this anxiety and depression and stress caused by her being fired after 10 years on the job at McKenzie Manor nursing home."

Dr. Smulovitz recommended psychiatric evaluation.

At the request of SAIF, claimant was examined by Dr. Holland, a psychiatrist. Dr. Holland was of the opinion that the claimant's complaints did not sound genuine, were not the product of any emotional or mental disorder, and that claimant admitted to having had few, if any, problems subsequent to her termination, although she felt unable to return to the nursing profession due to a loss of confidence she suffered as a result of being terminated. After a thorough recitation of claimant's history and current complaints, Dr. Holland concluded:

> "Before considering Mrs. Elwood's diagnosis in her worker's compensation claim, it should be noted that she has some symptoms which she admits are not related to her work experience which suggest that she has had emotional difficulty for a considerable period of time in her life. * * * In reviewing the period with her immediately after her firing, it certainly is probable that Mrs. Elwood was experiencing some sort of an emotional reaction at that time which had phobic characteristics, and lasted for some time. By her own admission however, these symptoms are now abated, and the only thing that seems to bother her is her inability to marshal herself to apply for another job."

Dr. Holland concluded that claimant "does not at the present time have a significant or diagnosable mental illness which is either producing impairment or causally related to her work experience at the McKenzie Manor Nursing Home."

Claimant was then seen by Dr. Radmore, also a psychiatrist, following a referral by her attorney. In her May 4, 1981 report, Dr. Radmore stated:

> "It is my impression that Mrs. Elwood has experienced a significant blow to her ego which has persisted throughout the years since her initial firing from her job, and that this is clearly expressed by her low level of aspiration for her life and her perception of what she might be able to do in the line of gainful occupation. * * * At the present time she appears to be chronically depressed. . . . This depression is also seen as the causative factor in her lack of ambition and drive at this time, and is thought to represent a maladaptive way of coping with her lack of self-confidence and self-esteem in her profession * * * It is therefore my opinion that Mrs. Elwood is suffering from psychiatric impairment which is the result of her employment at McKenzie Manor Nursing

> Home and her subsequently being fired from that employment in such a way as to leave her feeling that she has been incompetent to assess her own skills in her profession."

Dr. Radmore then stated that she did not believe that the claimant was capable of returning to work at that time and that, if claimant did not respond to psychotherapy, she would be permanently and totally disabled.

Following the hearing, Drs. Woodward and Lawton were deposed. Neither physician is a psychiatrist and they had nothing to offer that is particularly elucidating.

Based on the Board's decision in Henry McGarrah, 33 Van Natta 584A (1981), the Referee concluded that claimant had not established a compensable claim because she had only been exposed to reasonable and normal supervision. The Referee's conclusion must be reexamined in light of the court's decision in McGarrah v SAIF, 59 Or App 448 (1982). However, even considering the current case in view of the court's holding in McGarrah, we still find that claimant has failed to establish that she suffers from a compensable occupational disease, from both a medical and legal standpoint.

We are not convinced that claimant has even demonstrated that she is actually suffering from a true psychiatric disease, rather than just emotionalism or hurt feelings. Claimant did not seek any psychiatric treatment for a nearly four-year-long period following termination of her employment. As a matter of common sense, it tends to stretch credulity to assert that, four years after the termination of all contact with her former employer, claimant developed a psychological disability as a result of that employment.

We find Dr. Holland's opinion more persuasive than Dr. Radmore's for several reasons. Dr. Radmore does not deal in her report with any of the other stress factors which were present in claimant's life, as pointed out by Dr. Holland, and deals only with claimant's employment at McKenzie Manor. We conclude that claimant has not established that she suffers from any form of mental disease or that her employment at McKenzie Manor was the major cause of any such condition. SAIF v Gygi, 55 Or App 570 (1982).

We believe that there is one additional difficulty with claimant's case. If we understand Dr. Radmore's thesis and the testimony correctly, it would appear that claimant is contending that the majority of her "disability" resulted from the employer's act of terminating her employment, which was a blow to her ego and caused her to lose confidence in her skills as a nurse. The legal question is thus whether a psychiatric disability suffered as a result of an employer's act of terminating an employe arises in the course and scope of the employment.

We dealt with a similar contention in George F. Weiland, 34 Van Natta 961 (1982), where the claimant was alleging, among other things, that his depression was caused by his reaction to his

dismissal from employment. We concluded that claimant had not established a compensable occupational disease claim. Although our decision in Weiland was based on our decision in McGarrah, we believe that the concept articulated in Weiland is still valid, that is, that a claimant who suffers a psychological disability as a result of an employer's act of terminating that claimant's employment has not established that he suffers from an occupational disease that arose in the course and scope of employment.

Although it is true, in an abstract sense, that an employe is not subject to the act of termination other than during a period of regular and actual employment, it could also be argued that the disability did not arise out of and in the course and scope of the employment if it did not arise until the employe was terminated and if it arose for no other reason than the act of termination itself. If involuntary termination could give rise to a compensable mental or emotional stress claim, why would voluntarily leaving employment be any different? That also is something a worker is not subject to other than during a period of regular actual employment. We do not understand the court's decision in McGarrah as extending compensability to that extreme.

Moreover, if there were a possible workers compensation remedy for psychiatric problems arising from the termination of the employment relationship, that remedy would be exclusive under ORS 656.018. There are now numerous other causes of action that can be and are asserted for an allegedly wrongful discharge, and special damages are often asserted in the form of psychiatric treatment. It would create considerable confusion, to put it mildly, to sort out what elements, if any, of these other causes of action for wrongful discharge would survive the extension of a no-fault, exclusive workers compensation remedy to cover the psychiatric consequences of all discharges.

ORDER

The Referee's order dated March 10, 1982 is affirmed.

Board Member Lewis Dissenting:

The Referee relied on our holding in Henry McGarrah, 33 Van Natta 584A (1981) as being dispositive of the compensability of this claim. The Court reversed our decision in that case, McGarrah v. SAIF, 59 Or App 448 (1982), but the majority seeks to avoid the court's holding in that case by asserting that "a claimant who suffers a psychological disability as a result of an employer's act of terminating that claimant's employment has not established that he suffers from an occupational disease that arose in the course and scope of employment." The only authority cited for that proposition is a previous Board case (George F. Weiland, 34 Van Natta 961) which was, in turn, based on our holding in Henry McGarrah.

Notwithstanding the lack of legal authority for its position, the majority postulates that of a compensable claim cannot arise where a claimant voluntarily leaves work, therefore, a claim cannot arise from an involuntary termination. I am not sure whether a voluntary separation from employment automatically bars a compen-

sable claim. I am not aware of any case so holding. Those are not the facts of this case, and the issue has not been raised or briefed by the parties. Assuming, arguendo, the truth of the premise, it simply does not follow that an involuntary termination cannot give rise to a compensable claim. The act of terminating an employe is not an abstraction, it is an act of supervisory authority, perhaps the ultimate act of supervisory authority. As the court noted in McGarrah, supervision is, by definition, an integral part of the employment relationship and is what brings claims based on psychological reactions to supervision within the course and scope of employment:

> "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 656.801)1)(a)." 59 Or App at 456.

Being terminated certainly marks the end of the employment relationship, but it is as much a part of that relationship as the caboose is part of the train.

The majority also refers to the fact that there are other causes of action that can be asserted for wrongful discharge and that one of the items of damages in such cases can be the expenses of psychiatric treatment. It is further reasoned that to allow a claim for psychiatric expenses in a workers compensation claim for what might be recoverable as damages in the context of other causes of action would cause "considerable confusion" because of the exclusive remedy provisions of ORS 656.018. One answer to this argument is that the employer sued in such "other cause of action" may be able to assert ORS 656.018 as a partial defense, or an offset against particular items of damages amounts recovered under the workers compensation legislation. It is simply illogical to assert that, because there may be other avenues for some claimants (i.e., those discharged in violation of anti-discrimination legislation or collective bargaining agreements) to seek relief which may include damages that are also benefits under workers compensation law, that, therefore, all discharged claimants are ineligible for workers compensation benefits.

In this case, claimant is not alleging that her psychological condition arose solely from the fact of her termination. She also is alleging that her condition was caused by the cumulative pressure of her job generally (which included 10 years of work with but one extended vacation near the end of her employment) and the perceived efforts of her co-workers to cause her to resign. The majority opinion devotes a great deal of discussion to the evidence as to whether there was a conspiracy against claimant and whether there was good cause for her termination. It may well be that, in fact, there was no effort at all by her co-workers to cause claimant to resign. It is a fact that claimant was involuntarily terminated. It is a fact that there were incidents and rumors upon which claimant could base her belief that there was an effort by various co-workers to get rid of her. Another person might not have perceived the things claimant did and might not have reacted

as claimant did; nevertheless, under James v. SAIF, 290 Or 343 (1981) and McGarrah v. SAIF, supra, I believe that the claimant here has established legal causation in that she has alleged and proven facts and circumstances which can give rise to a compensable claim.

The court in McGarrah emphasized that:

> "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....Nothing said by the Supreme Court in its opinion...is inconsistent with what we said * * * "
>
> "In this case it is clear that claimant believed he was being harrassed by a supervisor. 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 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." 59 Or App at 457-458.

I believe that the real issue here is whether claimant proved that she experienced an exacerbation of a preexisting psychological condition or developed a new psychologial condition, and whether her employment, including termination therefrom, was the major contributing cause of the exacerbation or new condition.

With regard to whether claimant experienced an exacerbation of a preexisting condition or developed a new one, the majority makes two factual assertions which, I believe, are unsupported by or contrary to the evidence in this case. The majority asserts that (1) "the first indication that claimant may have been suffering from treatable psychiatric illness after leaving McKenzie Manor is in Dr. Smulovitz's report of August 18, 1980", and that (2) claimant has not demonstrated that she is suffering from a true psychiatric disease as opposed to "just emotionalism or hurt feelings". The record reveals that claimant has the following history of psychological conditions and treatment:

Claimant received treatment from a psychiatrist for a six week period in 1965 when she was distraught over domestic difficulties

and the death of her mother. She was advised at that time that, "as long as she lived a nice, quiet life, without any shocks, she would get along."

Dr. Lawton, who was claimant's family physician from 1965 through 1978, found from the outset that claimant was a nervous person. Beginning in 1968 or 1970, he prescribed Psychlex and later Valium for use on an "as needed" basis. Prior to her termination, claimant used Valium on occasion in conjunction with the onset of her menstrual cycle. In his deposition, Dr. Lawton testified that in April 1976, claimant consulted him and related the termination from employment at the nursing home. There is a reference to claimant's nervousness in the chart notes at that time. Dr. Lawton testified that he did not find her behavior or manifestations of nervousness any different than usual at that time, but he did administer certain tests to eliminate the possibility of physical causes for her nervousness. He attributed her nervousness to excessive smoking and caffeine consumption. His chart notes from December, 1976 reveal that he found claimant to be "very nervous, jittery and not controlled well with Valium." He attributed claimant's symptoms at that time to the onset of menopause and did not relate it to claimant's employment situation.

Dr. Woodward, who had been claimant's treating gynecologist since 1970, indicated that he too from the first visit found claimant to be a nervous person. However, he also indicated, based on his own personal observation plus the history related to him by claimant, that claimant's emotional condition worsened in December 1976. At that time, claimant complained of tiredness, but he could find no physical basis for chronic fatigue. Dr. Woodward was of the opinion that at least by December 1976 claimant was experiencing "anxiety-tension-depression", that in his view anxiety and depression were interrelated conditions, and that they were causally related to claimant's employment at McKenzie Manor.

In May, 1979 Dr. Smulovitz replaced Dr. Lawton as claimant's primary treating physician. In his report, Dr. Smulovitz, an internist and endocrinologist, indicated that his focus of treatment in 1979 and 1980 was on claimant's gastritis, peptic ulcer symptomology, and irritable bowel syndrome. Dr. Smulovitz was of the opinion that these conditions arose from claimant's anxiety, depression, and stress which, in turn, arose from claimant being terminated without good cause from employment at MacKenzie Manor after 10 years of being on the job. Dr. Smulovitz prescribed medications for the treatment of claimant's peptic ulcers and bowel spasms and Tranxene, and later Librax, and recommended a psychiatric consultation.

According to the Physician's Desk Reference, 35th Edition (Medical Economics Company, 1981), Valium, Tranxene, and Librax are all medications for the treatment of anxiety and tension. No listing could be found for Psychlex, but presumably it is used for the same purpose. The Physician's Desk Reference specifically indicates that these medications are for the treatment of anxiety and tension beyond that experienced in everyday life.

Thus, it is apparent from this record, contrary to the majority's assertion, that claimant has been diagnosed and treated for anxiety and tension for a considerable period before Dr.

Smulovitz so reported in August 1980. The majority totally dismisses the observations and opinions of Drs. Lawton and Woodward because they are not psychiatrists. Apart from the relevance of their observations of changes in the nature of claimant's emotional/psychological condition as reflected in their chart notes, I submit that as physicians they should be assumed to have some knowledge of emotional disorders. I would infer from the fact that they prescribed anti-anxiety medications that they had sufficient awareness of a change in claimant's condition to warrant changing the medication used to treat that condition. Psychiatrists may have more expertise with respect to psychological conditions, but that does not mean that the observations, diagnoses and treatment administered by practitioners of other specialities have no relevance.

With respect to the majority's assertion that claimant has not proven that she is presently suffering from a recognizable psychological disorder, in addition to the observations and diagnoses of Drs. Lawton, Woodward, and Smulovitz, Dr. Radmore, a psychiatrist, reported as follows:

> "It is my impression that Mrs. Elwood has experienced a significant blow to her ego which has persisted throughout the years since her initial firing from her job....She does appear to have lost total confidence in her nursing skills, and to have developed some phobic responses which have not been totally successful in controlling her anxiety, but have been destructive as they have contributed to her letting her license lapse, and in interfering with re-establishment of herself in her profession in some other location or capacity. At the present time she appears to be chronically depressed, to the degree that it is difficult to visualize her as ever having had the skills which she must have had to have been successful in her profession for the 25 years. . . . This depression is also seen as the causative factor in her lack of ambition and drive at this time, and is thought to represent a maladaptive way of coping with her lack of self-confidence and self-esteem in her profession by draining her of any ambition or drive which might impel her back into a situation where she could again be as forcibly rejected as she was when she was fired from her job at the Manor." (Emphasis added.)

Dr. Radmore may not have delineated with as much specificity as Dr. Holland the precise titles she ascribed to claimant's condition, but the inescapable conclusion from reading Dr. Radmore's report is that she believes that claimant is suffering from a significant psychological disorder.

I find that the evidence preponderates in favor of a finding that claimant presently does have one or more psychological conditions. Her present condition may represent a significant worsening of her pre-existing nervousness, or the development of new conditions (anxiety and depression and related physical disorders).

Although Dr. Holland opined otherwise, his opinion was based on the theory that claimant's inability to marshal herself to seek employment arose from some sort of unconscious recognition of her incompetence as a nurse. This theory is contradicted by the employer's evaluation of claimant job performance shortly before her termination, in which she received virtually uniform high marks for her work performance. An equally plausible explanation for claimant's failure to assume a position with greater responsibility would be that she had been advised by her psychiatrist in 1965 to pursue a quiet life and avoid shocks, and she recognized the limitations imposed by her tendency to nervousness. Dr. Holland also referred to the hiatus since claimant's last working as a nurse as a causative factor in her inability to seek employment. This theory is inconsistent with the fact that claimant's aversion to working as a nurse (because she felt she could no longer hold herself out to prospective employers as a nurse) developed shortly after her termination. Dr. Holland conceded that it was probable that claimant experienced an emotional reaction, including the development of phobias, following her termination.

The majority denigrates Dr. Radmore's opinion because she allegedly failed to deal with any of the other stress factors identified by Dr. Holland as being present in claimant's life. Dr. Radmore stated in her report that she was aware of the information elicited by Dr. Holland concerning claimant's present level of functioning, and developmental, familial, and educational history, and that she saw no need to repeat it. In his report, Dr. Holland refers to a psychosocial stressors rating scale, that applying that scale to claimant's situation since her termination from employment yielded a relatively low stress score and that less then half of the stress was due to work exposure. I am unable to determine from Dr. Holland's report whether the manner in which the test was administered would have included the stress claimant is alleging from the years of pressure cumulatively from her job and particularly the last two years, during the period in which she alleges that efforts were being made to get her to resign. Although Dr. Holland earlier in his report referred to claimant's menopause as the cause of her current problems, he does not include that in his diagnosis nor does he identify that or any other factor in conjunction with the stress evaluation scale.

The record does suggest two potential causative factors in addition to claimant's pre-existing propensity for nervousness and the alleged onset of menopause, namely, a variety of medical problems not related to this claim and a myocardial infarction suffered by claimant's husband in 1979. However, no physician identifies these latter two factors as being related to her psychological problems.

I think a fairer characterization of the evidence is that Drs. Radmore and Holland, both of whom are psychiatrists and both of

whom were aware of the same information, including sources of stress in claimant's life, reached different conclusions as to whether claimant has a treatable psychological condition and if so, its relationship to claimant's employment at McKenzie Nursing Home.

As between the two, I find Dr. Radmore more persuasive and conclude that claimant has proven that her employment at and termination from McKenzie Manor Nursing Home was the major cause of her present anxiety and depression. In reaching this conclusion, I am influenced by the fact that Dr. Lawton identified increased emotional problems in December, 1976, that Dr. Woodward noticed a change for the worse in claimant's emotional condition in December, 1976 and believed that she was suffering from anxiety and depression at that time arising from termination, and that Dr. Smulovitz identified emotional disorders and prescribed anti-anxiety medication for anxiety and related disorders in 1979 and 1980. It also is of some significance that the primary residual psychological manifestation of claimant's emotional condition (as distinquished from the gastritis, ulcer symptoms, and irritable bowel syndrome) is the loss of confidence in working as a nurse and inability to return to that line of work. In my opinion, this is not simply a case of "emotionalism and hurt feelings", nor is claimant's present psychological condition the product of claimant's alleged menopause. For a person prone to nervousness and who was as devoted to her job as claimant was, as evidenced by her years of service without vacations and with overtime, I believe it is highly likely that claimant would be devastated by being fired under the circumstances as she perceived them to be. I believe that claimant has established by a preponderance of the evidence that she has a psychological condition, that her exposure in the course and scope of her employment at McKenzie Nursing Home was the major contributing cause of that condition, and that the claim is compensable. Accordingly, I would reverse the Referee and remand the claim for acceptance.

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RICHARD HOGENSON, Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-09533
March 2, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review, and the SAIF Corporation cross-requests review, of Referee Gemmell's order which affirmed a February 19, 1982 Determination Order awarding the claimant no permanent partial disability and which set aside SAIF's October 5, 1981 denial. Claimant takes issue with the order insofar as it fails to award claimant any permanent partial disability attributable to his August 14, 1981 industrial injury; SAIF seeks reversal of that portion of the Referee's order setting aside its denial.

We adopt as our own the Referee's findings of fact and affirm that portion of her order awarding claimant no compensation for permanent partial disability.

We agree with the Referee's conclusion that claimant's industrial injury represented a compensable aggravation of pre-existing conditions. Although the denial is vague, it is clear that SAIF was attempting to advise claimant that it would not accept responsibility for claimant's pre-existing condition, denominated postural defect and Scheuermann's disease, or the natural progression of these conditions. Identified as a partial denial, the denial could just as well be called a "clarification of acceptance."

The Referee apparently set aside the denial on the basis that it was procedurally improper. We do not agree. SAIF did not, under the guise of issuing this denial, attempt to terminate its obligation to continue payment of temporary total disability compensation to claimant, which SAIF continued to pay until termination was authorized by a Determination Order. Although SAIF may have intended to terminate its responsibility for payment of medical services which it did not believe causally related to claimant's injury, it apparently continued paying all bills submitted. On April 9, 1982, counsel for SAIF corresponded with Dr. Strauss, indicating that claimant had been found medically stationary as of February 1, 1982, and that all bills submitted up to the date of his letter would be paid, but that only those treatments related to the residuals of claimant's industrial injury, if any, would be paid thereafter. This letter refers to SAIF's partial denial of October 5, 1981.

In Billy J. Eubanks, WCB Case No. 81-07465, 35 Van Natta 131 (February 3, 1983), we discussed the insurer's obligation to notify a claimant and a medical vendor of its asserted denial or partial denial of responsibility for medical treatment, and to issue a notice which sufficiently advises the claimant of hearing rights pursuant to ORS 656.245 and 656.283. That is just what SAIF did in this case. There was no procedural impropriety. We regard SAIF's October 5, 1981 denial as being consistent with our determination, and the Referee's determination, that claimant has sustained no permanent residuals as a result of his August 17, 1981 industrial injury. We do not consider this denial as being procedurally, or otherwise, improper. Accordingly, we reinstate SAIF's denial.

ORDER

The Referee's order dated May 19, 1982 is affirmed in part and reversed in part. Those portions of the order which set aside SAIF's October 5, 1981 denial and awarded an attorney fee for prevailing on a denial are reversed, and the denial is hereby reinstated and affirmed. The remainder of the Referee's order is affirmed.

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FRANCIS KNOBLAUCH, Claimant
Bischoff & Strooband, Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 82-01201
March 2, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

The insurer requests review of Referee Baker's order which set aside its denial of claimant's aggravation claim. The only issue is compensability.

Claimant, a diesel mechanic, was employed by Roseburg Lumber Company in 1978 when he suffered a condition known as Raynaud's Phenomenon. The claim was initially denied, but was ordered accepted by a Referee's order in a prior proceeding, WCB Case No. 79-02997. A Determination Order dated April 13, 1981 awarded claimant benefits for temporary total disability only. Claimant requested a hearing. In another prior proceeding, WCB Case No. 81-01293, a Referee awarded claimant 10% scheduled disability for each hand. That order was affirmed by the Board on December 28, 1981.

Claimant returned to work in the summer of 1981 following a remission of his condition and continued working until January of 1982 when, due to exposure to cold, he again became unable to continue with his work as a mechanic. On February 1, 1982 the insurer received a request from claimant's attorney requesting that the claim be reopened on the basis of aggravation. On February 3, 1982 the insurer denied the request on the grounds that there was no evidence that claimant's condition had worsened. Claimant's request for hearing gave rise to the present proceeding.

On November 20, 1979, Dr. Cleven reported he had no success in controlling claimant's symptoms and that claimant experienced a recurrence of Raynaud's symptoms whenever the weather turned cold. He stated that claimant could continue working if he could keep his hands warm while he did so but that, if he was not able to avoid working in the cold, he may have to change jobs. On January 28, 1981 Dr. Cleven reported that cold weather had an adverse effect on the claimant's condition and made him unable to use his hands at all. He noted that claimant had been able to work that winter since he worked inside and used gloves, although he still had difficulties. He further stated:

> "Mr. Knoblauch certainly is not totally disabled and would be able to perform any capacities if working in a warm environment totally during the winter. * * * I think that if he could find work inside during the winter months and then outside during the summer months that he could carry on activities quite well."

On March 6, 1981 Dr. Alberty reported that he had nothing to offer claimant with regard to surgical intervention, and stated that he expected that the condition would be aggravated "each and every time he is exposed to cold." Dr. Alberty reiterated this opinion on May 12, 1981.

The employer argues that the claimant is not entitled to have his claim reopened every winter when he suffers a recurrence of his symptoms due to his exposure to cold on his job as a mechanic because that is exactly what the claimant was compensated for when he received his award of permanent partial disability in the prior proceeding. Since it was known and expected that claimant would have a loss of function in his hands whenever the weather turned cold, the insurer argues that claimant has not established a worsening. Additionally, the insurer has submitted a copy of the transcript of the prior hearing as support for its position. Claimant objects to the insurer's attempt to "augment the record," and argues that an award of permanent disability does not preclude a claimant from receiving temporary total disability benefits later.

The only significance that the transcript of the prior hearing could have is to establish the validity of the insurer's argument that the claimant's award of permanent partial disability was based on the loss of function he suffered when exposed to work involving cold or cold weather. We find the evidence in the record in the present case more than adequate to establish that this was the basis of the award of permanent partial disability made in the prior proceeding. We, therefore, have not considered the transcript of the prior hearing in our review of this case.

Having concluded that the purpose behind the claimant's award of permanent partial disability was to compensate him for the loss of function he sustained in his hands when exposed to cold weather, it follows that the claimant has not established a worsening of his condition such as to warrant a reopening of his claim under ORS 656.273. Claimant's condition is by nature cyclical and chronic. He suffers exacerbations of symptoms in cold weather and remission of symptoms in warm weather. There has been no change in this condition since claimant's last award of compensation. The condition continues in its regular cyclical course and there is no evidence indicating that the condition has worsened. This chronic loss of function which claimant suffers in his hands whenever he works in cold weather is exactly what he was compensated for by his award of permanent partial disability, and he is not entitled to reopening of his claim each winter unless he establishes a worsening of his condition under ORS 656.273. Cf. Harmon v. SAIF, 54 Or App 121 (1981).

ORDER

The Referee's order dated August 10, 1982 is reversed. The insurer's denial of February 3, 1982 is reinstated and affirmed.

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CLAYTON LADD, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07078 & 80-07079
March 2, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Danner's order which affirmed the Determination Order dated August 20, 1980 which allowed the claimant benefits for temporary total disability only. Claimant contends that he is entitled to an award of permanent partial disability.

Dr. Anderson and Dr. Sutherland reported on claimant's lack of impairment following his compensable coronary surgery. Dr. Anderson states:

> "Mr. Ladd is currently in excellent health without any residual symptoms of coronary vessel disease. He has returned to his pre-injury status. He has been told to return to a full activity physical status."

Dr. Sutherland reported:

> "So far as I am able to determine, Mr. Ladd has no disability of any sort at this time and might conduct himself as any other person his age who had never had heart disease of any kind."

Claimant has not only returned to his regular employment, but was promoted. His current salary is $2,600 per month; it was $1600 per month prior to his compensable surgery.

Claimant agrees that he has suffered no physical impairment as a result of his surgery, but argues that the fact that he had surgery, in and of itself, affects his earning capacity in that it would make it more difficult to obtain other employment since the surgery would be a factor that would be considered by an employer in making a hiring decision. We believe that claimant's argument is both too speculative and too categorical. Surgery is performed, almost by definition, to cure physical problems and to improve physical conditions. When surgery is successful in achieving those goals, as it obviously was in this case, it does not make sense to us to say that there is necessarily a loss of wage earning capacity.

ORDER

The Referee's order dated June 25, 1982 is affirmed.

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LEON NEAL, Claimant
Harold Adams, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09515
March 2, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation requests review of Referee Baker's order which found claimant entitled to compensation for permanent total disability. The only issue is the extent of claimant's disability.

Claimant has a long history of industrial back injuries of a relatively minor nature followed by prolonged periods of apparent disability. In 1969, at the age of 34, claimant tripped and fell to the ground while working for a vineyard in California. Acute lumbar muscle sprain was diagnosed. Claimant's physical examination findings were all generally within normal limits. In his May 26, 1969 report, Dr. Huene noted that, "Mr. Neal is a very anxious person who tries to impress the examiner with the severity of his complaints," and that, "I think Mr. Neal will be a problem case in returning him to gainful employment, and one can expect a prolonged period of subjective disability secondary to this injury." Dr. Huene released claimant to return to work. Claimant did not do so. He contended that a hearing problem was related to his fall at work. Claimant's time loss benefits were apparently terminated following an investigation which revealed that he had been working part-time at a service station and had failed to so inform his physician or the California State Compensation Insurance Fund.

In approximately January of 1970, claimant was employed as a mechanic for a car dealer in Dallas, Oregon. On January 13, 1970 claimant strained his back while lifting a tire. A myelogram was performed. The results were completely normal. The claim was apparently closed in mid or late 1970 with no permanent disability. Claimant thereafter became employed as an electrician and on November 2, 1971 slipped on a stairway "for no known reason" and landed on his back. No neurological deficit or objective evidence of back disease or injury was found, although a left inguinal hernia was diagnosed. A hernioplasty was performed in January of 1973 and claimant thereafter returned to work.

Several months after his return to work, claimant slipped in the parking lot of his employer's premises and fell to the ground. Upon examination by Dr. White, claimant's physical findings were generally within normal limits. Dr. White suggested that claimant return to work and lose some weight. An evaluation performed at the Back Evaluation Clinic in January of 1973 resulted in a diagnosis of chronic low back sprain with severe functional overlay and a minimal loss of function due to the injury. A Determination Order allowed claimant no permanent disability. Claimant requested a hearing and, oddly enough, was awarded 70% unscheduled permanent partial disability by a Referee's order dated March 14, 1975. Following the employer's request for Board review, that award was reduced by stipulation of the parties to 46.875%.

Claimant apparently returned to some form of work in late 1974 or early 1975. Several months later, in July of 1975, claimant was involved in an automobile collision. Bilateral inguinal hernias were found and repaired. On February 10, 1976 Dr. Bright reported

that the automobile accident had aggravated claimant's lumbosacral strain, and:

> "My recommendation is the fact that the patient does have chronic lumbosacral strain but he also does not have the desire or the willingness to return to any gainful employment because of the fact that he appears to be involved in some legal litigation against the state."

Dr. Bright reported on April 20, 1976 that although claimant had chronic back strain he did not have a physically disabling problem and that he could engage in gainful employment. Dr. Bright reported again on October 5, 1976 that, although claimant was 100% disabled by his own complaints, he felt claimant should promptly seek gainful employment.

Claimant applied for Social Security disability benefits in 1976 but was apparently turned down after a hearing. Despite his contention that he was totally disabled, claimant did return to work as a mechanic and later as the general manager of a Washington apple orchard. His duties at the apple orchard included pruning, plumbing, spraying, fertilizing, electrical work, bookkeeping and supervision of several employees - rather vigorous activity for a man who perceived himself to be totally disabled. Claimant continued to work at the apple orchard for nearly two years, at which time the business was sold. Claimant subsequently took a job as a maintenance engineer in 1979. Four months later, on November 15, 1979, claimant sustained a back strain injury while reaching down to pick up a piece of pipe that was frozen to the ground. That is the injury that gives rise to the present proceeding.

Claimant was examined by Drs. Kovachevich and Eckman, who diagnosed lumbosacral strain. Dr. Eckman found no neurological problems and no evidence of radiculopathy. A myelogram performed on December 3, 1979 was essentially normal and Dr. Eckman recommended conservative treatment, feeling surgery would not be indicated:

> "The findings are to some extent inconsistent, particularly his sensory examination is not typically organic. His mechanical findings are inconsistent. . . . All of this makes assessment difficult and should alert us that we should not be terribly aggressive from a surgical standpoint at this time, particularly with a normal myelogram, neurological examination, etc."

On January 23, 1980 Dr. Kovachevich reported that claimant was essentially incapacitated by back pain. He stated that he felt claimant did have a problem, but that it would be difficult to pinpoint. He suspected a facet type of disorder. Claimant was referred to the Orthopaedic Consultants for an examination on January 22, 1980. The Consultants diagnosed:

"1. Chronic dorsal and lumbar strain with leg symptoms, by history.

"2. Functional overlay, moderately severe, conversion type.

"3. Obesity."

The claimant was not found to be stationary and Pain Clinic treatment was recommended. Dr. Kovachevich responded that he agreed with the Consultant's report, but that he did not feel claimant's functional overlay problem was that severe.

Claimant was thereafter evaluated at the Northwest Pain Center. Dr. Newman's psychological report of May 6, 1980 states:

"From a psychological perspective this patient appears to have very little interest in changing his situation. He has played a very passive role, if any role at all, in his rehabilitation to this point and appears to be going through the motions."

Dr. Newman felt that claimant had minimal motivation for a return to work. The psychological discharge summary report of June 23, 1980 states:

"This man very openly states that he does not feel that he can go back to work and would like to obtain 100% disability. Any motivation for return to work is minimal. * * * Prognosis for him returning to employment is thought to be minimal at the present time."

The physicians at the Pain Center did express the opinion that claimant would not be able to return to manual labor, an opinion shared by Dr. Kovachevich.

Claimant was thereafter referred for employment placement by the Field Services Division. The Industrial Counseling Service report of September 12, 1980 relates several barriers to successful reemployment of the claimant:

"1. Long history of medical problems.

"2. His belief that he is physically unable to work . . . .

"3. Limited activities and interests.

"4. Secondary gains from pain behavior."

The report further states that claimant had a wide variety of job experience that could be transferred if he were to take an interest.

Claimant returned to the Orthopaedic Consultants on October 2,

1980 for a second examination. The Consultants found claimant to be medically stationary. The diagnosis remained the same as at the time of the last examination with the additional factor of chronic overuse of analgesics. The report stated:

> "It is evident from our evaluation today that this patient will only be interested in returning to work when he is personally ready to do so. We believe he should not return to his previous job . . . . but he would be capable of some other occupation."

The Consultants stated that claimant's previous award was adequate and that additional impairment could not be documented. The Determination Order of November 18, 1980 allowed claimant no additional permanent disability.

The Referee stated:

> "Claimant is not motivated to work, essentially on the basis that he is convinced he is totally disabled. The critical question is, is claimant's belief reasonable."

The Referee concluded that claimant's belief was reasonable on the grounds that claimant had been advised by vocational and medical experts that he was unemployable and that he had in the past returned to work after sustaining injuries. Although he did not articulate the basis for his conclusion, the Referee found claimant permanently and totally disabled apparently not on a medical basis alone, but by a combination of medical and social/vocational factors. The Referee also noted that claimant had a pre-existing tachycardia heart condition.

We disagree with the Referee's conclusion and disagree with the Referee's characterization of this claimant as not unreasonably lacking in motivation.

With regard to claimant's physical condition, the medical information indicates that while claimant cannot return to his previous occupation, he is not totally disabled. In fact, he does not appear to have significant impairment at all. He has no neurologic problems and all myelograms have been normal. No physician has even felt that claimant has exhibited a need for surgery and claimant has undergone no back surgeries. The physical findings from the Orthopaedic Consultant's closing examination of October 2, 1980 are hardly indicative of total disability:

> "Backward bending is about 20% of normal. Sideward bending to the right are roughtly 50% of normal. Rotations to the right and left are 75% of normal. He did not wish to try forward flexion at the waist. * * * Passive motions of both hips are full. Bent-leg testing is 90° bilaterally, being limited by back and hip pain. Straight-leg-raising is estimated to be 15° on the right and 20° on the left, but the

patient was unable to adequately cooperate for this examination."

That is basically the extent of claimant's physical findings other than his complaints of pain which, as frequently noted by various examiners, tend to be exaggerated. Unlike the Referee, we do not find claimant's tachycardia to have pre-existed his injury. Claimant is obviously not permanently and totally disabled from a physical standpoint alone.

With regard to social/vocational factors, the record reveals that claimant is generally of average intelligence and has obtained a GED. He is only 46 years of age and has been engaged in numerous occupations including farm work, military service, new and used automobile sales, medical technician, auto mechanic, grocery clerk, meat cutter, taxi driver, orchard manager, welder, maintenance engineer, electrician, service station work and self-employment. The Industrial Counseling Service believed claimant possessed many transferable skills. We believe that the Referee may have placed too much reliance on the testimony of Mr. Marshall, a rehabilitation counselor who testified in behalf of the claimant at the hearing. Mr. Marshall testified that claimant was qualified for no job positions out of 265 positions tested. However, upon cross-examination, Mr. Marshall indicated that his testing was based on the claimant's preference. For example, if claimant indicated he wanted no job that paid less than $1,250 per month, all jobs that paid less than that were eliminated in Mr. Marshall's assessment. If claimant was not interested in jobs involving repetitive movement, all such jobs were eliminated from consideration. The test appeared to be more of a career preferences type of examination and is worthy of little weight in determining claimant's employability. Claimant's social/vocational factors, far from being detrimental, are, in fact, quite favorable and do little to enhance his argument that he is permanently and totally disabled.

ORS 656.206(3) requires a claimant seeking permanent total disability to establish that he is willing to seek gainful employment and show that reasonable efforts to that end have been made. We do not find that the claimant has poor motivation for returning to work; we find that he has no motivation for doing so. Claimant has made absolutely no effort to return to work or seek new employment following his 1979 back injury. In fact, the record reveals that all of his efforts have been purposely aimed at achieving total disability status. The examiner's reports are replete with such references.

To summarize, we find that claimant is not totally disabled from a physical standpoint. We find that when claimant's social/vocational factors are combined with his physical disability he is still far from totally disabled. We also find that claimant has failed to comply with ORS 656.206(3), and that he has not established that he should be relieved of this statutory obligation.

Having concluded that claimant is not permanently and totally disabled, the next question is the extent of claimant's partial disability. As noted above, claimant has already received 46.875% unscheduled permanent partial disability. It is questionable

whether claimant is currently any more disabled than he was at the time of that stipulated award. The Orthopaedic Consultants stated that they could not document any additional impairment. Considering claimant's past awards, his current work restrictions and his social and vocational factors, we do not find his total loss of earning capacity to be greater than 55%. In fact, we believe that such an award is generous based on claimant's minimal physical findings, broad range of work experience, favorable age, and poor motivation.

ORDER

The Referee's order dated June 29, 1981 is modified. Claimant is awarded 55% unscheduled permanent partial disability, that being an increase of 8.125% over and above the stipulation of April 14, 1975. This award is in lieu of that ordered by the Referee. Claimant's attorney's fee should be adjusted accordingly.

★★★★★★★★★★★★★★★

COLLEEN SCHOLZ, Claimant
Tamblyn & Bush, Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-09195
March 2, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of that portion of Referee Leahy's orders which upheld the insurer's denial of her occupational disease claim for her psychiatric illness. The only issue is compensability.

Claimant contends that the Referee's findings of fact contain numerous errors or mischaracterizations of the evidence. We find that the alleged errors are for the most part argumentative. The few errors that do exist are completely immaterial. Therefore, except as noted herein, we adopt the Referee's findings of fact as our own.

The claimant's condition is variously described as a "panic disorder" and/or agoraphobia with panic attacks. Claimant contends that this "condition" was caused or aggravated by conditions which she experienced at her job as a "Girl Friday" for an insurance brokerage office. Claimant's treating psychiatrist, Dr. Whitney, was of the opinion that claimant had a pre-existing anxious and dependent personality, that she was experiencing stress from various non-work related sources, but that her employment was the major cause of her "panic attacks."

At the request of the insurer, claimant was examined by Dr. Stolzberg, also a psychiatrist. In a very comprehensive report, Dr. Stolzberg concluded that claimant was an individual who could be described as conscientious, perfectionistic, orderly and self-critical and that she had experienced sub-assertiveness, tension, and performance anxiety throughout her life. Dr. Stolzberg felt that claimant was projecting the source of her anxieties from a relationship more personal to herself to a safer and more distant source, that being her employment. Dr. Stolzberg concluded that there was less than covincing evidence to relate claimant's anxiety attacks to her employment.

Considerable testimony was given at the hearing concerning the conditions surrounding claimant's employment as well as problems she encountered in her personal life. The Referee correctly noted that he was not bound to accept a particular medical opinion and that a favorable psychiatric opinion does not necessarily result in a finding of compensability. After considering the medical opinions in light of the extensive testimony, the Referee accepted the opinion of Dr. Stolzberg and concluded that the claimant had not established her employment as the major cause of her condition.

We agree with the Referee's conclusion. The non-medical evidence concerning this claim is as important as the medical evidence, and an accurate conclusion concerning compensability cannot be reached without a thorough weighing of all of the evidence in this case. Part of that process involves determining how much weight to assign the testimony of the respective witnesses. We believe that the Referee in this case was in the best position to make that determination and we will normally defer to that judgment unless there are adequate reasons to do otherwise. We do not find such reasons to be present in this case. We, therefore, agree with the Referee that the evidence when taken as a whole, does not preponderate in favor of compensability.

We note one additional matter. In his supplemental order, the Referee ordered the SAIF Corporation to pay claimant interim compensation, penalties and an attorney's fee. The record indicates that the employer was actually insured by St. Paul Property Company. With that correction noted, we affirm the Referee's order and supplemental order.

ORDER

The Referee's orders dated July 7, 1982 and July 8, 1982 are affirmed as corrected.

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MARJORIE C. SIAS, Claimant
Wiswall, Svoboda at al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-06726
March 2, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of that portion of Referee Peterson's order finding that her psychological illness is not a compensable consequence of her September 1978 industrial injury.

Claimant was voluntarily admitted to the hospital in March 1981 and was diagnosed as suffering from manic depressive illness at that time. Dr. Rinier, the psychiatrist who treated claimant in the hospital, is of the opinion that a causal connection exists between claimant's manic depressive illness, which has since resolved, and cortisone injections administered to claimant for treatment of her compensable orthopedic problems.

Dr. Parvaresh and Dr. Stolzberg, who testified at the hearing, are of the opinion that no such causal connections exists. We are most persuaded by Dr. Stolzberg's testimony that, although there are

cases in which treatment with steroids and cortisone have been found to bring on manic depressive states, the indications in claimant's particular case are that no such cause and effect relationship exists.

Accordingly, we affirm the Referee's conclusion that claimant has failed to satisfy her burden of proving it is more likely than not that her psychological condition was either caused or aggravated by the injections of Solu-Medrol administered by her orthopedic physician.

ORDER

The Referee's order dated May 28, 1982 is affirmed.

★★★★★★★★★★★★★★★

JOHN V. WILGERS, Claimant
Kenneth Peterson, Jr., Claimant's Attorney
Corey, Byler & Rew, Defense Attorneys

WCB 81-08703
March 2, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of those portions of Referee Knapp's order which found him entitled to 20% unscheduled permanent partial disability for injury to the back and affirmed that portion of the September 9, 1981 Determination Order finding claimant to be medically stationary as of July 21, 1981, the date of Dr. Pasquesi's examination. Claimant contends that the Referee's award of permanent partial disability is inadequate and that the Determination Order closed his claim prematurely.

We adopt the Referee's findings of fact as our own.

In support of his argument for increased permanent disability, claimant primarily argues that he has been rendered incapable of performing his occupation of utility lineman for which he was paid approximately $14.50 per hour and that if he returned to his previous occupation of meter reading at $5 per hour, he has suffered a 60% reduction in his wage earning capacity. We disagree. The fact that claimant has been precluded from returning to one particular high paying job is not alone determinative of loss of wage earning capacity. The appropriate test of earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations taking into consideration claimant's age, education, skills and work experience. ORS 656.214(5). Wages alone are not determinative.

Claimant has been precluded from returning to his occupation as a utility lineman. However, claimant is still capable of lifting up to 50 pounds, was only 39 years of age at the time of the hearing, possesses many transferable skills and admitted at the hearing that there were other jobs in the electrical industry that he could perform. Claimant's attempt to utilize the guidelines for the rating of unscheduled disability contained in OAR 436-65-600 to support his argument is commendable. However, the values which he assigns to the various factors are incorrect. A strict application of the guidelines would result in a reduction in claimant's

award. No party to this appeal argues in favor of a reduction. We, therefore, affirm the Referee's finding that claimant has sustained a 20% loss of earning capacity.

Claimant also argues that the Referee partially based his award on claimant's potential for retraining which is prohibited under Gettman v. SAIF, 289 Or 609 (1981). We do not read the Referee's order in that manner, and even if the claimant is correct, we do not find that it would change the result.

With regard to the issue concerning premature claim closure, we affirm and adopt those portions of the Referee's order.

ORDER

The Referee's order dated May 6, 1982 is affirmed.

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CLARENCE ZWALEN, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-07457
March 2, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Menashe's order which upheld the validity of OAR 436-54-320 against a variety of challenges, primarily on grounds that it is inconsistent with statutes and exceeds the Director's rulemaking authority. OAR 436-54-320 governs setoffs of prior overpayment of benefits against future benefits payable.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 9, 1982 is affirmed.

Board Member Lewis Dissenting:

I respectfully dissent. This case presents a direct challenge to the validity of OAR 436-54-320. The majority affirms and adopts the order of Referee Menashe which found the regulation valid. I would find the regulation invalid because I believe it is inconsistent with the workers compensation statutory scheme.

The claimant sustained a compensable injury on November 29, 1976. At some point he was overpaid by the employer. I infer from the sparse facts in the record that the claim was subsequently reopened as an aggravation. In April, 1981 the employer began paying claimant full temporary total disability benefits. On June 1, 1981 the employer reduced the amount of temporary total disability benefits by about 25% to compensate for the alleged overpayment. The employer relies on OAR 436-54-320 as authority for reducing claimant's temporary total disability benefits. The regulation provides:

> "Insurers and self-insured employers may recover overpayment of benefits paid a worker on an accepted claim for benefits which are or may become payable on that claim. Payment of benefits paid prior to denial pursuant to ORS 656.262(5) or paid during appeal pursuant to ORS 656.313 shall not be recoverable under this section.
>
> "(1) Overpayments may be recovered by:
>
> "(a) reduction of continuing temporary disability benefits in an amount not to exceed 25 percent of the benefit without prior authorization from the worker or beneficiary; . . ."

I believe the regulation is void because it is inconsistent with the statutory scheme. A regulation is invalid if it is outside the legislative delegation of authority or is not reasonably calculated to accomplish the legislative purpose. Pacific Northwest Bell v. Davis, 43 Or App 999, 1005 (1979).

There is no specific authority in the Workers Compensation statutes which allows a reduction of temporary total disability to compensate for an overpayment. On the other hand, ORS 656.268(4) specifically provides a mechanism whereby the Evaluation Division can adjust permanent awards to compensate for overpayments. The Legislature clearly knew how to provide for reduction of benefits to compensate for overpayments. If it had desired to allow reduction of temporary total disability benefits it could have done so. Because it did not do so, I conclude that it did not intend to allow reduction of temporary total disability benefits.

Not only is the statute devoid of any authorization for reduction of temporary total disability benefits, I believe that reduction of temporary total disability benefits contravenes the essential purpose of temporary total disability benefits. The Court of Appeals has said the purpose of temporary total disability is:

> "compensation for loss of income until claimant's condition becomes stationary in order to enable claimant to support self and family during that period." Taylor v. SAIF, 40 Or App 437, 440 (1979).

Allowing the employer or insurer to unilaterally reduce temporary total disability benefits may well lead to situations in which a claimant is prevented from supporting self and family while his condition is not stationary.

I recognize that in Stone v. SAIF, 57 Or App 808 (1982), the Court of Appeals cast some doubt on the validity of Taylor by awarding interim compensation to a retired worker. However, in view of the fact that Stone concerned only interim compensation, I

do not believe it is applicable. In Stone the court noted that the purpose of interim compensation is to prevent the employe from delaying acceptance or denial of a claim. I believe that Taylor correctly states the underlying purpose of paying temporary total disability.

This case presents the same type of dilemma the Court of Appeals addressed in Wilson v. SAIF, 48 Or App 993 (1980):

> "The situation with which we are confronted is one in which there are competing policy considerations. On the one hand, there is a patent unfairness in permitting the claimant to retain over $2,800 to which he is not entitled. On the other hand, there is the desirability of maintaining an orderly compensation process . . ." Id at 997.

The court chose the policy of maintaining an orderly compensation process. In this case, the majority chooses to help the employer recover an overpayment at the expense of the claimant's need for support of self and family during a period of disability due to a compensable injury.

I would find this regulation invalid because it is not authorized by the statutes and because it thwarts the purpose of temporary total disability, which is to provide for the claimant and family pending resolution of the claim.

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ROBERT L. AKINS, Claimant
Michael Dye, Claimant's Attorney
Minturn, VanVoorhees et al., Defense Attorneys

WCB 82-01013
March 4, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Daron's order which granted claimant compensation equal to 80° for 25% unscheduled disability, in addition to that awarded by the January 26, 1982 Determination Order, for a total of 144° for 45% unscheduled disability resulting from injuries to the claimant's abdomen, left shoulder and left hip. The Referee also affirmed the Determination Order's award of 22.5° for 15% loss of the left leg in addition to making a separate award for the hip. The insurer contends that the Determination Order award of 64° for 20% unscheduled disability resulting from injury to the abdomen and 22.5° for 15% loss of the left leg (hip) should be reinstated.

We affirm and adopt the Referee's order with the following comment. There was an error in the January 26, 1982 Determination Order in that the claimant's unscheduled left hip disability was rated as a scheduled leg disability; however, SAIF has not requested that the award be eliminated. We generally will not grant greater relief than that which is requested.

The Referee correctly pointed out that the hip disability is to be compensated with an unscheduled award. We have previously held that hip disabilities are to be rated as unscheduled injuries,

rather than as scheduled injuries. See John Cameron, 34 Van Natta 211 (1982). In Cameron, we determined that injuries to the acetabulum, the large cup-shaped cavity on the lateral surface of the os coxae, is an unscheduled injury. In this case, the claimant's injury is to his left acetabulum for which he may eventually require a total hip replacement. The 45% unscheduled award is a fair award when considering claimant's hip disability in addition to his left shoulder and abdomen disability.

ORDER

The Referee's order dated July 29, 1982 is affirmed. Claimant's attorney is awarded $550 as a reasonable attorney's fee for services on review.

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RICHARD BURWELL, Claimant
Bottini & Bottini, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-08088
March 4, 1983
Order of Dismissal

The claimant has requested review of Referee's order dated January 21, 1983. The request for review was filed with the Board on March 3, 1983 , more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

The claimant's request for review is hereby dismissed as being untimely filed.

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MARION L. ELLS, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-03102
March 4, 1983
Interim Order on Remand

On January 26, 1983, the Board received a letter from claimant's attorney requesting that this case be remanded for the introduction of certain documents and the presentation of further evidence. That letter alleges that at the hearing on December 7, 1982, counsel for the SAIF Corporation stated under oath that "SAIF had received no medical reports or billings directly from Dr. Srch." Claimant subsequently received a letter from Dr. Srch on December 16, 1982, enclosing copies of the doctor's bills which have been stamped as "received" by SAIF on April 8, 1982 and September 23, 1982. Claimant's attorney alleges:

> "This office has been aware for a period of time that it has been a practice of the SAIF Corporation to return billing statements to physicians, keeping no copies of returned billings, thereby enabling the SAIF Legal Division to take the position during negotiations or hearings with claimant's counsel that no billings have been presented to the SAIF Corporation or that they know of no billings presented to the SAIF Corporation."

We conclude that this as yet unrefuted allegation justifies a remand for a full development of this issue regardless of what standards we would otherwise apply to a motion to remand.

We retain jurisdiction over this case but remand to the Presiding Referee and direct that a hearing on remand be convened as soon as possible. At the hearing on remand the parties shall be permitted to introduce exhibits and testimony relevant to the issues raised in claimant's counsel's letter quoted above. At the conclusion of the hearing on remand, the Presiding Referee shall forward to the Board the additional evidence admitted and any recommendation the Presiding Referee may choose to make. At that point the Board will establish a briefing schedule and proceed with the review of this case.

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JULIA HACKETT, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-05673
March 4, 1983
Order of Dismissal

The claimant has requested review of Referee's order dated December 29, 1982. The request for review was filed with the Board on February 28, 1983 , more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

The claimant's request for review is hereby dismissed as being untimely filed.

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RICHARD W. HARMON, Claimant
Gerald R. Kolb, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Attorney

WCB 80-05381
March 4, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests review of Referee Mongrain's order which upheld SAIF's denial of claimant's claim for benefits relative to low back surgery performed in May of 1979.

We affirm and adopt the Referee's order, subject to the following comments. There is a conflict in the evidence concerning the nature and extent of claimant's work activities after May of 1978 and before March of 1979. The Referee found that for a year preceding the acute onset of symptoms clearly indicating a herniated disc in March of 1979, claimant was performing heavy work hauling bales of hay. Although Dr. Sulkosky's report of March 29, 1979 indicates that claimant had been working with his father lifting hay, "for the last year or so," other portions of the record indicate that this may have been a misunderstanding on the part of Dr. Sulkosky. Dr. Miller's report, for example, states that claimant had been working at odd jobs since May of 1978, when his driver's license was revoked; and that "the last [job] was helping haying or loading hay at a nearby ranch."

Resolving this ambiguity in claimant's favor, we still are unable to conclude that he has satisfied his burden of proving by a preponderence of the evidence that his 1977 industrial injury was a material contributing cause of the herniation of his lumbo-sacral disc and the surgery necessitated thereby. Grable v. Weyerhaeuser Company, 291 Or 387, 401 (1981). Although Dr. Miller was the physician who performed the surgery, his opinion regarding causation is not based upon any findings made during, or as a result of, the surgical procedure. His opinion, like Dr. Tennyson's, is based upon the medical records generated as a result of claimant's original injury together with claimant's history. His opinion, therefore, is not entitled to any greater weight than Dr. Tennyson's simply by virtue of the fact that he was the operating physician. Cf. Richard L. Schoennoehl, 31 Van Natta 25 (1981), aff'd., 51 Or App 998 (1981).

Considering Dr. Miller's explanation of causation, Dr. Tennyson's contrary opinion, and the evidence concerning claimant's general complaints of continuing and gradually increasing complaints of pain subsequent to his 1977 injury, we find the evidence is in equipoise. Accordingly, claimant cannot prevail.

Claimant's attorney asserts entitlement to a reasonable attorney's fee for prevailing before the Referee on the issues concerning SAIF's denial of claimant's status as a subject worker. SAIF's denial dated April 28, 1980 is based on claimant's alleged status as a California worker; however, one of the issues at the hearing, as stated by claimant's attorney in his opening remarks, was "whether or not this injury is a compensable injury." Claimant does not seem to suggest that SAIF was estopped from denying causation by its failure to issue a denial stating this as its reason. Claimant's attorney, however, maintains that he should receive a fee for establishing that, contrary to the assertion set forth in SAIF's denial, claimant was a worker entitled to benefits under Oregon's workers compensation law.

Although counsel has been instrumental in establishing this fact, and SAIF has not raised this issue on review, claimant has not benefited by receiving the benefits claimed. Although claimant might have been entitled to receive interim compensation as of the 14th day after he filed his claim with the employer (there is an 801 form in evidence signed by claimant and apparently dated December 17, 1979, date-stamped received by SAIF August 6, 1980) and the date of SAIF's denial, see Bell v. Hartman, 289 Or 447 (1980), and Ronald D. Brown, 34 Van Natta 1004 (1982), no such issue was raised; and we have no way of knowing from the record whether claimant did or did not receive interim compensation.

ORDER

The Referee's order dated March 31, 1982 is affirmed.

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LORETTA M. HODGES, Claimant
Wheelock, Niehaus et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-07667
March 4, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Menashe's order which upheld the SAIF Corporation's denial of her occupational disease claim.

Claimant has moved to remand this case to the Referee for further evidence taking. Such motions are governed by the standards set forth in Ora Conley, 34 Van Natta 1698 (1982), and Robert Barnett, 31 Van Natta 172 (1981), which generally require a specific showing that material evidence could not reasonably have been discovered and produced at the hearing with due diligence.

Claimant seeks remand to introduce evidence that, since the hearing, she has been dismissed from her "employment due to recurring debilitating effects of cellulitis and thrombo-phlebitis." While we agree that evidence about events that do not occur until after a hearing cannot, with any level of diligence, be produced at a hearing, we fail to see the materiality of this additional evidence. The only issue in this case is compensability. Dismissal from employment does not tend to prove or disprove compensability; nor, for that matter, would continuing to work tend to prove or disprove compensability. The motion to remand is denied.

With regard to the issue concerning compensability, we affirm and adopt the order of the Referee.

ORDER

The Referee's order dated June 7, 1982 is affirmed.

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WARREN E. LANE, Claimant
Wiswall, Svoboda et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05870
March 4, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of that portion of Referee Baker's order which declined to order the SAIF Corporation to pay temporary total disability for a particular time period. In addition, claimant has submitted a motion to remand this case to the Referee for consideration of newly discovered evidence. The issues are whether to remand and, if not, whether claimant is entitled to time loss for the period in question.

Claimant filed a claim for low back and arm/elbow symptoms arising out of falls at work on January 23 and 25, 1981. X-rays confirmed that claimant had preexisting degenerative osteoarthritis of both the cervical and lumbosacral spine. Claimant missed no time from work and the claim initially was accepted as nondisabling.

On May 16, 1981 claimant quit work. Medical reports submitted thereafter were treated as an aggravation claim. In June of 1981 SAIF denied the aggravation claim with respect to both the ulnar nerve/elbow condition and the low back condition. On February 22, 1982 claimant underwent surgery to correct the ulnar nerve condition which had been diagnosed as causing most of claimant's arm and elbow symptoms. In March of 1982, SAIF reopened the claim and the next month SAIF accepted the ulnar nerve condition. SAIF paid time loss from the date of the surgery, but not prior thereto. Thus, at issue is the period from May 16, 1981, when claimant quit work, to February 22, 1982, the date of the surgery.

I.

The preliminary issue is whether this case should be remanded to the Referee for consideration of newly discovered evidence. There are two different documents or sets of documents offered by claimant. The first document appears to be an Oregon Employment Division form signed on November 10, 1981 by Dr. Lundsgaard, one of claimant's treating physicians, indicating that claimant was disabled from January 23, 1981 through November 9, 1981. Claimant avers by affidavit that he discovered this document in October of 1982 when he and his wife were going through their tax records. The hearing was held in this case in May of 1982 and the Referee's order issued on June 29, 1982.

The second set of documents consists of a report from Dr. Lundsgaard prepared in October, 1982, together with a statement of restrictions on claimant's activities and a job description of the job in which claimant was engaged at the time of his injury (boiler tender), tending to indicate that claimant cannot return to that employment.

With respect to Dr. Lundsgaard's November 10, 1981 report, the document was in existence and apparently in claimant's possession at the time of the hearing. It is apparent from the transcript that in late 1981 claimant was concerned with his entitlement to unemployment compensation benefits because of his disability status. Claimant must have been aware that a medical report had been generated addressing that issue; at least claimant does not allege that he was not aware of it. The burden is on the claimant to demonstrate that in the exercise of due diligence the report could not have been made available at the time of the hearing. Ora M. Conley, 34 Van Natta 1688 (1982); Robert A. Barnett, 31 Van Natta 172 (1981). He has failed to show why he did not search for and produce this document prior to the hearing.

The other set of documents offered by claimant have even more serious defects. First, although the October, 1982 report from Dr. Lundsgaard was not prepared until long after the hearing, there has been no showing why the job description was not furnished to the doctor prior to the hearing and an opinion requested. Second, claimant underwent surgery in February, 1982 and the doctor's report appears to address claimant's condition in October, 1982. The issue here, of course, is claimant's ability to work from May,

1981 to February, 1982. Lastly, Dr. Lundsgaard's report purports to indicate that the reason claimant cannot return to his prior employment is because of a 30 pound lifting limitation. There is no indication whether the lifting limitation is due to claimant's back condition (which is in denied status) or his ulnar nerve condition (the only accepted condition). Thus, it appears that, as to the second set of documents, claimant has not only failed to demonstrate that they could not have been obtained in the exercise of due diligence, but he also failed to demonstrate that they are material and relevant to what is at issue in this proceeding.

We decline to remand this matter to the Referee for consideration of the evidence offered by the claimant.

II.

On the merits of the claim, we agree with the Referee that the claimant has failed to prove entitlement to time loss during the period in question. The claimant seizes upon one sentence in the Referee's order and characterizes the issue as "whether there must be express medical authorization to discontinue working and receive temporary compensation where the claim previously has been accepted as nondisabling."

We do not believe it is necessary to reach that legal/policy question in this case. We believe that SAIF correctly characterizes the Referee's sentence in context as indicating that, given the ambiguity and conflicts in the medical reports as to whether claimant was disabled because of the accepted ulnar nerve condition or the denied low back condition, some clear medical statement of an inability to work due to the ulnar nerve condition was necessary as a factual matter to shore up claimant's alleged entitlement to time loss. Claimant testified that he quit working in May, 1981 because his right arm became virtually useless. Yet, in the report of Dr. Bender, the first physician claimant saw after quitting work, little mention is made of arm problems. Dr. Bender's report refers primarily to claimant's back pain which be believes arose from claimant's underlying and progressively worsening osteoarthritic condition. Also, one of Dr. Lundsgaard's reports contains a reference to claimant having retired from working as a boiler tender because of his spinal osteoarthritic condition.

On this record we reach the same conclusion as the Referee, namely, that claimant has not proven that he quit work and remained off work because of his ulnar nerve condition.

ORDER

The Referee's order dated June 29, 1982 is affirmed.

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ROBERT E. LEE, Claimant
Hayner, Waring et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-05622
March 4, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Shebley's order which, in relevant part, affirmed the Evaluation Division's determination of the medically stationary date as set forth in the Determination Order, awarded 10% unscheduled permanent disability for claimant's back condition, and allowed the employer to take an offset for an overpayment of temporary total disability. In its reply brief, the employer challenged that portion of the Referee's order which reversed its denial of the compensability of claimant's left leg (thigh pain) condition.

Except as inconsistent with our findings and conclusions herein, we adopt the Referee's findings of fact which, in brief, are as follows. Claimant sustained a compensable low back injury in November, 1979 while working as a charger operator in a lumber mill. He was treated by Dr. Whitney, orthopedic surgeon, who diagnosed lumbar disc syndrome and a probable L4-5 tear without rupture. Claimant began experiencing pain in his left thigh within a week after the injury. Dr. Whitney initially thought the thigh pain was related to the injury; however, in September, 1980, he began expressing uncertainty whether the thigh pain was related to the back condition because the back condition was getting better but the thigh pain persisted. X-rays and tomograms then revealed the existence of a defect on claimant's left femur.

On the basis of this evidence, Dr. Whitney began opining that he did not know the etiology of the thigh pain but continued to follow claimant's progress with respect to his back and thigh pain. In September, 1980, claimant's back had improved sufficiently to enable him to be released for light work. Dr. Whitney's chart notes indicated that claimant was still experiencing leg pain and discomfort. On December 30, 1980, claimant was referred to the Orthopaedic Consultants who found that claimant's back condition was medically stationary, that claimant's thigh pain was a continuing problem but not related to the compensable injury, that claimant was subject to work restrictions, but that he had sustained no loss of function in the back due to the injury. Dr. Whitney concurred with the Consultant's findings regarding the back condition, but indicated that he still was not sure concerning the nature of the femur defect and whether the pain claimant was experiencing in the thigh was related to the back condition. The claim was submitted for closure and a Determination Order issued on March 5, 1981 awarding time loss through December 30, 1980 and no permanent disability.

Claimant was seen by Dr. Whitney on March 17, 1981 with complaints of increased back pain related to activity. In April, 1981 Dr. Whitney reported that claimant was "still on light duty, and this may be a permanent relationship . . . as any increase in his physical activity does cause a recurrence of some back pain as well as an exacerbation of the leg pain." In a report prepared on May

20, 1981 (we find misdated as May 20, 1980), Dr. Whitney declared claimant's back condition stationary with permanent disability limiting claimant to light work. In July, 1981, the employer issued a denial of liability for claimant's left leg condition.

With respect to the thigh aspect of claimant's condition, throughout the recovery period for the low back aspect of claimant's condition, Dr. Whitney continued to administer tomograms and x-rays and monitor changes, if any, in the femur. Dr. Whitney's chart notes reflect that there was improvement in claimant's thigh condition in June 29, 1981 and that claimant was released for regular work on August 18, 1981. The parties referred to claimant being released for regular work or returning to work in July, 1981. We cannot find evidence of that but we will assume that claimant was released or actually returned to his regular work, or both, in July, 1981.

In his deposition, Dr. Whitney testified that he ultimately became satisfied that claimant's femur defect was in fact a developmental, asymptomatic anomaly that played no role in claimant's thigh pain, and that it was medically probable that the thigh pain was related to the compensable back pain. He based this opinion on the fact that the defect did not change over the period of months that it was followed; that such defects can develop during a person's adolescence and remain asymptomatic; that there was a change in the pain claimant experienced in his thigh not reflected by changes in the x-rays and tomograms of the femur defect; that the onset of the thigh pain coincided with the back injury, and to some extent, changes in the thigh pain tended to coincide with changes in back pain; and that a common residual of back injuries is the type of referred pain claimant experienced here.

I.

With respect to whether the thigh pain is a compensable consequence of the accepted low back condition, we agree with the Referee that it is. Claimant's treating physician followed claimant over a significant period of time and monitored both claimant's symptoms and changes in the femur defect. In so doing, Dr. Whitney was able to exclude other possible pain-producing causes of the defect and satisfy himself that the defect was a benign developmental malformation and that it was medically probable that the thigh pain was referred pain from the back injury. The employer criticizes Dr. Whitney's conclusion because the thigh pain claimant feels is not related to the sciatic dermatome and because Dr. Whitney was unable to explain how the phenomenon of referred pain, or "mechanical radiation" of pain works. However, Dr. Whitney's conclusion is supported by Dr. Bernstein, the employer's consulting physician, who reviewed Dr. Whitney's deposition and submitted a report opining as follows:

> "I would agree with Dr. Whitney that there is such an entity as 'mechanical radiation' of back pain, which is unrelated to direct nerve root irritation. I would further agree with him that this is a very common cause of thigh pain, although I am not sure that it is more common than 'sciatic nerve'

> or lumbosacral root irritation caused by disc or spondylitic disease.
>
> * * * *
>
> "I further sympathize with Dr. Whitney's difficulty in presenting a coherent pathophysiologic mechanism for this phenomenon . . . as so often occurs in medicine, we have a very limited understanding of this entity."

II.

Determining when claimant became medically stationary is more difficult. Apparently, as of December 30, 1980, the unanimous expectation of the Orthopaedic Consultants and claimant's treating physician was that there would be no further improvement or deterioration in claimant's back condition, and that claimant was permanently restricted to what Dr. Whitney characterized as "light work." However, by August, 1981 claimant had obtained a release to return to his regular work as charger operator which we find to be heavy work. In the meantime, in March, 1981, claimant experienced what could be considered an aggravation of his back condition, and Dr. Whitney declared claimant's back medically stationary again in May, 1981.

It does not appear that any physician has rendered an opinion as to whether or when the thigh aspect of claimant's condition became medically stationary. Pending a definitive diagnosis of the exact nature of the thigh condition, treatment appears to have been limited to palliative pain relief. The Referee reasoned that since the thigh pain arose from the back condition, therefore, the thigh condition became medically stationary at the same time as the back condition. Clearly, from the medical evidence, that proposition cannot be sustained. Dr. Whitney testified that there was a correlation between changes in claimant's back pain and the referred thigh pain, but his chart notes indicate that there was not an exact correlation because the two aspects of claimant's condition worsened and improved at somewhat different times. Most notably, claimant's back had been stable for some time when, in June, 1981, Dr. Whitney observed further improvement in the thigh pain, and shortly thereafter claimant was released for regular employment and returned to regular employment.

With the benefit of hindsight, it appears that claimant did not obtain maximum improvement in the totality of his condition until July or August 18, 1981. Because we are unsure precisely when claimant was released for regular work and returned to regular work, we will establish August 18, 1981 as the medically stationary date, and award temporary disability through that date, less time worked. In light of this award of time loss, it follows that there is no overpayment of temporary disability to deduct from claimant's permanent disability award and that portion of the Referee's order will be reversed.

III.

With respect to the extent of disability issue, the record does not indicate that the thigh pain has resulted in any loss of function in the leg, nor has claimant contended that he is entitled to an award of scheduled disability. Based on our de novo review of the evidence, considering that claimant's impairment is limited to some restrictions in lifting and bending and that he has returned to his regular occupation, and considering further his age (37) and his two years of college, we are satisfied that the Referee's award of 10% permanent disability very generously compensates claimant for his loss of wage earning capacity. The employer has argued only that claimant is entitled to no more permanent disability than that awarded by the Referee, therefore, we affirm that portion of the Referee's order.

ORDER

The Referee's order dated May 25, 1982 is modified. Claimant is awarded temporary total disability through August 18, 1981, less time worked. That portion of the Referee's order allowing the employer to deduct an overpayment is reversed. The remainder of the order is affirmed. Claimant's counsel is allowed 25% of the increased temporary disability awarded by this order, up to a maximum of $400.

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ERIC MAUSER, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 82-00480 & 81-02308
March 4, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation, as insurer for Albany Iron Works, requests review of Referee Foster's order which set aside its denial of March 4, 1982 and approved the December 3, 1981 denial issued by EBI Companies, as insurer for L & M Welding Incorporated.

The only issue is responsibility between two employers. Neither SAIF nor EBI denies the compensability of claimant's back condition. The Referee concluded that the claimant's back difficulties, beginning in October of 1981, represented an aggravation of his compensable injury of July 24, 1980, rather than a new injury for which EBI would be responsible. We disagree and reverse.

Claimant was employed by Albany Iron Works, when, on July 24, 1980, he suffered a back injury while pulling some steel rods out of a pile of scrap steel. Dr. Fitchett diagnosed a back strain superimposed upon a preexisting spondylolisthesis. Claimant was treated conservatively with physical therapy and later entered an approved program of vocational rehabilitation in welding at Linn-Benton Community College.

On April 24, 1981 claimant was examined by the Orthopaedic Consultants. The Consultants found claimant to be medically stationary with mild residual impairment of the lumbar spine secondary to his injury. The prognosis was guarded, however, with recurrent problems expected if claimant continued in heavy work. The Consultants stated, "We would note that the potential for recurrent problems is related to his pre-existing structural deformities." Dr. Fitchett concurred with the report.

Claimant continued in his training program until August of 1981 when he secured employment with L & M Welding as a painter and light welder. L & M was insured by EBI. L & M was initially very reluctant to hire the claimant due to his history of back difficulty. An employment agreement was entered into, however, whereby the Worker's Compensation Department agreed to subsidize the employer's wage payments to the claimant. Apparently, L & M was also assured that it would not be responsible for claimant's back condition and that the Second Injury Reserve Fund would be utilized. A Determination Order issued on September 1, 1981 allowing claimant benefits for temporary total disability and 5% unscheduled permanent partial low back disability.

Claimant experienced no difficulties while working for L & M until late October of 1981 when he began noticing back pain and exhibited a limp. His employer suggested that he see a doctor. Claimant was initally examined by Dr. Drost, an osteopathic physician, and Dr. McBride, a chiropractor. He then returned to Dr. Fitchett who indicated in his chart notes of November 23, 1981 that claimant was demonstrating L5 nerve root irritation in addition to his spondylolisthesis. Dr. Fitchett stated that claimant would be temporarily unable to work.

Claimant filed a Form 801 with L & M on November 25, 1981. On December 31, 1981 EBI denied the claim on the basis that claimant's condition represented an aggravation of his July 24, 1980 injury. EBI requested the Department to designate a paying agent pursuant to ORS 656.307. On February 9, 1982 SAIF accepted the claim, thus abrogating the need for a .307 order. On March 4, 1982, however, SAIF revoked its previous acceptance of the claim. On March 12, 1982 an order pursuant to ORS 656.307 issued, designating EBI as the paying agent pending a hearing on the matter.

The Referee concluded that claimant had suffered an aggravation of his previous injury. He stated that the evidence indicated that any activity which the claimant may have engaged in, work or otherwise, would have had the same effect on his back, and that merely because the work activities caused the difficulty, it was not necessarily the responsibility of the last employer. We disagree.

We find that the evidence is supportive of the conclusion that responsibility for claimant's October, 1981 back condition rests with EBI. Claimant testified that prior to going to work for L & M he experienced virtually no difficulty with his back and that he was able to engage in fishing and waterskiing. Claimant indicated that the back pain he experienced in October of 1981 and thereafter was the same type of back pain he experienced previously, but

that this time the pain traveled into his leg, whereas it had not before. In his January 21, 1982 report, Dr. Fitchett stated that claimant was ". . . symptom-free in the summer of 1981 and functioning in a relatively strenuous fashion without any symptoms at all."

On October 23, 1981, Dr. Fitchett reported:

> "I felt that my restrictions were based on his pre-existing condition and am concerned that he not develop a new musculoligamentous strain episode. Certainly his pre-existing condition of spondylolisthesis makes new episodes more likely, especially if he puts his back into position of poor biomechanical support." (Emphasis added.)

Dr. Fitchett reported further on January 21, 1982 that claimant did not suffer a specific injury at L & M, but that his back pain began to develop gradually. He stated that he felt the major cause of claimant's difficulty was his pre-existing spondylolisthesis and that:

> "Because of this basic and underlying condition, even when he is asymptomatic, mechanical stresses which could normally be handled without any problem can produce an overuse situation . . . I think this recent episode has demonstrated that the patient, even when he reaches a completely asymptomatic condition, does require permanent restrictions so that he avoids those types of stresses, mainly activities that involve repeated bending and stooping, and repeated lifting of weights and carrying of weights." (Emphasis added.)

We think that Dr. Fitchett is clearly stating that it was claimant's employment activities with L & M that produced this new episode of back difficulty. This is exactly what he noted could occur in his report of October 23, 1981. This interpretation is further supported by Dr. Fitchett's report of January 25, 1982 where he states:

> ". . . he had built himself into a stable condition where stresses across the back were handled by his slightly weakened spine and his somewhat strengthened musculoligamentous structures; however, activities that do involve frequent bending, stooping and lifting may well overstress the back and produce symptoms arising from any of those back structures . . . I think his activities at L & M did, indeed, aggravate his underlying condition to the point that he did develop further and new symptoms referable to his back." (Emphasis added.)

Despite his use of the term "aggravate," Dr. Fitchett's statement is consistent with the notion that claimant's work activities at L & M were responsible for the back difficulty in that the activity worsened claimant's underlying condition resulting in increased symptomatology.

The fact that claimant suffered a gradual worsening of his back condition with no specific traumatic incident occurring at L & M does not necessarily mean that the test articulated in Inkley v. Forest Fiber Products Co., 288 Or 337 (1980), must be applied. Boise-Cascade Corp. v. Starbuck, 61 Or App 631 (1983). In fact, this case is factually similar to Starbuck, where the last-injurious exposure rule was applied to find that a claimant who had suffered a gradual worsening of his back condition sustained an aggravation rather than a new injury. The claimant in the current case, however, was virtually completely asymptomatic prior to his new employment, unlike the claimant in Starbuck, whose back remained constantly symptomatic prior to and throughout his new employment. See Terry L. Starbuck, 34 Van Natta 81 (1982). The period of relative stability prior to the new employment, the increased pain and appearance of L5 nerve root irritation, leg pain and disability, none of which had been present before, combined with Dr. Fitchett's opinions point to the conclusion that claimant's employment at L & M contributed independently to claimant's current condition. Clayton's Automotive v. Stayton Auto Supply, 54 Or App 980 (1981). Therefore, under Smith v. Ed's Pancake House, 27 Or App 361 (1976), responsibility for the current claim rests with EBI rather than SAIF.

Claimant's attorney is entitled to an attorney fee for services rendered on Board review. Robert Heilman, 34 Van Natta 1487 (1982).

ORDER

The Referee's order dated July 22, 1982 is reversed. The SAIF Corporation's letter of denial dated March 4, 1982 is approved. The December 31, 1981 denial issued by EBI is set aside and the claim remanded to EBI for the payment of compensation as authorized by law until closure pursuant to ORS 656.268.

That portion of the Referee's order which ordered the SAIF Corporation to pay claimant's attorney the sum of $1,000 as an attorney's fee for services rendered at the hearing is also reversed. EBI is ordered to pay claimant's attorney the sum of $1,000 for services before the Referee.

Claimant's attorney is awarded an attorney's fee of $275 for services before the Board, payable by EBI.

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MARY O'LEARY, Claimant
Judy Danelle Snyder, Claimant's Attorney
Bruce Bottini, Defense Attorney

WCB 80-07237
March 4, 1983
Order of Dismissal

The claimant has requested review of Referee's order dated December 14, 1981. The request for review was filed with the Board on February 2, 1983 , more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

The claimant's request for review is hereby dismissed as being untimely filed.

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LOUISE W. THOMAS, Claimant
Gary Susak, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05919
March 4, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation requests review of Referee Danner's order which found claimant's carpal tunnel condition was a result of her compensable injury of November 2, 1978.

We adopt the Referee's findings of fact as our own. This case involves three employers, all insured by the SAIF Corporation. Occupational disease claims were filed against all three for claimant's bilateral carpal tunnel syndrome. In addition, claimant filed an aggravation claim against the first employer, alternatively alleging her condition was the result of a November 2, 1978 compensable injury.

We agree with the Referee that claimant has failed to prove her condition is a compensable occupational disease chargeable to any of the three employers. None of the medical evidence supports a finding that claimant's employment was the major cause of her condition.

The remaining question is whether claimant's condition is actually an aggravation of her 1978 claim.

The first mention of numbness in claimant's hands is found in a 1974 chart note written by Dr. German, claimant's then treating physician. He indicated she was complaining of problems in both her hands and her feet, and he felt that the problem might be due to vascular instability. No further mention of hand complaints appears until the report of the Orthopaedic Consultants in March of 1980.

Claimant's injury in November 1978 occurred when she fell down several stairs at her place of employment. Claimant was holding onto the bannister with her right hand when it came loose. As she fell, she twisted her body in an attempt to protect herself. No

hand complaints were made at that time. In fact, claimant was able to return to her regular employment, which entailed production typing for at least six hours a day, with no complaints. It was not until claimant changed jobs in June of 1979 that she began to notice problems in her hands and fingers.

Dr. Button, a hand specialist, felt that claimant's November 1978 injury was probably the most significant factor in claimant's current condition. He stated in his deposition: "It's an assumption on my part that it was related somehow to the fall because carpal tunnel can occur after injury." He continues by stating:

> "It's very common after fractured wrists, and you can see it in people that have wrist sprains or a great deal of swelling, continuing in repetitive type work, where they will then become symptomatic. That's a fairly frequent occurrence."

Dr. Button assumes facts not in evidence. He first apparently assumes trauma to both wrists, but there is only a history of right wrist involvement in the 1978 accident. He also bases his opinion on his experience with people who have fractured their wrists or sprained them, conditions which we would expect to be manifested immediately and which would, of course, cause problems if the injured person were to continue to perform repetitive work, such as typing. Because of these flaws in Dr. Button's explanation of his opinion, we are not persuaded that claimant's bilateral carpal tunnel syndrome is causally related to her November 2, 1978 industrial injury.

ORDER

The Referee's order dated June 18, 1982 is affirmed in part and reversed in part.

That portion of the Referee's order which remanded claimant's aggravation claim to SAIF Corporation for acceptance and payment of compensation is reversed. SAIF's June 17, 1981 denial is reinstated and affirmed.

The remainder of the Referee's order is affirmed.

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ARNOLD L. WEBBER, Claimant
Coons & McKeown, Claimant's Attorneys
Ackerman et al., Attorneys
SAIF Corp Legal, Defense Attorney
Moscato & Meyers, Defense Attorneys

WCB 80-03390 & 81-04831
March 4, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review, and the claimant and EBI Companies have cross-requested review, of Referee Mannix's order which in relevant part: (1) reversed SAIF's denial of claimant's aggravation claim; (2) established a medically stationary date relative to the aggravation claim and awarded temporary total disability and permanent disability; (3) reversed EBI's denial of claimant's new injury claim; and (4) established a medically stationary date relative to the new injury claim and awarded temporary disability, but no permanent disability, arising from this claim.

The issues on review are: (1) whether any compensable event occurred on August 14, 1980 while claimant was employed by EBI's insured; (2) if so, whether the incident was an aggravation of claimant's 1976 injury when he was employed by SAIF's insured, or a new injury, or both; (3) extent of permanent disability; and (4) the propriety of the Referee's action in "apportioning" between SAIF and EBI time loss incurred by claimant after the August, 1980 incident.

In his reply brief, claimant raised issues concerning whether the new injury claim had been prematurely closed and whether penalties and attorney's fees should have been imposed. These issues were not raised at hearing and it is likely that the presentation of evidence would have been different had those issues been raised in a timely manner. Therefore, we decline to consider issues on review which have not been considered at hearing. Russell v. A & D. Terminals, 50 Or App 27 (1981), Mavis v. SAIF, 45 Or App 1559 (1980).

The Referee's order consumed over 26 pages of text and included a detailed discussion of the evidence, detailed findings of fact, and conclusions and reasoning. We have reviewed the record de novo and agree in toto with him, but feel that some of the parties' contentions on review warrant comment. Therefore, we affirm and adopt the Referee's order with the following comments.

The case is somewhat unusual because the Referee found that a single incident, the one occurring on August 14, 1980, was not only a compensable event but aggravated a previous industrial condition and constituted a new injury. However, the record supports these findings, and these findings are crucial to the other issues and contentions in this case. Claimant's condition arising from his 1976 industrial injury was a low back and leg condition. The Referee found, and we agree, that the lifting incident in August, 1980 temporarily exacerbated this condition. The Referee also found, and we agree, that the lifting incident caused a thoracic strain which manifested itself in chest and mid to upper back symptoms. Given the medical evidence in this case, the injury to the thoracic area does not represent a worsening of the low back condition but rather it constitutes a separate condition.

Because we are dealing with two separate conditions, the only relevance of the last injurious exposure rule would be to determine whether the 1980 incident independently contributed to the low back condition. The Referee correctly determined that it did not and that the 1980 incident merely temporarily worsened his symptoms. It follows that claimant sustained a temporary aggravation of his low back condition.

The Referee also correctly found that the August, 1980 incident caused a thoracic strain, that the strain caused a brief period of total disability, but that no permanent impairment resulted from that condition. EBI, the "new injury" insurer, citing our decision in Dean Planque, 34 Van Natta 1116 (1982), argues that the claim should be disallowed altogether because claimant intentionally engaged in unreasonable conduct by returning to employment involving potentially heavy lifting and carrying when he had been advised by his physician to avoid such work. In Dean Planque, we disallowed an aggravation claim arising from a fall claimant sustained while attempting to go fishing when he was still recovering from his injuries and had a cast on.

Planque is inapplicable because that case involved an off-the-job incident whereas this case involves work activities. This difference is significant because the negligence or misconduct of a claimant engaged in work activities at the time of an injury generally is irrelevant to the determination of compensability of a workers compensation claim. Even if reasonableness could ever be a factor to consider, claimant did not act unreasonably. Lifting, carrying and other restrictions are frequently placed on patients with back conditions out of a surfeit of caution and not because the restrictions necessarily reflect actual impairment. In fact, one physician's report in the record notes that the doctor specifically cautioned claimant to that effect. Claimant was well within his rights to take such work as he could find to determine his true capabilities. We also note that EBI's insured hired claimant with knowledge of his back condition. In retrospect, we feel, as the Referee noted, that claimant's efforts to return to work were misguided considering the extent and type of disability he has, but we cannot say that, at the time, claimant acted unreasonably.

SAIF and the claimant argue that the Referee inappropriately "apportioned" the time loss incurred by claimant following the August, 1980 incident. Actually, the Referee did not "apportion" the time loss in the sense that he ordered the insurers to pay time loss for the same time period. The Referee found that immediately after the lifting incident and for several months thereafter, it was the pain from the low back condition which rendered claimant disabled. After that condition resolved and returned to its pre-August, 1980 condition, the upper back symptoms became more prominent and rendered claimant disabled for a short period of time. Accordingly, the Referee correctly ordered SAIF to pay the first period of time loss and EBI the second period of time loss. Although it is unusual to "apportion" between the aggravation insurer and the new injury insurer the time loss incurred by a claimant after an industrial incident, in this case the evidence supports the Referee's action.

With respect to claimant's extent of permanent disability, the initial Determination Order ordered 10% unscheduled disability for claimant's low back condition. Subsequent Determination Orders ordered additional time loss but did not change the permanent disability award. The Referee awarded 30% unscheduled permanent disability. SAIF contends that that award is excessive. The claimant contends that the award should be 60%.

Evaluating the extent of disability highlights one additional aspect of this case that is unusual in our experience. It is well documented in the record that claimant's objective impairment is very minimal but that he suffers from conversion reaction and experiences substantially more pain than normally would be expected. However, the reports of orthopedic examinations have noted no functional disturbance or interference in the evaluation by claimant. Physicians' estimations of impairment have ranged from mild to moderate degrees of impairment. Considering the type of low back surgery claimant underwent (bilateral laminectomy and discectomy), a very minimal loss of range of motion, and the disabling pain, an impairment value of 20 is warranted.

The only other significant disability rating factors are claimant's age (now 48) and the fact that he is now restricted to light or medium work whereas formerly he was capable of heavy to very heavy work. Combining the values arising from these factors in the manner provided in the disability evaluation guidelines (OAR 546-65-600, et seq.) yields a rating of 30% unscheduled permanent disability. Comparing this case to similar cases, we conclude that the Referee's award of compensation accurately reflects claimant's loss of wage earning capacity arising from the 1976 injury.

ORDER

The Referee's order dated July 2, 1982 is affirmed. Claimant's attorney is awarded $250 as and for a reasonable attorney's fee for successfully defending the Referee's award of permanent disability.

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ROBERT B. WOODRUFF, Claimant
Lyle Velure, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04854
March 4, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Foster's order which upheld the SAIF Corporation's denial of claimant's occupational disease claim. The issue is compensability. We agree with the Referee's conclusion, but do not agree with all of the Referee's analysis.

This claim is for hepatitis type B, a communicable viral disease. Claimant's work as a police officer involved transporting alcoholics to and from a detoxification center. Dr. Bury opined that, although it was possible that claimant was exposed to hepa-

titis off the job, it was more probable that claimant contracted the disease in the course of his work. Although Dr. Bury does not so state, his opinion is apparently based on the belief that the clientele of a detoxification center are more likely to be a contagious source of hepatitis.

In Barbara Wasson, 34 Van Natta 1094 (1982), we discussed at length the problems that can be presented with claims for relatively ubiquitous viral infections. Wasson involved exposure "to some virus, probably chicken pox." 34 Van Natta at 1094. Most of the same problems we discussed in Wasson are present in this case: (1) here there is no actual evidence of at-work exposure to hepatitis virus, although such exposure could be inferred; (2) here, most significantly, there is no evidence (or even evidence that would support a reasonable inference) that it was any at-work exposure that actually infected claimant; and (3) the requirement of ORS 656.802(1)(a), that the disease be something that a worker is not ordinarily exposed to except in employment, has not been satisfied.

ORDER

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

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ROSE HESTKIND, Deceased
Norman L. Lindstedt, Attorney
Wolf, Griffith et al., Attorneys

WCB n/a
March 8, 1983
Order Approving Third Party Settlement

This matter is before the Board on the application of the personal representatives of the worker, who is deceased, for approval of a settlement of a third party action presently pending in Multnomah County Circuit Court. ORS 656.587. Plaintiffs and defendants have agreed to settle the pending wrongful death action for the sum of $245,000. The industrial insurer refuses to approve this settlement offer, claiming that if the case proceeded to trial, the jury's verdict would be likely to exceed the settlement amount negotiated by the parties to the third party action. The amount of the settlement offer will not completely satisfy the industrial insurer's lien for claim expenditures, and it, therefore, is withholding its approval of the settlement for this reason as well. See ORS 656.580(2), 656.593.

Plaintiffs' attorney, by way of affidavit, has stated his reasons for believing that the settlement amount is reasonable, based upon the facts that would be presented to the jury as well as the existence of a legal defense asserted by the third party defendants, which, if well-founded, would prevent any recovery as a matter of law.

We, therefore, are called upon to attempt to evaluate the merits of the legal defense, as well as the contingencies involved in forecasting a jury's verdict. We find that we are in no better position than the parties to the third party action to evaluate the possible outcome of this litigation. In exercising our authority

pursuant to ORS 656.587, we will approve settlements negotiated between a claimant/plaintiff and a third party defendant unless the settlement amount appears to be grossly unreasonable.

Applying that standard to this case, we cannot say that the settlement offer of $245,000 is grossly unreasonable. Therefore, we approve the settlement of the third party action, the proceeds of which shall be distributed pursuant to the formula set forth in ORS 656.593(1).

ORDER

Pursuant to ORS 656.587, the Board approves settlement of the wrongful death action which is the subject of this dispute, for the sum of $245,000.

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VIRGINIA MERRILL, Claimant
Weber, Baumgartner et al., Attorneys
Landerholm, Memovich et al., Attorneys
Wolf, Griffith et al., Attorneys

WCB n/a
March 8, 1983
Order Approving Third Party Settlement

This matter is before the Board on claimant's application concerning a dispute over the settlement of a third party action. See ORS 656.587. Claimant and the third party defendant have negotiated a settlement whereby claimant will receive $30,000 in full satisfaction of her right of action against the third party defendant. The industrial insurer responsible for payment of workers compensation benefits to claimant refuses to approve the settlement offer because it will not obtain full reimbursement and satisfaction of its lien for claim expenditures. The industrial insurer maintains that if the third party litigation proceeded to trial, claimant would be awarded a verdict in excess of the offered settlement amount. The offer of settlement, therefore, is unreasonable according to the industrial insurer, and it will not grant its approval.

"In exercising our authority pursuant to ORS 656.587 we will approve settlements negotiated between a claimant/plaintiff and a third party defendant unless the settlement amount appears to be grossly unreasonable." Rose Hestkind, 35 Van Natta 250 (decided this date).

ORDER

Pursuant to ORS 656.587, the Board approves settlement of the third party action which is the subject of this dispute, for the sum of $30,000. The proceeds of this third party action shall be distributed according to the formula set forth in ORS 656.593(1).

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ROBERT RODARTE, Claimant
Allen, Stortz et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08894
March 8, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee McCullough's order which concluded that claimant was not entitled to additional compensation for temporary or permanent disability beyond what had previously been awarded in a series of Determination Orders, the most recent of which is dated September 23, 1981.

We affirm and adopt the Referee's order with the following additional comments on the issue of entitlement to additional time loss. The most recent Determination Order terminated time loss on July 27, 1981 in reliance on a report from Salem Orthopaedic Consultants. Claimant argues that he is entitled to time loss to November 1, 1981 based on the opinion of his treating chiropractor, Dr. Whitmire. As we said in Lavona Hatmaker, 34 Van Natta 950 (1982), 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, but as a practical matter we tend to defer to a treating physician's opinion as to whether a claimant is medically stationary. Nevertheless, we here find, as we found in Hatmaker, that such deference is not sufficient to tip the scale in claimant's favor. Dr. Whitmire does not state any reasons for his conclusion that claimant was not medically stationary until November 1 and does not explain in what way his treatments after July 27 were expected to improve claimant's condition. Considered beside the comprehensive report and analysis by Salem Orthopaedic Consultants, we are not persuaded that claimant was other than medically stationary as of July 27, 1981.

ORDER

The Referee's order dated May 11, 1982 is affirmed.

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TIMOTHY TREADWELL, Claimant
Michael Williams, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 81-00093
March 8, 1983
Order on Remand

On review of the Board's Order dated May 28, 1982, the Court of Appeals reversed the Board's Order.

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

IT IS SO ORDERED.

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JIMMY K. LAYTON, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-01225
March 10, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant seeks review of Referee Baker's order which upheld the SAIF Corporation's denial of exploratory surgery sought by claimant to determine whether his hearing loss is related to a compensable injury. The only issue is whether the surgery is compensable under ORS 656.245. We conclude that it is.

The claimant is a 31 year old former logger who fell against a log and injured his neck in February of 1980. The claimant began experiencing hearing loss, worse on the right, shortly after his injury. Claimant suspects his hearing loss is attributable to the compensable upper body injury.

Claimant's treating physician, Dr. Wheatley, initially and tentatively suggested otosclerosis as the explanation of claimant's hearing loss. Otosclerosis is a congenital condition/disease process that in all probability could not be caused nor aggravated by claimant's traumatic injury. However, Dr. Wheatley requested permission from SAIF to perform diagnostic surgery to rule out the possibility of a connection between claimant's hearing loss and the industrial injury. Dr. Wheatley's associate, Dr. Cohen, explained:

> "Audiometry suggests a conductive hearing loss which is bilateral but worse on the right side. It is unlikely that a slowly-progressive hearing loss would result from his injury; however, the only way to definitively establish the diagnosis is at surgery."

SAIF's doctor, Dr. Norton, felt that the hearing loss could not be related to the injury because claimant's records do not mention a hearing loss until some time after the injury.

Both the Court of Appeals and the Board have consistently recognized that ORS 656.245 extends to payment for diagnostic procedures. Brooks v. D & R Timber, 55 Or App 688 (1982); Edith Stevens, 34 Van Natta 642 (1982); Richard S. Short, 27 Van Natta 274 (1979); Vivian Johnson, 11 Van Natta 98 (1974); Howard Shirley, 9 Van Natta 254 (1973). For example, myelograms which are purely diagnostic are routinely authorized or even requested and paid for by industrial insurers.

The real problem in this case is not whether diagnostic procedures are compensable; the real problem is when are diagnostic procedures compensable.

Some guidance is suggested by our policy of deferring to the treating physician on questions of the need for medical treatment. Lucine Schaffer, 33 Van Natta 511 (1981). By parity of reasoning, we probably should likewise defer to a treating physician's judgment about the appropriateness of a given diagnostic procedure. Any deference approach would cut in claimant's favor since we understand Drs. Wheatley and Cohen to be saying that they regard exploratory surgery to be appropriate.

In this case, however, we conclude we need not consider the outer limits of the responsibility of industrial insurers for diagnostic procedures because here SAIF concedes that "when a physician suspects a related condition, diagnostic procedures are the [insurer's] responsibility" but argues "when an unrelated condition appears one year after the accident, payment for exploratory operation is not compensable." The flaw, as we see it, is that the record does not establish that claimant's hearing loss is "an unrelated condition." It may be unrelated. If we had to assess probabilities, it is probably unrelated. But claimant's doctors also recognize a possibility -- at least implicit, if not explicit, in their request for authorization for surgery -- that there may be some relationship between claimant's industrial accident, which involved upper body trauma, and his subsequent hearing loss.

On this record, and as the case has been argued, we conclude that claimant is entitled to the surgery in question.

ORDER

The Referee's order dated August 10, 1982 is reversed. The SAIF Corporation is ordered to pay for the diagnostic surgery proposed by Dr. Wheatley. Claimant's attorney is awarded $900 as a reasonable attorney's fee for services at hearing and on Board review in prevailing on this denial of medical services, payable by the SAIF Corporation.

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WALTER P. KOTILA, Claimant
Parks, Montague et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02492
March 10, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee James' order which awarded him 90% unscheduled permanent partial disability for his abdominal condition. Claimant argues he is permanently and totally disabled. We agree and modify the Referee's order accordingly.

Claimant sustained a noncompensable abdominal gunshot wound in the mid-1960's. Surgery was performed at that time. Following his recovery, claimant had few abdominal problems until 1976.

In 1976, in the course of his work as an operational engineer for the Portland Water Bureau, claimant picked up a metering device which he expected to weigh about eight pounds; instead, it was a special device that weighed about eighty pounds. When he lifted it, claimant experienced a tearing sensation and then severe abdominal pain. Immediate medical treatment resulted in the conclusion that some wire sutures left in claimant's abdominal wall at the time of the gunshot-wound surgery had torn. The wire suture material was then surgically removed and the fistula which had developed was drained. Since 1976 claimant has undergone several additional abdominal surgeries to drain fistulas and to remove bowel obstructions -- all being consequences of claimant's 1976 industrial abdominal injury.

Dr. McFarlane has been the claimant's treating physician during the course of his abdominal problems. Dr. McFarlane has concluded that the claimant is precluded by his abdominal problems from doing any:

> "heavy physical labor . . . that requires persistent use of the abdominal wall musculature. I think that the stability or strength of his abdominal wall is such that he could not tolerate that without severe symptoms of pain."

Dr. Lipshutz, a gastroenterologist, stated:

> "Regarding functional limitations, I feel this man is unable to perform tasks which result in increased intra-abdominal pressure such as lifting or even significant ambulation. If he were required to carry light packages from station to station in a given building, I think he would still have trouble with abdominal discomfort."

Dr. Goldman, another gastroenterologist, opined:

> "I do feel that he is disabled as a result of his multiple infections of the abdominal wall . . . I do feel that he could do sedentary work at the present time which would involve no lifting."

Claimant's sole argument is that he is permanently and totally disabled based on a combination of medical and social/vocational factors. We disagree with that specific argument. Although claimant's age (61) tends to increase his loss of wage earning capacity, all of the other social/vocational factors are neutral or cut the other way. Claimant has at least average education or above average education, depending on the weight to be attached to specialized college training. Claimant is obviously extremely intelligent. Claimant has considerable vocational experience that would likely be transferable to relatively sedentary supervisory/administrative positions, and some avocational experience along these lines.

Although the case has not been argued precisely this way, we find claimant permanently totally disabled on the medical evidence alone. We are particularly impressed in this case by the medical evidence which indicates that claimant could reinjure his abdomen by doing almost anything, including carrying light packages or even walking. Indeed, several of the operations that have been performed since 1976 have been necessitated by very modest activity or even no apparent activity. We do not mean to imply that any chance of reinjury means that a claimant is precluded from regular work; but in the somewhat unusual circumstances of this case, the conclusion we draw from the evidence is that there is a high probability that claimant will seriously reinjure his abdominal area if he were to attempt to return to even the lightest forms of work.

The unlikelihood of the claimant being able to return to work without reinjury is borne out by the problems he has had in completing a vocational rehabilitation program. Claimant was enrolled in vocational rehabilitation programs in 1978, 1979 and 1981. In each instance, he was terminated from the programs because his medical condition became so severe as to preclude completion of the programs. There is no indication, however, that the claimant was resisting vocational assistance or was uncooperative in any way. The vocational counselors considered his problems real and believed that he actually wanted to return to work. Claimant might be able to work at a very sedentary supervisory/administrative occupation for a short time; however, any return to work would probably be as short-lived as claimant's repeated attempts to obtain vocational assistance.

We conclude that the claimant has proven by a preponderance of the evidence that he is permanently and totally disabled as of March 16, 1982.

ORDER

The Referee's order dated July 22, 1982 is reversed. The claimant is awarded permanent total disability effective March 16, 1982. This is in lieu of all prior awards, and the SAIF Corporation may setoff compensation paid pursuant to the Referee's order against the award granted by this order. In lieu of the attorney's fees granted by the Referee's order, claimant's attorney is allowed an attorney's fees of 25% of the compensation granted by this order, not to exceed $3,000.

★★★★★★★★★★★★★★★★★★★

JAY STOREY, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-09441
March 10, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review, and the SAIF Corporation cross-requests review, of Referee Baker's order which awarded claimant compensation for a 50% unscheduled permanent partial disability, an additional 20% scheduled permanent partial disability for a total scheduled award of 80% for loss of claimant's right leg, imposed a penalty and associated attorney's fee for unreasonable delay and awarded claimant's attorney a reasonable attorney's fee payable out of claimant's increased award of compensation. Claimant contends he is permanently and totally disabled as a result of his November 7, 1972 industrial injury. SAIF maintains that the Referee's award of unscheduled permanent disability is error, based upon the standards set forth in Woodman v. Georgia-Pacific Corp., 289 Or 551 (1980).

As to SAIF's contention that claimant has failed to satisfy his burden of proving the compensability of his low back disability, as a consequence of his ankle/foot injury, we find that the record supports the Referee's conclusion that claimant's low back disability has been materially caused by his severe

ankle/foot injury. Furthermore, although the Referee did not couch his finding in terms of the Supreme Court's holding in Woodman, we are satisfied that claimant's low back disability is an independent disability, that it is a secondary consequence of the sequelae of his ankle/foot injury which, although common, is not so intrinsic to the ankle/foot injury that its failure to follow would be "anomalous and surprising." Woodman, supra, 289 Or at 558. See also Donald Woodman, 34 Van Natta 178 (1982).

In arguing that the Referee erred by failing to award him permanent total disability status, claimant relies in part on the Referee's reference to claimant's need for job placement assistance and possibly retraining, as violating the rule that disability is determined based upon the circumstances existing at the time of the decision, as opposed to a speculative future change in employment status. Gettman v. SAIF, 289 Or 609, 614 (1980). We do not find the Referee's observation as being violative of the principle announced in Gettman, and we agree with his determination that claimant has not established by a preponderance of the evidence that he is presently precluded from obtaining and regularly performing a gainful occupation suitable to his physical limitations. Admittedly, the disability attributable to claimant's industrial injury is substantial; and we, therefore, affirm the Referee's awards of scheduled and unscheduled permanent partial disability.

ORDER

The Referee's orders dated June 18, 1982 and June 24, 1982 are affirmed.

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JACK BENSON, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10167
March 11, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Baker's order which upheld the SAIF Corporation's denial of claimant's claim for medical services and which refused to award claimant a penalty for SAIF's alleged unreasonable resistance to payment of compensation. We agree with the result reached by the Referee but disagree with his reasoning.

Claimant suffered a compensable low back injury in 1978. A Determination Order dated December 11, 1978 awarded claimant time loss but no permanent disability. Claimant's low back symptoms recurred in August 1981 while he was bending over off the job. He went to see his chiropractor, Dr. Moore, who submitted his bill to SAIF. SAIF sent Dr. Moore a letter informing him that it would not pay the bill. SAIF never informed the claimant that it was denying payment of Dr. Moore's bill.

The Referee concluded that SAIF was not liable for penalties and attorney fees for failing to issue a denial to the claimant because "the claimant was not materially prejudiced thereby." The

Referee's reasoning is contrary to our subsequent decision in Billy J. Eubanks, WCB Case No. 81-07465, 35 Van Natta 131 (February 3, 1983), in which we said that the appropriate responses to bills for rendered medical services are either to pay the bills or issue a denial to the medical provider and the claimant. SAIF's failure to notify the claimant of its denial would subject it to penalties if there were any compensation "then due" the claimant..

Unfortunately, SAIF cannot be assessed a penalty in this instance because we agree with the Referee that the claimant has failed to sustain his burden of proving that the 1978 compensable injury was a material cause of the condition for which he was treated by Dr. Moore in 1981. Consequently, SAIF is not liable for paying Dr. Moore's medical bills because no compensation is "then due" and there is no amount upon which to assess a penalty. See Gary L. Clark, WCB Case Nos. 80-04402 and 80-04403, 35 Van Natta 117 (February 3, 1983).

ORDER

The Referee's order dated May 14, 1982 is affirmed.

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DANIEL K. BEVIER, Claimant
Hoffman, Morris et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07645
March 11, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review and claimant cross-requests review of Referee Quillinan's order which affirmed SAIF's denial of claimant's claim for a gastrointestinal condition and awarded 10% unscheduled permanent disability arising from claimant's low back injury.

The issues are compensability of the gastrointestinal condition and extent of permanent disability. We affirm with respect to the gastrointestinal condition but reverse the award of disability. Except as inconsistent with our findings herein, we adopt the Referee's findings of fact.

In brief, the facts are that claimant was injured when he fell approximately 20 feet while working as a climber for a logging concern. He suffered a musculoligamentous strain, contusions and possibly a bruised spleen. About six months after the fall, claimant began experiencing gastrointestinal difficulties. Claimant's treating physician, a chiropractic physician who utilizes naturopathic treatment modalities, came to believe that the gastrointestinal difficulties were causally related to the fall. The insurer's examining physician, a physician specializing in gastrointestinal disorders, opined that claimant had a preexisting irritable bowel syndrome that had not been affected in any way by the fall.

Claimant missed one week of work immediately following the injury but none thereafter. Approximately two months prior to the

hearing, claimant began working as a cutter which is more strenuous work physically than working as a climber.

With respect to permanent disability arising from the low back injury, there is no medical verification of permanent impairment. Based on claimant's testimony, the Referee made the following findings of fact, with which we agree, concerning residual impairment:

> "Claimant's present problems include stiffness in his low back, pain radiating from the hip down the back of his legs, pain when picking up heavy objects, and pain when jumping or falling....Claimant also experiences problems sleeping, and wakes up occasionally at night. He has problems getting in and out of bed or moving his back after it has cooled off after a period of strenuous work. Claimant is careful in his movements and avoids jumping or other activities which cause a 'shock' to his spine. He is careful in walking."

With respect to the gastrointestinal condition, we are satisfied that claimant's condition either significantly worsened (if he had a preexisting disorder) or is a new condition which has developed since the June, 1980 fall. We are also satisfied that the condition when it is active causes pain in claimant's low back because of the pressure it creates. However, we are not persuaded by claimant's treating chiropractor's explanation as to how the fall could have worsened or caused the condition, particularly in light of the examining physician's contrary opinion. We agree with the Referee that claimant has failed to prove that this condition is a compensable consequence of his occupational injury.

With respect to the extent of permanent disability, in the absence of medical evidence indicating that claimant has sustained some residual impairment from the injury, and considering that claimant has returned to a physically more strenuous job at a higher rate of pay, we do not think an award of permanent disability can be justified. Accordingly, we reverse that portion of the Referee's order.

ORDER

The Referee's order dated July 7, 1982 is reversed in part. Those portions awarding permanent disability and an associated attorney's fee are reversed. The remainder of the Referee's order is affirmed.

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W.A. CHISHOLM, Claimant
Cottle & Howser, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-06975
March 11, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Mongrain's order which set aside its denial of claimant's injury claim for a ruptured kidney. The issue is compensability.

Claimant was born without a left kidney and his single right kidney is enlarged and probably polycystic. We do not understand claimant to contend that SAIF is responsible for any of his pre-existing kidney conditions. Rather, this claim involves a specific at-work incident on June 30, 1980 when claimant leaned over the edge of a concrete box with his abdomen pressed against the side of the box, felt an immediate upper right abdominal pain and was diagnosed a few days later as having ruptured his right kidney.

SAIF argues that the claimant has failed to prove that his right kidney condition resulted from an industrial injury, and that claimant will eventually suffer renal failure whether he suffered a work-related injury or not. SAIF also makes an argument which basically goes to the issue of claimant's credibility.

Although the medical evidence does indicate that claimant will probably suffer eventual renal failure and that the possibility of renal failure is not greater because of the June 30, 1980 kidney rupture, we fail to see what relevance that has to the compensability of this rather straightforward traumatic injury claim. We are convinced by the evidence that SAIF is responsible for whatever damage was caused by the June 30, 1980 incident.

Regarding claimant's credibility, the Referee found claimant to be a "very impressive" and "extremely credible" witness. We find nothing in the record that raises any doubt in our mind about the Referee's conclusions.

ORDER

The Referee's order dated June 8, 1982 is affirmed. Claimant's attorney is awarded an attorney's fee of $475 for services rendered on Board review, payable by the SAIF Corporation.

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ANTHONY J. DUMAN, Claimant
Gatti & Gatti, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02571
March 11, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review, and claimant cross-requests review, of those portions of Referee Seymour's order granting claimant compensation for 20% unscheduled permanent partial disability and overturning SAIF's denial of responsibility for claimant's continuing chiropractic care. SAIF contends that claim-

ant is entitled to no award for permanent disability and that its denial should be reinstated. Claimant maintains that the Referee's award of permanent disability is inadequate.

The Board affirms and adopts the order of the Referee, with one exception. We have previously stated that, in appropriate cases, orthopedic surgeons are qualified to express an opinion concerning the need for chiropractic care, and that the opinion of the orthopedic physician could, in an appropriate case, be found more persuasive on that issue. Madonna Duman, 34 Van Natta 1642, 1644-1645 (1982). We, therefore, do not agree with the Referee's possible implication to the contrary.

ORDER

The Referee's order dated May 10, 1982 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney's fee on Board review, payable by the SAIF Corporation.

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MATTHEW J. SAMPSON, Claimant
Cash Perrine, Claimant's Attorney
James Larson, Defense Attorney

WCB 81-08496
March 11, 1983
Order on Reconsideration

The Board issued its Order on Review herein on February 22, 1983. Claimant has requested that we reconsider that order, and on reconsideration we modify our Order on Review.

This case, in part, involves the compensability of claimant's neck and left knee conditions, which allegedly arise out of one of his two compensable injuries which occurred in August and November of 1979. In our Order on Review we suggested that, by virtue of an earlier hearing before a Referee in which that Referee refused to award claimant compensation for any permanent disability as a result of the August injury, claimant was foreclosed from making a claim for compensation for his knee and neck conditions in the current proceeding. Specifically, page 2 of our order states the following:

> "Claimant argues that the two claims have been combined. We disagree. The August, 1979 claim was closed by the Determination Order of November 5, 1979. Referee Danner affirmed that Determination Order in the prior proceeding. No appeal was taken from that order. Under these circumstances, claimant cannot now argue that he is entitled to compensation for his knee and neck conditions based on the August, 1979 claim."

On reconsideration, we find that analysis to be incorrect. We, therefore, modify our order to delete the above passage.

We adhere to our conclusion, however, that claimant has

failed to adduce sufficient medical evidence to satisfy his burden of proving that his left knee and neck conditions are compensable as consequences of his November 1979 injury; and we further find that there is insufficient evidence to causally relate these conditions to claimant's earlier accidental injury in August 1979.

ORDER

On reconsideration of our Order on Review dated February 22, 1983, we modify our order as set forth above. Except as modified, we adhere to our former order.

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HAROLD WALDRIP, Claimant
Peterson & Peterson, Claimant's Attorneys
Roger Warren, Defense Attorney

WCB 81-09007
March 11, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Leahy's order which affirmed the Determination Order dated September 24, 1981. That Determination Order left intact prior awards that total 265° for 80% unscheduled permanent disability. Claimant contends that he is permanently and totally disabled.

We affirm and adopt the Referee's order with the following additional comments. We share the Referee's confusion about the basis upon which claimant's claim was most recently reopened. In any event, we believe the evidence indicates that claimant's condition has been stable or has improved slightly since the most recent claim reopening. Also, numerous professionals have indicated that they do not believe that claimant is motivated to return to work. It is, of course, claimant's burden to prove the contrary. ORS 656.206(3). We are not convinced that claimant has sustained that burden.

ORDER

The Referee's order dated June 25, 1982 is affirmed.

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NORMAN L. GARBUTT, Claimant
Welch, Bruun et al., Claimant's Attorneys
Minturn et al., Defense Attorneys

WCB 80-11364
March 14, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Peterson's order which awarded claimant compensation for permanent total disability. The issue is the extent of claimant's disability.

Claimant, who was 56 years of age at the time of the hearing, suffered an injury to his right shoulder on November 21, 1975 while employed by a lumber yard. A rotator cuff tear was diagnosed and surgery was performed in November of 1976. The surgery was described as an excision of the inter-articular portion of the long head of the biceps and tenodesis of the distal stump into the humerus with rotator cuff repair.

Following his surgery, claimant entered an approved program of vocational rehabilitation and was retrained as a motorboat mechanic. Subsequent to the completion of the program, he was employed by Inland Marine as a mechanic. The October 23, 1978 Determination Order awarded claimant 15% unscheduled permanent partial disability for the injury to his right shoulder. This award was increased to 60% following a hearing on March 27, 1979. On review by the Board, the award was modified to 30%. Norman Garbutt, 28 Van Natta 351 (1979). The Court of Appeals affirmed. Garbutt v. J. W. Copeland Yards, 46 Or App 649 (1980).

In approximately August of 1979, claimant began experiencing difficulties with his left shoulder. Dr. Corrigan reported on August 30, 1979 that claimant had rotator cuff tendinitis in the left shoulder with subacromial bursitis. Dr. Corrigan felt this was due to the fact that claimant's limited ability to use his right arm and shoulder forced him to rely on his left arm more than would ordinarily be necessary. Dr. Corrigan treated the shoulder with injections and reported on September 27, 1979 that he did not feel that claimant was precluded from employment at that time. The left shoulder claim was initially accepted by SAIF on a medical only basis. On October 25, 1979 Dr. Corrigan reported that claimant's left shoulder had progressively worsened and that he was unable to work as of October 5, 1979.

About the time that Dr. Corrigan issued his October 25 report, claimant decided to go on an elk hunting trip. On October 30, 1979, while hunting, claimant was struck in the pelvis by a bullet fired from a 30/30 rifle from a distance of between 100 to 150 yards. Surgery and a prolonged period of treatment followed. The eventual result of the bullet wound was partial paralysis of claimant's left lower extremity requiring him to use a cane to ambulate.

On March 4, 1979 SAIF revoked its previous acceptance of claimant's left shoulder condition. That denial was set aside by a Referee in a prior proceeding.

Claimant was examined by the Orthopaedic Consultants on November 11, 1980. Claimant was found to have relatively full ranges of motion in his left shoulder. The diagnosis was tendinitis and slight external rotation atrophy in the left shoulder. The Consultants found claimant to be medically stationary with regard to the shoulder with a minimal loss of function in the 0 to 10% range. The December 16, 1980 Determination Order awarded claimant 10% scheduled disability for loss of the left arm. All parties at the hearing stipulated that the disability should not have been rated as scheduled. See OSEA v. Workers' Compensation Dept., 51 Or App 55, 62 (1981); and Audas v. Galaxie, 2 Or App 520 (1970).

On February 20, 1981, Dr. Corrigan reported that he concurred with the report of the Orthopaedic Consultants, and:

> "As a result of his overall condition, including all problems, I don't think this man is going to be able to return to consistent, significant, gainful employment

> beyond a very sedentary type, and this is simply based upon the disabilities that he presents, primarily in the shoulders and pelvis and left lower extremity. If, however, we exclude the pelvis and left lower extremity problem from this, or from his status, I think he would be capable only of light work, that is, no excessive use of upper extremities, only infrequent use at or above the shoulder level, no lifting, carrying more than 10-15 pounds, and no heavy or forceful prying, pushing, pulling or the like."

This is virtually the only medical evidence with regard to claimant's condition excluding his bullet wound injuries.

Claimant was thereafter referred for vocational rehabilitation services. On October 16, 1981, Ron LaMotte, a rehabilitation counselor, reported: "I do not feel that Mr. Garbutt with his limited educational background and multiple physical disabilities is a suitable candidate for vocational rehabilitation." The examiners at the Callahan Center basically agreed that claimant's vocational opportunities were extremely limited. Claimant made an attempt at commercial fishing in July of 1981 with a boat that he had purchased. Claimant could not do any work himself and had to hire the entire crew. The venture was unsuccessful. He was also involved in a rodent control business which he basically turned over to his wife since he was unable to physically participate.

As noted above, claimant was 56 years of age at the time of the hearing. He has a tenth grade education and has worked at jobs involving hard physical labor all of his life. These jobs have included lumber yard boss, construction work, logging, shoeing and breaking horses and mules, mill work, rodent control, mechanic and apparently some farming. In addition to his shoulder and pelvis difficulties, he suffers from some mild hearing loss and also depression for which he has received treatment.

The Referee concluded that the evidence would not support a finding that claimant's psychological condition was a result of his work injuries or that it pre-existed the hunting accident. The Referee also correctly stated that he could not consider the claimant's bullet wound injury or the residuals thereof in determining the extent of claimant's disability. See Emmons v. SAIF, 34 Or App 603 (1978). The Referee concluded that, even excluding claimant's psychological condition and the physical problems resulting from the bullet wound, claimant's shoulder impairment combined with his age, education, work experience, etc. precluded him from gainful and suitable employment.

We have previously described the problem of assessing compensable disability when a claimant has both compensable and non-compensable impairments as "one of the most difficult kinds of decisions that must be made within the workers compensation system." Earl E. Ekstrand, 34 Van Natta 742 (1982). Although the question is just as difficult in this case, we cannot conclude

that, excluding claimant's psychological condition and bullet wound injury residuals, he would otherwise be permanently and totally disabled. Claimant has sustained a 30% loss of earning capacity as a result of injury to his right shoulder. The extent of disability from that injury, already having been established, is not currently in issue. However, it is proper to consider that disability for the purpose of determining whether claimant is permanently and totally disabled under ORS 656.206(1)(a).

Does claimant's right and left shoulder disability when combined with the relevant social vocational factors result in a finding of permanent total disability? We think not. The medical evidence does not support any conclusion other than that claimant has suffered a very minor impairment to his left shoulder. As noted above, the Orthopaedic Consultants found claimant's left shoulder ranges of motion to be nearly complete and full. Muscle strength was found to be normal. There was some infrequent crepitus and pain with movement. Impairment was in the minimal range of 0 to 10%. Dr. Corrigan felt that claimant would have still been capable of light work prior to the hunting injury. We do not believe that this relatively minor left shoulder impairment is sufficient, when combined with claimant's 30% right shoulder disability, to result in a finding of permanent total disability, even when claimant's social vocational factors are also considered.

While noting that the medical evidence offered no direct support that claimant's left shoulder condition was worse at the time of the hearing than at the time it was found to be medically stationary, the Referee nevertheless concluded that it had worsened. The medical evidence in favor of this proposition is both scanty and inconclusive. Prior to the hunting accident, claimant's left shoulder was being treated with rest and heat treatments and was improving to the point where claimant was capable of going elk hunting, riding a horse and apparently using a high-power rifle. By October of 1981, the pain had increased to the point where injections were necessary and an arthrogram was suggested but refused. We do not find a sufficient basis in the record for concluding that claimant's left shoulder condition had worsened. We do not believe that it is an uncomplicated matter such that lay testimony alone would be sufficient to resolve the issue.

Claimant argues that the vocational evidence contained in the record strongly supports the conclusion that he is permanently and totally disabled. The vocational evidence does indeed point toward such a conclusion. However, we think it is obvious that the vocational reports were considering claimant's entire physical disabilities including the non-related psychological condition and the non-compensable hunting injury which, as we have previously pointed out, may not be properly considered. We cannot conclude that the evidence as a whole supports the proposition that prior to the hunting accident, claimant was permanently and totally disabled. We are not even completely convinced that the medical evidence supports a conclusion that, prior to that hunting accident, claimant would have been precluded from his job as a small engine mechanic.

Considering claimant's left shoulder impairment, and considering the additional factors under OAR 436-65-600, et seq., and like

cases, we find claimant's loss of earning capacity as a result of his work-related left shoulder injury to be equal to 30%.

ORDER

The Referee's order dated July 21, 1981 is reversed. Claimant is awarded 96° for 30% permanent partial unscheduled disability for injury to his left shoulder. This is in lieu of and not in addition to that allowed by the December 16, 1980 Determination Order and the order of the Referee. Claimant's attorney's fee should be adjusted accordingly.

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D.L. BARRETT, Claimant
Douglas Minson, Claimant's Attorney
Miller, Nash et al., Defense Attorneys

WCB 82-04936
March 17, 1983
Order of Dismissal

The claimant has requested review of Referee's order dated January 11, 1983. The request for review was filed with the Board on February 11, 1983, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

The claimant's request for review is hereby dismissed as being untimely filed.

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MICHELLE MENDOZA, Claimant
Peter McSwain, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07482
March 17, 1983
Order on Remand

On review of the Board's Order dated January 18, 1982, the Court of Appeals reversed the Board's Order.

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

IT IS SO ORDERED.

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DANIEL MULLINS, Claimant
James Nelson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09638
March 17, 1983
Order on Remand

On review of the Board's Order dated February 26, 1982, the Court of Appeals reversed the Board's Order.

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

IT IS SO ORDERED.

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SUZAN BECHTEL, Claimant
Doblie & Francesconi, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-05216
March 22, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer requests review of Referee Shebley's order which required the employer to pay claimant benefits for temporary total disability for the period between October 29, 1981 and January 10, 1982.

The Referee concluded: (1) the July 17, 1981 Determination Order was not prematurely issued; (2) claimant's condition did not thereafter worsen within the meaning of the aggravation statute, ORS 656.273; but (3) based on a line of Board decisions commencing with Cecil B. Whiteshield, 4 Van Natta 203 (1970), a claimant is entitled to additional time loss compensation upon showing only that he or she became medically unstationary within one year of a Determination Order.

The employer correctly points out that, after the Referee's amended order was issued, the Board overruled the Whiteshield line of cases in Roy McFerran, Jr., 34 Van Natta 621 (1982), aff'd without opinion 60 Or App 786 (1982). Under McFerran, a claimant may only receive additional time loss following a Determination Order upon proof of either premature closure or aggravation. Claimant has filed no brief in defense of the Referee's order.

We, therefore, reverse the Referee's amended order with the additional comment that we do not necessarily agree that being medically unstationary (meaning physical condition will improve with further curative treatment) is something other than a worsening within the meaning of ORS 656.273.

ORDER

The Referee's amended order dated April 29, 1982 is reversed. The Referee's original order dated April 8, 1982 is affirmed.

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LEOLA L. DAVIS, Claimant

WCB 81-10941

Board Member Lewis Dissenting:

I respectfully dissent from the majority's opinion for three reasons: (1) the record does not indicate that the claimant was treated for neck and shoulder symptoms throughout the spring of 1981 prior to her strenuous lifting exposure with this employer; (2) her treating doctor, Dr. Michael Kirkland, D.C., specifically related her neck and shoulder complaints to her lifting activity at work; and (3) although the claimant's family physician, Dr. John Buell, D.O., did not specifically relate her neck and shoulder conditions to work, neither did he state that work could not have been the cause of her neck, shoulder, and upper back pain. Rather, he stated that work "could" be the cause of the condition. At worst, Dr. Buell's opinion is noncommittal.

This case simply boils down to the following: The claimant was involved in an unrelated shoving incident in November, 1979 in which she was treated for cervical strain in November and December of 1979. She had one more treatment for this unrelated cervical strain in May of 1980. She had no problems with her neck and upper back until July 10, 1981, which was approximately a month after she had been working as a psychiatric aide at the Fairview Hospital. Claimant's job entailed caring for severely handicapped patients and part of this care required the claimant to lift the patients who weigh from 47 to 156 pounds in and out of their beds and into wheelchairs, and from there onto and off of toilets. The claimant reported muscle spasms in her neck and up her back to Dr. Buell in July of 1981. Shortly thereafter, she reported her symptoms to Dr. Kirkland in August, 1981 and she also reported her condition to her supervisor at work. Considering the time lapse between treatment for the November, 1979 incident and the July, 1981 lifting incidents the evidence indicates to me that the claimant's prior neck and shoulder symptoms had resolved and that the work exposure brought about new neck and shoulder symptoms related to heavy lifting at work which has caused the claimant to incur medical costs and time loss.

I believe that she should be compensated for this expense by her present employer.

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JAMES H. DONEY, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05878
March 22, 1983
Order on Review

Claimant is a 57 year old former truck driver and rock crusher operator with a tenth grade education. On November 13, 1980 he injured his low back on the job when he attempted to lift a 225 pound tire onto a pickup bed. He sought medical treatment about two weeks later. In December 1980 and again in January 1981, while he was still symptomatic from the lifting incident, he was involved in automobile accidents.

Claimant has consistently complained of low back pain since his on-the-job incident. He testified that prior to that time he never had back problems. At most, he had suffered minor muscle aches as a result of the strenuous nature of his jobs.

I.

On June 11, 1981 SAIF issued a partial denial which stated that claimant's "muscle strain" was accepted but that his underlying degenerative joint disease was denied. For reasons set forth later in this order, we affirm that denial.

On July 20, 1981 a Determination Order was issued which awarded the claimant temporary total disability through May 31, 1981 and permanent partial disability of 15% for his low back injury.

Claimant argues that he was not medically stationary on that date. We agree with the Referee that the medical evidence indicates that he was medically stationary at that time. Therefore, we find the claim was not prematurely closed.

II.

On September 23, 1981 SAIF issued a denial of claimant's aggravation claim. Claimant argues that he sustained a compensable worsening in September 1981. We agree with the Referee that "[t]here is no evidence of a worsening other than the periodic exacerbations that occurred when the claimant misused his back." Accordingly, we find that the claimant has failed to sustain his burden of proving that he suffered a compensable worsening.

III.

On January 27, 1982 and again on February 2, 1982 SAIF issued denials which denied all compensation subsequent to January 24, 1981, the date of claimant's second automobile accident. The stated basis for these denials was prejudice to SAIF's ability to determine the exact extent of claimant's original injury.

We believe that claimant has established that at the time of the automobile accidents his underlying arthritic condition was worsened by his industrial injury. Under Grable v. Weyerhaeuser Co., 291 Or 397 (1981), the test is whether the industrial injury continues to be a material contributing factor to the claimant's condition notwithstanding contribution from an off the job incident. We are persuaded by the facts of this case that, notwithstanding the automobile accident, claimant's industrial injury continued to be a material contributing factor up until the time

expenses and time loss due to a temporary worsening of his underlying arthritic condition, until the time of the Determination Order, when he became medically stationary.

IV.

SAIF also argues that claimant's low back strain had resolved itself and that the only thing from which he continued to suffer was his underlying degenerative disc disease. This argument relates to the denial of June 1981. The issue is whether the claimant has sustained his burden of proving that he suffered a permanent disability as a result of his industrial injury. We find that he has not.

In April 1981 claimant's then treating physician, Dr. O'Fallon, opined that there would be no permanent residuals from claimant's on the job injury and that he would be medically stationary in July 1981. In May 1981 Dr. Degge, a consultant, opined that claimant's muscle strain from the industrial injury had run its course and that he was then medically stationary. In October 1981, Dr. Degge opined that:

> "Current symptoms are due to pre-existing osteoarthritic changes and spondylosis in the spine and are for a pre-existing condition which was not materially worsened or aggravated by the accident, although the condition of arthritis and spondylosis predisposed his low back to injury. Current treatment for his spondylosis and arthritic condition is not related to the industrial injury of a sprain of his lower back."

Of all the physicians involved in evaluation and treatment of the claimant, only Dr. Smith connects the on-the-job injury with claimant's current back problems:

> "I believe that Mr. Doney has a severe back pain which has certainly been aggravated by his work injury of 13 November 1980, and that the most likely cause of this acute pain problem at this time is a facet impingement syndrome...."

We find Drs. Degge and O'Fallon more persuasive than Dr. Smith. Dr. O'Fallon was claimant's treating physician at the time he voiced the opinion that claimant's on-the-job injury would not result in a permanent disability. Dr. Degge's report is based on a thorough review of the medical reports to that time as well as an examination of the claimant. His conclusion appears to us to be well reasoned. Dr. Smith's conclusion, while also based on a review of the medical reports and an examination of the claimant, does not logically flow from the reports or any of his preliminary conclusions.

The most significant fact which connects claimant's current

virtually asymptomatic prior to the accident. However, the Court of Appeals has held that the mere appearance of symptoms in a previously asymptomatic individual is insufficient to prove a worsening of the underlying disease. Cooper v. SAIF, 54 Or App 659 (1981); Cochell v. SAIF, 59 Or App 391 (1982); but see, Weidman v. Union Carbide, 59 Or App 381 (1982). Likewise, the Board has held that an increase in symptoms is insufficient to establish a worsening of the underlying disease. William Jameson, 34 Van Natta 1532 (1982). Following the rationale of those cases, we find that the claimant has failed to sustain his burden of proving that his industrial injury caused a permanent worsening of the underlying disease. Claimant is entitled to no permanent disability compensation.

ORDER

The Referee's order dated July 28, 1982 is affirmed in part and reversed in part. Claimant is not entitled to have his claim reopened. SAIF's denial of June 11, 1981 is affirmed. SAIF's denials of January 27, 1982 and February 2, 1982 are reversed. Claimant's attorney is awarded $400 as a reasonable attorney's fee, payable by the SAIF Corporation.

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DENNIS FRASER, Claimant
Bloom, Marandas & Sly, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03809
March 22, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Leahy's order which affirmed the SAIF Corporation's March 16, 1981 and April 23, 1982 aggravation claim denials, found claimant entitled to no benefits for temporary total disability benefits other than for the period from September 11, 1980 to November 19, 1980, and found claimant entitled to no additional permanent partial disability benefits over amounts previously awarded.

Although claimant mentions other issues in his brief, it appears to us that all other issues depend upon resolution of the "main" issue of whether the Referee erred in not admitting into evidence seventeen exhibits offered by claimant. The Referee refused to admit the exhibits in question because they were not timely submitted under OAR 436-83-400. That rule provides in part:

> "(3) As soon as practicable and not less than 10 days prior to the hearing each party shall file with the assigned referee and provide all other parties with legible copies of all medical reports and all other documentary evidence upon which the party will rely except that evidence offered solely for impeachment need not be so filed and provided.

"(4) At the hearing the referee may in his discretion allow admission of additional medical reports and other documentary evidence not filed as required by (3) above."

Claimant argues that the Referee erred in applying this rule at the hearing to exclude a number of documents which claimant failed to submit at least 10 days prior to the June 18, 1982 hearing, while seemingly allowing admission of a document (a Referee's order approving a settlement) submitted for the first time by SAIF at the hearing. Claimant contends that the Referee failed to utilize his discretion in favor of allowing these documents to be received into evidence and that this refusal was arbitrary. He requests the Board to remand the case for receipt of the excluded documents.

Even if we were to agree with claimant that the disputed documents should have been received, we would find remand to the Referee unnecessary. In Edward Morgan, 34 Van Natta 1590 (1982), we considered our authority to consider on review documents offered but not admitted into the record by the Referee. We determined that we are not required to remand a case to a Referee when an offer of proof is made at the hearing and, on review, we disagree with the Referee's evidentiary ruling and find that the evidence should have been admitted. Similarly in the current case, even if we were to agree with claimant's contentions that the offered documents should have been admitted by the Referee, it would not be necessary to remand because the documents could be considered by the Board.

Our prior interpretations of OAR 436-83-400 have established that there is a general rule that requires exclusion of exhibits not offered in the manner contemplated by OAR 436-83-400, e.g., Minnie Thomas, 34 Van Natta 40 (1982); that there is a "good cause" exception that permits discretionary admission of exhibits when good cause is established to deviate from the requirements of OAR 436-83-400, e.g., Donald J. Young, WCB Case No. 82-00503, 35 Van Natta 143 (February 3, 1983); and that the "best cause" is in cases in which the exhibits in question could not, with due diligence, have been generated prior to the hearing, e.g., Fred Hanna, 34 Van Natta 1271 (1982).

In this case, claimant seems to acknowledge what we have interpreted OAR 436-83-400 to require, but then seemingly argues that exclusion of material evidence as a sanction for violation of a discovery-type requirement is per se unconstitutional. We do not so understand constitutional doctrine. All of claimant's proposed exhibits which the Referee did not admit are dated well in advance of the hearing date; there is thus no question of whether the documents could, with due diligence, have been generated pre-hearing. And, as far as the general "good cause" exception is concerned, claimant offers no explanation at all for failing to comply with OAR 436-83-400. Therefore, we agree with the Referee's decision not to admit claimant's exhibits in question.

Claimant's offer of a continuance of the hearing to allow SAIF to depose the authors of the documents does not cure the violation. In this regard it should be noted that it was the claimant who ini-

tially requested that the hearing be set on an expedited basis and that the insurer accomodated this request. As the Referee stated at the hearing:

> "I would let you continue it, but the defendant has got a witness here now, a client, and they accomodated you. You are the one who wanted it, so I think we are going to have to go ahead with it."

We conclude that the Referee did not abuse his discretion by refusing to admit the offered documents or continue the hearing.

The question concerning the document submitted by SAIF for the first time at the hearing is more difficult. That document is an order of this agency dismissing claimant's request for hearing in a prior proceeding and approving an agreement between claimant and SAIF granting claimant 5% unscheduled permanent partial disability in addition to the amounts awarded by prior Determination Orders.

The first problem is that the transcript of the present hearing is vague as to whether this prior order was actually admitted into evidence. Claimant's counsel initially objected to the admission of this document due to SAIF's failure to submit it in compliance with the ten-day rule of OAR 436-83-400. The Referee's only reply was: "I will still have to leave it in the file, the same as [claimant's proposed exhibits that were not admitted.]" Counsel for SAIF then argued that it was proper for the Referee to take administrative notice of the prior order. The Referee responded: "That is something I have got to worry about; so far I am not receiving it."

It would appear at this point that the Referee was not admitting or taking notice of the document in question. However, the Referee's order recites facts that are necessarily based on the document in question. The Referee refers to the last arrangement of compensation, "which was November 24, 1980 when [claimant] was allowed an additional 5% unscheduled permanent partial disability." Also, the Referee concluded: "I find that claimant's previous awards totaling 15% are at least fair and generous." It would appear at that point that the Referee either determined that the exhibit offered by SAIF would be admitted, which is a possible assumption because, unlike the exhibits that were not admitted, it contains no notation to that effect; or the Referee concluded that he would take administrative notice of the prior order, which is a possible assumption because the Referee made no specific reference to admitting that document in his order.

In any event, claimant argues that basic fairness precludes a Referee from excluding exhibits offered by one party in violation of OAR 436-83-400 while admitting exhibits offered by the other party in violation of OAR 436-83-400. We have already stated our basic agreement with claimant's argument in Fred Hanna, supra.

We have not, however, previously considered the possibility of taking administrative notice of prior orders of this agency, including the possibility of taking administrative notice when a prior order is not admitted into evidence because of noncompliance with OAR 436-83-400. SAIF here makes an alternative administrative

notice argument. We conclude that it is proper to take notice of prior agency orders in current proceedings.

Prior to the adoption of the current Oregon Evidence Code, the general rule was that normally no notice was taken of records in different cases than the case at bar. Hood v. Hatfield, 235 Or 38 (1963). ORS 40.065, (Rule 201(b), now provides that notice may be taken of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Even if the rule expressed in Hood were still valid, it has long been generally accepted that where the results of one case are determinative of the current case, notice may be taken of the judgment of the other proceeding. 29 Am Jur 2nd, Evidence §59. Obviously knowledge of the date of claimant's last arangement of compensation is necessary in order to begin to determine whether claimant's current condition is now worse than it was at that time. On that basis alone, the document is subject to notice.

Going one step further, we believe that the better rule allows Referees and this Board to take notice of prior orders of this agency whether requested or not. McCormick on Evidence, §330 (2nd ed.). To require formal "proof" of prior orders seems to be a needless elevation of form over substance and serves little purpose other than to clutter evidentiary records that are already sufficiently long and complex. We do believe, however, that if notice is taken without request that the parties should be given an appropriate opportunity to comment. In this case, SAIF specifically requested the Referee to take notice of the document, and claimant's counsel had ample opportunity at that point to respond. We, therefore, agree with SAIF and concur that the November 24, 1980 order was a proper matter for administrative notice in this case.

With regard to the issue concerning compensability of claimant's aggravation claims, extent of disability, and temporary total disability, we affirm and adopt the relevant portions of the Referee's order.

ORDER

The Referee's order dated July 6, 1982 is affirmed.

* * * * * * * * * * * * * * * * * *

ADAM J. GABEL, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Rankin, McMurry et al., Attorneys
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al., Defense Attorneys
Mitchell, Lang et al., Attorneys
Schwabe, Williamson et al., Attorneys
Moscato & Meyers, Attorneys
Richard Pearce, Attorney

WCB 81-02817, 81-03932, 81-04989, 81-04990, 8109226, 81-10240 & 81-10404
March 22, 1983
Order Denying Motion to Dismiss

On February 11, 1983 the Board received a Motion to Dismiss from the insurer seeking dismissal of the request for review filed by Columbia Body and Equipment Company and Fred S. James on or about January 5, 1983, and the cross-request for review filed by claimant, Adam J. Gabel. The insurer alleges that the request for

review and the cross-request were not served on the parties but instead served on the attorneys for the parties, thus not complying with the provisions of ORS 656.295(2). On March 2, 1983 the Board received the employer's response to the Motion to Dismiss.

It has been established that service upon the attorneys for the parties satisfies the jurisdictional requirements of the statute. The Board hereby denies the Motion to Dismiss.

IT IS SO ORDERED.

* * * * * * * * * * * * * * * * *

FREDERICK E. HAHNE, Claimant
Michael Dye, Claimant's Attorney
Moscato & Meyers, Defense Attorneys

WCB 82-01831
March 22, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer requests review of Referee Quillinan's order which: (1) found that a December 27, 1981 bending incident which occurred at the claimant's home was an aggravation of his December 15, 1979 low-back injury; (2) that as of the time of the hearing the employer had not received medical verification of the claimant's inability to work due to a worsened condition resulting from an industrial injury as required under ORS 656.273(6); therefore, as of the April 6, 1982 denial of the claim for aggravation the employer had no duty to pay temporary total disability and, therefore, no penalties and attorney's fee would be imposed for their failure to do so; and (3) that the employer failed to accept or deny the claim within 60 days of notice or knowledge of the claim as required under ORS 656.262 and, therefore, awarded a penalty of 15% of the compensation due from April 2, 1982 to the date of denial April 6, 1982.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated August 2, 1982 is affirmed. The claimant's attorney is awarded $600 as a reasonable attorney's fee for services on Board review.

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GLENN O. HALL, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
John Snarskis, Defense Attorney

WCB 81-03510
March 22, 1983
Order on Reconsideration

On December 30, 1982 the Board issued its Order on Review herein, reversing the Referee's award of permanent total disability and awarding claimant compensation for 45% unscheduled permanent partial disability. The insurer thereafter moved the Board for reconsideration of its order, requesting that the Board authorize and allow the insurer to setoff amounts paid pending review under the terms of the Referee's award of permanent total disability against the Board's award of permanent partial disability. In order to allow us to consider the merits of the insurer's request, we abated our Order on Review by order of

January 10, 1983. For the following reasons, the insurer's request is denied.

The applicable statute and rule are ORS 656.313 and OAR 436-54-320. See also ORS 656.268(4), which allows the Evaluation Division to make necessary adjustments in compensation paid or payable as part of the terms of a Determination Order. ORS 656.313 provides in part:

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

OAR 436-54-320 is the administrative rule of the Workers Compensation Department governing the recovery of overpayments of benefits. That rule provides in part:

> "Insurers and self-insured employers may recover overpayment of benefits paid to a worker on an accepted claim from benefits which are or may become payable on that claim. Payment of benefits paid prior to denial pursuant to ORS 656.262(5) [now 656.262(6)] or paid during appeal pursuant to ORS 656.313 shall not be recoverable under this section."

We think the reference to benefits paid "during appeal" is intended to include benefits paid pending Board review. Because the administrative rule is thus specific in providing that benefits paid pending review are not recoverable by operation of its terms, this rule has no application to the issue raised by the insurer's request for reconsideration.

The issue, then, is whether ORS 656.313, particularly subsection (2), prohibits the setoff requested by the insurer. We find that it does.

An interpretation of ORS 656.313(2) which would allow the setoff in this case could be based upon a distinction between (1) a claimant's entitlement not to have to "repay" compensation erroneously paid pending the review process, an entitlement created by the terms of ORS 656.313, and (2) offsetting payments made on the Referee's award against payments due on the award made by the Board. There is some basis for such a distinction -- merely allowing the insurer/employer a setoff, without actually requiring a claimant to repay benefits previously received, is seemingly a less onerous consequence. The practical effect of

both alternatives is, however, substantially the same: To allow the insurer/employer to recover compensation benefits erroneously awarded by litigation order. We have determined that, whatever the theoretical merits of a distinction between not having to "repay" and having future benefits reduced because of a "setoff," the legislature has not seen fit to make such a fine distinction but instead had chosen statutory language which broadly seems to contemplate claimants having the right to retain, without any form of legal consequences, compensation paid pending review and appeal even when it is subsequently determined that such compensation was erroneously awarded.

In addition to the substantially similar practical effect of the two arguably different interpretations of the statute, the legal effect of the two is exactly the same; i.e., each has the result of retroactively negating the effect of an order of an inferior tribunal. In Rak v. SAIF, 31 Or App 125 (1977), the court considered SAIF's argument that the court had inherent authority to suspend SAIF's obligation to pay accrued benefits ordered by the circuit court. The court found that it had no such authority by virtue of the terms of ORS 656.313. 31 Or App at 129.

The insurer's argument in this case in favor of its claim for a credit and offset, in addition to relying upon the meaning of "repay", is that claimant is unjustly enriched by being permitted to retain the permanent total disability benefits received under the terms of the Referee's order, as well as the permanent partial disability benefits awarded by the Board. Citing Candee v. SAIF, 40 Or App 567 (1979), and J. P. Compton Co. v. DeGraff, 52 Or App 317 (1981), the insurer maintains that, "[t]he courts have frowned on the idea of an unjust enrichment in workers compensation proceedings." Although this is true, the courts have also recognized that, in enacting ORS 656.313, the Legislature has struck a balance in the quid pro quo format of the workers compensation system:

> "The [workers] compensation system compromises many interests of both employers and employes out of the belief that an alternative to judicial determination of employment-related injury claims is necessary. Employes must forego, inter alia, the right to sue in court for injuries occurring in the course of employment but receive in exchange the elimination of fault as a basis for compensation. Employers receive the benefit of limited liability for compensable accidents but are required on the other hand to assume liability for a greater number of injuries." Wisherd v. Paul Koch Volkswagen, Inc., 28 Or App 513, 516 (1979).

Wisherd upheld the constitutionalty of ORS 656.313, which at the time of that decision, was comprised of only subsections (1)

and (2) of the present statute. At issue in Wisherd was the payment of medical expenses. In apparent response to the court's decision in that case, in 1979 the legislature added subsections (3) and (4) to ORS 656.313. Oregon Laws 1979, Chapter 673, Section 1.

Subsections (3) and (4) provide that contested medical services need not be paid for by an industrial insurer or self-insured employer pending review and appeal until the compensability of those medical services has been finally determined adversely to the position of the insurer/employer.

In adding subsections (3) and (4) to ORS 656.313, the legislature left intact subsections (1) and (2), which continue to state the general rule that all forms of compensation benefits (other than medical services) do have to be paid pending review and appeal. This legislative inaction does not form the complete basis of our decision; however, it fortifies us in our conclusion that the legislature clearly has placed the burden for erroneously ordered compensation paid pending review or appeal upon the employer and its insurer. See Jones v. SAIF, 49 Or App 543, 547 (1980). Although the effect of our order may be to unjustly enrich claimant, this is a matter which must be addressed to the legislature.

The employer in Harry C. Jordan, WCB Case No. 81-01698, 35 Van Natta 282 (decided this date), has directed our attention to our decision in Harold O. Peterson, 30 Van Natta 273, 275 (1980), reversed on other grounds, 52 Or App 731 (1981), in which we allowed an offset against the permanent partial disability award granted by our order against the payments of permanent total disability made pursuant to the Referee's order. We apparently granted that relief sua sponte, as it was not an issue discussed in our order. Now that the issue has been raised by the parties, and having given it our complete consideration, we find that the requested credit and offset cannot be allowed by virtue of ORS 656.313(2).

ORDER

The insurer's request for an order allowing it to offset permanent total disability benefits paid pending review pursuant to the Referee's order, against the permanent partial disability award granted by the Board's Order on Review, is denied. There being no issue concerning the remaining provisions of the Board's Order on Review dated December 30, 1982, we readopt and republish that order effective this date.

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BETTY L. HAMILTON, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09228
March 22, 1983
Order on Review

Reviewed by Board members Ferris and Lewis.

Claimant seeks review of Referee Braverman's order affirming the SAIF Corporation's denial of her psychiatric condition. The only issue is whether the claimant has sustained her burden of proving that her psychiatric condition was caused by work exposure.

The claimant is a high school language arts and social studies teacher. During the spring semester of the 1979-80 school year she began noticing physical symptoms which included abdominal spasms, shaky arms and hands, disorientation, tightness of the throat and a stiff neck. Her family physician, suspecting that the problems were psychological, referred her to a psychiatrist. The psychiatrist confirmed the family doctor's diagnosis. The claimant took a leave of absence for the 1980-81 school year because her psychiatrist thought it would relieve her problems. During the time she was off work her symptoms disappeared. However, they reappeared while she was doing volunteer work the following spring. After the volunteer work ended the symptoms again disappeared. She has now returned to work, apparently without problems.

This claim must be resolved by applying the major contributing cause standard enunciated by the Court of Appeals in SAIF v. Gygi, 55 Or App 570 (1980). The Referee did not have the benefit of Gygi when he issued his decision. Instead, he relied on the significant preponderance test which was then the standard applied by the Board. Applying that test, the Referee found that the claimant had failed to sustain her burden of proving that her condition was caused by her work exposure.

On de novo review, we find that the claimant has sustained her burden of proving by a preponderance of the evidence that her work exposure was the major contributing cause of her psychological condition.

Claimant's treating physician, Dr. Buss, was of the opinion that the two main factors causing the claimant's psychological problems were her marital situation and her work situation. However, he was adamant in refusing to quantify the extent to which either contributed to her condition. SAIF's counsultant, Dr. Stolzberg, was unable to venture any opinion as to the possible causation of claimant's condition. The medical evidence, therefore, does not clearly establish that claimant's work exposure was the major cause of her condition. Considering the medical evidence of record, however, together with the testimony given by claimant, her supervisor and her daughter, we are convinced that claimant's work exposure was the major contributing cause of her psychological difficulties.

Claimant and her husband first began to separate over two years before the onset of her symptoms. Her husband developed a consulting business in California at that time and began spending more and more time away from home. Over one year before the onset of her symptoms it became apparent to claimant that her husband was

never actually going to return. At that time he stopped contributing any significant amount to the claimant's support. She testified that she had crying spells as a result of the separation from her husband, but suffered no physical symptoms at that time.

Both claimant and her co-worker testified that beginning in the fall semester of the 1979-80 school year claimant's work pressures increased significantly. She was teaching five classes at that time. Her average class size was in excess of 32 students. Several of her classes were writing classes which required her to grade numerous papers. She had four different subjects to prepare with only about one hour a day set aside for preparation. One of the classes was a brand new course which was designed to be at a college level. In addition, the school had increased the paper work involved in keeping track of student attendance and discipline. The college level course was cancelled because of administrative problems. The claimant felt she was blamed by other teachers who had to absorb the students from that class into their classes. The work pressures during the following semester were roughly equal.

It was during the following semester that the claimant began experiencing the physical symptoms. The fact that when she took a leave of absence her symptoms gradually disappeared indicates to us that it was the stresses on the job which precipitated her condition.

If her marital problems predisposed her to this condition, her claim would still be compensable, because her work exposure was the major contributing cause of the condition which caused her to miss work. In speaking of the claimant in Gygi, the court said:

> "Certainly he was highly susceptible to depression and alcoholism resulting from stress in many situations in his life. Nonetheless, when viewed as a cause of his disability, the stress he faced while on the job was of greater intensity and was not substantially the same as the stress faced off the job."

Claimant was able to cope with her marital problems without disabling symptoms. It was only when her work stresses increased that she became disabled. We conclude that her work stresses were of greater intensity and not substantially the same as her off the job stresses. Accordingly, we find that her psychological condition is a compensable condition.

ORDER

The Referee's order dated January 20, 1982 is reversed. The claim is remanded to SAIF for acceptance and processing. Claimant's attorney is awarded a reasonable attorney's fee of $1,600 for services at hearing and before the Board.

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DWAYNE L. HANSON, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-10048
March 22, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Baker's order which disapproved the insurer's October 23, 1981 denial, and awarded claimant's counsel a $950 attorney's fee.

The issue on review is compensability, SAIF asserting that claimant did not prove the compensability of his left knee and low back injury of October 9, 1981 by a preponderance of the evidence.

The bottom line in deciding this case is the credibility of the claimant. While recognizing that there is "ample basis for reasonable doubt" in the record, the Referee did find claimant to be credible, noting that claimant is not required to prove his case beyond a reasonable doubt. We usually defer to the Referee's finding on the issue of credibility since he has the opportunity to see and hear the witnesses and is thus better able to weigh their credibility on disputed issues of fact. Hannan v. Good Samaritan Hospital, 4 Or App 178 (1971). Yet, depending upon the basis therefor, we do treat credibility findings differently, as we said in Karen K. Kephart, 34 Van Natta 707 (1982):

> "The Board has the advantage of having a transcript, which was not available to the Referee. If a Referee makes a credibility finding based on demeanor, the Board necessarily usually must defer. If a Referee makes a credibility finding based on what was said . . . . the Board is in a superior position to make that judgment. Richard A. Castner, 33 Van Natta 662, 663 (1981)."

Here, we are unable to determine the basis upon which the Referee made the credibility finding: on demeanor, on what was said, or a combination of the two. Nevertheless, based upon our review of the record, we defer to the Referee's finding that claimant is credible. We conclude, therefore, that the weight of the evidence establishes that claimant sustained a left leg and low back injury arising out of and in the course of his employment, requiring medical treatment and resulting in disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 29, 1982 is affirmed. Claimant's counsel is awarded $500 as a reasonable attorney's fee for prevailing on review.

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HARRY C. JORDAN, Claimant
Allan Coons, Claimant's Attorney
Wolf, Griffith et al., Defense Attorney

WCB 81-01698
March 22, 1983
Order on Reconsideration

The Board issued its Order on Review herein on December 30, 1982, modifying the Referee's award of permanent total disability and, in lieu thereof, awarding claimant compensation for unscheduled and scheduled permanent partial disability. The self-insured employer thereafter moved the Board for reconsideration of its order, requesting that it be allowed to offset the permanent total disability benefits paid pending Board review against the permanent partial disability award granted by the Board. We abated our Order on Review by order of January 28, 1983. Claimant's attorney has also requested reconsideration, contending that the Referee's award of permanent total disability was correct, or, alternatively, that claimant is entitled to an award of 100% unscheduled permanent partial disability.

For the reasons stated in Glenn O. Hall, WCB Case No. 81-03510, 35 Van Natta 275 (decided this date), the self-insured employer's request for a credit and offset against the permanent partial disability benefits awarded by the Board's Order on Review is denied. Having reconsidered the merits of our Order on Review, modifying the Referee's award of permanent total disability, we decline to modify our order as requested by claimant.

ORDER

On reconsideration of our Order on Review dated December 30, 1982, we adhere thereto. The self-insured employer's request for a credit and offset is denied. Our Order on Review is, therefore, readopted and republished effective this date.

* * * * * * * * * * * * * * *

LEONARD F. KISOR, Deceased
Jeffrey Mutnick, Attorney
SAIF Corp Legal, Defense Attorney

WCB n/a
March 22, 1983
Third Party Order

This proceeding concerns attorney fees that may be recovered by an attorney representing a worker, or the worker's beneficiaries, where a civil (third party) action has been initiated as a result of injury or other wrongful conduct which also gives rise to a workers compensation claim. See ORS 656.154 and 656.576, et seq.

The third party action involved herein is a suit presently pending in the Federal District Court for the Western District of Washington, filed by the deceased worker's widow, as the personal representative of the decedent's estate, against various asbestos manufacturers whose products allegedly caused the death of the worker as a consequence of the development of mesothelioma, an asbestos-related disease. The plaintiff in the third party action is represented by counsel in Portland, Oregon who filed suit in the State of Washington due to the more favorable products liability laws in that state. Accordingly, Portland counsel have necessarily associated local counsel in Seattle, Washington. The

retainer agreement entered into between plaintiff and her attorneys calls for a contingent fee equivalent to 40% of the recovery obtained against the various third party defendants. Portland counsel has communicated with the industrial insurer, the SAIF Corporation, in an effort to obtain the insurer's agreement to this attorney fee arrangement. SAIF has indicated that, even though they have no objections to the attorney fees requested in this case, because of existing administrative rules governing recovery of attorney fees in third party actions, it has no authority to agree to any fee arrangement which would result in an attorney's recovery of a fee exceeding the schedule contained in the administrative rules. The parties appear to believe that the present rules limit the attorney's fee recoverable in third party actions to 33-1/3% of the gross recovery obtained in behalf of the claimant/plaintiff. Counsel herein have indicated their inability to proceed further in the third party litigation if the attorney's fee that they are permitted to receive from the proceeds of the third party recovery is so limited.

The issue, therefore, is whether counsel are entitled to receive a fee equivalent to 40% of the recovery obtained in behalf of the plaintiff, in accordance with the retainer agreement entered into between plaintiff and her attorneys, or whether, by virtue of the administrative rules governing attorney fees in third party actions, counsel are limited to receipt of a fee which does not exceed 33-1/3% of the proceeds of the third party recovery.

We hold that the present administrative rules do not necessarily limit the attorney's fee in all third party actions to 33-1/3% of the gross recovery, and that, under the facts and circumstances as they appear to exist in this case, counsel are entitled to receive an attorney's fee equivalent to 40% of the gross recovery obtained in behalf of the claimant/plaintiff.

The general statutory provision governing the schedule of attorney fees in workers compensation proceedings is ORS 656.388. Subsection (4) provides:

> "The board shall, after consultation with the Board of Governors of the Oregon State Bar, establish a suggested schedule of fees for attorneys representing a worker under ORS 656.001 to 656.794."

The more specific statutory provision relative to attorney fees in third party proceedings is contained in ORS 656.593(1)(a), providing that attorney fees and other costs of litigation are to be paid from the proceeds of damages recovered from a third party, and that, "such attorney fees in no event [shall] exceed the advisory schedule of fees established by the Board for such actions."

The administrative rules governing attorney fees in workers compensation proceedings are contained in Chapter 438, Division 47 of the Oregon Administrative Rules. OAR 438-47-095 is the specific provision governing attorney fees in third party actions, and it provides:

> "In third party claims, as outlined in ORS 656.593, the attorney's fees shall in no event exceed 33-1/3 percent of the gross recovery obtained by the claimant."

This rule, in and of itself, appears to limit an attorney's fee arising out of a third party action to one-third of the gross recovery. We so stated in our Interim Third Party Distribution Order in John Galanopoulos, 34 Van Natta 615 (1982):

> "The express language of the rule governing attorney fees in third-party claims is that the attorney's fee shall in no event exceed one-third of the gross recovery. While we may believe that in certain cases one-third of the gross recovery obtained in behalf of the worker does not adequately compensate the plaintiff's lawyer, which may be particularly true in medical malpractice and some products liability cases, we are prohibited from allowing any fee in excess of that permitted by our rules. A change in the rules may be in order, but any such change will have to await rule-making proceedings and cannot be accomplished on a case-by-case basis." 34 Van Natta at 617.

OAR 438-47-010 contains general principles governing attorney fees in workers compensation proceedings, including third party actions. Subsection (2) provides:

> "The amount of a reasonable attorney fee when authorized under 47-000 to 47-095, including cases involving extraordinary services, shall be based on the efforts of the attorney and the results obtained, subject to any applicable maximum fee provided by 47-000 to 47-095. A referee, the Board, or a court may allow a fee in excess of the maximum amount fixed by 47-000 to 47-095 for extraordinary services on a showing by claimant's attorney in a sworn statement the services performed by the attorney."

This rule specifically incorporates the rule governing attorney fees in third party proceedings, OAR 438-47-095. There is a potential conflict between the terms of this general rule and the terms of the specific rule governing attorney fees in third party actions, providing that the attorney's fee shall "in no event" exceed one-third of the proceeds of the third party recovery; however, this apparent conflict is present as between the general principle set forth in OAR 438-47-010(2) and every other rule in Chapter 438, Division 47, providing for a maximum attorney's fee payable out of a claimant's award of compensation or in addition thereto. Attorney fees exceeding the limitations contained in the administrative rules are commonly awarded in workers compensation proceedings where the attorney has made a satisfactory showing of extraordinary services, generally based upon favorable resolution

of a claim involving unusually complicated legal, medical or other factual issues, where there has been a justified expenditure of an extraordinary amount of the attorney's time.

On reexamination of the issue, we see no reason to treat workers compensation proceedings involving third party litigation differently from the more usual workers compensation proceedings. In fact, civil litigation often entails a greater investment of attorney resources than does the usual proceeding in workers compensation claims, simply by virtue of the procedural differences, including motion practice and discovery. This is particularly true in cases involving complex litigation, such as the products liability case involved in this instance.

In James H. Roberts, 34 Van Natta 1603 (1982), we recognized that, in the appropriate case, the Board has the authority pursuant to OAR 438-47-095 to order payment of an attorney's fee in some amount less than 33-1/3 percent of the total proceeds of a third party recovery. 34 Van Natta at 1604. We now hold that, in appropriate cases, the Board has the authority, pursuant to ORS 656.593, to allow an attorney representing a claimant/plaintiff in third party litigation an attorney's fee in excess of one-third of the total proceeds of a third party recovery, where the attorney makes a satisfactory showing that such a fee is warranted, OAR 438-47-010(2), and that it is consistent with the retainer agreement entered into between the attorney and client. Cf. OAR 438-47-010(3). To the extent that our holding in John Galanopoulos, supra, is inconsistent, it is modified accordingly.

In this case, we are satisfied that counsel has established his entitlement to the attorney's fee of 40% of the recovery obtained in behalf of the plaintiff, in accordance with the terms of the attorney-client retainer agreement. Counsel in Oregon have filed suit in the State of Washington in order to take advantage of that state's apparently more favorable products liability law. This has necessitated association with Washington counsel, which results in the need to apportion a single fee between the two law firms. The third-party action names approximately thirty defendants, and obviously involves complex issues of proximate causation. Portland counsel allege that their law firm is the only firm actively involved in representing Oregon plaintiffs in litigation of this nature involving asbestos exposure and mesothelioma. As an example of the complex nature of this litigation, counsel refers to a similar case recently tried by their office, which involved approximately 78,000 pages of documentary material. Based upon the facts and circumstances as they have been presented, we are satisfied that an attorney's fee equivalent to 40% of the total proceeds of the third party recovery obtained in behalf of the claimant/plaintiff is warranted, and such a fee will be allowed.

ORDER

Upon distribution of the proceeds of the third party recovery discussed herein, counsel shall be allowed as a reasonable attorney's fee an amount equivalent to 40% of the total proceeds thereof.

* * * * * * * * * * * * * * *

EDWARD O. MILLER, Claimant
Bloom, Marandas et al., Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 79-03231 & 83-02511
March 22, 1983
Consolidated Order on Review and Own Motion Order Remanding and Referring for Further Proceedings

Claimant requested review of Referee St. Martin's order in WCB Case No. 79-03231, which arises out of a January 4, 1974 injury sustained while claimant was working for Coast Packing Company. Claimant also petitioned the Board to exercise its own motion authority and reopen his 1970 claim for an injury sustained while he was employed by Brander Meat Company, the predecessor of Coast Packing Company. Claimant's request for own motion relief was assigned Own Motion No. 82-0210M. On claimant's motion, and by an Interim Order dated September 10, 1982, the Board consolidated claimant's request for review and petition for own motion relief.

The substantive issues on review of WCB Case No. 79-03231 involve the extent of compensable consequences of claimant's 1974 finger/hand injury, which allegedly include a psychological/psychiatric condition diagnosed as a paranoid state, an organic brain pathology diagnosed as psychomotor epilepsy or a complex partial seizure disorder, and orthopedic problems extending beyond the area of claimant's initial injury, which was a severely lacerated right index finger, to include problems in the area of claimant's shoulder, neck and upper back. A sub-issue concerning Coast Packing Company's alleged liability for either claimant's psychological/psychiatric disorder or organic disorder, is the effect and scope of a 1977 disputed claim settlement entered into between claimant and this employer. Claimant also contends that he is entitled to an award for permanent total disability as a result of his 1974 injury.

The issue in Own Motion No. 82-0210M is whether Brander Meat Company is liable for either claimant's psychological/psychiatric condition or organic pathology, neither, or both of these conditions, if, indeed, they are separate or separable conditions.

In the course of reviewing these consolidated proceedings, it has become apparent that exhibits were offered and admitted during the course of the proceedings in WCB Case No. 79-03231; however, some of these exhibits are not contained in the certified record on review. Specifically, claimant's attorney, under cover of a letter to the Referee dated January 14, 1982, submitted a number of exhibits with a supplemental exhibit list itemizing the exhibits in chronological order. The transcript of the proceedings indicates that all the exhibits submitted to the Referee under cover of the January 14, 1982 letter and supplemental exhibit list were admitted into the record, and, in fact, the Referee's order at page 8 specifically refers to an April 3, 1978 letter from claimant's attending orthopedic physician which was part of this package of supplemental exhibits; however, this exhibit, as well as many of the other exhibits submitted under cover of the January 14, 1982 letter and supplemental exhibit list, are not contained in the record certified by the Referee for purposes of Board review. Some of these exhibits are duplicative of other exhibits

previously submitted and are contained in the record that was certified by the Referee; however, the majority of the exhibits submitted under cover of the January 14, 1982 letter and supplemental exhibit list are missing from the record presently before the Board. Furthermore, the Referee relied upon a November 2, 1978 report from the Orthopaedic Consultants which is not contained in the record presently before the Board in WCB Case No. 79-03231. This report is part of the record in Own Motion No. 82-0210M, and it is apparent that this report was submitted to the Referee as part of the material identified as Exhibit 57 in the original exhibit list dated March 6, 1981. Exhibit 57 as it presently exists in the certified record on review consists of a six-page affidavit from claimant's attorney requesting the Board to exercise its own motion authority and reopen claimant's 1970 injury claim with Brander Meat Company. It is obvious that, in WCB Case No. 79-03231, claimant submitted some or all of the materials filed with the Board in support of his request for own motion relief, including the November 2, 1978 report from the Orthopaedic Consultants. Other than the affidavit of counsel, it is not at all clear what the extent of Exhibit 57 was at the time it was submitted, although, in the certified record, it consists only of the affidavit.

Because we are presently unable to ascertain which exhibits were, in fact, considered by the Referee when he made his disposition of the various issues before him, and since it is possible that the Referee issued his order without considering all the exhibits that were submitted and admitted into the record during the course of the proceedings, we remand WCB Case No. 79-03231 to the Referee for further proceedings.

In Own Motion No. 82-0210M many of the issues relating to the possible responsibility of Brander Meat Company for claimant's current psychological/psychiatric and/or psychomotor epilepsy conditions overlap the issues in WCB Case No. 79-03231 concerning Coast Packing Company's liability, including the nature and extent of these conditions and their possibly disabling effects. The proceedings in both cases previously have been consolidated, and we deem it appropriate to refer the own motion proceeding to the Referee to be considered with the issues in WCB Case No. 79-03231.

The scope of this remand is as follows. In WCB Case No. 79-03231 the Referee shall consider all issues previously before him as addressed in his March 12, 1982 order. The parties to WCB Case No. 79-03231 shall be permitted to marshal any additional evidence deemed necessary and appropriate to allow the Referee to make a full and final disposition of the issues in that case, including testimony, and the proffered evidentiary material that formed the basis of claimant's motion for remand for further evidence taking shall be admitted and considered by the Referee.

In Own Motion No. 82-0210M the Referee shall consider the question of Brander Meat Company's responsibility for claimant's psychological/psychiatric and/or psychomotor epilepsy conditions as a possible consequence of claimant's 1970 head injury. The Referee shall make a recommendation to the Board concerning claimant's request for own motion relief, including Brander Meat Company's liability for temporary total disability and/or permanent disability compensation.

The question of Brander Meat Company's possible liability for medical services associated with claimant's psychological/ psychiatric and/or psychomotor epilepsy conditions is not a question which the Board will address pursuant to its own motion authority. These medical services are currently in denied status, although no formal denial of the claim has been issued by or in behalf of Brander Meat Company. The question of Brander Meat Company's responsibility for payment of these medical services is a question concerning a claim which is subject to a hearing pursuant to ORS 656.283. ORS 656.245(2); Max D. Cutler, 34 Van Natta 1480 (1982). Accordingly, claimant's denied claim for medical services, as to Brander Meat Company in claim number 131-7G0507, is hereby assigned WCB Case No. 83-02511, and the Referee is directed to take evidence on the issue of claimant's entitlement to and Brander Meat Company's responsibility for medical services associated with claimant's psychological/ psychiatric and/or psychomotor epilepsy conditions.

The Referee shall take and consider, and the parties are at liberty to adduce, all evidence that is deemed necessary and appropriate to fully address and dispose of all pending issues in WCB Case Nos. 79-03231, 83-02511 and Own Motion No. 82-0210M, including any further testimonial evidence deemed appropriate. At the conclusion of the proceedings, the Referee shall issue an order in WCB Case Nos. 79-03231 and 83-02511 pursuant to ORS 656.289; and the Referee shall issue proposed findings and recommendations in Own Motion No. 82-0210M concerning claimant's request for and entitlement to own motion relief (i.e., temporary total disability and permanent disability compensation as the responsibility of Brander Meat Company). The Referee shall provide the Board with all documentary evidence presented and the record of further oral proceedings taken, if any, which shall be added to and made a part of the record previously developed in WCB Case No. 79-03231. These proceedings shall remain in their consolidated status, and the Referee's recommendation in Own Motion No. 82-0210M will be considered by the Board upon completion of the proceedings before the Referee, whereupon the Board will issue an order pursuant to ORS 656.278, granting or denying claimant's request for own motion relief. The Board, however, will not consider any of the issues in WCB Case Nos. 79-03231 and 83-02511 unless one or all of the the parties request Board review of the Referee's order entered in those cases, pursuant to ORS 656.295.

ORDER

WCB Case Nos. 79-03231 and 83-02511 are remanded to the Referee pursuant to ORS 656.295(5), and Own Motion No. 82-0210M is referred to the Referee pursuant to OAR 436-83-820, for further proceedings as provided herein, and the Referee, with the cooperation of the parties, shall arrange to have a hearing, if any, set on a preferential basis.

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C. WAYNE SCHRUNK, Claimant
Coons & McKeown, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 79-08111
March 22, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Peterson's order which set aside SAIF's denial of claimant's aggravation claim and ordered it to accept claimant's current back condition as an aggravation of his 1976 industrial injury; imposed a penalty and associated attorney's fee for SAIF's failure to issue a timely denial of claimant's aggravation claim and its failure to pay interim compensation pending acceptance or denial; and awarded claimant's attorney a reasonable attorney's fee for prevailing on a denied claim. The issues are compensability of claimant's aggravation claim and the propriety of the Referee's imposition of penalties and attorney's fees.

Claimant was involved in an accidental injury on June 21, 1976 while working as a journeyman carpenter. Claimant was carrying decking on a roof which was under construction. A truss broke, and claimant fell to the ground, a distance of approximately 20 feet, landing on his left side. He was knocked unconscious, and he sustained a fracture of his left wrist and left fifth metatarsal. On admission to the hospital, the diagnoses were mild cerebral concussion, facial lacerations involving the left eyebrow and nose, contusion of the chest wall on the right side, contusion of the left hip and abrasions over the left hand. Claimant's left wrist fracture was surgically repaired at that time.

Dr. Adams, an orthopedic surgeon, performed the surgery and was claimant's attending physician with respect to his fractured wrist, which was the only condition resulting from the 1976 injury that then required treatment. Claimant was able to return to his regular work in November of 1976, five months after the injury, and he became medically stationary in May of 1977. A Determination Order closed his claim in July of 1977, awarding him temporary total disability and 15% scheduled permanent partial disability for loss of his left forearm.

In May 1979 claimant apparently began treating with Dr. Rabin, a chiropractic physician, for low back pain. Dr. Rabin had previously treated claimant for low back pain in July of 1977, at which time claimant received four treatments. On November 15, 1977 Dr. Rabin reported to SAIF that claimant's episodes of low back pain in July 1977 and May 1979 were both identified by claimant as being gradual in onset. Dr. Rabin's diagnosis with reference to both episodes was lumbosacral strain.

Dr. Rabin had taken x-rays in conjunction with claimant's treatment in 1977, and he again had x-rays taken of claimant's lower spine in August 1979. On comparison of the two films, Dr. Rabin found more deterioration present at the L5-S1 disc space in the 1979 films and greater amounts of hypertrophic change noted than, he stated, would normally be expected with a person of claimant's age involved in claimant's occupational activities. Based upon the diagnosis of contusion of the left hip recorded in the

1976 hospital admission records, Dr. Rabin concluded that claimant had sustained a trauma to his left hip as a result of his 1976 accidental injury. He stated that, considering this trauma, claimant's physical findings at the time of the November 1979 report, and comparisons of the x-ray films, "it is medically probable that the deterioration is due to the effects of his June 21, 1976 injury."

Dr. Rabin's bills for chiropractic manipulation of claimant's low back, apparently submitted to SAIF for the first time in May of 1979, were the first indication to SAIF that claimant's fall in 1976 possibly had any significant consequences other than his severely fractured wrist.

Claimant changed treating physicians and began treatment with Dr. Hebert, a chiropractic physician, who reported to SAIF on February 1, 1980 his diagnosis of chronic lumbosacral sprain and chronic left sacroiliac sprain which was probably related to the trauma involved in claimant's industrial accident. "With no history of the patient having suffered any new injuries, I feel that the condition I am now treating is the result of the accident of June 21, 1976."

Dr. Hebert referred claimant for evaluation to Dr. Smith, a neurosurgeon, who examined claimant on January 21, 1981. Dr. Smith reviewed a series of x-rays of claimant's lower spine, from 1971, 1977 and 1979. He concluded that these indicated a slowly progressive degenerative osteoarthritis of the lumbar spine, which he believed to be continually aggravated by the nature of claimant's work, which he apparently understood to be relatively heavy. Dr. Smith stated: "I would believe that his physical impairment based on the progressive degenerative arthritis which in itself would be somewhat independent of traumatic injury processes, would have to be considered moderate. I believe that the patient's impairment based entirely on his history of injury of 6/21/76 would be considered minimal or mild."

The quoted statement authored by Dr. Smith is confusing regarding the possible cause and effect relationship between claimant's 1976 injury and apparently progressing degenerative changes of the spine. A subsequent note from Dr. Smith, generated by an inquiry from claimant's attorney, more clearly indicates Dr. Smith's opinion of the relationship between claimant's 1976 injury and the condition of his lower back at the time of Dr. Smith's examination. Although this statement, dated and signed by Dr. Smith on April 1, 1981, is little more than a check-the-boxes response, this statement is of more value than such a report ordinarily would be in light of the doctor's earlier narrative report. In it he states his opinion that claimant's 1976 injury aggravated claimant's degenerative osteoarthritis. We do not find this statement inconsistent with the conclusions stated in his February 21, 1980 report; rather, we find this statement a clarification of an otherwise obscure report.

SAIF referred claimant for an independent medical examination with the Southern Oregon Medical Consultants, and claimant was

examined on May 11, 1981 by two orthopedic surgeons and a neurosurgeon, who diagnosed chronic lumbar strain, superimposed upon degenerative disc disease, not causally related to claimant's injury. The Consultants found insufficient evidence to relate the claimant's current back problems to his 1976 accidental injury, but they stated that the degenerative processes had been aggravated by claimant's heavy work. They agreed with Dr. Smith's opinion that it would be advisable for claimant to limit his types of physical work activity.

Claimant returned to Dr. Adams, the orthopedic surgeon who originally treated him for the wrist fracture, for examination on October 28, 1981. Dr. Adams states: "Please note there was mention of some problems in his left hip after his fall, but there was no mention of back pain until recently, from my standpoint."

Dr. Adams agreed with the conclusion as stated by previous examiners, that claimant had degenerative disc disease. In his October 30, 1981 report, Dr. Adams stated that the question of the possible relationship between claimant's current back difficulties and his 1976 industrial fall was very difficult, one which he did not feel capable of answering based upon the information then available to him. He stated, however: "My only personal opinion would be that his industrial injury would not cause him to have these significant degenerative changes at L4-L5 and L5-S1 but might cause him to have an exacerbation of this." A November 2, 1981 addendum to his October report indicates that Dr. Adams had the opportunity to view a series of x-rays in addition to those which had been taken in May 1981 by the Southern Oregon Medical Consultants. In addition to those, Dr. Adams viewed x-ray examinations dated March 17, 1971, at which time claimant was 21 years of age; July 26, 1977 when claimant was 27 years old; and x-rays taken in 1979 when claimant was 29 years of age. Dr. Adams concluded:

> "On the basis of these x-rays he had normal x-rays in 1971. In 1977 he had very minimal change, but by 1979 he had significant degenerative changes. We would have to assume that his fall off the scaffolding in 1976 would have aggravated his pre-existing complaints. I still cannot come right out and say, however, that all his etiology is due to his fall. Certainly, we do know that trauma can aggravate this type of situation."

Claimant had experienced periodic low back pain prior to his 1976 injury. The history taken by the Southern Oregon Medical Consultants relates the earliest onset of low back symptoms to 1967 or 1968. In 1971 claimant sought chiropractic treatment with Dr. Chatburn, in approximately March of 1971, at which time he took x-ray films of claimant's spine. Claimant received three treatments at this time, and he testified that he experienced no further low back difficulties prior to his 1976 injury.

During this entire period, i.e., from 1971 until his injury in 1976, claimant was primarily employed as a carpenter. After gradu-

ating from high school in 1967, he was in an apprenticeship program for four years, after which time he became a journeyman. Claimant thus worked for approximately nine years in carpentry work prior to his 1976 injury, finding it necessary to seek treatment for relief of low back pain only briefly in 1971. After three treatments he was discharged, and x-rays taken at that time indicate a normal lumbar spine with no evidence of degenerative changes.

When claimant sustained his fractured wrist as a result of the 1976 injury, the only evidence of trauma to the low back was the left hip contusion noted in the hospital admission record. No mention was made by claimant of low back pain at this time, and there is some confusion in the record as to exactly when claimant experienced the onset of low back pain subsequent to the 1976 fall. The Referee's order indicates he was of the impression claimant experienced back symptoms four months after his 1976 injury, before his return to regular work. The Referee stated that he drew this conclusion from claimant's testimony. On our review of the record, however, it is apparent that the only reference to the onset of back pain four months after his accidental injury is in Dr. Rabin's report of November 15, 1979, and we do not find this statement supported in any other portions of the record. Claimant appeared uncertain in his testimony as to the exact onset of low back problems. The transcript of the proceedings indicates his initial recollection to be December of 1976, but he, in the same breath, changed his testimony to state that, "It would have been about June of '77." In either event, the onset of back problems would have followed claimant's return to regular work in November of 1976. We find that claimant's post-injury onset of low back symptoms was most likely in early to mid-1977. In fact, he sought treatment for these symptoms in July of 1977, when Dr. Rabin treated him four times and then released him to return to work. The Referee's finding that claimant experienced the onset of low back symptoms four months after his 1976 injury, before his return to regular work, is significant because he accorded less weight to the medical opinions relating claimant's low back problems in 1979 and thereafter to the effects of his return to heavy work. Our finding that claimant did not experience the post-injury onset of low back symptoms until after his return to regular work does not significantly change the picture, however, and we reach the same conclusion as did the Referee.

Claimant testified that after he returned to work in November 1976, he continued working for this employer for a period of approximately four months. During this period of time, claimant initially was engaged in finishing work for the most part, which he characterized as "basically light work." Although claimant testified that, when he returned to work, he returned to performing "normal carpentry work," it is apparent from his testimony that when he first returned, he was performing basically light work. He apparently was capable of performing full work activity, and the only limitations he experienced initially were with regard to his left wrist.

In March 1977, claimant started his own construction business. We find that about that time or shortly thereafter he began to

experience problems with his low back, which he described as insidious in onset. As previously mentioned, he was treated by Dr. Rabin in July 1977. It was not until December of 1978, according to claimant's testimony, that his back pain began to interfere with his ability to work. He testified to limitations in his ability to work for a full day, and he began to experience limitations in bending and lifting. He experienced no particular incidents that could be identified as accidents or injuries to his back. He testified that he was doing the same kind of work during this period of time, as he had prior to his 1976 injury; however, in light of his accompanying testimony regarding his increasing limitations beginning in December 1978, we understand this testimony to mean that claimant was performing the same type of work but experiencing increasing difficulties and limitations in doing so.

Claimant testified to an approximate 50% reduction in the amount of time he was able to work, and he found it necessary to hire other people to perform heavy work he was previously capable of performing. He was able to perform easy tasks. He took a position supervising the construction of a church in Barbados in April 1979, but his activities were limited to supervisory type activities without much physical labor. When he returned, he resumed his own construction business. He was unable to work 40 hours a week and again found it necessary to hire out the hard jobs. When he saw Dr. Rabin, apparently beginning in May 1979, Dr. Rabin suggested that claimant stop working. Between June 1979 and December 1979 claimant worked part time, and in December 1979, on the advice of Dr. Hebert, he stopped work entirely, until he was released to return light to work in April of 1980.

I

In order to establish the compensability of claimant's current low back condition, which has been diagnosed by medical doctors as degenerative disc disease, and by chiropractic physicians as chronic lumbosacral strain or sprain, he must establish a causal connection, legally and medically, between his 1976 accidental injury and his present condition. The Referee stated that the diagnosis of a left hip contusion gives rise to an inference that there may have been trauma to claimant's lumbar spine. It is clear that the Referee was referring to the legal causation aspect of claimant's proof, and not medical causation.

The evidence indicates that, when claimant fell 20 feet from the scaffolding to the concrete ground at the construction site, he landed on his left side, suffering a severely fractured left wrist, a concussion and facial lacerations, as well as a contusion of his left hip. This incident arose out of and in the course of his employment, and we are satisfied that claimant has established the legal causation aspect of this claim. Cf. Olson v. SIAC, 222 Or 407 (1960); Summit v. Weyerhaeuser Company, 25 Or App 851, 856 (1976).

In order to satisfy the medical causation aspect, claimant must establish that his 1976 injury was a material contributing cause of the condition for which he now claims compensation. There are two possible interpretations of the medical evidence. The first, indicating compensability of claimant's present low back

condition, is that the trauma of the 1976 fall either caused or accelerated the ongoing degenerative processes occurring in claimant's lumbar spine. The second, which would not lead to a finding that this aggravation claim is compensable, is that claimant's work activity as a carpenter after 1976 has caused or aggravated the degenerative process, causing claimant's current disabled condition. The opinions of Dr. Rabin and Dr. Hebert support the former. The opinion of the Southern Oregon Medical Consultants supports the latter. The opinion of Dr. Smith, which initially would appear to support the latter to the exclusion of the former, although not clearly so, appears to support the former with the benefit of a clarifying statement.

Dr. Adams' opinion is somewhat equivocal; however, he seemed to be of the impression that, in order to causally relate claimant's back condition to his 1976 injury, it was necessary to identify the injury as the sole cause of claimant's back condition. The injury need not be the sole or primary cause of claimant's condition; it is only necessary that it be a material factor. Summit v. Weyerhaeuser Company, supra, 25 Or App at 856.

We find the evidence preponderates slightly in favor of finding that claimant's 1976 injury precipitated or accelerated the onset or progression of his degenerative disc disease, resulting in disability at a point in time earlier than what otherwise would have occurred in the absence of the industrial injury. This is clearly supported by Dr. Rabin's conclusions, as well as the opinion of Dr. Adams, who was impressed with the progression of claimant's degenerative processes, reflected by a comparison of x-ray films, causing him to remark: "There has certainly been a significant progression from 1977 to the present." It is unlikely that claimant's ten years of construction work would have resulted in minimal changes in 1977 but significant changes by August 1979, particularly in view of the fact that for almost one-half of this intervening two-year period, claimant's work activities were more limited than the activities in which he had engaged for the preceding ten years. It is more likely than not that claimant's 1976 injury contributed to the progression of the degenerative process, and we find this contribution to have been material.

II

We next address the question of penalties and attorney's fees. Due to a mistaken reading of date stamps, the Referee found that SAIF had failed to commence payment of interim compensation benefits within 14 days of its receipt of medical verification of claimant's inability to work. Claimant concedes that SAIF's denial issued 14 days after receipt of the form 827 from Dr. Hebert, and that, therefore, SAIF was not obligated to pay interim compensation benefits. We, therefore, reverse that portion of the Referee's order imposing a penalty and associated attorney's fee for late payment of interim compensation.

The Referee also imposed a penalty and attorney's fee for a late denial. We agree with the Referee's conclusion that, upon receipt of Dr. Rabin's November 15, 1979 report, which was received December 5, 1979, SAIF had adequate notice that claimant was making a claim for compensation for a worsened condition related to his

1976 industrial injury. SAIF did not deny the claim until March 4, 1980, which was 29 days late. The claim for a back condition may have taken SAIF somewhat by surprise, in view of the fact that only claimant's wrist condition required extended treatment as a result of the 1976 injury; however, this is not sufficient justification for the late denial in this case, considering the fact that SAIF had requested this report from Dr. Rabin by letter of October 25, 1979, which was an apparent response to billings for back treatment previously received from Dr. Rabin. As of SAIF's receipt of this report, there no longer could have been any confusion concerning exactly what claimant was claiming, as argued in SAIF's brief on review. This report clearly states a claim for treatment associated with low back complaints which SAIF should have denied in a more timely fashion. Cf. Billy J. Eubanks, WCB Case No. 81-07465, 35 Van Natta 131 (February 3, 1983).

Having determined that Dr. Rabin's November 15, 1979 report obligated SAIF to accept or deny claimant's aggravation claim within 60 days of receipt of that report, SAIF is subject to a penalty for unreasonably delaying a denial, if there is any compensation "then due" upon which to impose the penalty. Because SAIF issued its denial on the 14th day after medical verification of inability to work due to a claimed worsened condition, thereby cutting off its obligation to commence payment of interim compensation, there are no amounts "then due" for purposes of imposing a penalty for SAIF's late denial of claimant's aggravation claim. Accordingly, we reverse the Referee's imposition of penalties based upon the late denial.

ORDER

The Referee's order dated May 20, 1982 is affirmed in part and reversed in part. Those portions of the order imposing penalties and attorney's fees for failure to pay interim compensation and for unreasonably delaying acceptance or denial of claimant's aggravation claim are reversed. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney's fee on Board review for prevailing on the issue of the compensability of claimant's aggravation claim.

* * * * * * * * * * * * *

CHET TESTER, Claimant
Bischoff & Strooband, Claimant's Attorneys
Allan deSchweinitz, Attorney
Cowling & Heysell, Defense Attorneys

WCB 82-04912 & 82-01933
March 22, 1983
Order Denying Motion to Dismiss

The employer, Southern Oregon State College, has moved to dismiss Jackson County Juvenile Department's request for review on the grounds that they failed to mail the request to all parties within the 30-day period, pursuant to ORS 656.295(2). See ORS 656.289(3).

The motion to dismiss is denied. Barbara Rupp, 30 Van Natta 556 (1981); Michael J. King, 33 Van Natta 636 (1981).

IT IS SO ORDERED.

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JAMES L. WALKER, Claimant
James O'Neal, Claimant's Attorney
Steven Yates, Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 81-00096
March 22, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Johnson's order which affirmed the December 16, 1980 Determination Order which allowed claimant no additional permanent partial disability beyond amounts previously awarded. The only issue is the extent of claimant's right foot (ankle) disability.

Claimant, a physical education instructor, sustained compensable injuries to his right arm and right foot on November 9, 1976 while engaging in basketball practice. Claimant was treated by Dr. Donahoo who diagnosed a right elbow dislocation with ulnar nerve involvement and a fracture dislocation of the right ankle. The elbow was treated by closed reduction with application of a posterior splint. The right ankle was treated by open reduction, internal fixation and ligament repair.

On June 24, 1977 Dr. Donahoo reported that claimant's condition was stationary and that claim closure was in order. A Determination Order dated September 12, 1977 awarded claimant benefits for temporary total disability, 5% scheduled disability for loss of right arm and 5% scheduled disabiltiy for loss of the right foot. These awards were subsequently increased by stipulation of the parties on January 30, 1978. Claimant received a total of 15% permanent disability for the right arm and 15% permanent disability for the right foot.

On November 21, 1979 Dr. Schostal reported that claimant was suffering severe aching pain in the right elbow. Dr. Schostal suspected the presence of a right ulnar nerve lesion and referred claimant to Dr. Smith, who diagnosed a dislocating right ulnar nerve with ulnar neuropathy of a mild degree. On June 4, 1980 Dr. Smith performed an anterior transposition of the right ulnar nerve. Dr. Smith reported on November 12, 1980 that claimant was medically stationary with a considerable improvement in his condition. A Determination Order issued on December 16, 1980 allowing claimant additional benefits for temporary total disability only.

With regard to claimant's right foot, Dr. Thompson reported on November 2, 1979 that claimant was experiencing aching pain in his right ankle when he was involved in vigorous activity. Dr. Thompson stated that claimant had degenerative joint disease secondary to his foot injury. On December 23, 1980 Dr. Thompson reported that claimant would have a chronic pain problem with his ankle, and on January 1, 1981 stated that he felt that it was unfair to assign a numerical value of 5% to a disease process. Claimant was referred to Dr. Donahoo for evaluation. On April 6, 1981 Dr. Donahoo reported that he found no measurable loss of motion, no swelling or change in the height of the joint space in the ankle to suggest that there had been any changes in claimant's ankle condition since 1977, and that the claimant's subjective complaints remained consistent with claimant's prior award for permanent disability.

The matter proceeded to hearing on the sole issue of the extent of claimant's right foot disability. The Referee noted that claimant was still able to participate in vigorous activities such as officiating at basketball and baseball games, building and carpentry activities and yard work and landscaping, thus demonstrating little loss of function to his foot. The Referee concluded that claimant was sufficiently compensated for his foot/ankle loss by previous awards.

We agree with the Referee's conclusion that claimant has not demonstrated that he has suffered any loss to his right foot beyond that allowed by his previous awards. There is an additional basis for our conclusion. The employer has pointed out that, when the claim was reopened in June of 1980, it was reopened with regard to claimant's right arm condition, not his right ankle condition, and that temporary total disability benefits were paid for the disabling arm condition only. The employer argues that the hearing resulted in allowing the claimant a "second bite at the apple" in regard to the issue of the extent of his right foot disability.

We agree with the employer's argument. In James B. Johnson, 35 Van Natta 47 (1983), we discussed the somewhat obscure origins of the maxim that, when a claim is reopened, it is "reopened for all purposes." In Johnson the claimant sustained injuries to his right shoulder and left knee and received permanent disability awards for both body areas. His claim was later reopened for knee surgery and reclosed with an increased award for the knee. Claimant requested a hearing on the Determination Order and a Referee increased claimant's right shoulder disability, despite the fact that claimant had not demonstrated that his shoulder condition had changed since his last arrangement of compensation. We reversed the Referee's award of increased shoulder disability, stating:

> "We think the better policy position in this kind of situation is to limit the cognizable extent issues after reclosure of a claim to conditions and circumstances that have changed since the prior claim closure." (Emphasis in original.)

The same is true in the current case. There is no evidence here that claimant's right foot condition has worsened since the 1978 stipulation. Claimant's claim was reopened only in relation to his right elbow problem. Absent a showing that his foot/ankle condition has changed claimant is not entitled to a new determination of the extent of his right foot disability.

ORDER

The Referee's order dated June 29, 1982 is affirmed.

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CURTIS H. BEST, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05481
March 23, 1983
Order of Remand

Claimant requests review of Referee Seifert's order which awarded him 75% scheduled permanent partial disability for loss of the right arm, that being an increase of 15% over and above the Determination Order of April 27, 1982, affirmed the Determination Order's award of temporary total disability benefits and ordered the SAIF Corporation to pay for claimant's ongoing psychiatric treatments with Dr. Straumfjord.

Claimant, by motion of September 7, 1982, requested the Board to remand the matter to the Referee for supplementation of the record pursuant to ORS 656.295(5). Claimant contends that SAIF failed to comply with OAR 436-83-460, which provides:

> "Upon demand of any claimant requesting a hearing, the DRE/SAIF and its representatives shall within 15 days of mailing said demand furnish to claimant or his representative, without cost, copies of all medical and vocational reports and other documents relevant and material to the claim which are then or come to be in the possession of the DRE/SAIF or its representatives, except evidence offered solely for impeachment need not be so disclosed. Failure to comply with this section may be considered unreasonable delay or refusal under ORS 656.262(8)."

Specifically, claimant alleges that SAIF failed to provide him with copies of any of the medical reports which were in its possession relating to claimant's right arm surgery in June of 1980 in Seattle, Washington, following proper demand. Claimant argues that SAIF obviously was aware of the surgery since it paid for it, and that copies of the related medical reports could have been important in regard to the issue of whether the claimant was medically stationary during the period from July 30 to November 17, 1980. Therefore, the claimant contends that the matter should be remanded to the Referee with instructions to supplement the record and penalize SAIF.

SAIF argues that the rule only requires it to provide copies of documents which are "relevant and material" to the claim, and that these reports are not relevant or material to any of the issues at the hearing. We recently rejected that construction of OAR 436-83-460 in Rose E. Pederson, 34 Van Natta 1658 (1982). As is typical of discovery obligations, the rule requires disclosure of all medical reports because even those which are not material may lead to the development of material evidence.

SAIF also contends that claimant is required to show that documents were not obtainable with due diligence before the hearing

and that "a mere request to provide medical reports readily obtainable by claimant directly from his physicians should not be considered a diligent effort to obtain the evidence." (Emphasis added.)

We believe that these arguments miss the point of the discovery procedure provided for in OAR 436-83-460, and contradict the very terms of the rule. We do not consider a demand made pursuant to the rule to be, in SAIF's words, a "mere request." It is also not necessary under the rule for the claimant to establish that he has exercised due diligence in attempting to obtain the documents on his own. The rule provides that upon demand the documents shall be furnished to a claimant without cost. Other than a demand, there are no requirements with which claimant must comply.

SAIF's reliance on Marion L. Ells, 34 Van Natta 1010 (1982), is misplaced. Ells involved a request for remand to admit medical reports generated after the hearing. There was no issue with regard to OAR 436-83-460.

This case is remanded to the Referee with instructions to permit supplementation of the record in accordance with this order, for imposition of what he determines to be an appropriate penalty against the SAIF Corporation for its failure to comply with OAR 436-83-460 and for such further proceedings as may be necessary.

IT IS SO ORDERED.

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BENJAMIN O. HOCKEMA, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-09555
March 23, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Shebley's order which awarded claimant an additional 20% unscheduled permanent disability, for a total award of 90% unscheduled permanent disability. Claimant contends he is permanently and totally disabled.

As a preliminary matter, claimant requests that we remand this case to the Referee for receipt of additional evidence. The nature of this additional evidence is ambiguous. To the extent that it relates to what claimant's condition was at the time of the hearing, we find that the evidence could, with due diligence, have been obtained and offered before the record closed; accordingly, remand is inconsistent with the standards set in Ora M. Conley, 34 Van Natta 1698 (1982), and Robert A. Barnett, 31 Van Natta 172 (1981). Alternatively, the additional evidence claimant wants to introduce may relate to a worsening of his condition after the present hearing record closed. Because claimant's aggravation rights expired in 1980, claimant cannot now assert an aggravation claim in connection with this pending case. Claude Allen, 34 Van Natta 769 (1982); Wilma Kim Buhman, 34 Van Natta 252 (1982). Rather, if claimant believes his condition has worsened, his proper remedy at this point is to submit the additional evidence in question to the

Board in connection with a request for own motion relief pursuant to ORS 656.278. Claimant's motion to remand is denied.

The extent of claimant's disability was previously litigated in Benjamin O. Hockema, 26 Van Natta 437 (1979). We granted an award for 70% unscheduled permanent disability. The Court of Appeals affirmed without opinion. Hockema v. SAIF, 41 Or App 1 (1979). Claimant's claim was thereafter reopened for pain center treatment and reclosed with no additional award for permanent disability. Claimant's request for hearing on the extent of his disability gave rise to this proceeding.

The Referee properly focused on changed circumstances since the prior litigation. See James B. Johnson, 35 Van Natta 47 (1983); Fred Hanna, 34 Van Natta 1271 (1982). The Referee found some change in claimant's physical condition:

> "Since his 1978 hearing, claimant's low back pain has grown more acute, even during the good or normal periods, and it is significantly worse during his bad spells. These bad spells are occurring more frequently now and, for example, he experienced eight or nine such episodes between the May 29, 1981 and January 22, 1982 hearing sessions."

We agree with these findings.

The parties argue at length about whether there has been any change in claimant's vocational circumstances. One of the findings in the prior litigation was that claimant was not motivated to seek work and had not made reasonable efforts to seek work. See 26 Van Natta at 440. Since the prior litigation claimant has made some efforts toward seeking work, both on his own initiative and with assistance from vocational rehabilitation counselors. However, the seriousness of these efforts is debatable. For example, when interviewed by prospective employers, claimant would always display a copy of a several-year-old medical report that is about the most pessimistic of all of the medical reports in this record. In addition, the magnitude of claimant's job search (four applications) was, as the Referee put it, "minimal." We are not persuaded that claimant's seek-work efforts were reasonable.

In summary, the change in claimant's physical condition (increased pain) justifies the Referee's award for increased partial disability, but the change in claimant's vocational circumstances (minimal and not very serious efforts to become employed) is not sufficient to justify an award for permanent total disability.

ORDER

The Referee's order dated March 24, 1982 is affirmed.

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LENA HUNTER, Claimant
Goldberg & Mechanic, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-07942
March 23, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee St. Martin's order which affirmed the May 26, 1981 Determination Order which awarded claimant 45% unscheduled permanent partial low back disability. The only issue is the extent of claimant's disability. Claimant contends that she is permanently and totally disabled, or, in the alternative, that her disability is greater than that allowed by the Determination Order.

Claimant sustained a compensable injury to her back on September 18, 1969. A myelogram revealed herniated discs at L2-3 and L4-5, and a laminectomy was performed in April of 1970. Claimant continued to experience difficulties, however, and a second myelogram was performed in 1971 which disclosed nerve root pressure at L5-S1. Surgery was again performed including a bone block fusion at one level. A third myelogram was performed on claimant in 1972. The findings were negative, but cluneal nerve entrapment was found. A cluneal neurectomy in the right iliac crest was then performed. A graduated spinal block was performed on January 18, 1973. This was followed by a bilateral lumbar sympathectomy on March 6, 1973.

Claimant thereafter came under the care of Dr. Raney, an orthopaedic surgeon in San Francisco. On November 5, 1974 Dr. Raney performed an anterior lumbar intervertebral disc excision with an interbody anterior fusion. There are numerous reports from Dr. Raney in the record which indicate that claimant experienced substantial pain relief and was very pleased with the results of the surgery.

Despite the fact that claimant's back pain was substantially relieved, she continued to experience pain at the donor site of the iliac crest. This was treated by injection therapy and oral pain medications. In 1976 claimant underwent a hysterectomy which was necessary in order for her to continue with estrogen therapy for her back. Dr. Raney continued to follow claimant and reported on her progress in many optimistic reports in which he indicated that claimant was experiencing an improvement in her physical abilities and activities. Claimant was eventually examined at the request of the employer/insurer, by Dr. McIvor on March 9, 1981. Dr. McIvor concluded that claimant was medically stationary and found her capable of light work. On April 14, 1982 Dr. Raney reported his concurrence that claimant was medically stationary on March 9, 1981 but that he had not released her to return to work. He stated that this was because, "It is my impression that Mrs. Hunter has basically entered into a retirement status and has no intention of returning to gainful employment." He also agreed that if claimant did return to work, that she would be limited to light work with no repetitive bending or lifting of more than twenty pounds. A Determination Order issued on May 26, 1981 awarding claimant temporary total disability benefits from September 27, 1969 through March 9, 1981 and 45% unscheduled permanent partial disability. Claimant requested a hearing.

The Referee's order contains very few findings of fact. The Referee described certain behavior exhibited by the claimant at the hearing as "bizzare." He described claimant lying down on chairs, kneeling, and lying down on the floor during the course of the hearing. Much of claimant's testimony was contrary to information contained in the medical reports. Comparing claimant's testimony and behavior to the medical evidence, the Referee concluded that claimant's testimony was unreliable and incredible. He further concluded that the evidence did not support the contention that claimant was permanently totally disabled, or that the Determination Order's award was inappropriate under the circumstances. We agree.

Claimant was 61 years of age at the time of the hearing. She has an eighth grade education. Her work history consists of waitress and cashier work, assembly-line cannery work, and some sawmill work.

It is apparent from a review of the record in this case that claimant has exhibited little desire or willingness to return to work. She has received temporary total disability benefits for approximately 13 years, and in that time period has not once attempted to return to work nor made any effort in that direction. As the Referee indicated, this is no doubt due in part to the fact that claimant's husband has a successful business and there is little or no financial incentive for claimant to return to employment. Dr. Raney's reports indicate that claimant was making excellent progress, had reached a stage where she was virtually pain-free and was able to return to many of her pre-injury activities, but instead, had chosen to retire from the work force. We conclude that claimant has not demonstrated that she is willing to seek gainful employment or that reasonable efforts in that direction have been made pursuant to ORS 656.206(3).

With regard to the question of whether claimant's disability is greater than that awarded by the Determination Order, we defer to the Referee's finding concerning the claimant's lack of credibility, and agree with him that the totality of the evidence leads to the conclusion that the amount awarded by the Determination Order was appropriate.

ORDER

The Referee's order dated July 20, 1982 is affirmed.

* * * * * * * * * * * * * * * * * *

BRAD L. LOREN, Claimant
Clinton Simpson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Scott F. Gilmon, Defense Attorney

WCB 81-00216
March 23, 1983
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 aggravation claim. The issue is compensability.

In December of 1979, while working for an employer insured by SAIF, claimant sustained a low back strain/sprain. Claimant received chiropractic treatment from Dr. Ott and missed little or no time from work. SAIF initially accepted the 1979 injury claim as nondisabling. In March of 1980 claimant changed jobs and began working for Mart Excavation & Trucking, driving dump trucks and apparently occasionally operating some heavy equipment. Claimant continued to suffer some low back symptoms and continued to receive chiropractic treatment. Claimant, however, missed no time from work due to his back symptoms with the exception of about a one-week period in October of 1980. SAIF paid time loss for this period and apparently then reclassified claimant's 1979 injury as disabling.

After working for Mart a few months as an employe, claimant became a partner in that company. His duties over the following year evolved toward increased supervisory work and less truck driving and equipment operation.

In the summer of 1981 claimant experienced a marked increase in low back pain and, for the first time, pain radiating into his right leg. Claimant testified that he first experienced radiating leg pain when getting out of bed one morning in July. Claimant experienced increased low back pain in connection with all activities, but the pain-producing activity mentioned in all medical histories taken during this period is "getting into and out of trucks." Claimant testified, however, that he was not driving dump trucks during the summer of 1981 and that "getting into and out of trucks" meant only a pickup truck he used in connection with his supervisory duties at construction sites. Ultimately, a herniated disc was diagnosed and Dr. Golden performed surgery.

Claimant has not and cannot assert a claim against Mart Excavation & Trucking, i.e., that work activity for Mart caused his disc herniation, because as a partner in Mart claimant is not subject to the Act. The only claim in issue is an aggravation claim. The question is whether claimant's 1979 low back strain/sprain injury was a material contributing cause of claimant's 1981 herniated low back disc. Claimant, of course, has the burden of proving the requisite causal relationship. Anderson v. West Union Villege Square, 43 Or App 295 (1979).

There are three lines of evidence relevant to the causation question. First, Dr. Golden, who performed claimant's 1981 laminectomy, states in a check-the-boxes report that claimant's surgery was not an aggravation of his 1979 industrial injury. Dr. Golden

was deposed. Parts of his deposition testimony are hard to understand. Dr. Golden repeatedly refers to "two separate incidents," the first being the 1979 injury and the second being something that happened during the summer of 1981. Apparently Dr. Golden is referring to "getting into and out of trucks" as an "incident." Dr. Golden discussed "continuity of symptoms" as significant in establishing a cause-and-effect relationship between the 1979 strain and the 1981 herniation; the more frequent, more severe and more persistent the symptoms were during this interval, the more likely there would be a causal relationship. It appears to be Dr. Golden's theory that claimant's continued ability to do the work that he did between the 1979 strain and the 1981 herniation suggests a low level of back symptoms that is inconsistent with the former being a material cause of the latter. Finally, Dr. Golden was asked whether he adhered to the opinion expressed in his check-the-boxes report:

> "Q. Dr. Golden, the report that you signed on December 8, 1981 stated that you felt that [claimant's] laminectomy was, more probably than not, related to a new incident. * * * Are you still in agreement with that statement? Or are you modifying that statement?
>
> "A. Well, what I'm saying is that, that while it would be difficult to assign a proportion between the causes of his condition which led to the laminectomy, it's clear to me that an extremely significant feature of his illness is the incident which happened on, on his job, of getting in and out of the truck. And some kind of stress had to happen to produce the herniation. It
>
> takes some kind of stress. Those things just don't happen without something pushing the disk out. So that just happened to be the factor.
>
> "He was at work when it happened, so I'm saying that, while it's true there may be an underlying condition and there may be some other material cause, but for his work-related injury, he may not have herniated a disk.
>
> "Q. Okay. You're saying, then, that the work activity was the precipitating factor --
>
> "A. Yes.
>
> "-- in the herniation? All right."

In context, we understand Dr. Golden's reference to "work activity" to mean claimant's work during the summer of 1981.

The Referee interpreted Dr. Golden's deposition testimony as follows: "Dr. Golden appears to be saying that the 1979 injury was a material contributing cause of the need for surgery." We disagree. While interpretation of Dr. Golden's deposition may be debatable, we think that overall it is somewhere between neutral and adverse to claimant's position; we do not think it lends any support to claimant's position.

The second line of evidence relevant to the causation question comes from claimant's chiropractor, Dr. Ott, who treated claimant between 1979 and 1981. Dr. Ott opined: "From the history of his care since the 1979 injury my opinion is that [claimant's] symptoms in August 1981 [i.e., herniated disc symptoms] are a resultant direct worsening of his initial injury in December 1979." However, Dr. Ott offers no explanation of the basis of his opinion.

Possibly because the medical evidence is not conclusive, claimant places major emphasis on the third type of evidence -- the fact that claimant suffered no new "injuries" between 1979 and 1981. Claimant argues:

> "In order to absolve itself of liability in this case, SAIF would have to show that claimant suffered a new accident or injury. * * * Getting into and out of vehicles, a problem which occurred for the claimant both on and off the job, is an ordinary activity which is not a new event under the workers compensation laws."

In a hearing memorandum, claimant was even more emphatic:

> "SAIF cites no authority for the proposition that regular bodily motion done over a period of time, such as getting in and out of vehicles and in and out of beds, constitutes 'an injury.'"

The authority that claimant requested exists. It has been frequently recognized that very minor activity, without any "injury" or "trauma" in the ordinary sense of those terms, can cause the herniation of a vertebral disc. Keith G. Underwood, 34 Van Natta 1305 (1982); Richard D. Minshall, 34 Van Natta 1173 (1982); Richard R. Miller, 34 Van Natta 514 (1982); Valtinson v. SAIF, 56 Or App 184 (1982); Hamel v. Tri-Met, 54 Or App 503 (1981). It is not clear, however, whether we can consider this authority. On review of our decision in Richard R. Miller, supra, in which we did so, the court stated, "we caution the Board against use in one case of evidence produced in another." Miller v. SAIF, 60 Or App 557, 562 n 2 (1982). This may mean that, as claimant here argues, we must find the evidence that claimant suffered no "injury" between 1979 and 1981 as probative that the 1979 back strain caused the 1981 vertebral disc herniation.

There is another possibility. There is an elusive, but important distinction between an agency's evaluation of the evidence in the record and an agency's reliance on evidence not in the

record. See Rolfe v. Psychiatric Security Review Board, 53 Or App 941 (1981). Here claimant relies on evidence that he suffered no "injury" between 1979 and 1981; that evidence has to be evaluated. It is apparent that claimant equates "injury" with significant trauma. It is also apparent that claimant assumes that a vertebral disc cannot herniate without an "injury" in the sense of significant trauma. There is no evidence in this record that supports that assumption. On the contrary, Dr. Golden testified, as we understand his deposition, that the activity of getting into and out of motor vehicles could cause a herniated disc. We accept this testimony as true. Thus, as we evaluate the evidence, the argument that claimant builds on the foundation of a lack of "injury"/significant trauma between 1979 and 1981 loses most of its probative force.

In summary, we are not persuaded that any or all of the three lines of evidence upon which claimant relies makes it more likely than not that his 1979 industrial injury was a material cause of his 1981 disability.

ORDER

The Referee's order dated April 21, 1982 is reversed. The SAIF Corporation's denial of claimant's aggravation claim is reinstated and affirmed.

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RHEA R. RAMBERG, Claimant
Evohl F. Malagon, Claimant's Attorney
Wolf, Griffith et al., Defense Attorney

WCB 81-10707
March 23, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Mannix's order which, in relevant part, affirmed the insurer's denial of liability for claimant's low back surgery. The substantive issue on review is whether claimant's need for surgery is causally related to the accepted industrial injuries. Claimant also has assigned as error the Referee's failure to postpone the hearing in order to allow claimant to testify. Claimant has requested that we remand this matter for that purpose. We affirm and adopt the Referee's order with the following comments.

Addressing the remand issue first, the record reflects the day prior to hearing claimant learned that her boyfriend of 11 years had died of a heart attack. Claimant's counsel was not informed of this until 20 minutes prior to the hearing. The hearing was held in Coos Bay and the insurer's counsel was from Portland. The Referee observed claimant's demeanor at hearing and concluded that she was too distraught to testify or meaningfully participate in the hearing. After discussing the issues with counsel for both sides and reviewing the exhibits, the Referee decided that the compensability of the proposed surgery presented a complex medical causation question and that claimant's testimony would not materially aid in the resolution of that issue.

There being no other witnesses, the Referee went on to hear oral argument and subsequently issued his order affirming the insurer's denial. Given the circumstances of claimant's inability to testify at hearing and considering that the compensability issue was decided adversely to claimant, we are strongly tempted to remand this matter and allow claimant the opportunity to be heard in her own behalf. However, we have reviewed the documentary evidence in this case and reach the same conclusion as the Referee, namely, that resolution of the medical causation issue requires reference to expert medical opinion and that claimant's testimony, even assuming it to be most favorable to her position, would not resolve the causation issue.

With respect to the relationship of the medical services in question to the accepted injuries, the surgery in question is a decompressive laminectomy at L4 and a bilevel fusion, L4 to the sacrum. Claimant has a long history of injuries to her back, including automobile accidents in 1968 and 1970, each of which caused claimant to be off work for several months. In 1970 degenerative changes were noted at L5-S1 of claimant's spine. The industrial injuries forming the basis for this medical services claim occurred in 1973 and 1974. The first claim arose from a fall from a loading dock onto railroad tracks and resulted in contusions of the coccyx and chest. The second claim arose when claimant turned while lifting a piece of veneer and strained her upper back. Each claim was closed with an award of about one month of temporary disability and no permanent disability. In 1976 claimant was injured in another automobile accident, and in 1977 she again strained her back. Another back strain in 1978 gave rise to an aggravation claim and culminated in an award of 10% unscheduled permanent disability for impairment to claimant's upper and lower back.

Claimant had back pain again in April, 1980 which gave rise to another aggravation claim. That claim culminated in a hearing, with Referee McCullough concluding that claimant had proven neither a worsening nor causal relationship to the compensable injuries.

The strongest statement claimant has in her favor is from her treating orthopedist, Dr. Bert, who opined that:

> "Her current symptoms are related to a rather complex etiology which is both ongoing natural deterioration of her lumbar spondylosis and perhaps contributed to some degree by an injury she received some time ago."

It is not clear what "injury" Dr. Bert was referring to but even assuming that it was to the 1973 or 1974 injury, in that same report, Dr. Bert went on to say:

> "I think it is safe to say that she will continue to have problems with her back and it will continue to deteriorate with time on the basis of a natural progression of

> degenerative changes. I do think...that activities of daily living, riding in a car, cleaning house would materially contribute to her present symptomatology...."

Claimant also relies on a statement in a report from the insurer's examining physician who opined that claimant's current condition could not be ascribed to her 1973 and 1974 injuries but went on to say:

> "I believe they [claimant's conditions] are in part a process of the natural aging of the lumbar spine and in part it must be stated that I do not find remarkable evidence either historically or from physical examination of active disease which is markedly changed since prior examinations."

Claimant urges us to infer from the reference to the natural aging process "in part" being a causative factor that the industrial injuries must be the other, material, part of claimant's present condition. Suffice it to point out that the record is replete with other, more plausible causative factors than contusions and strains received in 1973 and 1974 which could be the "other part" to which the doctor was referring.

As we indicated earlier, because of the extraordinary circumstances existing at the time of hearing, in consideration of fairness to the claimant, we are tempted to remand this matter for the taking of claimant's testimony. However, as can be seen from our brief summary of the evidence, which is by no means all of the evidence contraindicating compensability, the determination of compensability depends on expert medical opinion concerning which of numerous potential causes actually contributed to a material degree to claimant's need for surgery. We are satisfied that claimant's testimony could not add materially to that determination and that no useful purpose would be served in remanding this matter for additional evidence taking.

ORDER

The Referee's order dated June 23, 1982 is affirmed.

★★★★★★★★★★★★★★★

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

WCB 81-01599
March 23, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Brown's order which approved the SAIF Corporation's denial of claimant's aggravation claim. The only issue is whether claimant has established a valid claim for aggravation of his September 20, 1979 industrial injury.

We adopt the Referee's findings of fact as our own.

Subsequent to making his factual findings, the Referee went into considerable detail concerning claimant's lack of credibility, noting particularly that claimant gave a different and often contradictory history to nearly each doctor he treated with or was examined by, and that yet another version was related by the claimant at the hearing. The Referee noted that the only physicians to relate claimant's current cervical difficulties to the 1979 injury were Drs. Ferguson and Smith. He concluded, however, that he could not accept either opinion as Dr. Ferguson saw claimant for the first time nearly one year following the industrial injury, and that the uncertain history given by claimant to Dr. Smith rendered his opinion suspect.

Claimant in his brief admits to certain discrepancies in the record, but basically contends that the question of whether or not he has suffered an aggravation of his 1979 industrial injury is a medical question, and that the opinions of Drs. Ferguson and Smith are conclusive.

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. It is virtually impossible in this case to determine which physician, if any, received a correct history from the claimant. This is reflected in the various conclusions the examiners reach. For example, Drs. Ferguson and Smith find a causal connection, but Drs. Narus and Degge find no relaionship to the 1979 injury. We believe that it is exceedingly important, when considering the question of causal connection, for the physicians involved in this claim to have had an accurate history. We, therefore, agree with the Referee.

ORDER

The Referee's order dated June 25, 1982 is affirmed.

★★★★★★★★★★★★

ALAENE R. SMITH, Claimant
Johnson, Marceau et al., Claimant's Attorneys
Minturn et al., Defense Attorneys

WCB 81-10322
March 23, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Quillinan's order which set aside its partial denial of medical care and treatment for claimant's osteoporosis condition. The Referee concluded that:

> "Claimant's underlying condition of osteoporosis has already been determined to be compensable by Opinion and Order. * * * Generally, once a determination has been made as to compensability of a condition, the employer and its insurance carrier remain responsible under ORS 656.245 for any further medical treatment or care related to the compensable industrial injury."

SAIF argues that the Referee's finding that the compensability of the osteoporosis condition had already been established at a prior hearing is incorrect, and that there is nothing in the record which supports such a conclusion. We agree and reverse.

Claimant, who was approximately 67 years of age at the time of the hearing, sustained an injury to her hip and back in 1973. She was hospitalized at St. Charles hospital and discharged on March 17, 1973. Claimant experienced no further difficulty with her back or hip and eventually became employed as a restaurant hostess and waitress. On April 16, 1975 she slipped on a wet spot, fell and injured her back. A claim was filed with SAIF and was accepted as a disabling injury.

Following her 1975 injury, claimant initially received conservative treatment from Dr. Renwick, a chiropractor, but was hospitalized on September 22, 1975 due to increasing pain. Dr. Pease diagnosed acute lumbar strain and placed the claimant in traction. X-rays revealed degenerative changes at the L4-5 and L5-S1 levels. On September 30, 1975 Dr. Corrigan, after reviewing the x-rays, reported that claimant exhibited osteoporosis of the vertebral bodies with degenerative arthritic disease between L4 and L5. He suspected a herniated disc. Claimant was discharged from the hospital on October 11, 1975, but was readmitted again on October 28, 1975 due to a severe exacerbation of pain. Lumbosacral tomograms were performed, revealing bony overgrowths in the L4 and L5 areas suggestive of previous fracture; sclerosis of the posterior facet of L4 was also present. A myelogram was also performed which resulted in no findings suggestive of a herniated disc, but did establish some lumbar scoliosis to be present. Osteoporosis was found to be generally present throughout the spine.

Claimant was discharged from the hospital on November 8, 1975, but continued to experience back pain. She was referred to Dr.

Raaf for a neurological examination. Dr. Raaf found osteoportic demineralization to be present in claimant's pelvis, hips and spine. He reported on February 19, 1976 that claimant's problem was most likely due to the low back strain sustained at work combined with arthritic changes in the back. Claimant was also examined by Dr. Post, who diagnosed acute and chronic lumbar sprain, with left iliac myositis and greater trochanteric bursitis secondary to the 1975 injury. He said that surgery was not advisable.

On March 23, 1976 SAIF denied the aggravation claim. Claimant requested a hearing which was held before Referee Foster on August 11, 1976. Referee Foster set aside the denial and ordered the aggravation claim to be accepted. A Determination Order issued on January 21, 1977 awarding claimant 25% unscheduled permanent partial low back disability.

Subsequent to the issuance of the Determination Order claimant began to experience increasing symptoms. This apparently generated another hearing request from the claimant based on aggravation. A stipulation was entered on October 11, 1978 whereby claimant received an additional 15% unscheduled disability in settlement of all issues that were to be raised in the hearing.

On August 3, 1979 SAIF received an 827 form from Dr. Nelson on which he reported that claimant was experiencing back, hip and leg pain. The diagnosis was unresolved back strain with osteoporosis and deformity of the intervertebral spaces. Claimant was again hospitalized on January 3, 1980 due to continued and increasing pain. Following her discharge, she was examined by Orthopaedic Consultants on February 26, 1980. The Consultants diagnosed chronic dorsolumbar strain, osteoporosis of the spine and functional overlay. Treatment for the osteoporosis was suggested.

On March 18, 1980 SAIF denied the claim for aggravation. On July 18, 1980 Dr. Brown reported that it was difficult for him to separate the respective roles of the claimant's 1975 injury versus the ongoing degenerative process in the claimant's spine. He stated:

> "The naturally progressing degenerative process and osteoporosis does play a role and does contribute to her worsening, but it is not possible for me to state precisely what portion that role would be in terms of percentages.
>
> "Dr. MacClosky has seen her more often than I have, and he also indicates that the scoliosis and degenerative arthritis are becoming progressively worse. I would think that these would be due to natural processes, especially the osteoporosis."

Apparently claimant again requested a hearing. The matter was settled by stipulation on October 9, 1980; the hearing request was dismissed and SAIF agreed to pay claimant an additional 25% unsche-

duled permanent partial disability. Claimant's awards to date total 65% unscheduled permanent partial disability.

On February 5, 1981 Dr. MacCloskey reported that:

> "This patient is extremely painful to any type of motion, which I think is probably on the basis of her osteoporosis and micro-fracture collapse throughout the spine. In no way could any surgical procedure be carried out that would be beneficial to this patient, for there is no bone structure to hold any corrective device. . . Premarin therapy probably should include high dosages of vitamin B and good intake of calcium."

On April 24, 1981, Dr. MacCloskey reported:

> "I believe the patient's original injury significantly decompensated her back with a compression fracture. This is easier to injure because of mild osteoporosis at the time and subsequent progression of the osteoporosis has led to aggravation of the condition."

On September 10, 1981 the Orthopaedic Consultants reported that claimant did not possess a condition requiring treatment as a result of her 1975 injury. On October 9, 1981 SAIF issued a partial denial, stating:

> ". . . we find that we are unable to accept responsibility for your osteoporosis condition involving the dorsal and lumbar spine. Information in the file indicates this condition is not the direct result of your April 16, 1975 injury."

On December 15, 1981 Dr. MacCloskey reported that it was probable that the claimant had scoliosis prior to her 1975 fall, but the fall probably aggravated this pre-existing condition.

The Referee believed that the compensability of claimant's osteoporosis condition had already been litigated and determined in the claimant's favor at the prior hearing before Referee Foster. In other words, the Referee concluded that the compensability of that condition was a matter of res judicata. We disagree.

In Lewis Twist, 34 Van Natta 29 (1982), we concluded that the side that asserts the affirmative defenses of res judicata or collateral estoppel has the burden of proving what was previously litigated. In Kathie Cross, 34 Van Natta 1064 (1982), we noted that the prior orders upon which a res judicata claim was based were "sufficiently ambiguous that somebody had some obligation to furnish something from the prior proceeding to aid in interpretation of those orders." The same can basically be said of Referee Foster's order of August 9, 1976. The issue at that hearing was

the March 23, 1976 aggravation claim denial. Referee Foster's order contains no mention of claimant's osteoporosis problem. Referee Foster's order concentrates almost exclusively on claimant's back sprain and preexisting degenerative arthritic condition, and the interaction of those two difficulties:

> "An evaluation of Dr. Raaf's opinion indicates that the injury was relatively minor but she did have a strain and he went on to say that the low back strain and her arthritic changes are probably responsible for her present complaints and pain. * * * Dr. Pease and Dr. Corrigan seem to continue to relate their treatment and the claimant's existent problems to the April injury and there is apparently little question about
>
> it from their medical reports that the injury at least caused, or aggravated, her condition and has brought back her present problems; therefore, the denial of the Fund must be set aside."

Referee Foster's use of the term "condition" is subject to a variety of interpretations. Read in context with his entire order, however, the most probable interpretation is that he was speaking in terms of claimant's work related back strain superimposed on her underlying preexisting degenerative arthritic condition. As noted above, the burden is upon the claimant to establish that the osteoporosis condition was a matter that was litigated at the prior hearing. She has not established that to be the case.

There are a few additional factors which lead us to our conclusion. It is evident from the medical reports dated prior to the hearing before Referee Foster that the osteoporosis diagnosis was (if it is a proper term) an "incidental" diagnosis. In other words, claimant was suffering from several different back difficulties but it is evident that the physicians were mainly concerned with the back strain and ongoing degenerative arthritic process. No physician proposed or offered claimant any treatment for the osteoporosis until it was first recommended in the Orthopaedic Consultants report of March 3, 1980. These facts make it difficult to imagine that the condition was a matter litigated at the prior hearing.

Having disposed of the argument regarding res judicata, we turn to the issue concerning compensability of the claimant's osteoporosis condition. Osteoporosis is defined in Dorland's Illustrated Medical Dictionary, (25th ed.), as:

> "abnormal rarefaction of bone, seen most commonly in the elderly. Depending on the extent of demineralization of bone, it may be accompanied by pain, particularly of the lower back."

We are unaware of how a back strain injury could cause or

accelerate bone rarefaction and demineralization, and no physician involved in claimant's treatment has so stated or explained. Osteoporosis has been found to be present in many areas of the claimant's body, including her entire spine, her rib cage and her pelvis. If claimant's back strain caused the osteoporosis to occur or materially accelerated its progress, why would it be present in such a variety of body locations which were untouched or unaffected by the injury?

Dr. Brown indicated that osteoporosis is a natural process and he could not state that the injury was a material contributing cause to the continued degeneration. Dr. MacClosky indicated that the claimant's back was more subject to injury due to her pre-existing osteoporosis. He stated that the continual osteoporotic degenerative process tended to continually aggravate claimant's work related back injury. The Orthopaedic Consultants apparently concluded in their September 9, 1981 report that the osteoporosis was not caused or aggravated by the 1975 injury. In his December 15, 1981 report, Dr. MacClosky indicates that the 1975 injury did aggravate claimant's preexisting condition. However, it is clear that he is only speaking of claimant's left lumbar and right throacic scoliosis in that report, and not the osteoporosis.

We conclude that the claimant has not established that her 1975 work injury was a cause of or a material factor leading to the acceleration of her osteoporotic condition, and we, therefore, affirm the SAIF Corporation's partial denial of October 9, 1981. This does not affect claimant's entitlement to continued medical services and aggravation rights for the 1975 back injury and the compensable residuals thereof.

ORDER

The Referee's order dated August 5, 1982 is reversed. The SAIF Corporation's partial denial dated October 9, 1981 is reinstated and affirmed.

* * * * * * * * * * * * * * * * *

WILLIAM STREBENDT, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorney

WCB 81-10056
March 23, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Howell's order which set aside its denial of claimant's claim for a worsened back condition allegedly arising out of his 1978 compensable injury. The issue is medical causation. We reverse.

Claimant originally injured his back on October 23, 1978, while lifting blocks used to position a mobile home. This injury was accepted and processed as a nondisabling injury claim. Claimant received several chiropractic treatments but missed no time from work. Claimant testified that he continued to experience some continuing back discomfort, and approximately two months after the October 1978 incident, while working, his leg went out from under him, and he again sought chiropractic treatment. A January 9, 1978 827 form contains the diagnosis of a lumbar strain superimposed

upon a birth anomaly at L3-4. Claimant apparently received one treatment at this time, and he missed no time from work. For the remainder of 1978, through 1979 and until June of 1980, claimant continued to work for this employer, who was in the business of selling and servicing mobile homes. Claimant was laid off in June 1980. He remained unemployed throughout the remainder of 1980 and 1981, although he performed various odd jobs, including working on a fishing boat as a deckhand during the summer of 1980.

Claimant testified that, after being laid off, he continued to experience periodic episodes of low back discomfort, as well as occasional left leg pain. He sought no medical or chiropractic treatment for these problems, testifying that he did not realize that, if they were related to his original compensable injury, he was entitled to receive continuing treatment at the expense of the insurer. He testified that when his back became a problem for him, he would stay home and lay down for two or three days at a time, and that when the episode resolved he would usually be symptom-free for another four or five months. Although claimant experienced these periodic episodes of low back and left leg pain, he was apparently capable of performing the tasks required as a deckhand in the summer of 1980, which he described as leaning over the side of a boat, pulling fish in and cleaning them. He testified that, although leaning over the boat would make his back sore, the activity was not really strenuous and it never caused an onset of leg pain. Claimant performed this work activity sporadically with a friend over a period of approximately one month, and it was sometimes necessary for him to stay out on the boat two full days at a time. The total number of days claimant actually worked as a deckhand did not exceed seven days within the period of a month.

During June and July of 1981, claimant played basketball on several occasions. He testified that he never experienced any back pain or discomfort during or after this activity. Claimant went hunting in August or September 1981, at which time he apparently engaged in a fair amount of walking and climbing. He apparently experienced no immediate episode of back or leg pain associated with this expedition.

On the evening of Saturday, October 10, 1981, claimant experienced a relatively sudden onset of back and leg pain without any identifiable precipitating activity. He testified that he had performed some minor household chores that day, and that he may have mowed the lawn. In the evening, after playing some pool and eating dinner, he sat down in a chair and began to experience increasing symptoms of pain. He testified that the following morning he was hardly able to get up from bed.

He sought treatment with Dr. Chatburn on Monday, October 12, 1981, who reported left-sided low back pain which went down the left leg to the calf. Dr. Chatburn's October 28, 1981 report states that claimant was unable to recall any precipitating incident, "except that he had been out in the woods hunting and did much more walking and climbing than he was accustomed to." Claimant testified that, although he mentioned the hunting trip to Dr. Chatburn, he did not deem that day's activities as particularly significant in terms of exertion. Dr. Chatburn diagnosed intervertebral disc syndrome, grade two protrusion at L4-5 on the

left side, with radiculitis, and referred claimant to Dr. Smith for a surgical consultation.

The diagnosis of an extruded left L5-S1 disc was confirmed, and surgery was performed in November 1981 for removal of the disc. On February 3, 1982 SAIF denied responsibility for claimant's current low back condition. The Referee set aside this denial, finding "claimant's testimony credible and sufficient to establish that his worsened condition was materially contributed to by the October 1978 injury to his back." The Referee relied upon claimant's testimony concerning the continual episodes of back and leg pain and discomfort subsequent to his original injury, as confirmed by claimant's co-worker and friend, and evidence of long-term wasting of the muscle groups in claimant's lower left leg.

Claimant experienced an apparently minor back strain as a result of a lifting incident in 1978. Three years later he was diagnosed as having an extruded lumbosacral disc. The fact that claimant suffered no intervening injury in the three years between his industrial injury and his diagnosed disc problem is not dispositive. See Brad L. Loren, WCB Case No. 81-00216, 35 Van Natta 303 (decided this date).

The two possible relationships between claimant's 1978 injury and 1981 surgery are that the disc was herniated in 1978 as a result of the lifting incident, but went undiscovered until October of 1981; or that, although the disc did not herniate until 1981, the 1978 lifting incident materially contributed to the ultimate result of an extruded disc. In either event, the answer to the question of the possible causal connection between claimant's 1978 back strain and 1981 disc herniation is a complex medical issue requiring persuasive medical evidence under the Uris line of cases: "Where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science and must necessarily be determined by the testimony of skilled, professional persons." Uris vs. Compensation Department, 247 Or 420, 424 (1967). We find that the claimant has failed to adduce sufficiently pursuasive medical evidence.

Dr. Adams, who performed the surgical excision of the extruded disc, stated with certainty that claimant's extruded disc had not been present since the time of his 1978 injury. He recognized the possibility of a trauma, followed by a period of activity, with a subsequent herniation that may be related to the original trauma:

> "Certainly, people can have their back injury, can spit and sputter along with intermittent back pain for a considerable period of time before they will have a full-blown disc herniation or rupture. Certainly [claimant's] extruded disc had not been present since his [1978] industrial injury. The disc herniation from that standpoint was a fresh herniation but the underlying changes that may occur in the

> anulus to allow the disc herniation can proceed and go on for a long period of time before the disc herniation. The only thing I can go by is the patient's history. Certainly from a physical condition I cannot say whether or not it was or was not caused by his [1978] industrial accident. According to his history it was."

We find that claimant did more than simply "spit and sputter along" between October 1978 and October 1981. After his original injury, which resulted in no time lost from work, he continued to perform the same job with apparently little in the way of physical limitations, until he was laid off in June 1980, a period in excess of 18 months. Thereafter he worked in odd jobs including carpentry and fishing, and he was able to hunt, fish and play basketball. Although Dr. Adams' theory concerning "the underlying changes in the anulus that may occur," (emphasis added) is interesting, it is insufficient to form the basis for a conclusion that it is more likely than not that a causal connection exists between claimant's 1978 injury and diagnosed herniated disc in 1981. Claimant must establish by competent medical evidence that the causal relationship is medically probable. Dr. Adams' statements amount to a possibility of a causal relationship, which is insufficient to prove the compensability of claimant's herniated disc. See Gormley v. SAIF, 52 Or App 1055, 1060 (1981).

The remaining medical opinions in the record add little to the analysis. When Dr. Bernstein examined claimant on November 3, 1981 in consultation with Dr. Adams and Dr. Smith, he noted "fairly impressive wasting of the anterior compartment group and the extensor digitorum brevis along the left." The extensor digitorum brevis is a short muscle which extends or straightens the toes, which is supplied by the deep peroneal (concerning the fibula) nerve. Vol. 1 Schmidt's Attorneys' Dictionary of Medicine (Matthew Bender, 1982). This finding on examination by Dr. Bernstein would tend to substantiate claimant's testimony that, after his 1978 injury he noticed that his left leg had become slightly smaller than his right leg; however, the fact that Dr. Bernstein found this wasting of the musculature on November 3, 1981 does little to assist us in determining the relationship between claimant's 1978 injury and his condition on the date of Dr. Bernstein's examination. Our experience in cases involving herniated discs which go undiscovered for a considerable period of time is that such muscle wasting is indicative of a long-standing herniation; Dr. Adams' statement, in very clear terms, states that the herniation was of recent occurrence.

Dr. Bernstein's March 26, 1982 report to Dr. Adams discusses a number of physical problems that claimant may have had at that time, with apparent major emphasis upon problems in the cervical region, and without any specific mention of claimant's herniated lumbosacral disc. That report concludes with an addendum: "It should be obvious from the above note that [claimant's] present condition is industrially related." The relationship between the problems discussed in that report and claimant's 1978 injury is certainly, in our evaluation, much less than obvious. Moreover,

it is not even clear exactly what conditions Dr. Bernstein had in mind in referring to claimant's "present condition."

In conclusion, considering the medical evidence concerning the causal relationship between claimant's 1978 industrial accident and the diagnosis of a herniated intervertebral disc at the L5-S1 level and consequent surgery in 1981, together with the lay testimony concerning claimant's activities after his injury and before the discovery of his herniated disc in October 1981, we are unable to conclude that claimant has satisfied his burden of proving it is more likely than not that his 1978 injury was a material contributing cause to his herniated vertebral disc.

ORDER

The Referee's order dated June 8, 1982 is reversed, and SAIF's denial dated February 3, 1982 is reinstated and affirmed.

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KATHLEEN HANSEN, Claimant
Noreen K. Saltveit, Claimant's Attorney
Gary D. Hull, Defense Attorney

Own Motion 81-0262M
March 25, 1983
Own Motion Determination on Reconsideration

Claimant, by and through her attorney, Noreen Saltveit, has requested the Board reconsider that portion of its January 14, 1983 order which failed to grant her an increased award of compensation for permanent partial disability. Claimant has forwarded to the Board a report of Dr. Parsons in support of her request.

Dr. Parsons indicates that "Ms. Hansen was awarded compensation equal to 32 degrees for 10 percent unscheduled disability. . . . Since she did require further surgery, it is my opinion that her present disability is greater than that previously awarded." We are not persuaded by this report that claimant is entitled to an increased award. Claimant has actually received awards totaling 13%. Laminectomies are awarded 1-5% according to OAR 436-65-615. We are convinced that claimant has been adequately compensated by her previous awards and hereby deny her request for increased compensation.

IT IS SO ORDERED.

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KARL HOGANSEN, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0314M
March 25, 1983
Own Motion Order

SAIF Corporation has referred claimant's claim to the Board for consideration of his entitlement to additional compensation under the provisions of ORS 656.278. Claimant's compensable injury occurred on October 25, 1973, and his aggravation rights have expired. SAIF has indicated their willingness to pay for the medical expenses related to the removal of neuromas on claimant's left hand. The sole issue before us is claimant's entitlement to compensation for temporary total disability.

Claimant's recent work status is not clear at this time. Claimant indicated that he last worked for Tic Logging in November, 1982. Attempts to document this employment have been fruitless. Without documentation, the Board must assume that claimant has voluntarily removed himself from the general labor market and, therefore, is not entitled to compensation for time loss. Michael Vernon, 34 Van Natta 1212 (1982). Claimant's request for own motion relief is hereby denied.

IT IS SO ORDERED.

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HOLLIS TURNIDGE, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 83-0069M
March 25, 1983
Own Motion Order

SAIF Corporation has forwarded to the Board claimant's request for own motion relief due to a worsened condition resulting from his January 15, 1974 industrial injury. SAIF has indicated that they have authorized surgery pursuant to ORS 656.245 and would like the Board to consider claimant's entitlement to compensation for temporary total disability. Claimant's aggravation rights have expired.

We find no evidence of claimant's current work status in the record before us, except for an Employment Division print-out which indicates "No record found." Under the rationale in Vernon Michael, 34 Van Natta 1212 (1982), we conclude that claimant is not entitled to compensation for temporary total disability. Claimant's request for own motion relief should be denied.

IT IS SO ORDERED.

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JACK STOCKTON, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 81-0296M
March 25, 1983
Own Motion Order

Claimant, by and through his attorney, has requested the Board exercise its own motion authority and reopen his claim for worsened conditions related to his September 21, 1961 industrial injury. Claimant's aggravation rights have expired. We note that claimant's injury occurred prior to the law change in 1966 at which time ORS 656.245 came into effect. The Board will, therefore, consider claimant's entitlement to medical services and temporary total disability compensation.

Based on the evidence before us, the Board reaches the following conclusions: (1) Claimant is moderately disabled as a result of his 1961 injury with awards for 55% back disability and 95% left leg disability; (2) There are no objective findings to indicate a worsening of claimant's condition, but rather we find claimant is suffering the expected residuals of a moderate to severe disability; (3) We do not find it unusual that claimant, with the amount of disability he has, cannot sit in school for six to eight hours at a time - this is not evidence of a worsened condition; (4) The recent medical reports are few in number, but seem to indicate that claimant's condition remains in a stationary status; (5) No curative treatment has been recommended at this time.

The Board concludes, based on the above, that claimant is not entitled to have his claim reopened and, in fact, SAIF Corporation is not responsible for any medical bills claimant may have incurred as a result of this most recent request.

IT IS SO ORDERED.

DAWN C. WHITE, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 82-03402
March 25, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Neal's order which affirmed the Determination Order dated April 9, 1982. Claimant contends that her hip condition claim was closed prematurely and, alternatively, that claimant has permanent disability attributable to the compensable injury. In its brief, the employer contends that the claimant was medically stationary on a date earlier than that established by the Determination Order and affirmed by the Referee. In addition, claimant contends that the Referee erred in failing to reopen the hearing to consider newly discovered evidence.

The Referee correctly declined to reopen the record to consider the proffered evidence. Ora M. Conley, 34 Van Natta 1698 (1982); Robert A. Barnett, 31 Van Natta 172 (1981). With respect to the remaining issues, we agree with the Referee. Therefore, we affirm and adopt the Referee's order and Order on Reconsideration subject to one comment.

The Referee stated that, "One of Dr. Torres' main concerns seems to be claimant's fatty nodules, which he has said are not related to claimant's bilateral hip discomfort." A more accurate assessment of Dr. Torres' opinion is that he is unable to determine to what extent if any the nodules are related to the hip discomfort and the industrial injury. This clarification is important in the context of this case because claimant's pain has continued since the injury but the etiology of the continuing pain problem has yet to be diagnosed.

ORDER

The Referee's orders dated June 15, 1982 and August 3, 1982 are affirmed.

ESTA L. ALGER, Claimant
English & Metcalf, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-08628
March 28, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests review of Referee Pferdner's order which awarded him 25% unscheduled permanent partial disability, that being an increase of 10% over and above the January 8, 1981 Determination Order. Claimant contends that he is permanently and totally disabled.

Claimant, 58 years of age at the time of the hearing, was employed by United Parcel Service when, on December 17, 1979, he jumped down from the back of a truck, landing on his left leg or knee. A myelogram taken on May 23, 1980 revealed a herniated disc at the L4-5 level. A bilateral lumbar laminectomy and diskectomy was performed on May 27, 1980 by Drs. Hill and Stark. Claimant was discharged from the hospital on June 5, 1980.

On August 16, 1980 claimant was admitted to Providence Hospital complaining of fever, nausea and generalized malaise. There was some concern that claimant may have suffered a myocardial infarction, but this was ruled out by Dr. Kuge after a complete examination, and so claimant was discharged.

On September 5, 1980 Dr. Hill reported that the claimant's condition had stabilized and that claim closure was in order, but suggested that claimant be referred to the Workers' Compensation Department, Field Services Division, for job placement assistance. Claimant was thereafter evaluated at the Callahan Center where vocational testing indicated that claimant possessed an I.Q. of 127, was above average in reading comprehension and verbal skills and above average in mathematical ability. The examiners noted that claimant had a tendency to convert social and emotional problems to physical symptoms. Dr. Toon reported on December 11, 1980 that although claimant complained of pain in his back being worse than it was before his surgery and inability to use his right hand, that he moved about easily, had no trouble getting dressed or undressed and exhibited no difficulty using his right hand. Dr. Toon felt that there was a functional overlay problem and that claimant was not cooperating in the examination. No loss of hand function could be verified by any of the other examiners.

A Determination Order issued on January 8, 1981 awarding claimant benefits for temporary total disability and 15% unscheduled permanent partial low back disability. Claimant thereafter was referred to Crawford Rehabilitation Services for employment re-entry assistance, but eventually was terminated due to a lack of interest and poor cooperation with the vocational counselors.

Dr. Kuge reported on June 30 and July 17, 1981 that claimant had a good range of motion of all extremities and a fair amount of muscle strength with no muscle atrophy. He noted that claimant had 90% mobility of his lumbar spine.

On December 6, 1981 claimant was hospitalized at Woodland Park

Hospital with complaints of epigastric distress. Dr. Kuge concluded that claimant had suffered an acute inferior wall myocardial infarction. Dr. Kuge reported on December 30, 1981 that claimant was 50 to 100% disabled as a result of his damaged heart and chronic low back condition which caused him "to be constantly worried and tense and may have contributed to his heart attack." The insurer requested an opinion from Dr. Shepherd, a cardiologist. Dr. Shepherd replied on March 3, 1982 that any attempt to relate claimant's 1979 injury to the heart attack would be "ludicrous" in his opinion and that it was equally unlikely to have been caused by "nervous tension" or "stress." Claimant was examined by the Orthopaedic Consultants on March 11, 1982. The Consultants found claimant's back condition remained stationary and concurred with Dr. Shepherd's opinion concerning the lack of any relationship between claimant's myocardial infarction and his back injury.

Claimant first contends that the Referee erred in refusing to admit two exhibits which were not submitted in compliance with the ten-day rule of OAR 436-83-400(3). We doubt that this claim of error has been preserved. When the insurer objected to the admission of the exhibits at the hearing, claimant's hearing counsel stated that he had no objection to the exclusion of the exhibits. Assuming that the claim of error has been preserved, claimant offers no excuse whatsoever for the failure to comply with this "simple, unambiguous rule which is designed to effectuate the entire hearing process." Minnie Thomas, 34 Van Natta 40 (1982). The Referee's refusal to admit the exhibits in question was a correct application of OAR 436-83-400(3).

Claimant next contends that he is entitled to an award of permanent and total disability. Claimant concedes in his brief that:

> ". . . neither his heart attack, nor his right hand difficulties have been causally linked to his back injury. Indeed, at the hearing, the parties stressed that they were not litigating the compensability of the heart attack."

Such candor is appreciated. However, claimant contends that ORS 656.206(1) does not by its terms prohibit the taking into account, for the purpose of determining permanent total disability, unrelated disabilities which arose subsequent to claimant's compensable injury, but prior to the hearing. ORS 656.206(1)(a) provides:

> "'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation."

Claimant concedes that Emmons v. SAIF, 34 Or App 603 (1978), is contrary to his position. However, he argues that Emmons was wrongly decided and need not be followed because the Supreme Court

subsequently stated in Gettman v. SAIF, 289 Or 609 (1980), that disability is rated at the time of the hearing. We see no inconsistency between Gettman and Emmons. Both cases involved interpretation of the same statute, but nothing in the Gettman analysis even comes close to the precise interpretational issue that was before the court in Emmons. We leave the question of whether Emmons was wrongly decided to higher authority.

We conclude that the Referee was correct in refusing to take into consideration claimant's alleged right hand difficulties and whatever disability claimant sustained as a result of his myocardial infarction, neither problem having been preexisting at the time of claimant's 1979 back injury. With regard to the extent of claimant's back disability, claimant argues only that he is entitled to permanent total disability. Since we have found to the contrary, we affirm the order of the Referee which awarded 25% unscheduled permanent partial disability.

ORDER

The Referee's order dated May 10, 1982 is affirmed.

CORBIN D. ALSABROOK, Claimant
Lyle Velure, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 80-07902, 81-09287 & 82-01093
March 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The employer requests review of those portions of Referee Galton's order which affirmed the February 2 and February 22, 1982 Determination Orders' awards of temporary total disability benefits for the period from September 10 through November 2, 1981, and those portions of the Referee's order which awarded the claimant 40% unscheduled permanent partial disability, that being an increase of 15% over and above the Determination Orders of January 27, 1978, February 2 and February 22, 1982.

The employer contends that the claimant is entitled to no temporary total disability benefits beyond September 8, 1981, the date on which Dr. Campagna released claimant to return to regular work, and that the Referee's award of unscheduled permanent partial disability is in error.

We adopt the Referee's comprehensive findings of fact as our own, and further affirm those portions of the order finding claimant entitled to benefits for temporary total disability benefits from September 10 through November 2, 1981. To find otherwise would be, as stated by the Referee, "to ignore the obvious."

With regard to the issue concerning the extent of claimant's disability, the Referee applied the guidelines for the rating of unscheduled permanent disability, OAR 436-65-600, et seq. The Referee found that claimant's impairment was equal to +20; that his education was twelfth grade and equal to a value of zero; that

his age was 29 which also yielded a value of zero; that his residual functional capacity justified a value of +7; that his mental capacity was normal, as were his emotional and psychological aspects, thus justifying values of zero; and that labor market findings justified a value of +10. The Referee then stated that the combined value of the factors was +37 and rounded the award to 40%. He stated that he found nothing in the record which would warrent a departure from the factors contained in the guidelines.

The employer argues that the Referee made several errors. It first argues that the following impairment is appropriate, based on Dr. Campagna's finding that all of claimant's lumbar motions are limited to 50% of normal:

Motion	Degrees Retained	Impairment
Flexion	45°	4.5%
Extension	15°	1.5%
Rt. L. Rotation	10°	2.0°
Lt. L. Rotation	10°	2.0%
Right Rotation	15°	3.0%
Left Rotation	15°	3.0%
		16.0

We agree completely with the employer's impairment determination. However, we note that there is the additional factor of mildly disabling pain present. We, therefore, do not find the Referee's value of +20 to be inappropriate when that factor is also considered.

The employer also argues, and the claimant acknowledges, that the Referee erred in assigning a value of zero to claimant's age factor. The guidelines actually provide for a -4 for a worker 29 years of age. The employer agrees, as do we, with the Referee's findings regarding claimant's residual functional capacity, and that a value of +7 is justified for this factor. There is no dispute between claimant or employer regarding assignment of values of zero for mental capacity and emotional and psychological factors.

The employer takes issue with the Referee's assignment of a value of +10 for labor market findings, arguing that since there is no table for a "light to medium" work category, the numerical designations must be averaged, and that this yields an average of 8.5 corresponding to an impact value of +6. We agree with the employer that this is, in most instances, the fair way to handle this type of situation. However, we find that whether a +10 or a +6 is utilized does not affect the final outcome of the award. Although the Referee stated that he combined the positive values, it is obvious that he added them. The correct combined value, utilizing the Referee's impact values, equals 33. When the -4 is factored in the final value is 31.68 which, rounded to the nearest 5%, equals a final value of 30%. If the employers labor market factor value of +6 is utilized, the combined value is equal to 30. When the -4 is factored in, the final combined value is 28.80, which yields a rounded total of 30%. We, therefore, find the correct extent of claimant's unscheduled permanent partial disability to be 30%.

ORDER

The Referee's order dated June 7, 1982 is modified. Claimant is awarded 30% unscheduled permanent partial disability. This is in lieu of and not in addition to all prior awards. Claimant's attorney's fee should be adjusted accordingly.

The remainder of the Referee's order is affirmed.

DICK L. BABCOCK, Claimant
Roy Dwyer, Claimant's Attorney
Brian Pocock, Defense Attorney

WCB 81-11786
March 28, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer has requested review of Referee Seymour's order which reversed its denial of claimant's aggravation claim. The insurer also filed a motion to remand this matter to the Referee for consideration of newly discovered evidence. The issues are whether to remand the case and, if not, whether claimant's aggravation claim is compensable.

I.

With respect to the remand issue, at hearing the Referee offered to keep the record open in order to allow the insurer to obtain rebuttal medical reports or depose claimant's new treating physician. After receiving the Referee's order which found in favor of the claimant, the insurer then requested reconsideration and solicited the medical reports it now seeks to have included in the record. The reports in question were not received or written prior to closure of the record at hearing, but in the exercise of due diligence they could have been. In its reply brief, the insurer stated that at hearing counsel waived keeping the record open because at that time he believed the insurer was going to win. We can imagine no clearer case for applying the rule announced in Robert A. Barnett, 31 Van Natta 172 (1981) and reaffirmed in Ora M. Conley, 34 Van Natta 1688 (1982), to the effect that remand will be denied where the exercise of due diligence would have resulted in receipt of the proffered evidence prior to closing of the record.

II.

Whether the aggravation claim in this case is compensable is a far more complicated matter. We adopt the Referee's findings of fact supplemented by additional findings of our own. Claimant sustained a compensable low back injury on June 15, 1978 and subsequently underwent back surgery. The claim ultimately was closed by Determination Order with no award of permanent disability. By stipulation dated July 14, 1980 claimant received an award of permanent disability. This July, 1980 stipulation constitutes the last arrangement of compensation.

After claim closure claimant worked at a variety of jobs. In August, 1981 he began delivering Diners Club coupon booklets to

the homes of customers who had purchased the books pursuant to telephone solicitation. This employment required claimant to get in and out of his car some 20 to 40 times a day. In September, 1981 claimant sought medical care for increased low back pain, discomfort in the left leg and foot, and sexual dysfunction related, he thought, to low back impairment. Claimant's condition continued to worsen until he ultimately quit work. Claimant did not experience an identifiable traumatic incident in the course of his employment with the Diners Club. His condition was diagnosed as either a bulging disc or facet impairment syndrome at the same vertebral interspace as the previous injury and surgery.

Claimant filed an aggravation claim with the insurer on the risk at the time of the 1978 injury. He did not file a new injury or occupational disease claim with the Diners Club. The aggravation insurer denied the claim on the ground that claimant had "sustained a subsequent injurious exposure during a more recent employment."

Based on the posture of the case as presented by the parties and on our de novo review of the record, we find that the 1978 injury and 1981 Diners Club employment work activities are both material contributing causes of claimant's present condition. Although the insurer's reply brief attempts to raise the issue whether the 1978 injury is a material contributing cause of claimant's present condition, the aggravation claim was denied and litigated solely on the basis that the subsequent employment materially contributed to claimant's condition and, therefore, responsibility shifts to that employer. Thus, we deem the insurer to have conceded that claimant experienced a worsening and the 1978 injury was a material contributing factor to that worsening. There is evidence supporting these findings. We further find that neither employment was the major contributing cause of claimant's worsened condition, but that the work exposure from both jobs cumulatively was the major contributing cause of claimant's present condition.

The insurer contends that claimant's most recent employment has contributed independently to claimant's worsened condition, therefore, under the last injurious exposure rule, it (the aggravation insurer) is relieved of further responsibility. The Referee rejected that argument, reasoning that claimant's work activities with the Diners Club were an occupational disease type of exposure and a claim against the Diners Club would fail under the SAIF v. Gygi, 55 Or App 570 (1982), major contributing cause test. Therefore, the claim was not compensable as to the Diners Club but was compensable as an aggravation claim.

In attempting to come to a resolution of this case we have carefully considered a number of appellate court decisions, including Smith v. Ed's Pancake House, 27 Or App 361 (1976), Mathis v. SAIF, 10 Or App 139 (1972), Inkley v. Forest Fiber Products Co., 288 Or 377 (1980), Grable v. Weyerhaeuser Co., 291 Or 387 (1981), Bracke v. Baza'r, Inc., 293 Or 239 (1982), and most recently, Boise Cascade Corp. v. Starbuck, 61 Or App 631 (1983) and Peterson v. Eugene F. Burrill Lumber, 294 Or 537 (1983). We have arrived at the firm conclusion that it is difficult to know what the correct resolution should be; however we resolve this case as follows.

Since the worsening of claimant's condition occurred during and because of employment activities, as opposed to nonemployment activities, Grable v. Weyerhaeuser Co. is inapplicable. But see Peterson v. Eugene F. Burrill Lumber, 57 Or App 476 (1982), affirmed on other grounds, Peterson v. Eugene F. Burrill Lumber, supra. Since two employers, or at least two employment situations, are involved in this claim, we apply the last injury rule(s) (for industrial injuries) or the last injurious exposure rule(s) (for occupational diseases) depending on whether the claim is classified as an occupational disease or an injury. Until Boise Cascade v. Starbuck, supra, was decided, we were more certain what distinguished an occupational disease from an industrial injury. However, in Starbuck, if the claimant's exposure at the furniture factory was an injury, despite the absence of an identifiable trauma and notwithstanding approximately two months of repetitive exposure to heavy lifting, we have difficulty deciding where to draw the line between occupational disease claims and industrial injury claims. Moreover, in our experience, back conditions are so ubiquitous regardless of the sedentary or strenuous nature of the work, that regarding them as not an inherent risk of employment does not aid in distinguishing between occupational diseases and injuries.

Perhaps it does not matter whether this claim is classified as an industrial injury or occupational disease. Claimant's subsequent employment with the Diners Club not only could have but did in fact contribute independently and materially to claimant's worsened condition. Thus, regardless of how the Diners Club exposure is classified, that exposure is responsible for claimant's condition. However, applying the Starbuck test, the worsening of claimant's condition while employed by the Diners Club should be considered an injury. Since it contributed independently to claimant's condition, responsibility shifts to that employer and the aggravation employer/insurer is relieved of responsibility. Since claimant elected not to pursue a claim against the Diners Club, he will receive no workers compensation benefits arising from his worsened condition.

We recognize that the Supreme Court in Bracke expressed doubt whether the last injurious exposure rule could be used defensively to defeat compensability. We have expressly held that it cannot. Robert Luhrs, 34 Van Natta 1089 (1982). However, the most recent appellate court decisions, Starbuck and Peterson, suggest a different conclusion, in circumstances such as the one presented here. There is precedent for such a result, see Crosby v. General Distributors, 33 Or App 543 (1978). Accordingly, we reverse and reinstate the insurer's denial.

ORDER

The insurer's motion to remand this case to the Referee for consideration of newly discovered evidence is denied. The Referee's order dated August 13, 1982 is reversed and the insurer's denial dated June 9, 1982 is reinstated and affirmed.

LEE P. HALE, Claimant
Galton, Popick & Scott, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08232
March 28, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review and the claimant cross-requests review of Referee Fink's order which: (1) Affirmed SAIF's August 28, 1981 denial; (2) remanded the claim to SAIF with instructions to pay claimant interim compensation from July 3 through August 28, 1981; (3) ordered SAIF to pay 25% of that compensation as a penalty under ORS 656.262(9); and (4) ordered SAIF to pay claimant's attorney $400 in attorney's fees in connection with the above penalty.

The only issue SAIF raises on review is the order requiring payment of interim compensation. SAIF, therefore, asks the Board to either reverse the Referee, awarding no interim compensation, no penalties and no attorney's fee, or in the alternative, if interim compensation is awarded, that the penalties and/or attorney's fee be allowed out of the claimant's increased compensation.

The only issue claimant raises on cross-request is compensability. Claimant asserts that the medical evidence establishes that he sustained a low back injury arising out of and in the course of his employment.

With respect to compensability, the burden of proof is on the claimant to establish by a preponderance of the evidence that his injury arose out of and in the course of his employment. Riutta v. Mayflower Farms, Inc., 19 Or App 278, 280 (1974). We conclude that claimant has failed to meet his burden of proof. Not only does the scant medical evidence fail to support his claim, but the Referee found that claimant's own testimony, regarding the circumstances of his injury and subsequent medical care, was not credible. We accept the Referee's credibility finding. Thus, the weight of the evidence does not establish that claimant's low back condition is compensable.

The issue of interim compensation raises the related issue of SAIF's ability to assert the defense of claimant's untimely filing of his claim.

Because we concur with the Referee's finding that claimant's testimony is not credible, the only reliable evidence we have regarding the date the employer had notice or knowledge of the claim is the date the Form 801 was filed, July 3, 1981. The Form 801 states that the injury occurred March 8, 1981; thus, as the Referee found, claimant failed to give notice of the claim within 30 days after the accident as required by ORS 656.265(1). However, as the Referee correctly stated, the insurer must either accept or deny the claim or begin paying compensation no later than the 14th day after the employer has notice or knowledge of the claim. ORS 656.262(4); Jones v. Emanuel Hospital, 280 Or 147 (1977). The insurer did not deny the claim until August 28, 1981, after having received notice on July 3, 1981, nor did it begin paying interim compensation within 14 days after such notice.

SAIF's justification is that since claimant was untimely in filing his claim, it was not required to pay interim compensation according to the holding of Logan v. Boise Cascade Corp., 5 Or App 636 (1971). We have decided that this defense to non-payment of interim compensation is without merit. Inez Van Horn, WCB Case Nos. 80-02851, 80-05095, 35 Van Natta 342 (decided this date). Fore reasons also stated in Van Horn, we reduce the Referee's imposition of the maximum penalty.

ORDER

The Referee's order dated July 13, 1982 is modified in part. The SAIF Corporation shall pay to claimant 10% of the interim compensation due for the period July 13, 1981 through August 28, 1981 as a penalty for SAIF's failure to make timely interim compensation payments in lieu of the penalty imposed by the Referee. The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded $400 as a reasonable attorney's fee on Board review, payable by the SAIF Corporation, for prevailing on the interim compensation issue.

ROSCOE HOWARD, Claimant
Allen & Vick, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-01231 & 81-10827
March 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of those portions of Referee Johnson's order which: (1) ordered that claimant's claim for his post-May 5, 1981 low back condition be remanded to SAIF for acceptance as a new occupational disease claim rather than an aggravation of a prior industrial injury for which North Pacific Insurance Company would be responsible; and (2) assessed penalties and attorney fees against SAIF's insured, the Yamhill County Council on Aging.

On the first issue, it is far from clear whether the issue is only responsibility as between two insurers or whether an issue of compensability is also presented. It is also unclear how claimant's limited (about two weeks) work for the Council on Aging could have produced an occupational disease. It is not even clear what claimant's disease is. Having said all that, however, on this record we agree that claimant's post-May 5, 1981 back symptoms are compensable and are SAIF's responsibility.

The penalty/attorney fee issue is a bit more involved. We find the relevant facts to be as follows. A few days after May 20, 1981 claimant presented to his employer a letter so dated from Dr. Stellflug. This letter is sufficient to constitute a claim under ORS 656.005(7). The Council on Aging is operated by a small staff of salaried employes aided by numerous volunteers. The salaried employe who would ordinarily handle workers compensation matters was on vacation and, in her absence, claimant gave Dr. Stellflug's letter to a volunteer. The volunteer did not initiate processing

of a workers compensation claim or forward any information to SAIF. SAIF thus did not know of any claim until late November or early December of 1981 when claimant's counsel filed another claim on claimant's behalf. SAIF issued its denial on February 2, 1982.

A worker is only required to submit a claim to his or her employer. ORS 656.265(1), (2) and (3). An employer has a duty to forward the claim to its insurer. ORS 656.262(3). The insurer must then process the claim, ORS 656.262(1), and specifically the insurer must accept or deny "within 60 days after the employer has notice or knowledge of the claim." ORS 656.262(6) (emphasis added). In other words, any delay on an employer's part in forwarding a claim to its insurer cuts into the insurer's statutory response time.

Nevertheless, penalties for unreasonable failure to accept or deny within the statutory time limit are assessable against the insurer:

> "If an insurer or self-insured employer . . . unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25% of the amounts then due plus any attorney fees which may be assessed under ORS 656.382." ORS 656.262(9) (Emphasis added.)

The insurer, in turn, may be able to charge its insured employer for penalties assessed for a late denial when the employer has not complied with its duty to forward the claim promptly to the insurer: "Failure to so report subjects the offending employer to a charge for reimbursing the insurer for any penalty the insurer is required to pay under [ORS 656.262(9)] because of such failure." ORS 656.262(3).

Although ORS 656.262(3) refers only to reimbursement for "a penalty" assessed under ORS 656.262(9), the latter section also contemplates the possibility of assessment of a penalty-type attorney fee under ORS 656.382(1). We thus assume that an insurer's ORS 656.262(3) claim for reimbursement against an employer would include both the amount of a penalty ordered paid to the claimant and the amount of a penalty-type attorney fee ordered paid to the claimant's attorney.

In this case, the Referee ordered that a penalty of 25% of the temporary disability benefits due the claimant between May 20, 1981 and February 2, 1982 be paid to the claimant by the employer and that an ORS 656.382(1) penalty-type attorney fee of $550 be paid to claimant's attorney by the employer. In ordering the employer to pay these assessments, the Referee must have been combining ORS 656.262(9), which states penalties are payable by the insurer, and ORS 656.262(3), which contemplates possible reimbursement of the insurer by an "offending employer." The Referee's approach is understandable under the facts of this case but we nevertheless think it is erroneous.

We conclude that, just as ORS 656.262(9) and 656.382(1)

state, the orders of this agency should assess penalties and associated attorney fees only against an insurer or self-insured employer. An insurer may or may not them choose to seek reimbursement from its insured under ORS 656.262(3). If an insurer seeks reimbursement and the insured employer contests that claim, we believe that dispute must be resolved in some other forum. While we believe we lack jurisdiction over this kind of dispute between insurer and insured in any event, see Derral D. Kelley, 34 Van Natta 73 (1982), we note it was particularly inappropriate in this case for the Referee to determine whether the insurer or the insured would be ultimately responsible for payment of the penalty and ORS 656.382(1) attorney fee when the insurer and the insured were not represented by separate counsel.

Turning to the issues that we can consider, SAIF argues that there was no unreasonable conduct on the part of anybody and that the penalty and attorney fee assessed by the Referee should be eliminated or reduced. The facts remain that: (1) claimant gave his employer what we construe to be a claim on or about May 20, 1981; and (2) that claim was not denied until February 2, 1982. We agree that it is understandable that a volunteer temporarily running the office at a social-service organization might not recognize a workers compensation claim or know what to do with a claim. However, that does not establish that the delay in denying claimant's claim was other than unreasonable. Under the standards discussed in Zelda M. Bahler, 33 Van Natta 478 (1981), rev'd on other grounds, 60 Or App 90 (1982), the Referee correctly imposed the maximum possible penalty for a delay of this duration.

We believe, however, that an ORS 656.382(1) attorney fee of $550 was excessive under the circumstances of this case. Considering that the most telling evidence on the compensability/responsibility issue was generated by North Pacific Insurance Company rather than by claimant's counsel, that claimant's counsel was awarded $1,250 for prevailing on SAIF's denial, that it appears that little additional legal service was necessitated by the delayed denial and considering the understandable explanation for the (albeit unreasonable) delayed denial, we conclude that an ORS 656.382(1) attorney fee of $200 would be more appropriate and more in line with other similar cases.

ORDER

The Referee's order dated May 31, 1982 is modified in part. The penalty of 25% of compensation for temporary disability shall be paid by the SAIF Corporation. An ORS 656.382(1) attorney fee of $200 shall also be paid by the SAIF Corporation in lieu of the ORS 656.382(1) attorney fee ordered by the Referee. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $50 for services rendered on Board review in connection with the compensability/responsibility issue, payable by the SAIF Corporation.

JOSEPH R. KLINSKY, Claimant
Hill & Schultz, Claimant's Attorneys
Keith Skelton, Defense Attorney

WCB 81-02964
March 28, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Howell's order which upheld the insurer's denial of his aggravation claim. Claimant contends that he has established a worsening of his September 1976 injury and that he is now permanently and totally disabled.

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

Claimant sustained a work-related back injury in 1976. The claim was closed by Determination Order on June 26, 1978 which awarded 20% unscheduled permanent partial disability. On reconsideration the award was increased to 30%. A third Determination Order issued on November 13, 1978 but did not award any additional permanent partial disability. Claimant requested a hearing. The hearing convened on September 14, 1979 before Referee Seifert and claimant was awarded an additional 20% unscheduled permanent partial disability for a total award of 50%. The Referee's order was affirmed by the Board on April 8, 1980 and the Board's order was affirmed by the Court of Appeals without opinion. 48 Or App 519 (1980). On March 18, 1981 claimant filed a claim for aggravation which is the subject of the current case.

The Referee noted that the first question before him was determining what the last award or arrangement of compensation was, in order to allow him to determine the appropriate time period from which the claimant must establish a worsening of his condition. ORS 656.273(1). The Referee had several possibilities from which to choose, including the date of the hearing before Referee Seifert, the date of the Board's order affirming Referee Seifert and the date of the Court's decision affirming the Board. Referee Howell selected the date of the prior hearing before Referee Seifert and concluded that claimant must establish a worsening of his condition subsequent to September 14, 1979.

When the most recent award of compensation is either by Determination Order or stipulated order, it is obvious that such orders constitute the "last award or arrangement" within the meaning of ORS 656.273. When, however, a previously litigated extent-of-disability case has gone through all levels of hearing, review and appeal, the question of what constitutes the "last award or arrangement" has been answered a variety of ways.

We think the best answer is that used by Referee Howell in this case. It is illogical to measure worsening from any prior point other than the date of a prior extent hearing because: (1) Board and judicial review of a claimant's extent of disability is based on the record made at the hearing, subject to the very rare exceptions contained in OAR 436-83-720(1) and 656.298(6); and (2) Board and judicial decisions about extent of disability are decisions about disability as of the time of the hearing, e.g., Gary A. Freier, 34 Van Natta 543 (1982).

Prior interpretations of the statutory phrase, "last award or arrangement," are generally consistent with our present interpretation that looks to the date of a prior hearing. In Sylvia Crites, 7 Van Natta 100 (1971), we stated:

> "The hearing on which the last closure was based was held June 11, 1969. It would appear that any claim of aggravation would rest upon developments following the last opportunity of the claimant to be heard with respect to her condition on the former closure which would be the June 11, 1969 date." 7 Van Natta at 100.

A similar situation was presented in McKinney v. G.L. Pine, Inc., 16 Or App 619 (1974). In that case the claimant was awarded partial disability at a hearing held on September 16, 1971. The Referee's order was affirmed by the Board from which no appeal was taken. The claimant subsequently filed a claim for aggravation. The claim was ordered accepted at a hearing and the Referee's order was in turn affirmed by the Board. On appeal, the court stated:

> "The initial hearing in this case was held on September 16, 1971, at which time the parties litigated the issue of the extent of claimant's then-existing disability. . . . In order to support an aggravation claim, the physician's opinion would have had to indicate that there was a reasonable basis for believing that claimant's condition had worsened since September 16, 1971." 16 Or App at 622.

Other decisions appear to be inconsistent with Crites and McKinney. See Bowser v. Evans Products Co., 17 Or App 542 (1974) (seemingly indicating that the date of a Determination Order was the pertinent date despite a subsequent Referee's order and Board order); Joyce McCammon, 22 Van Natta 28 (1977) (stating, perplexingly, that an aggravation can occur prior to a final order from the Board or the court, but that a claim for aggravation cannot be filed until after issuance of a final order). See also Johnson v. SAIF, 54 Or App 179 (1981); Robert Hill, 24 Van Natta 39 (1978).

In view of these disparate results, we feel justified in selecting what we believe to be the better policy approach to this problem. We believe that the better approach is represented by the decision of the Board in Crites and the decision of the Court of Appeals in McKinney. Any other approach could cut off a claimant's aggravation rights during the often-protracted period between the hearing (the claimant's last opportunity to present evidence on his current condition) and the final order of the Board or the appellate courts.

Our selection of the hearing as the date of the last award or arrangement of compensation from which a claimant seeking reopening must establish a worsening is in need of additional refinement. ORS 656.289(3) allows a Referee 30 days in which to issue an order following the conclusion of the hearing. It is conceivable that a worker could worsen subsequent to his last opportunity to present

evidence at the hearing, but prior to the Referee's issuance of an order. We believe that as between the date of the Referee's order and date of final opportunity to present evidence, the latter is the appropriate date from which a worsening must be established. Normally this will be a distinction with little meaning; as a practical matter an aggravation rarely occurs during this brief period. See, e.g., Dinnecenzo v. SAIF, 18 Or App 63 (1974). Nevertheless, in those few cases in which such an event does occur, the appropriate period for the purposes of worsening will be from the date of the final opportunity to present evidence at the hearing.

Another situation is represented in Lewis Twist, 34 Van Natta 290 (1982). In that case the claimant entered into a stipulated order on March 30, 1979. Subsequently claimant filed an aggravation claim which was denied. The denial was upheld at hearing on March 11, 1980, and the Referee's decision was affirmed by the Board and the Court of Appeals. A second aggravation claim was filed by the claimant on March 12, 1980. We concluded that we would look to the March, 1979 stipulation as the last award or arrangement of compensation from which claimant must establish a worsening. In other words, the Board held that a denied aggravation claim does not constitute an award or arrangement of compensation and therefore the appropriate period from which to measure a worsening is the last award or arrangement prior thereto.

To summarize, in determining whether there has been a worsening of a worker's condition since the last award or arrangement of compensation so as to warrant a reopening pursuant to ORS 656.273, the claimant must establish a worsening in his condition since the last award of compensation. When there has been no hearing, the last award of compensation can be a Determination Order or a stipulated order. When there has been a hearing on extent of disability, the date of the last award or arrangement of compensation is the date of the final opportunity to present evidence at the hearing, notwithstanding subsequent appeals.

ORDER

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

CURTIS P. MANN, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-09447
March 28, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer has requested review of that portion of Referee Gemmell's order which increased the permanent disability award for claimant's upper and mid-back injury. Claimant was awarded 5% unscheduled permanent partial disability by a Determination Order. Employer contends that the additional 20% unscheduled award granted by the Referee was excessive and that the 5% granted by the Determination Order should be reinstated.

Claimant injured his back when he fell while pulling veneer at the employer's mill on September 11, 1980. His injury was

diagnosed as cervical and dorsal strain. There were no positive orthopedic or neurological findings. Claimant was treated by Dr. Stephen Ray, a chiropractor. Dr. Ray determined that claimant would not be able to return to his old job as a veneer puller, that he should avoid prolonged pushing or pulling movements with his arms and that claimant should not lift anything over 50 pounds. At the employer's request, claimant was examined by Dr. Thomas Martens, an orthopedic surgeon. Dr. Martens also concluded that claimant should not do any lifting over 50 pounds and should avoid repetitive pushing, pulling or twisting.

Claimant was 23 years old at the time of the hearing and has a high school education. In addition to working in the employer's mill, he has worked as a shipyard laborer, a machinist and tire changer.

When claimant is evaluated in light of the guidelines in OAR 436-65-600 et seq., it is clear that he has suffered permanent disability in excess of the 5% awarded by the Determination Order; however, it is also apparent that the additional awarded granted by the Referee is somewhat excessive. Claimant is a young man with a high school education. While he is foreclosed from doing heavy labor, claimant is still able to perform a wide spectrum of jobs. We, therefore, find that claimant's upper and mid-back injury has resulted in a 15% unscheduled permanent partial disability.

ORDER

The Referee's order dated July 28, 1982 is modified. Claimant is awarded 15% unscheduled permanent partial disability for his upper and mid-back injury, in lieu of all prior awards. Claimant's attorney's fee should be adjusted accordingly.

The remainder of the Referee's order is affirmed.

ROBERT F. MEIER, Claimant
Karol Wyatt Kersch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-07375
March 28, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review and the SAIF Corporation cross-requests review of Referee Foster's order which set aside SAIF's denial of medical treatment for claimant's low back condition and which awarded claimant 10% unscheduled permanent partial disability for his low back condition. The issues are: (1) to what extent claimant's low back condition is causally related to his industrial injury of April 21, 1981; and (2) the extent of his permanent disability.

Claimant is a 56 year old man who has operated his own plastering business most of his adult life. He has an extensive history of both on-the-job and off-the-job injuries. None of his previous on-the-job injuries resulted in an award of permanent disability. On April 21, 1981 claimant was injured on-the-job when he attempted to lift a one hundred pound sack of cement. The medical

experts are unanimous in stating that claimant has a longstanding preexisting degenerative arthritis of his spine. The dispute is whether claimant's April 1981 compensable injury caused any permanent worsening of that degenerative arthritis in claimant's low back. Drs. Abrams and Berman opine that claimant's degenerative arthritis was permanently worsened by his on-the-job injury. On the other hand, Drs. Bolin and Shaw opine that claimant's degenerative arthritis was not permanently worsened by the on-the-job injury.

The Referee concluded that the on-the-job injury did cause a permanent worsening of the underlying condition. He based his conclusion in part on the testimony of claimant and his son that the claimant could do much heavier work just before the injury than he could even six months later. The Referee also relied on Dr. Bolin's testimony that if the injury was a hyperextension type injury rather than a hyperflexion type injury, he would conclude there had been a permanent worsening. The Referee found that the injury involved hyperextension.

The Referee's finding about the mechanics of the injury was based on what he obviously believed was credible testimony by the claimant. We have no reason to question that credibility finding. Accordingly, we conclude that the weight of the medical evidence is that the on-the-job injury caused a permanent worsening of the underlying condition. Claimant is thus entitled to an award for permanent disability.

Claimant argues that he is entitled to a low back disability award greater than the 10% awarded by the Referee. We agree, but not for the reasons advanced by the claimant.

Claimant argues that we must take into account his preexisting disabilities in rating the extent of his disability. He argues that these must be taken into account because he has suffered a number of compensable injuries over the years. However, according to the record, none of these injuries has resulted in an award of permanent disability. We, therefore, infer that in each instance he became medically stationary without permanent residuals.

However, taking into account the relevant social and vocational factors including claimant's age and the specialized nature of his previous occupation, we find him entitled to an award of 64° for 20% unscheduled permanent partial disability for injury to his low back.

ORDER

The Referee's order dated July 14, 1982 is modified in part. Claimant is awarded 64° for 20% unscheduled permanent partial 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 and for a reasonable attorney's fee. The remainder of the Referee's order is affirmed.

LUZIA SNODGRASS, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-08979
March 28, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Seymour's order which affirmed the Determination Order closing claimant's claim with no award of permanent disability. The issue is extent of permanent disability.

In the course of her employment with the employer, Weyerhaeuser Company, claimant struck her back when she raised up while doing cleanup work under a piece of mill machinery. X-rays taken in the course of treating the injury revealed that claimant had severe scoliosis because of a congenitally short leg. Claimant previously was aware that she had a short leg but had not been aware of the scoliosis. Both before and after the injury, claimant enjoyed an active lifestyle which included playing volleyball in high school and participating in track, league softball, running three or four times per week, swimming and, up until five months or so prior to the hearing, lifting weights. Claimant returned to work with this employer and pursuant to its bidding system was assigned to work the green chain pulling relatively large pieces of lumber. Because of the risk of reinjuring her back, claimant avoids lifting weights in excess of 70 pounds but otherwise carries out her job duties without interference from her injury.

Considering this very minimal physical impairment together with claimant's other social/vocational factors (she is now age 23, has completed high school and some college courses, and has returned to relatively strenuous work), under the disability evaluation guidelines (OAR 436-65-600 et seq.), the Referee concluded that claimant is entitled to no permanent disability. This is because the combining and arithmetic required by OAR 436-65-601(3) yields an amount less than 2.5%, and under the rule, the calculated amount is rounded off to the nearest 5 percent, which under the Referee's calculations would be zero.

Claimant's contention is that she has greater impairment than the Referee found based on the medical evidence which indicates that because of the interaction between her injury and the scoliosis claimant is likely to reinjure herself and sustain more permanent disability if she continues to work in strenuous employment. This phenomenon has been described by claimant's physicians as follows:

> "I do not feel the spinal scoliosis itself is disabling. Many workpersons with this type of curvature perform physical labor most of their lives without injury. Once injured however, these people, due to the unequal distribution of their mechanical

> present in her spine. If her physical condition improves to the point where she can return to work, she must decide at that time whether or not she wishes to continue with this type of employment."

Also:

> "Ms. Snodgrass should not be employed in a job requiring more than light duty work. If she does engage in more than light duty in her present condition she will eventually suffer permanent disability.... Being young, she could possibly work a few years in her present occupation but due to her predisposed weakness and injury of 3/18/81 it is only a matter of time until serious spinal injury will occur."

The question is whether the potential for reinjury indicates that claimant has greater permanent impairment and hence disability than that reflected solely by present lifting limitations. We believe that the answer is no. The fact is that claimant has returned to more strenuous duty than that which she had at the time of her injury. If and when a compensable event occurs which leads to a reevaluation of claimant's condition, the extent of permanent disability will be determined at that time and claimant will be compensated accordingly. Claimant should be evaluated and compensated based upon her present, demonstrated impairment.

Claimant has not challenged the Referee's action in applying the administrative rule to round off claimant's disability rating to the nearest five percentage to deprive her of the small amount of permanent disability to which she would otherwise be entitled. The Referee did not indicate what value he assigned as an impairment rating. Our calculations yield a figure which, when rounded off to the nearest five percent, result in a five percent disability determination. In light of the sparse evidence of impairment and disability in this case, and comparing this case to others, a 5% permanent disability is perhaps a little high, but that seems to be the result required by the adminstrative rules.

ORDER

The Referee's order dated September 9, 1982 is modified. The Determination Order dated June 17, 1982 is modified to award claimant 5% unscheduled permanent disability arising from claimant's back injury. Claimant's attorney is allowed 25% of the increased compensation granted by this order as and for a reasonable attorney's fee.

RICK A. VANDERSCHUERE, Claimant
Roll et al., Claimant's Attorneys
Schwabe et al., Defense Attorneys
Miller, Nash et al., Defense Attorneys
McDonald et al., Defense Attorneys

WCB 81-04862, 81-00660 & 81-00661
March 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

EBI Companies, as insurer for Scott Machinery (Scott), requests review of Referee Mulder's order which set aside its June 11, 1981 denial of responsibility for claimant's back condition and ordered it to reimburse the SAIF Corporation, insurer for Coast Hardwood, for expenditures made pursuant to the June 29, 1981 order designating SAIF as paying agent under ORS 656.307. The issue for review is responsibility.

The pertinent facts are as follows. Claimant was employed by Scott Machinery in January of 1980. In February or March 1980, while lifting a steel tongue on a piece of farm equipment, claimant experienced back pain (there are certain discrepancies in claimant's version of this incident). The record reveals that claimant terminated his employment at Scott on approximately March 2, 1980. He did not terminate his employment due to the injury, but did so in order to move to Tillamook. Apparently claimant filed no claim with Scott (although he contends he informed his supervisor of the incident), and he did not seek medical services until April 9, 1980, when he was examined by Dr. Cole, an osteopath, complaining of back pain. Dr. Cole diagnosed a right rotation of the tenth throacic vertebra.

In July of 1980 claimant began working for Coast Hardwood. On July 21, 1980, while moving a barrel, he felt a "pop" in his back followed by pain. The pain was in the same general area as that which occurred following the lifting incident at Scott. The claim was accepted by SAIF. Dr. Cole diagnosed left rotation of the tenth thoracic vertebra with tenderness and muscle spasm. Claimant testified that the pain following this incident was not nearly as severe as it was following the incident at Scott.

Claimant was either laid off or terminated from Coast Hardwood in August of 1980 due to a reduction in the work force. Almost immediately thereafter, he was able to secure employment as a dryer grader at Louisiana Pacific, a self-insured employer. On September 5, 1980, claimant again experienced back pain while leaning over a piece of machinery. Dr. Cole reported on October 22, 1980 that claimant's September 1980 back injury was identical to and related to the July 1980 injury, and that the July and September 1980 injuries were exacerbations of the prior existing condition.

A claim was filed with Louisiana Pacific, and denied on September 22, 1980. The SAIF claim, however, was still in accepted status and claimant was referred by SAIF to the Orthopaedic Consultants for an examination. In their report of November 25, 1980, the Consultants diagnosed chronic thoracic strain by history and found that the claimant was not medically stationary. On December 22, 1980, Dr. Cole reported that claimant's July and September 1980 incidents represented exacerbations of the original injury sustained at Scott. On January 9, 1981, following receipt of that report, SAIF rescinded its previous acceptance of the claim.

Claimant thereafter filed a Form 801 with Scott Machinery. The employer indicated on the 801 form that this was the first notice that he had received concerning any such injury. The claim was nevertheless accepted by EBI on February 2, 1981. This acceptance was rescinded, however, on June 11, 1981.

On June 18, 1981 a hearing convened before Referee Williams. It was agreed by all parties to request the Workers' Compensation Department to issue an order designating a paying agent pursuant to ORS 656.307. This order issued on June 29, 1981 designating SAIF as paying agent pending resolution of the matter at a hearing.

The hearing on the responsibility question was held on December 17, 1981. At that hearing (although the record leaves ample room for a contrary conclusion), the Referee found the claimant to be a credible witness. He concluded that the medical evidence on the issue of causation was unambiguous and that responsibility for claimant's current back condition rested with the first employer, Scott Machinery.

Although we do not necessarily agree that the medical evidence is unambiguous, we do agree with the Referee that what evidence there is, points to Scott as being the responsible employer. In his report of October 22, 1980, Dr. Cole states that the tenderness and spasm for which he treated claimant in April of 1980 was caused by a malalignment of the articular surfaces of the thoracic vertebrae, a condition which persisted and predisposed the claimant to further injury in July and September of 1980. Dr. Cole was deposed on September 3, 1981. Although his testimony on deposition is hardly a model of clarity, it appears that Dr. Cole was basically of the opinion that the July and September incidents only represented aggravations of claimant's back condition producing only pain, and that these incidents did not worsen his underlying condition which was caused by the February 1980 incident at Scott:

> "Well, to go back again then, it is your opinion that there was probably a mild malalignment of all or many of the thoracic vertebrae in the thoracic spine in February of 1980, correct?
>
> "I think that is correct.
>
> "And that malalignment was responsible for his later problems?
>
> "I think that is correct.
>
> "And that malalignment was not made worse by any subsequent employment? In other words, his back was not worse at any time, made worse at any time?
>
> "I would not say it was made worse, I would say that some of his jobs made his back pain recur."

* * *

"I would say his rotations and muscle spasms involving the thoracic spine were made symptomatic by his later activities."

Claimant testified that since the injury at Scott, he had continual back pain and stiffness, and that he felt that the injury at Scott was the worst of the three injuries. Claimant's testimony with regard to type of pain, location, etc., is sufficiently inconsistent and unreliable such that we feel more secure in giving little weight to his testimony and relying on Dr. Cole's opinions.

This is a case requiring application of the last injurious exposure rule (now properly referred to as the "last injury rule", see Boise-Cascade Corp. v. Starbuck, 61 Or App 631 (1983). In Wills v. Boise-Cascade Corp., the issue was responsibility between two employers for a claimant's right wrist injury. The court, in applying the last injury rule, found that the medical evidence indicated that the second incident aggravated the claimant's symptoms, but did not worsen his underlying condition. Since the second incident did not contribute to the claimant's underlying condition, but only resulted in an increase in pain, the aggravation employer was found responsible. 61 Or App at 640.

Similarly in the current case, Dr. Cole is of the opinion that the July and September 1980 incidents did not in any way contribute to a worsening of claimant's underlying condition. The most that these incidents did was cause a symptomatic worsening in the form of increased pain and made no contribution to the existing rotational problem which was caused by the injury at Scott. Dr. Cole could not say that the incidents at either Coast Hardwood or Lousiania Pacific contributed even slightly to claimant's condition. Therefore, Wills requires responsibility to be assigned to Scott Machinery.

ORDER

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

INEZ VAN HORN, Claimant
Roger Rook, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys
William Beers, Defense Attorney

WCB 80-02851 & 80-05095
March 28, 1983
Order on Review

Reviewed by the Board en banc.

claimant requests review of Referee Leahy's order which approved the denials of claimant's aggravation and new injury claims and found that claimant was not entitled to temporary total disability compensation. Claimant asserts that: (1) She has either suffered an aggravation of a 1978 injury to her back, or suffered a new injury to her back on December 1, 1979; (2) she had good cause for failing to notify her employer of the alleged injury within 30 days as required by ORS 656.265(1); and (3) she is entitled to interim compensation for the period from December 1, 1979 to April 11, 1980 as well as penalties and attorney's fees for the failure to timely pay compensation.

With respect to the aggravation claim, the new injury claim and the question of whether there was good cause for giving late notice of the alleged injury, we affirm and adopt the Referee's findings and conclusions.

The question whether claimant is entitled to interim compensation necessitates discussion. Claimant asserts that ORS 656.262(4) requires the employer to begin paying interim compensation within 14 days after the employer has notice of an injury, even if such notice was not received within 30 days as required by ORS 656.265(1).

The requirement to pay interim compensation in this situation places the insurer in a "Catch 22" situation. ORS 656.265(4) states that a claimant's failure to give timely notice of an injury bars any claim for that injury. However, ORS 656.265(4)(b) provides an exception to this bar when "[t]he insurer or self-insured employer has begun payments as required under ORS 656.001 to 656.794," which would include interim compensation paid pending acceptance or denial. Thus, a claimant may be barred from pursuing an untimely claim unless the insurer begins making payments on the claim. But, if insurers are required to make interim compensation payments, they will lose their right to assert the defense of lack of timely notice. This puts the insurers in the position of having to deny a claim without adequate time to make a reasonable determination of compensability or face losing the right to assert the untimely notice defense. We do not believe that the legislature intended this result.

The courts have not directly addressed this statutory conflict but have enforced the ORS 656.265(4)(b) waiver of the untimely notice defense. In Logan v. Boise Cascade Corp., 5 Or App 636 (1971), the court referred to the insurer as having "voluntarily" made interim compensation payments and therefore being prevented from denying the claim on untimely notice grounds. The court did not comment in Logan on the requirement of ORS 656.262(4) to begin paying interim compensation within 14 days of receiving notice of the injury.

A paraphrasing of the holding in the Logan case, found in the 1975 Oregon State Bar Handbook on Workmen's Compensation, was quoted with approval by the Supreme Court in Frasure v. Agripac, 290 Or 99 (1980). The Supreme Court's dicta in Frasure appears to reaffirm that the payment of interim compensation would result in a waiver by the insurer of the right to assert untimely notice of a claim. The Frasure case, however, actually dealt with the payment of temporary total disability compensation following an acceptance of a claim. It did not directly address the duty to pay interim compensation following a late notice of injury prior to acceptance or denial of the claim. The reference in the Logan case to the payment of interim compensation as being "voluntary" was omitted without comment from the paraphrased quote set out in Frasure. Whether this omission was deliberate is uncertain.

There are two ways to construe these conflicting statutes, each with supporting policy considerations, that will yield workable procedures. The first would be to hold that there is no duty to pay interim compensation if a worker fails to file notice of an injury within the statutory limit. The second construction would hold that the insurer does have a duty to pay interim compensation upon receipt of notice of an injury, even if the notice is untimely, but the insurer does not waive its right to challenge the claim on timeliness grounds by making such payments, so long as they deny the claim within the 60-day limit.

There are several factors which weigh in favor of the first interpretation. At the time that the Logan decision was issued, the same statutory provision requiring the payment of interim compensation was in effect. Thus, the reference to "voluntary" payment in the Logan opinion could be seen as impliedly holding that the insurer had no duty to pay interim compensation to claimants who gave untimely notice of injury. Further, the opinion in Logan unquestionably states that such payments would invoke the waiver provision. If the court believed that there was a duty to pay interim compensation, it seems unlikely that they would enforce the waiver provision without even discussing how the duty to pay interim compensation meshed with the timeliness defense. Lastly, interim compensation is designed to provide immediate financial support for injured workers. One of the goals of the payments is to prevent the worker from suffering hardship as a result of the delay involved in processing a claim. When the worker fails to file a claim in a timely manner, the delay is not occasioned by the insurer, and the worker's delay in giving notice of the injury, it could be argued, indicates that there may be no immediate need or less immediate need for compensation.

On the other hand, a convincing argument can also be made for the second statutory interpretation. At the time of the Logan decision, the duties of insurers with respect to the payment of interim compensation had not yet been clearly delineated by the courts. Thus, it is possible that in deciding the Logan case, the Court of Appeals did not focus on whether the insurer had a duty to pay interim compensation to a claimant who had not filed a timely notice of injury.

Six years after the Court of Appeals decision in Logan, the

Supreme Court, in Jones v. Emanuel Hospital, 280 Or 147 (1977), specified when insurers have a duty to pay interim compensation. The court held that the fact that a claim was ultimately found to be noncompensable did not relieve the insurer of the duty to accept, deny or begin making interim compensation payments on a claim within 14 days after receiving notice of the injury. The court reasoned that if insurers were allowed to forego making interim compensation payments, they would be allowing them to "gamble on the ultimate outcome of the case and at the same time delay that outcome" at the worker's expense. ORS 656.262(4) states that there is a duty to begin making payments within 14 days of the date the employer has "notice or knowledge of the claim." There is certainly nothing on the face of this statute to indicate that insurers are not bound to pay interim compensation on late claims and, thus, it is difficult to justify treating late claims differently than those timely filed. To do so would give the insurer precisely the prejudgment power that the Supreme Court rejected in Jones.

Insurers are required only to pay interim compensation from the date of notice, not from the date of the injury. Stone v. SAIF, 57 Or App 808, 812 (1982). Thus, the hardship from a late notice of injury rests more heavily on the worker than the insurer. In addition to not receiving compensation for the period before notice was given, the claimant's case is often prejudiced by such a delay. Since the claimant has the burden of proof, the longer the delay in reporting an injury, the more difficult it becomes for the worker to prove that the injury occurred. Thus, the requirement to pay interim compensation to a worker who has filed late notice of injury would not place an undue hardship on the insurer.

In Frasure, the Supreme Court again relied upon the strong policy favoring prompt processing of claims by insurers. In the present case it appears that this policy would be best served by requiring the insurers to pay interim compensation even if notice of the injury is not received in a timely manner. This would only be fair to the insurers, however, if they are permitted to assert the defense of untimely notice in spite of such payments. To arbitrarily require an insurer to waive the lack of notice defense would obviously defeat the purpose for having a bar to late claims. We believe this statutory conflict can be interpreted to avoid the absurd result that would come from implementing the literal language of ORS 656.265(4)(b).

While there is no perfect solution to this dilemma, we find the most reasonable statutory construction to be that ORS 656.262(4) imposes a duty on insurers to pay interim compensation even if the insurer has not received timely notice of the injury, as required by ORS 656.265. However, such payments will not prevent the insurer from asserting the late notice as a bar to the claim under ORS 656.265(4) so long as the claim is denied within 60 days of receiving notice of the claim. Due to the state of confusion on this issue we do not believe the insurer should pay the maximum penalty for its failure to pay interim compensation in the present case.

ORDER

The Referee's order dated July 26, 1982 is reversed in part. That portion of the Referee's order which found that claimant was not entitled to interim temporary total disability compensation is reversed. Zurich Insurance Company is ordered to pay interim temporary total disability compensation to claimant for the period from March 21, 1980 to April 11, 1980 and to pay claimant an amount equal to 10% of this compensation as a penalty. The remainder of the Referee's order is affirmed.

Claimant's attorney is allowed 25% of the additional compensation awarded claimant by this order, payable out of and not in addition to claimant's award, as a reasonable attorney's fee. Claimant's attorney is awarded $100 as an additional fee pursuant to ORS 656.382(1), payable by Zurich Insurance Company.

Board Member Barnes, Dissenting:

If we were writing on the proverbially clean slate, I might join the majority's analysis in this case. But the slate is not clean. The exact same issue presented to us in this case was presented to the Court of Appeals in Logan v. Boise Cascade Corp., 5 Or App 636 (1971), and resolved by the court in that case in exactly the opposite way as the majority's conclusion in this case. I believe our duty at this level is to follow Logan and leave to the Court of Appeals the question of whether Logan remains good law in light of the other appellate court decisions discussed by the majority.

RANDY KING, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 82-0134M
March 28, 1983
Own Motion Order

Claimant requested the Board to exercise its authority pursuant to ORS 656.278 and order reopening of his July 31, 1975 injury claim. The Board initially deferred action in view of a pending hearing request concerning claimant's right to receive medical treatment pursuant to ORS 656.245. Thereafter, by order of July 27, 1982, the Board referred claimant's request for own motion relief to a Referee to be consolidated for hearing with the related medical services question and for a recommendation. The Referee issued his order in WCB Case No. 82-03625, and both parties requested Board review of his order. We have reviewed the Referee's order and, pursuant to ORS 656.295, issued an Order on Review in WCB Case No. 82-03625 this same day.

The Referee recommended that the Board not exercise its authority to order reopening of claimant's 1975 injury claim, reasoning that, although claimant's condition has worsened since his last award or arrangement of compensation, there was no medical evidence indicating that claimant, as a result of his current condition, is precluded from engaging in regular and gainful employment.

Claimant's claim was last closed by Determination Order dated April 3, 1979 awarding him temporary total disability for the period May 5, 1976 through March 16, 1979, and 10% unscheduled permanent partial disability. His condition was found to have been stationary as of September 20, 1976 after which date claimant continued to receive temporary disability benefits by virtue of his participation in an authorized program of vocational rehabilitation, in which he was trained as a real estate appraiser. A stipulation approved June 29, 1979 granted claimant an additional 10% unscheduled permanent disability for a total award of 20%.

After the date of the stipulation, which is the last arrangement of compensation, claimant continued to experience periodic exacerbations of low back pain, which responded favorably to chiropractic manipulation. He continued to work in a field related to his vocational retraining.

The record in WCB Case No. 82-03625, which we have reviewed and considered in conjunction with claimant's request for own motion relief, reflects that, until May 1981, claimant was able to continue working on a more or less regular basis, in spite of his low back pain, which was alleviated by chiropractic treatment. In May 1981 claimant became unemployed due to the state of the economy and not as a result of his low back condition.

The only evidence indicating that claimant is presently unable to engage in regular employment as a real estate appraiser, which he performed for two and one-half years prior to falling victim to the poor economy, or some other employment activity compatible with his physical limitations, are the conclusory statements of Dr. Poulson that claimant is "disabled" and "unable to continue his work." Claimant is disabled as indicated by his award of permanent partial disability. Orthopaedic Consultants' statement that claimant was not medically stationary at the time of their examination in April 1982 is insufficient to warrant reopening pursuant to ORS 656.278, in view of claimant's exhibited ability to regularly work within his physical limitations when work has been available. Accordingly, we agree with and adopt the Referee's recommendation to deny claimant's request for own motion relief.

IT IS SO ORDERED.

WILLIAM S. SWENSON, Claimant
Bottini & Bottini, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-03972
March 28, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Podnar's order which directed the SAIF Corporation to commence payment of temporary total disability benefits (interim compensation) to claimant beginning May 3, 1982, and to continue said payments until acceptance or denial of claimant's aggravation claim. Claimant does not take issue with any portion of the Referee's order, but contends that he is entitled to an award of penalties and attorney fees for SAIF's failure to commence payment of such benefits in a timely manner.

Claimant requested a hearing on the issues of extent of disability in relation to a June 10, 1981 Determination Order, a claim of aggravation pursuant to ORS 656.273, and the question of when SAIF was required to commence payment of interim compensation in relation to the aggravation. By letter of May 26, 1982, claimant's attorney stated:

> "Claimant further alleges herein that penalties and attorneys fees should be awarded based upon the insurer's unreasonable de facto denial for an aggravation claim in this case, and for failure to pay appropriate interim compensation within fourteen days of request to reopen."

The questions concerning extent of disability and compensability of the aggravation claim were eliminated as issues in a conference held between the parties prior to the June 2, 1982 hearing. When the hearing commenced, claimant's attorney set forth the issues for decision by the Referee as being:

> "Payment of interim compensation on the request to reopen the claim * * *. Other issues raised in this matter and not yet ripe for adjudication are the extent question from the original Determination Order of June 1981. That will be preserved for a hearing in the future pending further medical information, and the issue of aggravaton not yet ripe because the sixty day period from April 19, 1982, has not yet expired. So, we are left with the decision regarding strictly the time the interim compensation is to begin."

The hearing proceeded on the issue so stated and the Referee ordered SAIF to begin payment of interim compensation as of May 3, 1982. No evidence was presented on the issue of penalties and associated attorney's fees. After publication of the Referee's order claimant moved for reconsideration of the order with regard to penalties and attorney fees. The Referee denied the motion.

We believe the Referee's refusal to reconsider was entirely consistent with Mavis v. SAIF, 45 Or App 1059, 1062 (1980), where the court chose to apply a "raise or waive" rule with regard to issues involving penalties. See also Richard Pick, 34 Van Natta 957 (1982). Claimant's reliance on Hicks v. Fred Meyer, 57 Or App 68 (1982) is misplaced. That case involved a request for reconsideration of a Referee's order in regard to an overpayment issue that was not raised at the hearing itself. We think Hicks represents a somewhat unique situation and has no bearing on the general rule announced in Mavis.

ORDER

The Referee's order dated June 9, 1982 is affirmed.

WILLIAM WEBB, Claimant
Coons & McKeown, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-11715
March 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Nichols' order which dismissed the claimant's request for hearing with prejudice for the reason that the same type of treatment the claimant is currently seeking compensation for has previously been denied by a prior Referee's order issued on November 30, 1981.

We agree that claimant is not entitled to benefits for his current medical treatment from Dr. Richard Gorman, D.C., but we do so because we find that the claimant has failed to prove by a preponderance of the evidence that this current treatment is related to his January 5, 1981 injury, and not for the reason that the treatment is barred by the doctrine of res judicata.

ORS 656.245(1) states: "For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of recovery requires, including such medical services as may be required after a determination of permanent disability."

In the course of any workers' compensation claim, there may be periods of time when certain types of medical treatment are required and times when certain types of medical treatment are not required. By order dated November 30, 1981 Referee Howell determined that the treatment under question at that point in time was not related to the January 5, 1981 compensable low back injury. That decision does not, and could not, mean that the claimant is forever barred from presenting evidence of a need for medical treatment that may even be of the same type and by the same doctor. See Patricia M. Dees, 35 Van Natta 120 (1983).

If the claimant can prove by a preponderance of the evidence that later medical treatment is required and is related to the compensable injury, then those medical services must be paid for pursuant to ORS 656.245.

However, in this case we have examined all the medical evidence in the record, including the latest medical report from Dr. Gorman dated July 13, 1982, and have concluded that the claimant has failed to prove by a preponderance of the evidence that the current chiropractic treatment rendered to the claimant since the November 30, 1981 order is related to the January 5, 1981 compensable injury.

ORDER

The insurer's denial of responsibility for payment of chiropractic treatment rendered by Dr. Richard Gorman, D.C., between November 30, 1981 and May 26, 1982 is affirmed.

LORENE M. WEBSTER, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Keith Skelton, Defense Attorney

WCB 81-04035
March 28, 1983
Order on Review

Reviewed by the Board en banc.

The employer requests review of that portion of Referee Fink's order which awarded claimant interim compensation and a penalty and attorney's fee for unreasonable failure to pay interim compensation. The issues on review are whether any interim compensation is due and if so, for what period of time, and whether the penalty and associated attorney's fee are appropriate.

Claimant quit work as a medical technician on February 5, 1981 at least in part because of back pain arising from arthritis which claimant alleges was aggravated by her work. Claimant did not file an 801 claim form until March 17, 1981. The claim was denied May 15, 1981, no time loss having been paid in the interim. Claimant conceded at hearing that she had been unable to obtain medical support for the compensability of her claim, and the Referee ordered that the employer's denial be affirmed. As a result of claimant's concession and the Referee's order, it has been determined that the underlying claim is not compensable, but that is immaterial to claimant's entitlement to interim compensation. Jones v. Emanual Hospital, 280 Or 1443 (1977).

The employer contends, and we agree, that the Referee erred in awarding interim compensation back to the date claimant quit work. When the underlying claim is determined not to be compensable, entitlement to interim compensation begins on the date the employer had notice or knowledge of a claim, not on the date of disability. Donald C. Wischnofske, 32 Van Natta 136 (1981), 34 Van Natta 664 (1982); Stone v. SAIF, 57 Or App 808 (1982). We find insufficient evidence that the employer had effective notice or knowledge that claimant believed her physical condition was work related before she actually filed her 801 claim form. Therefore, claimant is entitled to interim compensation only from the date of claim filing, March 17, 1981, through May 15, 1981, the date of employer's denial.

ORDER

The Referee's order dated August 9, 1982 is modified. That portion of the order relating to interim compenstion is modified to require payment of compensation from March 17, 1981 through May 15, 1981. The penalty shall be 25% of the adjusted amount of interim compensation. The remainder of the Referee's order is affirmed.

JOHN J. WITTLAKE, Claimant
Parkinson, Fontana et al., Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-08793
March 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Leahy's order which affirmed the employer's denial of claimant's claim but ordered payment of interim compensation together with a penalty and an attorney's fee for unreasonable failure to pay interim compensation. The issues are compensability and whether it was appropriate to order interim compensation, a penalty and attorney's fee. We reverse the award of interim compensation and the associated penalty and attorney's fee but affirm the denial of the claim.

Claimant, age 49 at the time of hearing, worked in the laundry facility of the employer, Portland Adventist Medical Center (or the predecessor in interest which had contracted to operate the hospital's laundry facilities) since 1970. Among other tasks, this employment involved repetitive lifting of laundry bags weighing 25 to 40 pounds, occasionally lifting bags of soap weighing 100 pounds, pushing carts containing wet and soiled laundry weighing up to 800 pounds or more up ramps, and bending over and twisting while putting laundry in washing machines and untangling sheets after they were washed. In a form dated July 14, 1981 claimant alleged that over a period of time he had sustained a back injury arising from his job duties. Previously, in 1978, x-rays had revealed the existence of defects in claimant's lumbar spine diagnosed as "lumbar spondylosis with osteophyte formation and disc space narrowing...suggestive of degenerative disc disease."

Claimant is alleging that his back condition arose over a period of time as a result of work activities which would not be unexpected to cause back difficulties and, therefore, claimant's condition must be considered an occupational disease. James v. SAIF, 290 Or 343 (1981); O'Neal v. Sisters of Providence, 22 Or App 9 (1975). As such, claimant must prove that his work activities were the major contributing cause of his condition at the time it became disabling or required medical services. James v. SAIF, supra; SAIF v. Gygi, 55 Or App 570 (1980). It is insufficient to prove material contributing causation.

The medical evidence is conflicting or inconclusive as to whether claimant had experienced a worsening of an underlying condition, and as to what extent his work activities and nonwork activities contributed to his condition. We are unable to determine whether claimant's condition preexisted his employment at the employer's laundry facility. Although he experienced incidents of back pain as far back as 1956, these appear to have been back strains. In any event, we find that claimant's back was asymptomatic for a substantial period before and after he began the employment involved here. If the degenerative disc disease did not antedate the employment here, the worsening requirements of Weller v. Union Carbide Corp., 288 Or 27 (1979) are inapplicable; Lorena Iles, 30 Van Natta 666 (1981), Patricia Lewis, 34 Van Natta 202 (1982).

Regardless of the worsening issue, we believe that claimant has failed to prove that his work activities were the major contributing cause of his condition. There is evidence of off-the-job incidents which could have contributed to the development of the back condition, although we do not consider it very likely that the identified incidents actually did contribute much, if anything, to the condition. Far more likely is the possibility that claimant's present disability and need for medical services are the result of the natural progression of the degenerative disease process which developed independently of claimant's work activities. We need not affirmatively determine what caused claimant's current condition. Claimant has the burden of proving that his work activities were the major contributing cause of his condition (or a worsening of a preexisting condition), and this, in our opinion, he has failed to do.

The Referee reached the same conclusion, namely, that in light of the conflicting and inconclusive medical reports, he was unable to determine which physician was correct. Claimant contends that the Referee's inability to make a finding as to what did cause claimant's condition amounted to a failure to "properly, completely, and sufficiently develop and hear a case" as claimant contends is required by ORS 656.295(5). Claimant misconstrues the purpose of that statute. For better or worse, Oregon's system for adjudicating an appeal from a workers compensation determination is an adversarial process, not an inquisitional one. ORS 656.295(5) sets forth a standard for the Board to use in determining whether a record has been incompletely developed because of such factors as the failure to take the testimony of a witness or the discovery of new and material evidence. It does not require Referees to insure that parties marshal evidence their attorneys have overlooked or failed to solicit.

In an adversarial system, one purpose of assigning the burden of proof to a party is to insure that whatever material and relevant evidence that does exist will be brought forward by the party seeking relief to persuade the trier of fact to grant the relief being sought. The trier of fact is not required to find what alternative facts might be true, merely whether the facts necessary to afford a party relief have been proved by the appropriate standard of proof.

Here, instead of obtaining narrative reports, deposing the physicians or calling the physicians as witnesses, the parties relied on letters to the treating physicians propounding questions that assume certain facts, phrased in legal verbiage and calling for yes or no answers. Without supporting narrative material, we have no way of knowing whether the physicians understood the questions or whether their answers are of any probative value. Some of the questions have multiple parts so that the answer gives no clear indication what the answer means. Evidence in the format of essentially leading questions that assume certain facts can be effective to clarify minor points, correct erroneous references, etc., but as evidence going to the heart of a case, they are unpersuasive. The employer's use of such evidence in this case is of no consequence since it had no burden to prove anything. But the claimant's use of similar evidence is of considerable consequence because his chances of proving compensability depended on the per-

suasiveness of such reports. Given the ambiguities and conflicts in the medical evidence, we simply are not persuaded that claimant's work activities were the major cause of his condition.

Turning to the interim compensation issue, the Referee reasoned that the claim here was one for aggravation of a preexisting condition, therefore, time loss was payable no later than 14 days after receipt by the employer of medical verification of claimant's inability to work because of the aggravated condition. The Referee confused an original claim arising from an aggravation of a previously noncompensable condition with an aggravation claim arising from a previously accepted condition under ORS 656.273. Commencement of time loss payments under ORS 656.273 does require medical verification of inability to work due to the worsening of an accepted condition. There is no similar requirement for an initial claim based on an alleged aggravation of a previously noncompensable condition. While we have held that interim compensation is not payable when the claimant continues working after filing a claim, Anthony A. Bono, 35 Van Natta 1 (1983), as a general rule, the employer is obligated to commence interim compensation payments after the filing of the initial claim unless it knows that the claimant continued to work notwithstanding the filing of a claim.

Apart from the legal basis for ordering time loss payments, the Referee's order was in error because the record indicates (and the claimant does not contend otherwise) that time loss was timely paid from the date of the claim through the date of the denial. It follows that the portion of the Referee's order requiring payment of temporary disability was a redundancy, and that the imposition of a penalty and the award of an attorney's fee was erroneous.

Lastly, claimant contends that the employer had a duty to pay time loss through the date that claimant became medically stationary or ceased participation in a vocational rehabilitation program. Those requirements apply to accepted claims and are irrelevant to a denied claim. The duty to make interim compensation payments ceases upon issuance of the denial.

ORDER

The Referee's order dated July 12, 1982 is reversed in part. That portion of the Referee's order awarding temporary disability, imposing a penalty and awarding an attorney's fee is reversed. The remainder of the order approving the employer's denial is affirmed.

ROBERT W. DALTON, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-02824
March 29, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Peterson's order which denied claimant permanent partial disability for injury to his low back in addition to the 25% previously awarded by two Determination Orders and a stipulated order.

The issues on review are: (1) extent of claimant's permanent partial disability for injury to the low back; and (2) whether the Board should remand to the Referee for further evidence taking.

With respect to the extent issue, we have considered the following factors used in rating unscheduled disability: age, education, work experience, mental capacity, psychological findings, adaptability to less strenuous work, labor market findings, impairment, and the effects of two laminectomies. Based on our consideration of such factors, we conclude that claimant has not proven a loss of earning capacity warranting an award of more than the 25% already awarded.

With respect to the Motion for Remand, claimant makes such motion to allow the admission of two documents which he asserts: (1) he could not have obtained at the time of hearing; and (2) would change the extent rating.

At the time of injury, claimant was working at a job requiring heavy exertion (as a warehouseman in a steel rolling mill). At the hearing, claimant testified that he was at that time working as an auto mechanic and body and fender repairman, a job requiring medium exertion. One of the documents he now argues should be considered is a letter from the employer at the auto repair shop. That letter states that, by mutual agreement, the employer and claimant decided claimant was no longer able to perform even the medium-exertion work required by the job and thus terminated their employment relationship. The second document is a letter from a doctor stating that it might be time to reevaluate claimant for retraining to a job more suitable to his lifting limitations because claimant could no longer perform the auto repair job.

We realize that evidence about events occurring after a hearing cannot, with any level of diligence, be produced at a hearing. Nevertheless, we see no materiality in the proferred evidence because claimant's disability rating would not be different, even considering an inability to perform the auto repair job. Thus we decline to remand to the Referee.

ORDER

The Referee's order dated August 6, 1982 is affirmed.

WILLIAM DRAGOWSKY, Claimant
Eichsteadt et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-01340
March 29, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Seifert's order which upheld the SAIF Corporation's denial of his asbestosis claim. The issue is compensability, albeit with an unusual twist because claimant is totally disabled from emphysema which is not work related.

Some of the facts are not disputed. Claimant is a 74-year-old man who was exposed to asbestos while working as an electrician in the Portland shipyards during World War II. SAIF has conceded that its predecessor provided workers compensation insurance for claimant's employer during that time and that this claim was filed within the statute of limitations.

Claimant also has severe emphysema which is not related to asbestos exposure or any other alleged industrial cause; the emphysema was probably caused by cigarette smoking. About 12 years ago claimant received a Social Security total disability award due to his emphysema alone.

Other facts are disputed. The doctors involved seem to agree that claimant's known pulmonary disease (emphysema) makes any categorical diagnosis of additional pulmonary disease (such as asbestosis) very difficult. While there is evidence that would support a contrary conclusion, we are convinced that the preponderance of the evidence (especially recent x-ray findings of diaphragmatic calcification) establishes that claimant does have asbestosis which results from his World War II work exposure.

The doctors also seem to agree that, if claimant has asbestosis, it only became diagnosable or possibly disabling within the last few years, that is, long after claimant was already totally disabled due to emphysema alone. We so find.

Claimant contends that his asbestosis increases his level of disability. We find that to be legally impossible. Claimant was totally disabled before his asbestosis became apparent in any way; indeed, as noted above, even now it is somewhat unclear how apparent any asbestosis is because of the masking effect of claimant's other pulmonary disease.

There is some mention in the record of medical services necessitated by claimant's asbestosis. However, we find no evidence of any specific medical services suggested or rendered for treatment of asbestosis that would not otherwise be rendered for treatment of emphysema alone.

Under these circumstances, it is not clear what relief claimant wants us to grant or what relief we have authority to grant. "An occupational disease . . . is considered an injury." ORS 656.804. A compensable injury is one that requires medical services or results in disability or death. ORS 656.005(8)(a). Based on our above findings, claimant has no cognizable additional disability due to asbestosis; nor has he proven that he requires additional medical services due to asbestosis. Thus, even though we have found that claimant does have a disease caused by work exposure, technically under ORS 656.005(8)(a) that disease is not compensable. Stated differently, there are no forms of benefits under ORS ch 656 that presently can be granted based upon a finding of compensability.

We confronted a somewhat similar situation in Allen M. Sparks, 34 Van Natta 526 (1982). One of the issues in that case was the compensability of a "hip condition" when donor bone material was taken from the claimant's hip for compensable wrist surgery. We concluded that the hip condition was not compensable because "there is no impairment at the donor site." Substitute the word "disability" for the word "impairment" and our Sparks analysis expresses the concept of ORS 656.005(8)(a).

The Court of Appeals reversed. Sparks v. SAIF, 60 Or App 397, 399 (1982):

"We do not understand the Board's use of the term 'impairment.' The question of impairment is an extent-of-disability inquiry and is not involved in this case. This is a compensability case."

The court remanded the "hip condition" for acceptance.

We take the court's decision in Sparks to mean that, notwithstanding ORS 656.005(8)(a), in a situation like this where a claimant has suffered an on-the-job injury or disease that does not result in medical services, disability or death, we are empowered to issue something in the nature of a declaration to the effect that ORS ch 656 benefits should be paid if, at some point in the future, the injury or disease requires medical services or produces disability or death. Such a declaration seems to be the only form of relief that we can grant at this time in this case.

ORDER

The Referee's order dated July 7, 1982 is modified. Interpreted as a denial of present benefits, the SAIF Corporation's denial dated February 1, 1982 is affirmed. Interpreted as a denial of all possible future benefits for asbestosis, that denial is set aside and it is recognized that benefits should be provided for claimant's asbestosis if that disease requires medical services or produces disability or death.

PHYLLIS J. HAMILTON, Claimant
Doblie & Francesconi, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-04785
March 29, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Neal's order which affirmed North Pacific Insurance Company's May 20, 1982 denial. The issue for review is compensability.

Claimant, who was 50 years of age at the time of the hearing, was employed as an answering service operator for Commerce Answering Service (CAS). On January 5, 1982, following the completion of her shift, claimant went out the side door of the building and began walking across the parking lot. Apparently it had recently snowed and the lot was still slippery. Although the sidewalk beside the building had been salted, the lot had not. Claimant's feet slipped out from under her and she sat down hard in the parking lot, causing a back strain. Claimant was still under the care of a chiropractor at the time of the hearing.

CAS leases office space in a multi-tenant building in Portland known as the Colonial Office Campus. The building has a paved parking lot and has one entrance door in the front, and also one on the east side of the building. CAS's office was located adjacent to the east entrance. The parking spaces in the front of the building were designated for vistors of the building's various tenants. The parking spaces in the east side lot were assigned spaces for the tenants themselves. CAS's lease agreement provided that it had one designated parking space.

When claimant was first employed by CAS, she parked her car on a dirt or gravel road which ran alongside the Colonial Office Campus building, and normally utilized the east side entrance. Claimant's employer expressed no preference as to which door its employes utilized and claimant did use the front entrance at times. Approximately six months after claimant began working for CAS, EBI Companies, also a tenant in the building, moved its offices to a new location. By the time of claimant's injury, the building owner had not yet found a replacement tenant for the offices vacated by EBI. Several of the parking spaces in the east lot had been designated for EBI use and were so marked. Following EBI's departure, claimant and several of her co-workers began parking in the then unused EBI parking spaces.

At no time did CAS authorize its employes to park in the EBI spaces and, in fact, could not have done so under the terms of its lease. CAS was aware, however, that its employes were parking in the spaces. Prior to claimant's injury, notices were posted on bulletin boards in the building, to the following effect:

> "Once again we must remind you to park in the area designated by your lease. . . [Y]ou may only use the number of spaces agreed upon in your lease." (Emphasis in original.)

Claimant testified that she had seen these notices prior to her injury, but that she did not think that they applied to her. There was also testimony which indicated that claimant had been personally informed not to park in these spaces on several occasions, but claimant denied ever having been personally informed of this. On January 5, 1982, the date of her injury, claimant had parked her car in an EBI designated space and was walking across the lot to her car when she fell.

The Referee concluded that the claimant had failed to establish that she sustained an injury in the course and scope of her employment with CAS, or that a sufficent work connection had been shown to make the claim compensable under Rogers v. SAIF, 289 Or 633 (1980). The Referee additionally found that Gayle Duckett, 32 Van Natta 284 (1981), aff'd without opinion, 57 Or App 840 (1982), was dispositive. We agree.

The "going and coming" rule, which is recognized in Oregon, is that injuries sustained by employes while going to or coming from work are not injuries which arise out of and in the course and scope of the worker's employment in the absence of some special circumstances. White v. SIAC, 236 Or 444 (1964); Adamson v. The Dalles Cherry Growers, Inc., 54 Or App 52 (1981). There are certain exceptions to this rule. One of these exceptions is the so-called "premises" rule which states that "for an employee having fixed hours and place of work, going to and from work is covered on the employer's premises." 1 Larson, Workmen's Compensation Law, 4-3 §15.11. Thus, injuries sustained by workers while traversing a company owned parking lot have been held compensable.

Kowcun v. Bybee, 182 Or 271 (1947). In Pauline Cutter, 34 Van Natta 1709 (1982), we applied this rule to find that a claimant who worked for an employer in a multi-tenant shopping mall, who sustained an injury when she stepped into a pothole in the lot while returning to work, sustained a compensable injury. The facts of Cutter established that the employer paid into a common maintenance fund for the lot, had the right to exercise a certain amount of control over the lot and permitted its employes to park in the lot. We stated, "where each tenant in a shopping center shares the benefits and expenses of a general common parking lot, that the entire parking lot is the functional equivalent of the employer's parking lot." 34 Van Natta at 1711. Injuries sustained by employes in areas which an employer has assumed substantial responsibility for, although not owned by the employer, have also been found compensable under appropriate factual settings. Willis v. State Acc. Ins. Fund, 3 Or App 565 (1970).

On the other hand, compensation has been denied in cases where the claimant has failed to establish that the employer exercised a sufficent degree of control over the area in which the injury took place to justify labeling the area as the employer's premises. Adamson, supra, Rhors v. SAIF, 27 Or App 505 (1976); Duckett, supra.

We cannot conclude under the facts of the present case that the claimant sustained an injury in the course and scope of her employment with CAS. Claimant had completed her working shift, left the building and was traveling across the parking lot in order to reach her car when she sustained her injury. Claimant's car was parked in a space designated for the use of a business concern other than claimant's employer. Claimant's employer neither owned nor leased the area in which claimant had parked. There is no evidence that claimant's employer exercised or had a right to exerise any control over the area in which claimant had parked. Although claimant's employer was aware that claimant was parking in a non-assigned space, the evidence is convincing that claimant had been notified that she was not allowed to utilize non-assigned spaces. In any event, the fact that a parking area may be "customarily" used by an employer's workers does not automatically convert that area into the employer's premises. Duckett, supra. Thus the facts of this case do not bring it into any of the exceptions to the "going and coming" rule.

Claimant relies heavily on our decision in Susan Parries, 32 Van Natta 19 (1981), as support for her argument in favor of compensability. In Parries, we ruled that a claimant who fell in the lobby of a multi-tenant office building on the way to her office on the fifth floor was traveling in a common area on a necessary path to reach her place of employment and was thus on her employer's premises when she fell. Parries is distinguishable. The claimant in the current case was not traveling in any "common" or necessary path, but was injured in a parking lot on her way to her car which was parked in an unowned and unleased area over which her employer had no right of control nor had assumed any responsibiity for, and against the employer's express disapproval.

ORDER

The Referee's order dated August 18, 1982 is affirmed.

WILLIAM W. HUGHES, Claimant
Olson, Hittle et al., Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys

WCB 81-11780
March 29, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee Foster's order which set aside its denial and awarded claimant's attorney $1,200 in attorney's fees. The issues are: 1) Whether the claimant was within the course of his employment when he was injured; 2) whether the claimant's carpal tunnel syndrome and right shoulder condition were caused by the alleged industrial injury; 3) whether the Referee erred in failing to specify periods of temporary total disability to which the claimant is entitled; and 4) whether the Referee's award of attorney's fees is excessive.

In December 1980 the claimant was employed by Mulkey Spray & Tree as a weatherization salesman and installer. The employer's main office was in Junction City, Oregon, but the claimant's home in Salem was used as the employer's Salem office.

On December 23, 1980 the claimant traveled from Salem to Junction City to conduct business with his employer. After the business was finished the claimant began driving back to Salem by way of Corvallis where he attempted to contact a potential customer. He was unsuccessful in contacting the customer in Corvallis, so he proceeded back toward his home in Salem where he intended both to phone the potential customer and to participate in his family's Christmas celebration. About eight miles outside of Salem the claimant was involved in an automobile accident in which he kept hold of the steering wheel with his right hand but his right shoulder was thrown against the dashboard of the company pickup truck.

Claimant has since developed right carpal tunnel syndrome and right shoulder problems which he attributes to the automobile accident. The insurer denied compensation for those conditions on the grounds that claimant was not within the course of his employment when the accident happened and that there was insufficient medical evidence to link the two conditions to the automobile accident.

I.

The insurer argues that under the "going and coming rule" the claimant was not within the course of his employment when the automobile accident occurred, In reliance upon Grumbecht v. SAIF, 21 Or App 389 (1975), and Brown v. SAIF, 43 Or App 447 (1979). Grumbecht sets out the general rule that an employe who is going to or coming home from the employer's premises is deemed not to be within the course of his employment. Grum- becht also recognizes that there is an exception to this rule in cases in which the employe has a dual purpose for the trip. The court quoted Larson Workers' Compensation Law (1978), as follows:

> "'In all such cases, we start with a personal motive -- that of getting home -- which would have caused the employee to take the trip in any case. The question then becomes: was the business mission of such character or importance that it would have necessitated a trip by someone if this

employee had not been able to handle it in combination with his homeward journey?

> "'In some cases it has been possible to answer this question "yes" with the result that while covering his usual route toward his home the employee has been deemed, for this particular occasion, to remain in the course of his employment.' 1 Larson, supra, 4-169--4-170, §18.21." Grumbecht, supra at 393.

Brown v. SAIF, supra, was a case in which the court applied the dual purpose doctrine to find that an employe who flew an airplane to an airfield adjacent to his home, rather than to its normal airfield for the purpose of performing minor repairs which could have been done by another employe, was not within the course and scope of his employment. The court reasoned that his trip to the airfield was for the purpose of going home and the trip to that airfield would not have been made but for the purpose of going home.

This case involves a particular application of the dual purpose exception to the going and coming rule which Larson discusses in depth. We adopt Larson's analysis which says that when the employe's house is, in effect, an alternate business situs of his employer's business, then trips between the employer's business and the home are deemed to be within the course of the employment. 1 Larson, Workmen's Compensation Law, §18.31 (1978). Larson analogizes this situation to one in which the employe is required to travel between two parts of the employer's premises but makes a stop at his home which is directly between the two parts of the premises.

> "Claimant starts down Main Avenue intending to have dinner at home and continues directly on to Factory No. 2. If he were injured between Factory No. 1 and his home, the case would be clearly compensable under the dual-purpose rule, since it was independently necessary for him to cover the identical distance for business reasons. All we have to do to apply this to the present problem is to remove Factory No. 2 from the diagram as the second work place, and substitute the home itself. It becomes apparent that an injury at the same point should be considered compensable." 1 Larson, supra, §18.31 at 4-264 to 4-265.

The home may be a business situs for a particular purpose at the time the journey is undertaken, or it may have a continuing status of a business situs. If the home has a continuing status as a business situs, "any going and coming journey is covered. Of course, if both kinds of proof are present, the ad hoc and the general, the case is strongest of all." Id.

Larson cites three factors which indicate whether a home has a continuing status as a business situs: 1) The quantity and regularity of the work performed there; 2) the continuing presence of work equipment in the home; and 3) special circumstances of the particular employment which make it necessary and not merely personally convenient to work at home. In this case, all three factors lead to the conclusion that the claimant's home had the continuing status of a business situs.

Claimant testified that he worked out of his home on a daily basis. He testified that he only traveled to the employer's main office in Junction City about once a month. He also testified that three company-owned vehicles were parked at his home. In his garage were quantities of insulation used in the business. Inside the home, the employer had paid for a separate telephone which was listed under the employer's name in the telephone book and was used on advertising brochures. There was also a photocopy machine, an adding machine, an electric typewriter and a telephone answering machine in the home which were used in the employer's business.

The employer hired the claimant to begin an insulation and weatherization business in the Willamette Valley. The employer wanted a Salem office because of its central location. Much of the claimant's work consisted of telephoning prospective customers. This had to be done at night because in many homes no one was home during the day.

Based on the uncontroverted evidence, we find that the claimant's home had the status of a continuing place of employment.

In addition, the claimant testified that on the night of the accident he not only intended to, but actually did phone the Corvallis prospect from his home. Thus, he also had a specific business purpose for his trip from the main office to his home as well as the general purpose of traveling to his main place of work.

We find that the claimant was within the course of his employment when he was involved in the automobile accident on the evening of December 23, 1980.

II.

The insurer argues that the claimant has failed to prove that his carpal tunnel syndrome and right shoulder condition were caused by his automobile accident. The insurer's position is essentially that no doctor expressly states that the two conditions were caused by the automobile accident except Dr. Tiley, who merely checked a box on a letter sent by claimant's attorney.

It is true that none of the physicians expressly states that the two conditions were caused by the accident. However, a close reading of the medical reports in the record indicates that all the physicians acted under the belief the accident caused the two conditions.

Dr. Needham's chart notes from shortly after the accident describe the automobile accident and then proceed to discuss the

conditions which the doctor had observed had developed since the accident. The conditions described include pain in the right shoulder and grip weakness in the right hand.

Shortly thereafter, Dr. Schwartz recited the history of the accident including the claimant's statement that his problems began within days of the accident. He described right shoulder pain and popping in the right shoulder. He noted weakness in the right thenal area, the area just below the thumb. He concluded that the claimant may have developed right carpal tunnel syndrome and a mild stretch injury to his right brachial plexus.

Dr. Schwartz's diagnosis of right carpal tunnel syndrome was later confirmed, and he performed surgery for that condition. However, the shoulder problems did not abate and later seemed to get worse.

Dr. Melgard saw the claimant for the right shoulder problems and like all the other doctors recited the history of the accident including the fact that the claimant had struck his right shoulder against the dashboard of the pickup truck. Dr. Melgard observed right shoulder distress and opined that the claimant might have a C5-6 nerve root problem. Only a minimal disc space narrowing was observed on a later myelogram, but the claimant continued to have shoulder problems.

Dr. Tiley next saw the claimant for his right shoulder problems. He also recited the claimant's history of the automobile accident. He diagnosed possible rotator cuff injury and AC joint separation. He stated that these diagnoses were "compatible with the mechanism of the injury." The diagnosis of the AC joint separation was confirmed, and the claimant underwent an arthroplasty.

Dr. Tiley later responded to a letter by claimant's attorney which asked him whether the carpal tunnel and shoulder injuries were caused by the autombile accident. He merely checked a "yes" box. The insurer argues that under Moe v. Ceiling Systems, 44 Or App 429 (1979), and Joyce Adair, 34 Van Natta 203 (1982), Dr. Tiley's response to claimant's attorney's letter is insufficient to establish causation.

We agree that Dr. Tiley's response in and of itself would not be sufficient to establish causation. However, in view of the fact that all physicians apparently relied on claimant's history of the automobile accident in their reports and diagnoses, and the fact that Dr. Tiley said that his diagnosis of the nature of the shoulder problem was consistent with the mechanism of the accident, Dr. Tiley's response serves to corroborate and solidify the implicit opinion of Dr. Tiley and the other doctors that the conditions were caused by the accident.

We find that the claimant has proven by a preponderance of the evidence that his carpal tunnel syndrome and right shoulder problems were caused by his December 23, 1980 automobile accident.

III.

The insurer argues that the Referee erred in failing to

specify the periods during which the claimant was entitled to temporary total disability. It relies on Frank R. Gonzales, 34 Van Natta 551 (1982), in which we said that ideally the Referee should specify the dates of a claimant's entitlement to temporary total disability when setting aside a denied aggravation claim where the record allows such specificity. See also Clyde M. Hargens, 34 Van Natta 751 (1982). However, it is not always possible to achieve ideals. We find no basis in this record upon which the Referee could have (or we can) determine the dates for which claimant should have been paid time loss following the ordered acceptance of his claim.

IV.

Claimant argues that the attorney's fees awarded by the Referee are excessive. The fee awarded by the Referee is within the ordinary range of fees for denied claims as determined in Ada C. Del Rio, 32 Van Natta 138 (1981). On this record we are not able to say that the award was excessive.

ORDER

The Referee's order dated July 12, 1982 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney's fee for his services before the Board, payable by the insurer.

DAVID L. LAHAIE, Claimant
Brink, Moore et al., Claimant's Attorneys
Don G. Swink, Defense Attorney
Cheney & Kelley, Defense Attorney

WCB 81-02644 & 81-04603
March 29, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The employer, Captain B's Restaurant, and its insurer, Industrial Indemnity Company, request review of Referee James' order which vacated the March 4, 1981 denial by Industrial Indemnity and remanded the claim to that insurer for acceptance and payment; ordered Industrial Indemnity to pay claimant's counsel $800 as a reasonable attorney's fee; and affirmed the April 16, 1981 denial by Mission Insurance Group, insurer for the second employer involved in this case, Associated Specialty Products (ASP).

The only issue on review is responsibility.

Captain B's asserts that claimant's need for low back surgery in June 1980 was not a result of his compensable low back injury sustained March 4, 1979 when he lifted two beer cases at once while employed at Captain B's; rather, it is the result of a second, specific injury sustained December 14, 1979 when claimant slipped and fell in the men's room while employed at ASP. The second employer, ASP, and its insurer, Mission Insurance Group, assert that there is no evidence to support the contention that responsiblity for the June 1980 surgery is that of ASP, nor is it in any way related to the alleged fall at ASP.

After our review of the record, we agree with the Referee's conclusion that the March 4, 1979 injury sustained at Captain B's was the cause of claimant's need for surgery in June 1980. We, too, find that the weight of the evidence does not establish that the alleged second injury at ASP contributed independently to claimant's low back condition.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated July 26, 1982 is affirmed. Claimant's attorney is awarded $100 as and for a reasonable attorney's fee for services on Board review.

GARY D. LAND, Claimant
Cummins, Cummins & Brown, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 79-07894
March 29, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Mannix's order which found that claimant failed to timely request a hearing following the insurer's denial. The only issue is whether the claimant had good cause for failing to file a request for hearing within 60 days of receiving notice of the denial.

The insurer issued a denial on July 9, 1981, which claimant received on July 11, 1981. The claimant sought the advice of an attorney a few days later. The attorney, who no longer represents claimant, testified that within a week to ten days after he was contacted by the claimant he dictated a request for hearing. The attorney said that his normal practice was to give his dictation to his secretary who typed it up and gave it back to him to sign. The attorney testified he had no memory of ever signing the request for hearing. No copy of the request was found in the attorney's files, and it was never received by the Hearings Division. On the sixty-second day, the claimant contacted the attorney to inquire about the status of his case. The attorney then checked his file and realized that no request for hearing had ever been filed. A request for hearing was filed that day.

Claimant argues that under ORS 656.319(1) his failure to file within 60 days is excused by the "good cause" exception. The claimant, of course, has the burden of proving there was good cause for the late filing.

We have previously interpreted Brown v. EBI, 289 Or 455 (1980), "to mean that the question of what is 'good cause' within the meaning of ORS 656.319(1)(b) is a policy question for this Board to resolve under the McPherson v. Employment Division, 285 Or 541 (1979), line of cases." Juanita Trevino, 34 Van Natta 632 (1982). As policy judgments, we have previously concluded that there is good cause to excuse a delayed hearing request when the delay is caused by the negligence of an attorney's employe, Donna P. Kelley, 30 Van Natta 715 (1982), but that attorney negligence is not good cause, W. Leonard Bradbury, 32 Van Natta 246 (1981).

Claimant first argues, in effect, that we should overrule Bradbury and find as a policy matter that attorney negligence is good cause for a tardy hearing request. We have considered claimant's argument and adhere to the position we stated in Bradbury.

Claimant next argues, in effect, that this is an employe-negligence case like the Kelley case. We disagree. Claimant's former attorney testified that he might have given the dictation tape with the request for hearing supposedly on it to the secretary, but he might have kept the tape himself. He also testified that he might have made an error in the operation of the dictating equipment. These facts are quite different from the facts in Kelley, in which an attorney's employe failed to follow through on instructions the attorney had given.

ORDER

The Referee's order dated June 2, 1982 is affirmed.

VIRGINIA MERRILL, Claimant — WCB n/a
Weber, Baumgartner et al., Claimant's Attorneys — March 29, 1983
Wolf, Griffith et al., Defense Attorneys — Order of Abatement

On March 8, 1983, the Board issued an Order Approving Third Party Settlement herein. The industrial insurer has requested reconsideration of that order. In order to allow the Board an opportunity to consider the merits of the issue raised in the insurer's request for reconsideration, the aforementioned Board order is hereby abated. Claimant is directed to respond to the insurer's request for reconsideration within seven (7) days of receipt of this order.

IT IS SO ORDERED.

ROBERT E. MYERS, Claimant — WCB 80-08694
Karol Wyatt Kersh, Claimant's Attorney — March 29, 1983
SAIF Corp Legal, Defense Attorney — Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Seymour's order which found that claimant's authorized job training program was properly terminated by the Field Services Division of the Workers' Compensation Department. The only issue is the propriety of the Division's action.

Based on our reading of the record, we are not convinced that termination of the authorized job training program was the decision of the Division. It appears that it was the claimant who terminated the authorized training program by phoning his supervisor to tell him he was going to look for a "real job." However, assuming arguendo that it was the Division which terminated claimant and not vice versa, we find that the Division acted properly.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 25, 1982 is affirmed.

WESLEY STIENNON, Claimant
Hayner, Waring et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-06538
March 29, 1983
Order on Review

Reviewed by Board members Ferris and Barnes.

The SAIF Corporation requests review of Referee Quillinan's order awarding claimant compensation for permanent total disability as a result of his June 4, 1980 industrial injury. The issue is extent of permanent disability.

Claimant sustained a compensable severe rotator cuff tear of his right shoulder as he was throwing a large piece of wood. Within a week he underwent surgery for repair of the right rotator cuff. Seven months after surgery, he was still too weak to return to his regular employment. On January 21, 1981 Dr. Whitney, claimant's treating orthopedic physician, reported to SAIF that claimant was still unable to handle the shoveling or wheelbarrowing involved in his regular employment activity. On February 10, 1981, although claimant was still experiencing weakness and discomfort, Dr. Whitney released him to return to work on a modified basis, with a lifting restriction of 40 pounds. Claimant attempted to return to work at that time, but he was informed by his employer that his old job was no longer available due to a shutdown in the operations of the mill. Claimant testified that he informed his employer that he was "ready to go" but was advised that many other workers were ahead of him, presumably in terms of mill seniority.

On March 23, 1981 Dr. Whitney released claimant to return to his regular work activity. An April 20, 1981 chart note indicates that claimant was experiencing occasional pain and problems in certain positions, but otherwise was doing well, and that he had not returned to work because there was nothing available for him. On April 24, 1981 Dr. Whitney reported that claimant was medically stationary as of April 20, 1981.

Dr. Whitney's report of June 9, 1981 indicates that claimant continued to experience weakness, pain and snapping and popping as well as some crepitus on motion of the shoulder. He restated his impression that claimant was medically stationary and that a reexamination in six months would be appropriate to see whether claimant's strength improved. At that time Dr. Whitney found claimant's strength to be about 50% of normal against abduction. On July 2, 1981 the claim was closed by Determination Order awarding temporary total and temporary partial disability and 15% unscheduled permanent partial disability.

Claimant's attorney initiated contact with the Field Services Division of the Workers Compensation Department, as a result of which claimant was referred for evaluation by a vocational consultant, who found it unlikely that claimant would ever gain reemployment with retraining or return to work reentry assistance. The vocational consultant concluded that claimant was unemployable and that vocational assistance services would be inappropriate, given claimant's physical limitations and social/vocational factors. The consultant seemed to rely very heavily on the fact that the area in

which the claimant and his wife reside is very economically depressed. "Positions that he would appear able to handle do not exist within the Coos Bay/North Bend area nor significantly elsewhere in the state, according to employment service labor market information. The economy in the Coos Bay area is of the worst in the state." The consultant also stated that retraining claimant would have a low probability of success due to his lowly developed aptitudes and mid-range intelligence. As a result of this unfavorable assessment, Field Services notified claimant that vocational assistance did not appear feasible.

Claimant was 62 years old at the time of the hearing. He completed his primary education only to the fourth year. He has lived his entire life with an unrepaired cleft palate which, according to the report of the vocational consultant, prevented claimant from talking until the age of nine. This problem apparently continues to adversely effect claimant's communication skills. He has worked for this employer for eight years, essentially as a utility person, but primarily in a cleanup capacity. His vocational history consists primarily of working as a logger and in logging operations in the woods. His work with this employer exposed him to many aspects of mill operations. Claimant testified that he considered himself precluded from engaging in any of these activities due to the limitations caused by his shoulder injury. He testified that he has essentially no use of his right arm due to loss of control and give-way, describing his limitations in performing many tasks about he home. He is unable to work with his arms over his head for any length of time, or with his arms extended in excess of four or five minutes. He testified to an inability to support himself with his right arm, and his shoulder prevents him from applying any pressure with that upper extremity. He views himself as being unable to return to any of his previous job situations. These factors result in the conclusion that claimant is severely disabled. However, we are unable to find that claimant is permanently and totally disabled, considering the medically verified impairment resulting from this injury, which is more or less consistent with claimant's testimony, together with the pertinent social/vocational factors.

Although the present economic turndown in the state of Oregon, and particularly in the locale in which claimant resides, makes it difficult for claimant to obtain employment, we are required to evaluate his assertion that he is permanently and totally disabled in the context of his ability to obtain and hold gainful employment in a hypothetically normal labor market, Wilson v. Weyerhaueser, 30 Or App 403, 409 (1977), which is not necessarily limited to one finite geographical area, Raymond Orsborn, 34 Van Natta 574 (1982).

We find that claimant's physical limitations are not so severe as to amount to a finding of permanent total disability, even when considered in conjunction with his unfavorable social/vocational factors. Although Dr. Whitney did release claimant to full employment activity, with an apparent understanding of what was involved in claimant's day-to-day activities, he reported certain physical limitations when asked to evaluate claimant's physical capacity as part of the vocational assessment. He indicated claimant would not be able to lift or carry in excess of 25 pounds. These limitations are with regard to claimant's right arm, not his left arm. Claimant would be capable, in Dr. Whitney's opinion, of working on an

eight-hour per day basis, and he indicated that claimant would experience no limitations in sitting, standing or walking. Claimant's right arm activities would be limited in terms of pushing or pulling arm controls, but he has no limitations with respect to his left arm. Consistent with claimant's testimony, he does have limitations in crawling, but no limitations in bending, squatting or climbing. Simple grasping activities apparently would not present a problem for claimant.

Based upon Dr. Whitney's findings on examination, indicating loss in motion of the right shoulder, including pain and loss of strength, as well as claimant's testimony, we have assessed claimant's impairment rating at 27% of the whole person. We find that claimant's work history consists primarily of heavy work, and that he is now limited to performing light work activity. Considering claimant's relative lack of education and training, other than activities he has learned on the job, as well as his age and apparent mental capacity, we find that he is entitled to an award for 60% unscheduled permanent partial disability. Although we do not seriously question claimant's motivation to return to work in a capacity suited to his physical limitations, we simply are not convinced that, as a consequence of his compensable injury, claimant has been rendered unable to sell his services on a regular basis in a hypothetically normal labor market.

SAIF has requested that it be allowed a credit for amounts paid under the terms of the Referee's order, to be offset against the award of compensation granted herein. For the reasons stated in Glenn O. Hall, WCB Case No. 81-03510, 35 Van Natta 275 (March 22, 1983), SAIF's request is denied. Claimant shall be paid all additional permanent partial disability benefits ordered herein.

ORDER

The Referee's order dated August 18, 1982 is reversed. Claimant is awarded compensation for 60% unscheduled permanent partial disability. This award is in lieu of all prior awards. Claimant's attorney is allowed 25% of the increased compensation awarded by this order, in lieu of the attorney's fee allowed by the Referee's order.

MARY L. TATE, Claimant
Galton, Popick & Scott, Claimant' Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-04682 & 81-05233
March 29, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Leahy's order which failed to award her any compensation for permanent disability in addition to that previously granted by prior awards; declined to allow claimant's attorney an attorney's fee payable out of claimant's temporary partial disability compensation, which counsel claims he was instrumental in obtaining in behalf of the claimant; and refused to impose a penalty or attorney's fee for various actions by the insurer alleged to be unreasonable. Claimant also contends that the Referee erred in refusing to admit certain documents offered in violation of OAR 436-83-400(3), the ten-day rule. With the exception of one issue, concerning counsel's entitlement to an attorney's fee payable out of payments of temporary partial disability received by claimant, we affirm the Referee's conclusion on all issues.

Claimant was compensably injured on July 29, 1979 when she sprained her left ankle while helping a patient at bedside in the course of her employment as a nurse's aide. Although claimant denied having previously injured her leg, we find that she had, in fact, previously injured her left leg prior to her industrial injury, and that she had experienced intermittent problems with the leg for a year preceding the injury at work.

After her July 1979 injury claimant's attending physician put her in a short leg cast for four weeks, following which she was placed on several physical therapy regimens. She was released to return to work on September 21, 1979 but was required to cease her work activity due to an increase in pain and swelling of her ankle. The claim was eventually closed by a Determination Order dated March 7, 1980 awarding claimant temporary total disability for the periods August 24, 1979 through September 20, 1979 and October 1, 1979 through January 16, 1980.

Claimant reinjured her ankle at work on June 11, 1980 which resulted in claim reopening and subsequent closure by a November 3, 1980 Determination Order awarding temporary total disability for the period June 11 through June 25, 1980 and an award of scheduled permanent disability for a 5% loss of claimant's left foot (ankle).

On November 19, 1980 claimant apparently sustained another injury when she was moving a patient from a bed to a commode and fell, twisting her left ankle. The Form 801 indicates that this claim was accepted as a disabling occupational disease claim; however, there is presently no claim before the Board that claimant suffers from an occupational disease within the meaning of ORS 656.802. This November 1980 incident has been litigated as a separate injury claim to the same portion of claimant's body, i.e., her left ankle.

Claimant continued to experience difficulties subsequent to this November 1980 incident. She was placed in a short leg walking cast and given anti-inflammatory medication. The cast was removed,

whirlpool treatments were administered, cortisone treatments continued, and on January 13, 1981 claimant was released to return to work on a trial basis. In a letter report dated February 19, 1981 Dr. Carr advised the insurer that, although he had not seen claimant since her release to work on January 13, 1981, he assumed that she was continuing to work and that she could be considered medically stationary. It was his opinion that the November 1980 incident did not result in any impairment in addition to that previously manifested in the ankle. In a letter report of April 17, 1981, Dr. Carr reiterated his opinion that claimant could be considered medically stationary. He had apparently examined claimant sometime in the interim between this report and his February 19, 1981 report. He stated that claimant had no loss of motion or weakness in her leg, that she continued to manifest pain after being on her leg for any extended period; and that he, therefore, rated her residual impairment as being in the mild range. A Determination Order issued May 5, 1981 awarding claimant temporary total disability compensation for the period November 20, 1980 through January 12, 1981.

In a June 29, 1981 letter report to the insurer, Dr. Carr advised that as of June 4, 1981 claimant had been unable to work due to recurring problems with her ankle, directly related to her November 1980 injury. He stated: "I have seen [claimant] recently for aggravation of her ankle problems." Claimant's return to work was apparently complicated by certain problems with her knee, which were not clearly defined by Dr. Carr at the time of his June 29, 1981 letter.

In a September 11, 1981 report, Dr. Carr indicated that claimant had been released to return to work as of August 18, 1981 and that he had not seen claimant since that date. He diagnosed claimant's injury as a chronic sprain of her left ankle, with an acute exacerbation sustained in her injury of November 1980. Dr. Carr further indicated that claimant's primary problem was apparently a tear of the anterior talofibular ligament with resultant synovitis of the ankle joint, which he expected would continue to cause difficulties in claimant's ankle, which might benefit from some form of bracing in order to prevent recurrent injuries. An October 15, 1981 report from Dr. Carr indicates that, as of his last examination, August 17, 1981, there appeared to be no objective evidence of permanent impairment resulting from claimant's November 1980 injury.

> "The only thing 'permanent' about Mrs. Tate's ankle is the fact that she keeps having recurrent injuries and may continue to have these as time goes on. However, between episodes, she seems to regain full function of the ankle without any impairment."

The claim remained in open status although claimant was not receiving temporary disability benefits, which apparently were terminated as of August 18, 1981, at which time Dr. Carr had released claimant to return to work. In January 1982, claimant's attorney submitted a letter to the insurer under cover of which was a report from Dr. Carr dated December 20, 1981 indicating that claimant was not capable of working a full schedule but could only work a limited number of hours per week due to recurring problems with the condition of her ankle. Counsel's letter, apparently

dated January 4, 1982, and the enclosed letter report from Dr. Carr, are not contained in the record on review. The Referee excluded these documents because they were submitted in violation of OAR 436-83-400(3), the ten-day rule. Claimant has assigned this evidentiary ruling as error. Although the exhibits are not contained in the record, there is evidence in the form of testimony concerning the circumstances surrounding counsel's submission of his letter and the physician's report to the insurer and the insurer's response upon receipt of this information. The claims person responsible for administration of claimant's claim testified that, upon receipt of this information submitted by claimant's attorney, requesting payment of additional temporary disability compensation, claimant was paid retroactive temporary partial disability benefits for the period August 15, 1981 and until January 18, 1982 when claimant was laid off.

On January 15, 1982 the insurer submitted the claim to the Evaluation Division for closure. The claims person testified at hearing that Dr. Carr's statement that claimant was capable of working three days a week was not an indication, in her judgment, that claimant was no longer medically stationary; and that, based upon a report from Dr. Carr written in October 1981, it was her judgment that claimant was and had been medically stationary since that time, the claim never having been submitted for closure due to inadvertence. The claims person's testimony refers to an October 19 letter indicating permanent impairment; however, the only report from Dr. Carr in the record is dated October 15, 1981, which has been referred to above. We are satisfied that, in referring to the October 19 letter, the claims person was actually referring to the October 15, 1981 letter from Dr. Carr.

In response to the request for claim closure, the Evaluation Division issued a Determination Order on January 26, 1982 reclosing claimant's November 18, 1980 injury claim. This Determination Order is not in the record; however, it is referred to in a subsequent Determination Order which vacates and sets aside the January 26 Determination Order as premature.

Correspondence from Dr. Carr to the insurer in February 1982 indicates that Dr. Carr had advised claimant to work no more than three days a week because of increased pain occasioned by any period of work activity in excess of three days. On February 20, 1982 Dr. Carr indicated that his previous statement that claimant was medically stationary in August 1981 was probably premature; that her limitation of a three day work week was probably a permanent situation; and that, therefore, it was now safe to say that claimant was medically stationary as of February 1, 1982. Dr. Carr reiterated these impressions concerning claimant's medically stationary status, permanent impairment and limitations in her ability to work, in a letter report of April 22, 1982. On May 4, 1982 a Determination Order rescinding the previously mentioned January 26, 1982 Determination Order, awarding claimant compensation for temporary total disability from June 4, 1981 through August 17, 1981, temporary partial disability from August 18, 1981 through February 1, 1982 and an award of scheduled permanent partial disability for a 10% loss of claimant's left foot (lower leg).

Claimant argues that the Referee erroneously refused to admit

the January 4, 1982 letter he submitted to the insurer, as well as the December 1981 letter report from Dr. Carr submitted under cover of counsel's letter. In support of this contention, claimant maintains that, because these documents were in possession of both parties some four months preceding the hearing, it was an abuse of the Referee's discretion to refuse to admit them. We disagree. We have previously stated that, in addition to requiring reciprocal disclosure of exhibits, the ten-day rule requires submission of documents upon which a party intends to rely at hearing to the Referee at least ten days before hearing. "[T]he 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." Fred Hanna, 34 Van Natta 1271, 1272 (1982). Claimant has offered no other justification for his failure to submit these documents in compliance with OAR 436-83-400(3); therefore, we do not find the Referee's refusal to admit these proffered exhibits to constitute an abuse of dis- cretion. Cf. Donald J. Young, 35 Van Natta 143 (1983).

Concerning the extent of claimant's permanent disability attributable to her compensable industrial injuries, she has previously received an award for a 5% loss of her left foot as a result of her July 29, 1979 injury. As a result of her subsequent injury on November 19, 1980 claimant received an additional scheduled award of 10% for loss of her left foot, for a total award of 20.25° of scheduled permanent partial disability for a 15% loss of her left foot. Claimant's credibility was seriously impaired. As found by the Referee, claimant's denial of prior left foot incidents and treatment, as documented in medical records predating claimant's initial injury, cannot be excused. We, therefore, affirm and adopt that portion of the Referee's order refusing to grant claimant any compensation for permanent disability in addition to that previously awarded.

Claimant's attorney alleges entitlement to an attorney's fee as remuneration for his efforts in obtaining additional temporary disability compensation in behalf of claimant for the period August 17, 1981 through January 18, 1982. Although counsel's letter of January 4, 1982 to the insurer, as well as the December 1981 letter report from Dr. Carr, are not contained in the record, there is sufficient evidence concerning the circumstances surrounding the insurer's receipt of this information from counsel to substantiate an allowance of a reasonable attorney's fee payable out of the temporary partial disability compensation claimant received as a result of her attorney's efforts.

OAR 438-47-015 provides that when an attorney is instrumental in obtaining compensation for a claimant without a hearing, a reasonable attorney's fee may be allowed, and that the amount of the fee is to be determined in a summary proceeding by a Referee. This rule does not contemplate the issue of an attorney's entitlement to such a fee arising in an adversary context, and we do not fully understand the insurer's objection, as stated in its brief, to allowing claimant's attorney a reasonable fee payable out of the claimant's award of temporary partial disability compensation. We find that upon receipt of counsel's submissions, the insurer

properly responded by paying retroactive temporary disability compensation; that this compensation was paid in response to and as a result of efforts expended by counsel in behalf of his client; and that, therefore, counsel is entitled to remuneration for obtaining additional compensation in behalf of claimant. We, therefore, award claimant's attorney a reasonable attorney's fee.

Claimant alleges that penalties and attorney's fees are appropriate, based upon several allegations of unreasonable conduct on the part of the insurer. Counsel also claims entitlement to an insurer-paid attorney's fee for overturning a de facto denial. We will first address the claim of entitlement to an attorney's fee for overcoming an alleged de facto denial.

Claimant alleges that the insurer's action of submitting the claim to the Evaluation Division for closure after paying retroactive temporary partial disability payments constitutes a de facto denial of the claim for additional benefits. Claimant paraphrases the claims person's testimony to state that, according to her testimony, it was her understanding that counsel's letter and Dr. Carr's letter submitted under cover thereof led her to understand that claimant was no longer medically stationary. Contrary to this characterization of the testimony, the claims representative testified that her understanding of Dr. Carr's report did not indicate one way or the other as to whether or not claimant was medically stationary at the time of his December 1981 report; that claimant's inability to work more than a three day work week had been of long-standing duration, hence the retroactive payment of temporary disability benefits to August 1981; and that this inability to work any more than three days a week was a relatively permanent situation. The claims person further testified that the claim had not been submitted for closure in October 1981 due to inadvertence in the claims processing procedure. The claim was submitted for closure on or about January 15, 1982. A Determination Order issued January 26, 1982. It was not until February 20, 1982 that Dr. Carr indicated that his earlier statement regarding claimant's medically stationary status as of August 1981 was probably premature, and that she could be considered medically stationary as of February 1, 1982.

The insurer's action in promptly paying retroactive temporary disability benefits obviously constitutes an acceptance of the claim for additional benefits; and the action in submitting the claim for closure, if anything, would amount to a claim of premature closure. Based upon Dr. Carr's February 20, 1982 letter report indicating a modification in his opinion of claimant's medically stationary status, the insurer resubmitted the claim for closure to the Evaluation Division, which then proceeded to vacate its January 26, 1982 Determination Order on the basis of its premature issuance. There is, therefore, no issue concerning premature closure, unless it is that the May 4, 1982 Determination Order closing claimant's November 18, 1980 injury claim was premature. We find that it was not, as claimant's treating physician clearly found her to be medically stationary as of February 1, 1982, and there is no medical evidence that on the date of the last Determination Order, May 4, 1982, claimant's condition was other than medically stationary.

There is, therefore, no de facto denial of a claim for addi-

tional compensation. Since the additional compensation, as claimed, was paid, there was no duty to issue an acceptance. Cf. David Cheney, 35 Van Natta 21 (1983); Billy J. Eubanks, 35 Van Natta 131 (1983). Furthermore, we do not find any unreasonable conduct, as alleged, warranting imposition of a penalty or attorney's fee, pursuant to ORS 656.262(9) and 656.382(1). We find the insurer's claims processing, upon receipt of counsel's January 4, 1982 letter, and thereafter, reasonable and in compliance with its statutory and regulatory obligations to promptly pay compensation and apprise claimant of the status of her claim.

Claimant also argues that the insurer's action in submitting the claim for closure on January 15, 1982 subjects it to a penalty pursuant to ORS 656.268(3), based upon the insurer's "unilateral" decision to close the claim at that time. Claimant's reliance upon this statutory provision for imposition of a penalty is misplaced. The penalty provision in ORS 656.268(3) is concerned with the insurer's decision to administratively close a claim without submission to the Evaluation Division pursuant to subsection (2) of ORS 656.268, when, in the judgment of the insurer, the claim can be closed without an award of permanent disability. Insurers are authorized by ORS 656.268(3) to administratively close a claim when it is determined that the claim is either nondisabling or disabling without permanent disability. If the insurer's determination that the claimant is medically stationary and that the claim can be closed without an award of permanent disability is not supported by "substantial evidence," the insurer is subject to a penalty equivalent to 25% of all compensation determined to be owing between the date of original closure and the date upon which the claim is ultimately closed by Determination Order, when the insurer's closure decision is at issue in a hearing on the claim.

This case clearly does not involve an issue concerning "carrier closure," and the penalty provision of ORS 656.268(3) is, therefore, inapposite. The only possible issue concerning the propriety of the insurer's conduct in submitting the claim for closure would involve a claim of premature closure. We have already stated that the insurer's actions were not unreasonable; and even if they were, the insurer's actions could not subject it to a penalty or attorney's fee in the absence of fraud or misrepresentation. Flora Pelcha, 34 Van Natta 1141 (1982). There is no claim of fraud or misrepresentation by the insurer, nor is there the slightest hint of evidence to substantiate any such allegation. Claimant's request for imposition of a penalty and associated attorney's fee is, therefore, without merit.

ORDER

The Referee's order dated July 14, 1982 is reversed in part. That portion of the order which declines to allow claimant's attorney a reasonable attorney's fee payable out of claimant's compensation is reversed, and counsel is allowed as and for a reasonable attorney's fee a sum equivalent to 25% of the temporary partial disability benefits paid to claimant for the period August 18, 1981 through January 18, 1982. The remainder of the Referee's order is affirmed.

ROBERT WHITLEY, Deceased
Merrill Schneider, Attorney
Galton, Popick & Scott, Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-02449
March 29, 1983
Order on Review

Reviewed by the Board en banc.

Claimants (the widow and dependent children of the deceased worker, Robert Whitley) request review of Referee Braverman's order which denied their claims for death benefits. Robert Whitley committed suicide while recovering from an industrial injury. The Referee found that these claims were not compensable under Jones v. Cascade Wood Products, 21 Or App 86 (1975).

We affirm and adopt the Referee's order on the compensability issue. We do not reach the issue of whether or not certain of the claimants fall within the definition of "dependent children" because of our decision on the primary issue of compensability.

ORDER

The Referee's order dated April 29, 1982 is affirmed.

JUAN ANFILOFIEFF, Claimant
Blair, McDonald et al., Claimant's Attorneys
Burt, Swanson et al., Defense Attorneys

WCB 78-04612
March 31, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Danner's order which ordered that the insurer pay to the claimant a penalty equal to 25% of all sums due him for temporary total disability for the period of June 2, 1978 through November 7, 1979 pursuant to ORS 656.262(9). Claimant contends that he is entitled to a penalty based on all compensation due him between January 10, 1978, the date of the injury, until May 6, 1981, the date the Court of Appeals decided Anfilofieff v. SAIF, 52 Or App 127 (1981), which was the decision which upheld the compensability of the claim and remanded it to the Board for an award of penalties.

The court in Anfilofieff, supra, found that an award of penalties would be appropriate because the conduct of the employer was clearly unreasonable and was designed to avoid responsibility for the injury. They found the employer's conduct was a contributing cause of the denial of compensation and the consequent delay claimant suffered in receiving the compensation due him.

We find that claimant was caused denial and delay of compensation for related medical services claimed from January 10, 1978, the date of the injury, to November 7, 1979, the date the claim was ordered accepted by order of the Hearings Division. The effects of the delay of payment for claimed medical services ended on November 7, 1979 because, after that date, all related medical services had to paid in the normal course of claims processing as is required in any accepted claim.

We further find that claimant was caused denial and delay of

compensation for temporary total disability from January 10, 1978, the date of the injury, to January 4, 1979, the date claimant's compensable condition became medically stationary and he was released for work. Were it not for the erroneous June 2, 1978 claim denial, the claimant would have timely received temporary total disability compensation throughout that time period.

We do not find that permanent disability compensation that was awarded in a subsequent June 19, 1980 Determination Order should be included in the penalty calculations. For reasons unrelated to the employer's unreasonable conduct, the claim was not ready for submission to the Evaluation Division for closure and determination of permanent disability until some months after the claim was ordered accepted. By that time the effects of the employer caused delay had ceased.

In conclusion, we find that claimant is entitled to a penalty assessed against the insurer equal to 25% of: (1) related medical services claimed from January 10, 1978 to November 7, 1979; and (2) temporary total disability compensation due from January 10, 1978 to January 4, 1979 that was delayed due to the unreasonable conduct of the employer.

ORDER

The Referee's order dated December 2, 1981 is modified. Claimant is entitled to a penalty assessed against the insurer equal to 25% of: (1) related medical services claimed from January 10, 1978 to November 7, 1979; and (2) temporary total disability compensation due from January 10, 1978 to January 4, 1979.

GERALD E. BAKER, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Spears et al., Defense Attorneys

WCB 80-00048
March 31, 1983
Order on Review (Remanding)

Reviewed the Board en banc.

Claimant requests review of Referee Leahy's Supplemental Order which allowed the self-insured employer to offset an alleged overpayment of temporary total disability against the increased award of permanent disability.

Claimant's claim was originally closed by Determination Order awarding 5% unscheduled permanent disability. Following a hearing, on June 23, 1982, the Referee issued his initial order which increased the award 15% for a total of 20% unscheduled permanent disability. On July 14, 1982 when the Referee was in Tillamook for other hearings, the employer's attorney delivered to the Referee a Motion for Reconsideration requesting an offset against the award of permanent disability in the amount of approximately $6500 for a prior overpayment of compensation for temporary total disability.

On June 22, 1982 the Referee issued his Supplemental Order allowing the offset, reciting therein that claimant had not responded to the Motion. On July 28, 1982 claimant's attorney

wrote to the Referee informing him that neither he nor the claimant had received a copy of the employer's motion and requesting reinstatement of the Referee's original order. On August 4, 1982 the Referee denied claimant's request.

The employer's motion to the Referee requesting reconsideration recites that a copy of the motion was mailed to claimant's attorney. Claimant's attorney alleges that he did not receive a copy of it. We have no way of determining who is right; indeed, both may be right and the employer's motion may have been a victim of the mail services or other malady attributable to neither party. In any event, claimant argues that Wilson v. SAIF, 48 Or App 993 (1980), and Hicks v. Fred Meyer, 57 Or App 68 (1982), require that before an offset can be allowed, the issue must be raised at a time and in a manner sufficient to give the claimant notice and an opportunity to be heard. Clearly, the issue was not raised at or prior to hearing. The employer responds that claimant has not alleged facts or made any contention that the overpayment is not accurate. Claimant requests that we either affirm the Referee's original order or remand the matter to the Referee for a hearing on the alleged overpayment.

Given the circumstances of this case, we believe that claimant should be given an opportunity to contest the alleged overpayment. Therefore, we are ordering that this matter be remanded to the Referee for further proceedings limited to the issue raised by the employer's motion for reconsideration.

ORDER

The Referee's order dated June 23, 1982 and his Supplemental Order dated June 22, 1982 are vacated, and the matter is remanded to the Referee for further proceedings limited to the issue of whether and to what extent the employer is entitled to an offset against the award of permanent disability for an overpayment (if any) of temporary total disability benefits.

KATHRYN S. BENSON, Claimant
Rolf Olson, Claimant's Attorney
Bruce Posey, Defense Attorney

WCB 81-09987
March 31, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Self-insured employer, Pacific Northwest Bell, requests review of Referee Seymour's order which reversed its denial of compensability. The ultimate issue is compensability. We affirm and adopt the Referee's order subject to the following comments.

In summary, the facts are that over the course of several hours on August 19, 1981, in the course of using a video display terminal as a directory assistance operator, claimant experienced pain so severe that she was taken to a hospital for emergency treatment. The manner in which claimant was using the terminal resulted in her assuming a rigid or semi-rigid posture while handling up to 100 telephone calls per hour for periods of one and a half to one and

three-quarters hours without a break. The consensus of medical opinion is that claimant's work activities on that particular day caused both a strain and nerve root irritation, although the nerve root irritation was not diagnosed until November and December, 1981. X-rays revealed that claimant had more degenerative changes in her spine than would be expected for a person claimant's age (37 years). Claimant had experienced some back pain in the month or so prior to the day in question, but the back pain was the result of work activities and not off-the-job exposure. A neurologist opined that "most likely" there was some pre-existing weakness in claimant's back (albeit asymptomatic and nondisabling) which was worsened by the posture and manner in which claimant carried out her work activities, resulting in nerve root irritation.

These facts raise issues whether claimant had a pre-existing condition, whether claimant's condition should be considered to be the product of an industrial injury or an occupational disease, and whether the holding of Weller v. Union Carbide, 288 Or 27 (1979) is applicable to the effect that claimant has to prove a worsening of her underlying condition.

Given that the onset of disabling pain took place over the course of one work shift, we believe that the condition should be considered to be the product of an injury, Valtinson v. SAIF, 56 Or App 184 (1982), notwithstanding the suggestion of work related back pain over the previous month, Boise Cascade v. Starbuck, 61 Or App 631 (1983).

Here we conclude that it makes no difference whether this is an injury or a disease claim or whether claimant is required to demonstrate a worsening of her condition. Claimant's work actitivies on the day in question either caused a new condition or pathologically worsened a pre-existing one, rendering her disabled and requiring medical services. It follows that her claim is compensable.

ORDER

The Referee's order dated August 23, 1982 is affirmed. Claimant' attorney is awarded $650 as a reasonable attorney's fee for his services on review, payable by the employer.

ANITA GILLIAM, Claimant
Rex Q. Smith, Claimant's Attorney
Rankin, McMurry et al., Defense Attorneys

WCB 81-07539
March 31, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Mulder's order which upheld the employer's denials of continuing chiropractic treatment. One of the two denials (September 10, 1981) is based upon the employer's refusal to pay for treatment provided by an out-of-state chiropractor. The other denial (February 8, 1982) disclaims responsibility for all further palliative chiropractic treatment. The Referee also awarded claimant compensation for a 10% unscheduled permanent partial disability for injury to her low back.

Claimant contends that this award is inadequate. The employer argues that claimant sustains no permanent disability attributable to her September 1, 1979 accidental injury and that, therefore, the Determination Order awarding claimant no compensation for a permanent disability should be reinstated and affirmed.

We affirm and adopt those portions of the Referee's order which award claimant compensation for a 10% unscheduled permanent partial disability and which upheld the employer's denial of payment for chiropractic treatment provided by a Washington chiropractor, Dr. Norris. We vacate that portion of the Referee's order finding that claimant is not entitled to continuing chiropractic treatment for the residuals of her compensable industrial injury.

A. The September 10, 1981 denial.

In arguing that the employer is obligated to pay for chiropractic treatment provided by Dr. Norris in Washington, claimant relies upon the following passage from Rivers v. SAIF, 45 Or App 1105, 1108 (1980):

> "Reading ORS 656.245 in its entirety, it is clear that subsection (2) limits a worker's choice of doctors when they seek treatment in another state, but in no way diminishes their right to receive medical care, under subsection (1) of the same statute, wherever they are."

Claimant contends that the employer has an obligation to refer her for treatment with an alternative physician of its choosing, once it has decided to refuse to pay for treatment provided by a physician of claimant's choice; and that, until this responsibility is fulfilled, the employer should be prohibited from preventing claimant's treatment with Dr. Norris. The record reflects that, in fact, the employer did make an effort to refer claimant to another physician for treatment, but this physician apparently was not accepting any new patients at the time. Claimant, with the advice of counsel, chose to continue treating with Dr. Norris.

Our understanding of ORS 652.245 and Rivers is that: The worker has an absolute right to choose an attending physician within the State of Oregon; likewise, the employer/insurer has an absolute right to refuse to pay for treatment provided by a physician outside the State of Oregon. Cf Ronald W. Mogliotti, WCB Case No. 81-10963, 35 Van Natta 384 (decided this date). Although the claimant has a right to seek treatment with another out-of-state physician of claimant's choosing, the employer has no obligation to arrange alternative treatment in the claimant's behalf. As a practical matter, however, and in order to avoid the possible scenario of repeated denials when claimant chooses alternatives which continue to be unsatisfactory to the employer, the employer should give a claimant some indication of which out-of-state medical services or medical providers it will authorize or approve.

B. The February 8, 1982 Denial.

We vacate that portion of the Referee's order that upheld the

employer's second denial on the merits because we consider that denial to be a nullity and of no legal effect. Thus, claimant's request for hearing on that denial presents no justiciable controversy and there is nothing to decide on the merits one way or the other.

As we discussed in Billie J. Eubanks, 35 Van Natta 131 (1983), a claim for medical benefits usually takes the form of either a bill for medical services that have been rendered or a request for authorization for future treatment. Having decided that treatment by Dr. Norris is not compensable, there is no remaining claim for medical services in this case that requires adjudication. In Patricia M. Dees, 35 Van Natta 120 (1983), we stated that a denial of a claim for medical services will generally be interpreted as a denial of then-current treatment. Having denied payment for treatment by Dr. Norris for the reasons stated in its September 10, 1981 denial, the employer's February 8, 1982 denial was superfluous since there was no claim for medical services other than those provided by Dr. Norris. The employer's second denial, therefore, is without effect. We find that there is no justifiable controversy concerning claimant's abstract entitlement to future benefits under ORS 656.245, there being no bill for medical services or request for authorized treatment presently in issue. Accordingly, we vacate that portion of the Referee's order which upholds the employer's February 8, 1982 denial. We note in passing, however, that a claim for palliative treatment is compensable under ORS 656.245 if it is causally related to an industrial injury. Marlene Strauser, 34 Van Natta 168 (1982); Wait v. Montgomery Ward, Inc., 10 Or App 333, 338 (1972).

The employer's February 8, 1982 denial, although we find it a nullity, made it necessary for claimant and her attorney to request a hearing concerning its effect. Claimant has not actually prevailed on a denied claim; however, because it was necessary for her to retain the services of an attorney in order to clarify the effect of the employer's denial, we award counsel a modest attorney's fee. Elmer C. Gregory, 35 Van Natta 93 (1983); Edward M. Anheluk, 34 Van Natta 205 (1982).

ORDER

The Referee's order dated June 21, 1982 is vacated in part. That portion of the order which upheld the employer's February 8, 1982 denial is vacated, and that denial is declared to be a nullity and of no effect. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $400 as a reasonable attorney's fee for services rendered in connection with the employer's February 8, 1982 denial.

LOUIS HAHN, Claimant
Coons & McKeown, Claimant's Attorneys
Minturn et al., Defense Attorneys

WCB 81-11151
March 31, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review and claimant cross-requests review of Referee Johnson's order which granted claimant an additional 20% unscheduled permanent partial disability for his neck and shoulder injury. SAIF asserts that the award was excessive. Claimant argues that: (1) he is entitled to a greater award of permanent disability than that granted by the Referee; (2) the claim was prematurely closed; (3) he is entitled to additional temporary total disability compensation; and (4) he is entitled to penalties and attorney's fees for SAIF's failure to furnish the claimant's treating physician with a copy of an independant medical examination report prior to closure of the claim.

We affirm and adopt the Referee's findings and conclusions with two additional comments. Claimant asserts that ORS 656.268(3) allows for a penalty in the present situation and that former OAR 436-69-210 (now OAR 436-69-801) required the insurer to send a copy of the medical report to claimant's treating physician prior to claim closure. First, ORS 656.268(3) is only applicable to claims closed by the insurer. The claim is this case was closed by the Workers Compensation Department. Second, we think the validity of a claim closure depends upon the contents of medical reports, not on the contents of doctors' files; therefore, we do not think that the requirement of OAR 436-69-801 -- that copies of consulting physicians' reports be sent to treating physicians -- has any per se bearing on the validity of a claim closure.

ORDER

The Referee's order dated August 30, 1982 is affirmed. Claimant's attorney is awarded $200 as a reasonable attorney's fee for successfully defending the Referee's permanent partial disability award on Board review, payable by the SAIF Corporation.

LANCE HART, Claimant
VAL AIRWAYS, INC., Employer
Callahan et al., Claimant's Attorneys
Churchill et al., Attorneys
SAIF Corp Legal, Attorney

WCB 81-10037
March 31, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Foster's order which approved a claimed overpayment made by the SAIF Corporation to the claimant in the amount of approximately $6,214.77, and authorized SAIF to recover the overpayment by deducting 25% of any future temporary total disability payments due claimant and/or to offset the overpayment against any permanent partial disability benefits which might be awarded claimant. Claimant contends that the Referee erred in allowing SAIF to recover the overpayment.

We adopt the Referee's findings of fact as our own.

Several issues were originally raised by the parties to this

claim but were eventually reduced by the time of the hearing to the question concerning the overpayment. The Referee stated that all parties to the claim shared a certain amount of fault for the overpayment. SAIF was at fault for failing to properly interpret the report of its investigator, the non-complying employer for refusing to cooperate as fully as possible, and claimant for accepting, without comment, benefits which were well in excess of his full regular wage. The Referee concluded that fault was not particularly relevant in this case and that claimant was not entitled to receive double the benefits that he otherwise would have been allowed.

We agree completely with the Referee. Claimant puts forth no convincing argument for a contrary conclusion but states only that the non-complying employer's actions in refusing to fully cooperate in the processing of the claim constituted unreasonable resistance, and that under Anfilofieff v. SAIF, 52 Or App 127 (1981), recovery of the overpayment should be denied. Anfilofieff however does not support claimant's contentions, for in that case the penalty was based on unreasonable refusal to pay compensation. There was no such refusal in the present case. The claim was accepted and benefits paid in a timely manner. If there actually was any resistance to the processing of this claim by the non-complying employer, it certainly did not affect claimant. We find that it was proper for the Referee to approve the overpayment. See OAR 436-54-320.

ORDER

The Referee's order dated August 20, 1982 is affirmed.

MADELINE M. JENSEN, Claimant
Anderson et al., Claimant's Attorneys
Macdonald et al., Defense Attorneys

WCB 81-01029
March 31, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee St. Martin's order which affirmed a Determination Order awarding claimant 15% unscheduled low back disability. The issue is extent of disability, including permanent total disability.

Claimant strained her low back while flipping a mattress as part of her job as a motel cleaner. According to Dr. Pasquesi, claimant's strain condition is chronic and produces moderate to severe disabling pain. All treatment, however, has been conservative and there is no indication of orthopedic or neurological injury. Dr. Pasquesi estimated that claimant's impairment due to her chronic strain and disabling pain is equivalent to 15% of the whole person.

In addition to her back problem, claimant has preexisting hearing loss and a preexisting alcoholism problem. There is some suggestion that the back injury exacerbated the alcoholism. In view of the fact that claimant testified that she had stopped using alcohol, we conclude that any possible exacerbation of the

alcoholism was not permanent. We also believe that the evidence indicates that claimant's hearing loss is alleviated by use of hearing aids. Therefore, we do not believe that these additional problems contribute to claimant's permanent disability.

We agree with the Referee that claimant is not totally disabled. Her impairment from chronic back strain is not so severe as to preclude her from doing any work, but claimant has made no real effort to search for work as required by ORS 656.206(3).

We turn to the question of the extent of partial disability and confront a cryptic record. Dr. Pasquesi's finding of 15% impairment seems high in view of the evidence, but there is no other evidence from which we can extrapolate any other finding about impairment. Most social/vocational factors suggest a loss of more than 15% of claimant's wage earning capacity. Her age of 44 produces a +2 rating under OAR 436-65-602. Her tenth grade education produces a +5 rating under OAR 436-65-603. The evidence regarding adaptability under OAR 436-65-605 is especially vague. Doctors have suggested that claimant attempt only "more sedentary" work, but we do not understand the doctors to be saying that claimant's residual functional capacity is limited to literally sedentary work. The same ambiguity also makes application of the labor market criteria, OAR 436-65-608, difficult. Estimating as best as we can from the available evidence, it appears that the combined adaptability and labor market considerations should be about +10 to +15. The other social/vocational factors are either neutral or unsupported, one way or the other, by any evidence.

We are sure that Dr. Pasquesi's impairment finding combined with the social/vocational factors should produce an award in excess of the award for 15% disability granted by the Determination Order and affirmed by the Referee. We are not sure exactly what that higher award should be. Considering all the evidence and comparing this case with other similar cases, it is our best judgment that claimant would be properly compensated by an award for 30% unscheduled disability.

ORDER

The Referee's order dated June 3, 1982 is reversed. Claimant is awarded 96° for 30% unscheduled disability to her low back. This award is in lieu of all prior awards. Claimant's attorney is allowed an attorney's fee of 25% of the increased compensation granted by this order, not to exceed $3,000.

RICK LaPRAIM, Claimant
Jim L. Scavera, Claimant's Attorney
Lindsay, Hart et al., Defense Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-04676 & 82-05268
March 31, 1983
Order on Review

Reviewed by the Board Members en banc.

The employer, Twin City Builders, and its insurer, EBI Companies, request review of Referee Quillinan's order which set aside EBI's April 15, 1982 denial and affirmed SAIF's June 10, 1982 denial. The issue on review is responsibility: Is Mid-Coast

Electric Company, insured by SAIF, responsible for claimant's right shoulder problems and most recent surgery as an aggravation; or is Twin City Builders, insured by EBI, responsible on a new injury theory?

Claimant sustained a compensable injury in April of 1978 while working for Mid-Coast Electric. He dislocated his right shoulder,resulting in the need for surgery. He dislocated his right shoulder again in February of 1982 while working at Twin City Builders, again necessitating surgery. SAIF denied claimant's aggravation claim. EBI denied claimant's new injury claim.

We agree with the Referee that claimant experienced a new injury while employed at Twin City Builders: a sudden, acute episode of shoulder dislocation following an identifiable trauma which occurred after a long hiatus of any problems with his right shoulder. We thus affirm the Referee's order.

ORDER

The Referee's order dated August 20, 1982 is affirmed. Claimant's attorney is awarded $200 as and for a reasonable attorney's fee, payable by EBI.

FRED L. McOMBER, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Paul Mackey, Defense Attorney

WCB 82-00686
March 31, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Pferdner's order which upheld the self-insured employer's denial of his claim for injuries sustained on November 21, 1981.

Claimant was employed as a Human Services Assistant at the Multnomah County Alcohol Detoxification Center on November 21, 1981. While crossing the street to get a newspaper during his paid break, the claimant was struck by an automobile and sustained a leg injury.

The manager of the detoxification center, Ms. Dawson, and claimant's immediate supervisor, Mr. Nast, testified as follows. Work at the center is stressful because the clients served are frequently obstreperous, difficult to communicate with and ill. Management thus permitted/encouraged the employes to leave the premises during their breaks to refresh themselves. Claimant or some other employe would occasionally go out on break and buy a newspaper, bring it back and share it with other employes and the patients in the center. (There were no facilities to buy newspapers on the premises.) Management believed that taking off-premises breaks was a benefit to both the employer and the employes because of the stressful nature of the work. Management appreciated it when an employe brought a newspaper back from a break because of the diversion and relaxation that reading it then offered other employes and the center's patients.

In denying the compensability of the claim, the Referee noted

the seven part test in Jordan v. Western Electric Company, 1 Or App 441 (1970), which helps determine whether the activities in which a claimant is involved are sufficiently work related to be compensable. Not all the factors have to be present in order for a claim to be compensable. For example, one of the factors is whether the injury occurred on the employer's premises, but in Jordan v. Western Electric, supra, and Halfman v. SAIF, 49 Or App 23 (1980), injuries incurred during a worker's off-premises break were found compensable. The Referee based his affirmance of the denial on two of the factors: (1) He did not find that the claimant's break activity was intended to be for the benefit of the employer; and (2) he found that walking across the street on a break and colliding with an automobile was not an ordinary risk of the employment.

We find that there is sufficient work relation to make the claim compensable. We base this on our analysis of the personal comfort doctrine as set out in Jordan v. Western Electric, supra, and Halfman v. SAIF, supra. Both those cases dealt with the work-relatedness of injuries incurred during a worker's break. In both instances, the court found that the activity of the worker during the break was expected and necessary, and the conduct of the activity was not such a departure from the employment relationship that the activity became a "personal mission." We find that the facts of this case are substantially the same as the facts in Jordan and Halfman. The result should also be the same.

ORDER

The Referee's order dated September 14, 1982 is reversed. The employer's denial dated January 8, 1982 is set aside, and this claim is remanded to the employer for acceptance and payment of benefits. Claimant's attorney is awarded $1,600 as a reasonable attorney's fee for his services at hearing and on Board review, payable by the employer.

RONALD W. MOGLIOTTI, Claimant
Dennis H. Henninger, Claimant's Attorney
Keith Skelton, Defense Attorney

WCB 81-10963
March 31, 1983
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Neal's order which upheld the employer's denial of aggravation reopening for claimant's December 2, 1981 laminectomy. The Referee's order also found that the denial was not unreasonable and, therefore, did not award penalties and attorney's fees.

The issues on review are:

(1) Whether claimant's claim for reopening, to pay for the surgery performed out-of-state by a doctor not authorized by the insurer, should be denied:

(a) on the merits; i.e., because there is insufficient evidence of any relationship between the surgery and the prior compensable work injury; or

(b) procedurally; i.e., because under ORS 656.245(3) claimant did not have the choice of his attending physician outside the State of Oregon and the insurer did not consent to his treatment and surgery in California;

(2) whether penalties and attorney's fees should be awarded because of an alleged unreasonable denial; and

(3) whether the employer's Motion to Dismiss on res judicata grounds should be allowed.

Claimant sustained a compensable low back injury March 30, 1979 while employed as a welder. As a result of several Determination Orders, and after a laminectomy performed November 27, 1980, claimant was awarded 80° for 25% unscheduled permanent partial disability for his low back injury. Claimant moved to California in 1981. He testified that his back pain became worse, with pain radiating into his legs. He began treating with a Dr. Becker in Merced, California at the end of August of 1981. After performing a myelogram, Dr. Becker diagnosed a recurrent intervertebral disc herniation.

In the meantime, claimant had appealed the Determination Order which had awarded the 25% permanent partial disability, asking for additional permanent disability. A hearing was held before Referee Pferdner which resulted in an award for an additional 32° for 10% unscheduled low back disability. Claimant testified that during the week following the hearing, while he was still in Oregon, he called the insurance company to obtain permission for a second back surgery. He testified that he also called the insurer several times upon his return to California. The insurer never authorized the surgery. Claimant nevertheless elected to proceed with surgery in California without authorization from the insurer. The insurer issued its denial December 16, 1981, both because it was performed out-of-state by a doctor not authorized by the insurer and also on the merits.

We agree with the Referee's conclusion that claimant's December 2, 1981 laminectomy, performed by Dr. Becker, was related to his compensable 1979 back injury. We also agree with the Referee's conclusion that the denial of claimant's claim must be affirmed because he did not comply with the requirements of ORS 656.245 and Rivers v. SAIF, 45 Or App 1105 (1980). Rivers curtails a claimant's choice of an out of state doctor:

> "The intent of the statute is clear. By specifically giving the worker a choice of doctors within the state of Oregon, the legislature withheld that choice outside the state." 45 Or App at 1008.

See also Anita Gilliam, WCB Case No. 81-07539, 35 Van Natta 377 (decided this date).

The resolution of the first issue thus resolves the next

issue, that of penalties and attorney's fees, which leads us to affirm the Referee's conclusion on this issue as well.

The employer's Motion to Dismiss on res judicata grounds is based on the following events. At the prior October 5, 1981 hearing before Referee Pferdner, claimant testified that he was under Dr. Becker's treatment, that a second surgery was recommended and that he intended to have that surgery. The employer, therefore, argues that this is an issue which should have been tried at the prior hearing and, because it was not, claimant is barred from now litigating it. However, only claims that are in denied status are ripe for hearing. Hettie M. Eagle, 33 Van Natta 671 (1981); Syphers v. K-W Logging, Inc., 51 Or App 769 (1981). Regardless of what may have been mentioned at the time of the prior hearing, the fact remains that the claim for the benefits here in issue was not in denied status at the time of the prior hearing.

Finally, we note that there is a serious question of whether the issue of the insurer's duty to pay interim compensation has been adequately raised, either at the hearing or in the briefs on review. Claimant states that the insurer did nothing for 71 days following notice of the claim for reopening and that the insurer is required to act on a claim in accordance with ORS 656.262(4). Claimant does not specifically state that he is entitled to interim compensation, however. Nevertheless, even if this issue has been adequately raised, which we doubt, we still find that claimant is not entitled to interim compensation because there was never any medically verfied inability to work as required by ORS 656.273(6).

ORDER

The Referee's order dated July 21, 1982 is affirmed.

TERRY L. PAXTON, Claimant
Rodriguez, Glenn et al., Claimant's Attorneys
Minturn et al., Defense Attorneys

WCB 82-04425
March 31, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Williver's order which affirmed the SAIF Corporation's May 5, 1982 denial. The issue for review is the compensability of claimant's right carpal tunnel syndrome.

Claimant, who was 32 years of age at the time of the hearing, had been employed by the Madras Coffee Shop as a dishwasher and waitress. Her employment activities consisted of washing dishes, waiting on customers and busing tables. Claimant had previously been employed as a waitress at the Safari Club in Estacada and as an administrative assistant for the Lincoln Shelter in Lincoln County from February to June of 1981. Claimant's first day of employment with the Madras Coffee Shop was Monday February 22, 1982. On Thursday, February 26, 1982, four days after beginning work at the restaurant, claimant began to experience numbness and swelling of her right hand. Claimant nevertheless continued to work. On March 26, 1982, she was examined at the Central Oregon

District Hospital by Dr. Detwiller. Dr. Detwiller diagnosed right carpal tunnel syndrome and Bell's palsy, right side. He referred claimant to Dr. Altrocchi.

On March 29, 1982, Dr. Altrocchi reported:

> "In 1981 she was working as a secretary, obviously using her hands a great deal when she first began to notice right carpal tunnel symptoms in about April of 1981, manifested by intermittent numbness of the right hand during useage as well as at night. She. . . was off work thoughout the rest of 1981 and had very few symptoms."

Due to continuing symptoms, claimant was forced to cease working on April 7, 1982. On April 15, 1982, she filed a Form 801 with her employer contending that her carpal tunnel syndrome was caused by her work activities. On May 5, 1982, SAIF, as insurer for Madras Coffee Shop, denied the claim.

On April 14 and April 21, 1982, claimant was examined by Dr. Koning. Dr. Koning reported that he agreed with the diagnosis of carpal tunnel syndrome and that "I have filed a claim with SAIF as I feel that the condition has been definitely aggravated by her employment." On April 30, 1982, Dr. Koning performed a right carpal tunnel release on the claimant.

On July 2, 1982, Dr. Brown, neurological consultant for SAIF, reported that:

> "If the facts are correct that this claimant experienced wrist symptomatology prior to being employed at the restaurant in Madras, the carpal tunnel syndrome cannot therefore be due to factors in the restaurant only. . ."

Dr. Koning reported on May 28, 1982 that "It is my opinion that a coffee pot of 1 or 1 1/2 quarts easily qualified as a significant weight which could cause her symptoms to be aggravated." The only other medical opinion concerning causation is contained in Dr. Brown's report of July 2, 1982, in which he states that claimant's activities at home including knitting, crocheting and embroidery were as much of a contributing factor, if not more, to the development of carpal tunnel syndrome, as were her work activities as a waitress. He additionally stated:

> "There is also some historical indication of similar symptoms prior to the date of injury and her work as a waitress is no more of an aggravating (sic) factor than are her household activities of knitting, crocheting and embroidery."

The Referee concluded that claimant had not established the compensability of her condition on the basis of either industrial injury or occupational disease. We agree, although we believe that the claim is best characterized in terms of occupational disease.

See Beaudry v. Winchester Plywood Co., 255 Or 503 (1970). When a worker suffers from a symptomatic condition which pre-exists his or her employment, it must be shown that the work activity and conditions caused a worsening of the underlying condition resulting in an increase in pain to the extent that it produces disability or requires medical services. Weller v. Union Carbide, 288 Or 27 (1979). There is scant medical evidence on the issue of causation in this case. That portion which is favorable to the claimant is even scantier. The only such evidence comes from Dr. Koning, and that evidence is insufficient under Weller. Dr. Koning states only that claimant's work activity aggravated her symptoms, not that the underlying condition itself was worsened. In addition to the requirement of establishing a pathological worsening of her condition, claimant is also required to prove that her work activities were the major cause of the worsening. Douglas S. Chiapuzio, 34 Van Natta 1255 (1982). The claim fails in this regard also. Dr. Brown's opinions implicate claimant's non-work activities as at least equally contributory to her aggravated symptoms. There is no indication that Dr. Koning was aware of claimant's non-work activities.

ORDER

The Referee's order dated September 2, 1982 is affirmed.

KEITH PHILLIPS, Claimant
Olson, Hittle et al., Claimant's Attorneys
Keith Skelton, Defense Attorney

WCB 80-06429
March 31, 1983
Order on Review

Reviewed by the Board en banc.

The insurer requests review of Referee Shebley's order that affirmed the Determination Order dated July 18, 1979 that granted claimant compensation for permanent total disability.

In March of 1978 claimant compensably injured his knees when he tripped and fell, landing on his knees. Surgery has since been performed -- a total knee replacement on the right and a partial knee replacement on the left. Claimant's doctors have opined that, as a result of claimant's knee condition, he is incapacitated from protracted standing, walking, lifting, carrying and climbing. Claimant's claim was closed by the above-mentioned Determination Order. The insurer requested a hearing.

The first issue is what is the issue. The Referee stated the issue to be "whether claimant remains permanently and totally disabled." (Emphasis added.) We disagree with this statement of the issue. In litigated extent cases, disability is rated as of the time of the hearing. There is no presumption that the Determination Order is substantively correct. Michiel M. Harth, 34 Van Natta 703 (1982); SAIF v. Baer, 61 Or App 335 (1983). Thus, we think the issue is whether claimant was entitled to an award for permanent total disability as of the time of the hearing.

The Referee's contrary use of the verb "remains" leads to some erroneous analysis. The Referee relied on Bentley v. SAIF, 38 Or App 473 (1979), for the proposition that the insurer had to prove a

material change in claimant's condition since the date of the challenged Determination Order. See also Harris v. SAIF, 292 Or 683 (1982); Richard Pick, 34 Van Natta 957 (1982). However, cases like Bentley, Harris and Pick have all arisen under ORS 656.206(5) which permits periodic reexaminations of prior awards of total disability that had previously become final. The issue in this case, by contrast, is whether claimant should be granted total disability in the first instance. The Determination Order granting total disability did not become final because the insurer timely requested a hearing; thus, that award is not a prior award in the same sense as the prior awards in cases like Bentley, Harris and Pick.

In the same vein and for the same reason, we think the Referee's analysis of ORS 656.206(3) is erroneous. The Referee stated that the seek-work rule of ORS 656.206(3) "vanishes" once a claimant "has attained [total] disability status." Whatever the merits of that proposition in the Bentley context in which a prior award of total disability previously became final and is now being reexamined, it seems obvious to us in this case that ORS 656.206(3) is relevant to the question of whether claimant is entitled to an award for total disability in the first instance.

In fact, we think this whole case turns on ORS 656.206(3).

Between the date of the challenged Determination Order and the date of the hearing, claimant's employer, a newspaper publisher, offered him a full-time job as a night watchman. Claimant declined this offered employment. The ultimate issue, as we see it, is whether claimant's refusal to even attempt this offered employment precludes an award for total disability because of ORS 656.206(3).

The job description for the offered night watchman position is as follows:

> "Provide building security during night hours. Assure that people in the building during these hours are employees. Assure that company property is not stolen or vandalized.
>
> "Report to Production Director. Frequent contact with night supervisors in mailroom, pressroom, composing room and newsroom to gain greater familiarity with [nightshift] employees.
>
> "From sitting position outside mailroom superintendent's office, observe traffic through department with eye for non-employees -- 60%.
>
> "Make circuit through upper floor offices and cafeteria once every 30-45 minutes for observation -- 30%.
>
> "Make report at shift end of any unusual observations during first seven hours -- 10%."

After apparently being provided with this job description, claimant's physician, Dr. Chester, opined:

> "Assuming this to be quite a sedentary activity I can see no reason why Keith Phillips would not be able to do this, as long as it did not involve significant stair climbing, or walking or protracted distances or that type of thing. It could be just the occupation for him."

Much of the evidence at hearing addressed claimant's ability to perform the night watchman job. Claimant was concerned about his ability to walk enough to make a tour of the newspaper building every 30-45 minutes, but obviously from all the evidence claimant has some residual capacity to walk. Claimant was concerned about climbing stairs to tour the upper floor of the two-story building, but the employer pointed out the availability of a freight elevator. The Referee also noted that, because of pre-existing speech and hearing impairment, claimant might have difficulty communicating with others. However, before claimant's 1977 injury he was working in two different jobs in which his ability to communicate was apparently adequate; there is no basis other than speculation to believe that the communication requirements of the night watchman position would be greater than were the communication requirements in claimant's pre-1977 jobs; specifically, we understand the job requirement of "frequent contact" to be only or primarily visual contact to insure that persons present in the building at night are employees.

From this evidence we cannot affirmatively conclude either that claimant has the physical capacity to perform the offered night watchman job or that claimant lacks the physical capacity to perform that job. The Court of Appeals addressed a very similar situation in Shaw v. Portland Laundry/Dry Cleaning, 47 Or App 1041, 1044 (1980):

> "At the hearing before the referee, the employer for whom claimant was working when she became disabled stated that a seamstress position was available in his plant and in effect offered the job to claimant. Claimant had prior experience as a seamstress. She never clearly answered, we find, questions about whether she thought she was able to do that work. There is some indication in the medical evidence that working as a seamstress may involve more sitting than claimant is capable of doing and may involve more manipulation of sewing machine controls with her feet and knees than claimant is capable of doing. Like so many other parts of this record, however, the evidence about claimant's ability to work as a seamstress is inconclusive.

> "In sum, the medical evidence does not show total disability, and claimant was offered a job that she may or may not be capable of doing. Under these circumstances, we conclude that claimant's failure at least to attempt working as a seamstress is the most telling fact that forecloses a finding of total disability." (Emphasis added.)

Likewise, in this case, we find that claimant was offered a job that he may or may not be capable of doing and conclude that claimant's failure at least to try working as a night watchman forecloses a finding of total disability under ORS 656.206(3).

The ultimate rule stated in ORS 656.206(3) is a rule of reasonableness, and rules of reasonableness in statutes administered by agencies are generally for agency, rather than judicial, definition. McPherson v. Employment Division, 285 Or 541 (1979). Quite aside from the authority of the Shaw case, when questions arise under ORS 656.206(3) in the context of a specific job offered to a claimant, we think the better policy approach is: (1) If the evidence affirmatively establishes that the claimant is capable of performing the job, then ORS 656.206(3) forecloses an award for total disability; (2) if the evidence affirmatively establishes that the claimant is not capable of performing the job, then ORS 656.206(3) is irrelevant to an award for total disability; and (3) if, as in Shaw and this case, the evidence is inconclusive and the claimant may or may not be capable of performing the job, then we think ORS 656.206(3) requires that the claimant do what is reasonable and try to perform the offered employment. Cf. Dock A. Perkins, 31 Van Natta 180, 181 (1981), in which we referred to "the acid test of applying for work"; that metaphore is even more applicable to attempting offered work which a claimant may be capable of doing.

We turn to the question of the extent of partial disability and confront a relative lack of medical information. About all that is certain is that claimant's knee surgery was more extensive on the right side than on the left side, and claimant's doctors say he is precluded from prolonged standing, walking, etc., without defining what they mean by "prolonged." Claimant's testimony about what he feels able to do and not to do suggests impairment toward the moderately severe to severe end of the spectrum. Considering all the evidence, we conclude that claimant would be properly compensated by awards for 80% loss of the right leg and 60% loss of the left leg.

ORDER

The Referee's order dated June 11, 1982 is reversed. The award of compensation for permanent total disability in the Determination Order dated July 18, 1979 is reversed. Claimant is awarded 120° for 80% loss of use of his right leg and is further awarded 90° for 60% loss of use of his left leg. This award is in lieu of all prior awards.

Board Member Lewis Dissenting:

I agree with the majority's statement of the issue, whether claimant was entitled to an award of permanent total disability at the time of the hearing, and their statement of the ultimate issue, whether claimant's refusal to attempt the offered employment as a night watchman precludes an award of permanent total disability because of ORS 656.206(3). I disagree, however, with the majority's analysis and result.

Following is a description of claimant's disability, including not only his physical limitations and impairment, but the other factors of age, education, mental capacity and work experience, which we are required to consider in accordance with Butcher v. SAIF, 45 Or App 313, 608 P2d 575 (1980), and Emerson v. ITT Continental Baking Co., 45 Or App 1089, 610 P2d 282 (1980). Claimant, 61 years old, has had a total right knee replacement and a medial hemiarthroplasty, with the insertion of two prosthetic components, performed on his left knee. To this day he experiences residual pain and weakness in both knees, walks with a cane and suffers from severe degenerative arthritis in both knees, as both the medical reports and claimant's testimony establish.

Claimant testified at the hearing that his ability to climb -- for instance, up and down stairs or into a truck -- is still the same as it was following the 1978 industrial accident when he fell on his knees.

> "I couldn't bend my right knee. It hurt. Even now it still is the same. If I bend my right knee it is very painful. I go up with my left foot first and drag my right up. And when I come down steps I put my right foot down and my cane. And my cane keeps my . . . right knee from giving away. I can go without a cane but it is a hell of a thing."

He further testified that when it is cold and damp he must wear knee pads and two layers of underwear to keep his knees from hurting. Claimant also testified that his knees hurt all the time, in response to a question as to whether staying seated bothered his knees.

In addition to his knee disability and impairment, claimant wears bifocals, and he has great difficulty hearing because he is completely deaf in his right ear and wears a hearing aid in his left ear. He has difficulty speaking and being understood, as well, because of a malformed jaw due to an old fracture and because of a denture problem. In fact, claimant cannot even wear his dentures because they are so ill-fitting. Vocational rehabilitation consultant Mr. Adolph reported that claimant's right cheek is flaccid so that he speaks out of the left corner of his mouth, that he is articulate with a normal vocabulary, but difficult to understand except when facing him at a four foot distance. The combination of claimant's deafness, speech impairments, and inability to lip read make communication with him difficult at best, as Dr.

Chester, Mr. Adolph and the Referee all recognized. Mr. Adolph noted that claimant cannot use the telephone. The Referee noted at Page 5 of his order that:

> "As many of the reports in evidence indicate, claimant is very hard of hearing and is almost as difficult to understand. Having carefully observed him during the hearing I dare say it would be virtually impossible for him to communicate by telephone or CB radio."

The Referee is the only factfinder who observed claimant's difficulty with communication. The Board has to rely on a cold record, while the Referee saw and heard claimant testify. As in Emerson, supra, the Referee's Opinion and Order indicates that in evaluating claimant's disability, he relied on his observation of claimant. This is a case, as was Emerson, where observation of claimant is particularly important. Only the Referee had the opportunity to observe claimant. I thus defer to the Referee's observations.

Regarding the other factors of education and work experience, claimant has a high school education, graduating in 1939; thereafter he attended business school for six months. He has had no formal education since his shipyard welders' training in World War II. Claimant's work history includes jobs as a dishwasher, cook's helper, waiter, with the two most recent jobs being a janitor and delivering newspapers. In my opinion, these jobs would require much less in the way of communication skills than those required for the night watchman job, contrary to the majority's opinion. The night watchman job description, as clarified and expanded upon at the hearing by the employer's production director, requires: (1) frequent face-to-face and telephone contact with night supervisors throughout the building; (2) communication with the police upon observing people in the building not wearing employe badges, or observing other suspicious occurrences; and (3) a walking tour of the building every 30 to 45 minutes requiring walking up and down stairs.

The insurer-employer's sole basis for contending that claimant is not permanently disabled is that he refused to accept the job of night watchman offered him by his former employer. The insurer-employer, and the majority, assert that by his refusal to accept that job, claimant has not made reasonable efforts to obtain regular and gainful employment as required by ORS 656.206(3).

Under ORS 656.206(3), claimant has the burden of proving permanent total disability status and must establish that he is willing to seek regular and gainful employment and that he has made reasonable efforts to obtain such employment. ORS 656.206(1) defines "permanent total disability" as:

> "The loss, including pre-existing disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. . . a suitable occupation is one which the worker

> has the ability and the training or experience to perform or an occupation which the worker is able to perform after rehabilitation [emphasis added]."

Here I find that the evidence shows claimant has established that he is willing to seek regular and gainful employment of a suitable nature and that he has made reasonable efforts to obtain such employment, as defined in Butcher, supra. Butcher was a case in which the claimant was 60 years old, had an eighth grade education and had suffered three compensable injuries which produced a severe disability, requiring him to sleep in ankle braces. The claimant there relied on the statements of all the doctors who examined him and treated him, who said he could not work and, therefore, did not seek work. Claimant in the case before us was similarly discouraged from working, yet was still more optimistic of his future functional capabilities than his treating or examining physicians. The Referee in Butcher found that claimant was required to seek employment and thus denied an award of permanent total disability. The Court of Appeals reversed:

> "Here the statements of all doctors, taken together with the other factors of age, education, work experience and mental capacity indicate it would be futile for claimant to attempt to become employed. We do not believe the legislature intended that every injured worker, regardless of capacity to do so, must demonstrate an effort to become employed even where it is clear that such effort would be in vain." 45 Or App at 318.

Where permanent total disability is at issue, loss of earning capacity is the test for scheduled injuries. Total incapacity is not necessary to establish permanent and total disability; even a moderate disability may combine with other factors, rendering the worker permanently and totally disabled. See, for example, Emerson, supra; Morris v. Denny's Restaurant 50 Or App (1981). In the case at hand, although claimant is not totally incapacitated, he is nevertheless so handicapped that he is not able to obtain regular, suitable employment in a recognized branch of the labor market. See Deacon v. SAIF, 13 Or App 298, 509 P2d 1215 (1973). I think it is important that we consider the probable dependability with which a claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. See 2 Larson, Workmen's Compensation Law, §57.51 (1981). Simple qualification for employment is not sufficient to remove claimant from permanent total disability status where claimant is physically unable to perform the duties of the employment, as in the case before us. See Seaberry v. SAIF, 19 Or App 676, 528 P2d 1103 (1974). Even if claimant did not have to walk up and down stairs but could use the freight elevator, his other impairments and disabilities make him unable to perform the duties of the employment offered him.

As I said in my concurring opinion in Dock A. Perkins, 31 Van Natta 180 (1981),

> "'Permanent total disability' is more than a legal term of art. It is a very real state of being. Those unfortunate workers who find themselves in that state by reason of a combination of factors are no less disabled than those who are there by reason of physical incapacity alone; the loss of earning capacity is the same in either case. To impose an unreasonable standard on one group, requiring a futile search for employment, would be grossly unfair. Fortunately, the court has decided upon a more judicious approach."

Claimant here is incapacitated not only by a combination of physical limitations, but also by his age and his limited education, work experience and training. I would affirm and adopt the Referee's order.

JOHN B. RAGLAND, Claimant
Colombo & Scanlon, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-00690
March 31, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Leahy's order which, in relevant part, concluded that claimant's claim was not prematurely closed by the Determination Order of October 27, 1980; approved the insurer's January 16, 1981 denial of responsibility for claimant's aggravation claim; and approved the Determination Order award of 16° for 5% unscheduled permanent low back disability.

The issues on review are whether claimant has proven by a preponderance of the evidence (1) that his claim was prematurely closed by the October 27, 1980 Determination Order; (2) that the insurer's January 1981 denial of claimant's aggravation claim was not proper; i.e., this his condition worsened since the claim closure date and that such worsening was a result of his March 1, 1978 compensable injury; and (3) that the extent of claimant's unscheduled disability is greater than that awarded by the October 27, 1980 Determination Order.

Regarding the issues of premature claim closure and aggravation, we agree with the Referee that claimant did not meet his burden of proving either that he was not medically stationary on October 27, 1980, or that there was a worsening of his condition due to the prior compensable injury. Regarding the issue of the extent of claimant's unscheduled permanent disability, however, we conclude that claimant would be more appropriately compensated by an award of 32° for 10% unscheduled disability for injury to his low back.

Using the guidelines for rating unscheduled disabilities in

OAR 436-65-600, et seq., we reach the following conclusions. After a review of the medical evidence, we conclude that claimant has an impairment rating of 7% as a result of his compensable low back injury. Claimant's age (35) results in a -1. His education (tenth grade) results in a +5; mental capacity indicates an average rating, giving him a 0. His work experience rating results in an SVP (Specific Vocational Preparation) of 4 with an impact of 3. Claimant's adaptability to less strenuous physical labor results in an impact of 0. Emotional and psychological findings indicate average adjustment, also with an impact of 0. Using an SVP of 4, a GED of 3 and claimant's ability to still perform work requiring medium exertion, claimant has 51% of the labor market open to him, resulting in an impact of -25. When combining all of these factors, we find claimant's appropriate award to be 32° for 10% unscheduled permanent partial (low back) disability.

ORDER

The Referee's order dated April 13, 1982 is modified in part. Claimant is awarded 10% unscheduled permanent partial disability. This award is in lieu of all prior awards. Claimant's attorney is allowed 25% of the additional permanent partial disability compensation awarded herein, as a reasonable attorney's fee. The remainder of the Referee's order is affirmed.

GREGORY STILL, Claimant
Allen & Vick, Claimant's Attorneys
Schwabe et al., Defense Attorneys

WCB 82-06023
March 31, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Knapp's order which upheld the insurer's denial of compensability for claimant's back condition. Claimant asserts that he injured his back while working on April 28, 1982.

The Referee found that claimant had not proven that the alleged injury actually occurred. This finding was based in large part on the numerous inconsistencies in the record. Since this is essentially a question of credibility, we give considerable weight to the Referee's credibility finding. Anfilofieff v. SAIF, 52 Or App 127, 131 (1981); Miller v. Granite Construction Co., 28 Or App 473, 477 (1977); Fredrickson v. Grandma Cookie Co., 13 Or App 334, 337 (1973).

We affirm and adopt the Referee's order.

ORDER

The Referee's order dated September 10, 1982 is affirmed.

WORKERS' COMPENSATION CASES

January-March 1983

Decided in the Oregon Court of Appeals:

Decided in the Oregon Supreme Court:

No. 9

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Patrick Elliott, Claimant.

ELLIOTT,
Petitioner,
v.
LOVENESS LUMBER CO. et al,
Respondents.

(WCB Nos. 80-01598, 80-04905, CA A22533)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 9, 1982.

Robert Udziela, Portland, argued the cause for petitioner. On the brief was David R. Vandenberg, Jr., Klamath Falls.

No appearance for respondent Loveness Lumber Co.

Brian L. Pocock, Eugene, waived appearance for respondent, Argonaut Insurance Company.

Emil R. Berg, Portland, argued the cause for respondent EBI Companies. With him on the briefs was Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J.

Order modified to reinstate 25 percent penalty awarded by referee.

WARDEN, J.

Claimant appeals an order on reconsideration of the Workers' Compensation Board that eliminated the 25 percent penalty that had been imposed on EBI Companies for unreasonably refusing to pay compensation.

Claimant suffered an on-the-job injury to his lower back on November 15, 1979, when his employer was insured by Argonaut Insurance Company. That injury was an aggravation of a previous injury incurred on June 22, 1978, while claimant was working for the same employer, but when the employer was insured by EBI Companies.[1]

[1] EBI attempted to cross-appeal that determination, but its appeal was dismissed because it was not timely filed.

After the 1979 injury, claimant was treated by Dr. Scheer. He initially filed a claim with Argonaut, which denied the claim, stating that it appeared that claimant's back condition was the result of his earlier injury and not a new injury. Dr. Scheer then sent a letter to EBI informing them of the denial by Argonaut and asking that claimant's file be re-opened because of the "re-injury/aggravation of pre-existing injury having occurred June 22, 1978." EBI denied the claim, "due to the fact that you sustained new injury on November 15, 1979 * * * constituting a new claim."

The referee determined that EBI was the responsible carrier, ordered it to accept the claim, awarded an attorney fee and assessed a 25 percent penalty for unreasonable refusal to pay compensation. *See* ORS 656.262(8). The Board initially affirmed the referee but, in an order on reconsideration, it eliminated the imposition of the 25 percent penalty for unreasonable refusal to pay compensation. It concluded that the information available to EBI on the date its denial was issued "was not then of sufficient quantity or quality to make its denial unreasonable."

The Board pointed out that the current version of OAR 436-54-322 imposes a specific duty on an insurer to request designation of a paying agent when it appears that there is an issue of responsibility for an otherwise compensable condition. It concluded, however, that the version of

OAR 436-54-322 in effect at the time of EBI's denial did not impose such a specific duty and that EBI should not be penalized for failing to pay compensation when there was ambiguity in Dr. Scheer's reports as to whether claimant's condition was the result of an aggravation or a new injury.

By concerning itself with the fact that the new rule was not yet in effect, the Board erroneously concluded that there was no duty on EBI that would bring the penalty statute into play. In *Silsby v. SAIF,* 39 Or App 555, 592 P2d 1074 (1979), we held that:

> "* * * the triggering event for the purpose of awarding penalties for failure to accept, deny or pay interim compensation for an alleged aggravation is the receipt of 'medical verification' as contemplated in ORS 656.273(6). 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." 39 Or App at 563.

See Moore v. Commodore Corp., 55 Or App 480, 638 P2d 491 (1982).

That there was a question as to which of two insurers was responsible for the claim does not excuse EBI. ORS 656.307 recognizes that there may be situations in which there is an issue as to which insurer is responsible for a compensable injury. The *statute* provides that the director shall designate who shall pay the claim, and that

> "* * * [p]ayments shall begin in any event as provided in subsection (4) of ORS 656.262. When a determination of the responsible paying party has been made, the director shall direct any necessary monetary adjustment between the parties involved. * * *"

ORS 656.262(4) requires that compensation commence no later than 14 days after an employer receives notice of the claim. In this case, neither insurer sought designation of a paying agent. Even without the administrative rule requiring that an insurer make such a request, it is not relieved of its duty to pay compensation within the statutory time limits. Whip-sawing between insurers is precisely what ORS 656.307 was designed to prevent.

The portion of the Board's order on reconsideration that eliminates the imposition of a 25 percent penalty is reversed, and the referee's order imposing a 25 percent penalty against EBI is reinstated. Affirmed as modified.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
John Johnson, Claimant.

JOHNSON,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB No. 79-03695, CA A24512)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 15, 1982.

David C. Force, Eugene, argued the cause for petitioner. On the brief were Peter W. McSwain, and Malagon & Velure, Eugene.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, Thornton, Senior Judge, and Van Hoomissen, Judge.

VAN HOOMISSEN, J.

Reversed; referee's order reinstated.

Thornton, S. J., dissenting.

VAN HOOMISSEN, J.

Claimant appeals from an order of the Workers' Compensation Board that reversed the referee's finding that claimant's back condition had been aggravated by a later industrial accident to his ankle. The issue is compensability.

Claimant had suffered a series of back injuries which had resulted in several surgeries. His problems date back to 1961, when he was treated for a coccyx problem and a tailbone contusion. In 1964, he injured his back again, and a laminectomy was performed. He was off work for about a year and received an award of 35 percent loss of function of an arm. In 1968, he had a fusion of the sacrum at L-4. He returned to work as a yarder operator and received an award of an additional 35 percent unscheduled disability. Thereafter, he was injured in Alaska, when he fell on his back and left shoulder. A claim settlement was approved in Alaska for $8,957. He was then in an auto-

mobile accident. In 1972, he had a decompression laminectomy at L-3 with a spinal fusion. In 1975, he was injured in California, when he slipped crossing the deck of a yarder and he was off work until April, 1977. That claim was settled, and he again returned to work as a yarder operator.

The present injury to his left ankle occurred in August, 1977.[1] In October, he had pain in his back and left knee. After conservative treatment failed, he underwent lumbar myelography in February, 1980. In March, he underwent surgical decompression for spinal canal stenosis. SAIF denied responsibility for his current medical expenses.

Dr. Wilson, claimant's treating orthopaedist, said that his back condition was traceable to his left ankle injury. He later retreated from this opinion, however, and expressed a more general opinion that all the major and minor traumas and surgeries claimant has been subjected to had a bearing on his present back problem. Orthopaedic Consultants examined claimant and said his back condition

[1] The Board awarded claimant 15 percent scheduled disability for the loss of use of his left foot. That award is not in issue here.

was aggravated by his having to walk with a cast on his leg:

> "There is no question but that this man had a significant amount of back disability antedating the August 2, 1977, injury. Nevertheless, we feel he did experience significant residuals with regard to his back as a result of the August 2, 1977, injury."

Later they said that "there is probably more likely an inexact [causal] relationship * * * between the ankle trauma and back injury * * *." Dr. Tennyson examined the exhibits and said:

> "The fact that this patient was able to return to work as a yarder operator following his injury of August, 1977, for nearly a year without progressive radicular symptomatology would make me doubt that the injury of August 2, 1977 was a material contributing factor to the development of his apparent spinal stenosis."

Claimant contends that his back condition has been aggravated as a result of his compensable ankle injury. The referee said:

> "* * * I feel claimant suffered a compensable injury to his back resulting from the ankle injury of August 1, 1977, and was awarded disability on October 19, 1978. Subsequent to that order, claimant's back worsened and claimant became temporarily and totally disabled. On January 11, 1980, he was hospitalized by his treating physician and while there are multiple causes for his hospitalization and subsequent surgery, there seems to be little question in Dr. Wilson's opinion that claimant's back problems are related to his ankle injury in 1977, and that it was a material contributing factor to his hospitalization. Therefore, the claim should be reopened and temporary total disability paid from January 11, 1980 until closure pursuant to ORS 656.268. * * *"

The Board reversed, finding that claimant had failed to show that his current medical expenses were related to his 1977 ankle injury.

In April, 1978, Dr. Wilson, told SAIF that claimant's contention that his ankle injury had aggravated his back problem "appears to be possible from a gait standpoint, putting more strain on an already symptomatic low back." He observed that "this is a very complex disability

situation with multiple injuries over a good many years." In June, 1978, Orthopaedic Consultants said:

> "We do feel that there is a causal relationship between his ankle injury and an aggravation of his back difficulty. This would be because of a direct injury to his back, as well as additional stresses placed on his back by having to walk with a cast."

Dr. Wilson concurred with Orthopaedic Consultants' report.

SAIF asked Orthopaedic Consultants to clarify its conclusion that there was a causal relationship between claimant's ankle injury and his back problem. Orthopaedic Consultants said:

> "We understand there is some question about whether or not he actually injured his back per se at the time of the ankle injury. We cannot answer that question, but do feel that * * * his back condition was aggravated by having to walk with a cast on his leg, which would put additional strains on his back."

Additionally, it said that "we feel he did experience significant residuals with regard to his back as a result of the [ankle] injury." It also said that claimant's disability before his 1977 ankle injury was "moderate" but that his disability at the time of its 1978 examination was "at the lower limits of moderately severe."

Dr. Wilson stated in January, 1980, that claimant's back problem "appears connected" to his past injuries. This would obviously include his 1977 ankle injury. The Board relied heavily on Dr. Tennyson, who found no causal relationship between the 1977 ankle injury and the current back problem. However, Dr. Tennyson did not examine claimant; he relied on medical records.

The employer takes the worker as he finds him. On *de novo* review, we conclude that claimant has sustained his burden of proof by a preponderance of the evidence.

Reversed; referee's order reinstated.

THORNTON, S. J., dissenting.

From my reading of this record, I cannot agree with the majority that claimant has carried his burden of

showing medical causation between his ankle injury and his most recent back surgery.

This is a case where a workman has suffered a whole series of back injuries, which have resulted in repeated surgeries. The medical evidence of a causal connection between the ankle and the back is insufficient in my view to support the majority's decision. I am unable to see how a broken ankle can cause all the back complications and necessitate all the surgery which was claimed here, namely: decompression laminectomy at the L2-3 level; spinal canal stenosis secondary to degenerative disc disease; ridge and degenerative changes at L2-3. Also I note that claimant was able to return to work as a yarder operator following his injury of August, 1977, for nearly a year without "progressive radicular symptomatology." Further, after the ankle injury it appears that claimant fell in his shower, which resulted in fracturing two ribs and occurred only two months before his examination by Orthopaedic Consultants. Later claimant was sawing firewood in April of 1978 when his back "went out." I agree with the Workers' Compensation Board's conclusion that claimant's back condition is not the result of his August 2, 1977, ankle injury but is, rather, the cumulative effect of his successive back injuries. Superimposed on these injuries and the numerous corrective surgeries therefor is a degenerative disease process involving bony overgrowth from his prior fusion. The references in the medical reports of Dr. Wilson and Orthopaedic Consultants to the effect of the 1977 ankle injury on his back condition are inexact and more in the nature of a recognition of the temporary increase of pain from the back condition, including that caused by the change in gait and use of crutches and other factors, rather than a finding that the 1977 ankle injury was a material contributing factor to claimant's post-1977 back disability.

For the above reasons, I respectfully dissent.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Timothy Treadwell, Claimant.

TREADWELL,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB Case No. 81-00093, CA A25150)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 16, 1982.

Jane Bolin, Eugene, argued the cause for petitioner. On the brief were Michael L. Williams and Johnson, Harrang & Swanson, Eugene.

Darrell Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

PER CURIAM.

Reversed and remanded with instructions that the aggravation claim be accepted as compensable.

PER CURIAM.

Claimant appeals from a determination by the Workers' Compensation Board affirming the employer's denial of his aggravation claim for chronic strain in the sacroiliac region of the low back relating to an industrial injury in 1977 that caused multiple fractures of the left leg.

We need not reach the issue whether the Board improperly denied claimant's motion to remand for additional evidence. The medical evidence that was admitted establishes that claimant's low back problem stems either from the slight shortening of the left leg caused by the fractures or from an abnormal gait pattern resulting from the injury, or from both.

Reversed and remanded with instructions that the aggravation claim be accepted as compensable.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Fred Baer, Claimant.

SAIF CORPORATION,
Petitioner,
v.
BAER,
Respondent.

(WCB No. 80-06842, CA A24997)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 16, 1982.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for petitioner.

J. Michael Alexander, Salem, argued the cause for respondent. With him on the brief was Brown, Burt, Swanson, Lathen & Alexander, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed.

BUTTLER, P. J.

In this workers' compensation case involving a scheduled disability, SAIF seeks judicial review of a determination by the Workers' Compensation Board (Board) affirming the referee's award of compensation for a 30 percent loss of function of the left leg. SAIF contends that the Board erred in (1) not requiring the referee to apply administrative rules governing evaluation of permanent disability, OAR 436-65-000 *et seq,* and (2) not according presumptive validity to the determination by the Evaluation Division of a 15 percent loss of function. We affirm.

SAIF contends that the administrative rules are binding on the Board and the Hearings Division in that they require that "all parts or divisions of the [Workers' Compensation] Department evaluate disabilities as set forth in the rules." SAIF builds its argument on the basis of selected statutory and administrative provisions, including ORS 656.708 (the Board and Hearings Division are part of

the department); ORS 656.726(3)(a) (the director of the department has general authority to promulgate regulations); ORS 656.726(3)(f) (the director has authority to "provide general guidelines for the evaluation of permanent disabilities"); and OAR 436-65-003(1) (the rules "apply to the Workers' Compensation Department").

The only indication that the rules are *required* to be applied by anyone is found in a rule that governs only the Evaluation Division. OAR 436-65-005, entitled "Evaluation Division Responsibility: Procedure," provides in relevant part:

> "(1) The Evaluation Division has the responsibility of evaluating disability claims and determining compensation awards, and all requests for determination in the first instance shall be referred thereto.
>
> "* * * * *
>
> "(4) The guidelines promulgated by the Department pursuant to ORS 656.726(3) *shall be applied* when evaluating the permanent disability of an injured worker." (Emphasis supplied.)

On their face, therefore, the rules are binding as a procedural matter only on the evaluation division.

In oral argument, SAIF maintained that the referee's task was simply to find the facts and apply the administrative rules promulgated by the director. Insofar as the administrative rules have substantive effect, however, they are, by the terms of ORS 656.726(3)(f) and the rule promulgated thereunder, merely guidelines. A guideline is defined in Webster's Third New International Dictionary (unabridged 1971) as "an indication or outline of future policy or conduct." "Guideline" is thus not a term that denotes (or connotes) binding effect.

Insofar as the director's administrative rules have procedural effect, they could not bind the referees, because such rules would exceed the rulemaking authority of the director. ORS 656.726(3)(g) gives the director authority to make procedural rules affecting workers' compensation proceedings except as to those matters specifically delegated to the Board:

> "(3) * * * To that end the director may:
>
> "* * * * *
>
> "(g) Prescribe procedural rules for and conduct hearings, investigations and other proceedings pursuant to ORS 654.001 to 654.295 and 656.001 to 656.794 regarding all matters other than those specifically allocated to the board or the Hearings Division."

ORS 656.726(5) describes the Board's sphere of responsibility with respect to rulemaking:

> "The board may make and declare all rules which are reasonably required in the performance of its duties, including but not limited to rules of practice and procedure in connection with hearing and review proceedings and exercise its authority under ORS 656.278. Such rules may

provide for informal prehearing conferences in order to expedite claim adjudication, amicably dispose of controversies, if possible, narrow issues and simplify the method of proof at hearings. The rules shall specify who may appear with parties at prehearing conferences and hearings."

The Hearings Division is contained within the Board. ORS 656.708(3). Under ORS 656.726(3)(g) and ORS 656.726(5), therefore, the director must defer to the Board's authority and responsibility to promulgate rules affecting the performance of the referees' function.

SAIF contends in its second assignment[1] that the validity of the determination order should be given a presumption of validity under the holding of *Dimitroff v. State Ind. Acc. Com.*, 209 Or 316, 306 P2d 398 (1957). The statutory workers' compensation scheme in effect at the time *Dimitroff* was decided provided for jury trials in circuit court. The linchpin of the decision in *Dimitroff* was the lack of expertise on the part of lay jury members in rating disability:

> "Appeals from awards of the Industrial Accident Commission to the circuit courts authorize trials de novo before a jury in which the parties are not limited to the record made before the Commission. The result is that the decision of an experienced commission, based upon technical and medical knowledge, is reviewed by laymen having normally no experience in the difficult process of determining the extent of disability or the need of medical treatment, and having no familiarity with the administrative procedure or the terminology employed therein. We therefore find it to be of peculiar importance that the jury in the exercise of its independent function should at least be informed by an instruction that there is a disputable presumption in favor of the decision of the commission." 209 Or at 340.

In affirming the referee here, the Board cited its decision in the case of *Michael Harth,* 34 Van Natta 703 (1982), in which the Board noted that the Evaluation Division, the referees and the Board all have expertise in rating disability. *Dimitroff* is not controlling.

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[1] In rejecting SAIF's second contention on appeal, the Board cited its decision in *Michael Harth,* 34 Van Natta 703 (1982), which contains the following language:

> "Implicit in SAIF's argument about a presumption of 'correctness' is its belief that the Department's rules governing the rating of disability, OAR 436, Part 65, are binding at all levels of the de novo appeals and review process. We cannot comment on what standards the Court of Appeals does or should use for rating disability, but *we agree with SAIF's position about the binding effect of OAR 436, Part 65, at the Referee and Board level.* This does not mean that OAR 436, Part 65, necessarily contains the complete or absolute answer for all cases. See *Charles Hanscom,* 34 Van Natta 34 (1982). It does mean that to the extent relevant, OAR 436, Part 65, is binding." 34 Van Natta at 706. (Emphasis supplied.)

Whatever may be the effect of a rule that is binding only insofar as it is relevant, we point out to the Board that promulgation of procedural rules affecting performance of the function of the referees is within the Board's exclusive authority under ORS 656.726(3)(g) and 656.726(5).

In *Harth,* the Board rejected the same argument in favor of a presumption that SAIF now propounds before us. It reasoned:

> "We will presume that the Referees performed their official duty in a regular and procedurally correct manner. We decline to presume or to require the Referees to presume that the Evaluation Division made a substantively correct determination in the sense that SAIf here argues for, i.e., an increased burden of proof on the party challenging that determination. The Board likewise cannot presume that the Referees' decisions are substantively correct."

We agree. A substantive presumption in this administrative setting would undercut the referees' and the Board's *de novo* fact-finding function.

ORS 656.283(6) exempts a referee from technical or formal rules of evidence, except as provided in the statutes or in rules specifically promulgated by the Board. There is no statutory provision or Board rule requiring that the determination order be accorded the evidentiary value of a substantive presumption of validity. Even if the Oregon Evidence Code were made binding on the referee, it provides in relevant part only that it is presumed that "[o]fficial duty has been regularly performed," OEC 311(j), a presumption that does not aid SAIF.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Maxine E. Shaw, Claimant.

SHAW,
Petitioner,
v.
PORTLAND LAUNDRY/DRY CLEANING et al,
Respondents.

(WCB Nos. 79-01310, 79-010446, CA A23552)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 28, 1982.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Emil R. Berg, Portland, argued the cause for respondents. With him on the brief was Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J.

Affirmed.

WARDEN, J.

Claimant appeals an order of the Workers' Compensation Board affirming the referee's determination that claimant has no permanent disability resulting from her compensable disease. We also affirm.

Claimant suffered a compensable occupational disease in the form of phlebitis in both legs, claimed to have commenced on October 31, 1977. The claim was accepted, and on October 25, 1978, by determination order, claimant was awarded temporary total disability from October 31, 1977, through September 25, 1978, less time worked, but no compensation for permanent disability. At her request, a hearing was held on June 19, 1979, resulting in a finding by the hearing referee that she was permanently and totally disabled. Employer appealed, and the Board reduced claimant's disability to 70 percent unscheduled permanent partial disability. Claimant sought judicial review, claiming permanent total disability, and on August 25, 1980, this court found her disability to be less than total but remanded the claim to the Board to determine whether her

partial disability was scheduled or unscheduled. *Shaw v. Portland Laundry/ Dry Cleaning,* 47 Or App 1041, 615 P2d 1134 (1980). In an order of remand to the Hearings Division, the Board directed:

> "* * * The referee shall determine, by the taking of additional evidence, whether the claimant's condition is a general circulatory or vascular problem or whether it affects only the circulation in the veins of her legs. The referee further shall determine if the claimant is entitled to an award of scheduled disability or an award of unscheduled disability."

In the meantime, on July 24, 1979, claimant filed a claim that her hiatal "[h]ernia [was] materially and permanently worsened by inactivity and weight gain due to industrial injury." She requested a hearing, which was commenced on May 17, 1980, and was continued. The continued claim for hiatal hernia and the remanded claim for phlebitis were consolidated for hearing. At the hearing on June 9, 1981, the referee heard new evidence, including testimony of the claimant and a second deposition of her treating physician, Dr. Richard Ellerby. The referee affirmed the denial of claimant's hernia claim and affirmed

the determination order of October 25, 1978, on her phlebitis claim and, therefore, awarded claimant no benefits for permanent partial disability. The Board's order affirming the referee is before us on appeal.

Claimant contends that our prior opinion established that she was permanently disabled as "the law of the case" and that the Board was limited on remand to determining whether the disability was scheduled or unscheduled. Alternatively, she contends that the medical evidence establishes that she is permanently disabled.

In her first assignment, claimant contends that the referee and the Board were bound on remand by our prior "determination" that she is entitled to an award of permanent partial disability. It overstates our first opinion to say that we *determined* that claimant suffered a permanent disability. The only questions before us were whether claimant's disability was total or partial and scheduled or unscheduled. We merely accepted the Board's conclusion, unchallenged at that time, that the disability was permanent. More important, even if our prior opinion had been intended to establish the existence of a permanent disability, it would have represented our determination of claimant's condition only *at that time.* ORS 656.278 grants the Board continuing jurisdiction to modify or terminate former awards "if in its opinion such action is justified." The Supreme Court has interpreted that statute as "intended to prevent the normal operation of the doctrine of *res judicata*" in workers' compensation cases. *Holmes v. State Ind. Acc. Com.,* 227 Or 562, 574-75, 362 P2d 371, 363 P2d 563 (1961). Claimant has not referred us to any authority that would require a contrary conclusion here.

We did not determine the extent of claimant's disability in our earlier decision, and we do not have, in the

record before us, the evidence presented to the referee in the June 19, 1979, hearing and on which he based his finding that claimant was permanently and totally disabled. From the opinion and order, it appears that that finding was based on testimony of the claimant and other lay witnesses. The opinion states:

> "[A]ll of the physicians who have examined her are of the opinion that she could engage in light work which does not require continuous sitting or standing."

The Board's order on review, which reduced claimant's award to benefits for 70 percent unscheduled permanent partial disability, reviewed the medical evidence and relied on the deposition testimony of Dr. Ellerby "that claimant did now have some permanent limitations from her phlebitis."[1]

The purpose of the remand was to determine whether claimant's vascular disease was general or limited to her legs. Dr. Ellerby, who had continued to treat claimant, testified that her disease was limited to her legs. He further testified that she was suffering from varicose veins, that her varicose veins preexisted the thrombophlebitis and were not caused by her work conditions and that, although her work conditions had caused the thrombophlebitis, which had aggravated the varicose veins and resulted in temporary total disability, the thrombophlebitis had been medically stationary since about July, 1979, and in fact, was no longer present. He testified that her physical limitations were caused by a preexisting varicose vein condition and that those limitations could be partially alleviated if she would exercise and lose weight.

In her second assignment, claimant contends that the medical evidence establishes a permanent disability. We disagree. The referee summarized the evidence as follows:

> "Dr. Ellerby attributes all of her symptoms to varicose veins. Dr. Hampton explained: 'The etiology of the patient's condition is that she was born with poor veins and she has had jobs in which she stands or sits for long periods.'
>
> "Dr. Ellerby stated claimant's thrombophlebitis has been medically stationary since approximately July, 1979; but her varicosities pre-existed her injury, and insofar as her thrombophlebitis is concerned, it no longer exists."

From that, the referee concluded that claimant suffers no permanent disability. Our review of Dr. Ellerby's testimony confirms the referee's conclusion. He was claimant's

[1] We were not provided with Dr. Ellerby's testimony from the original hearing on this appeal. Our understanding of his earlier testimony is based on references to it at his May 18, 1981, deposition, especially claimant's attorney's summarization of his earlier testimony.

treating internist, and apparently the physician most familiar with her condition at the time of the remand hearing. Implicit in ORS 656.278 is the common sense understanding that the course of a disease or injury may change over a period of time and that a claimant's disability will vary accordingly. For that reason, in this case the more recent medical evidence carries greater weight in determining disability, and, as the Board has done, we rely on Dr. Ellerby's testimony of May 18, 1981, which establishes that claimant suffers no permanent disability from her compensable disease.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Christine Nelson Givens, Claimant.

GIVENS,
Petitioner - Cross-Respondent,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent - Cross-Petitioner.

(Nos. 80-05753, 80-07341; CA A24491)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 15, 1982.

Richard T. Kropp, Albany, argued the cause for petitioner - cross-respondent. With him on the briefs was Emmons, Kyle, Kropp & Kryger, Albany.

Darrell E. Bewley, State Accident Insurance Fund, Salem, argued the cause and filed the brief for respondent - cross-petitioner.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

GILLETTE, P. J.

Affirmed in part; reversed in part; referee's order reinstated as to thoracic outlet compensability.

GILLETTE, P. J.

Claimant seeks review of an order of the Workers' Compensation Board (Board) that reinstates SAIF's denial of compensation for her thoracic outlet syndrome and the surgery for that condition. SAIF cross-appeals, attacking the Board's ruling that surgery for claimant's cervical condition was compensable. We affirm in part and reverse in part.

On April 3, 1978, claimant suffered a compensable neck injury while participating in a work-related self-defense class. The injury resulted in a time-loss award and a later award for aggravation. *See Nelson v. SAIF,* 49 Or App 111, 634 P2d 245 (1980) (involving this claimant). Even after claimant had filed the claims leading to those awards, her cervical condition continued to worsen. In December, 1979, Dr. Poulson, who had treated her for the original injury, performed a discogram that indicated a rupture at intervertebral discs C4-5 and C5-6. He reported the discogram results to SAIF on December 13, stating that he would probably recommend surgery that would include anterior cervical fusion at both the C4-5 and C5-6 levels.

On January 4, 1980, SAIF notified claimant that it had made an appointment for her with Orthopaedic Consultants in order to obtain a second opinion about (1) whether the cervical disc surgery suggested by Dr. Poulson was "recommended" and (2) whether claimant's "present symptoms" had been caused by the 1978 industrial injury. The appointment was scheduled for February 7, 1980.

Also in late 1979, claimant told Dr. Poulson that she had pain and tingling in her right arm and hand.[1] Dr. Poulson referred her to Dr. Gaiser, a vascular specialist, who diagnosed the arm and hand symptoms as the products of thoracic outlet syndrome. When SAIF learned of Dr. Gaiser's diagnosis, it asked Orthopaedic Consultants to determine at the February 7 examination (1) the relationship between claimant's thoracic outlet syndrome and her compensable injury, (2) whether the diagnosis was correct, and (3) if the diagnosis was correct, whether surgery was desirable.

[1] The record indicates that claimant had had such problems for some time but that the symptoms got much worse in late 1979.

Claimant did not keep the February 7 appointment. Instead, she entered the hospital on February 3, and Dr. Poulson performed the cervical operation on February 4. He found degenerated discs at the C4-5 and C5-6 levels and performed an anterior cervical fusion. In the following months, the symptoms from claimant's thoracic outlet syndrome intensified. To correct that problem, Dr. Gaiser performed a transaxillary resection of her first rib on August 11, 1980.

In May, 1980, claimant made a second aggravation claim. By letter dated July 15, 1980, SAIF denied responsibility for her thoracic outlet syndrome, changes in her cervical condition and the medical expenses related to the treatment of both conditions.[2] Claimant sought administrative review and, after a hearing, the referee ordered

> "* * * that the denial * * * be set aside and the SAIF Corporation accept as a compensable claim the claimant's cervical and right sided thoracic outlet difficulties and the surgical attention addressed to these difficulties."

The Board affirmed the referee's order with respect to the cervical difficulties but reinstated SAIF's denial with respect to the thoracic outlet syndrome. This appeal and cross-appeal followed.

Claimant contends that the Board erred in holding that she failed to show by a preponderance of the evidence that her thoracic outlet syndrome was compensable. The Board stated:

[2] Claimant had not yet had her thoracic outlet surgery at the time she made this claim. However, the claim stated that her thoracic outlet syndrome would require surgery and requested compensation for all "medical care and treatment" related to that condition.

"With regard to the issue of compensability of claimant's thoracic outlet syndrome, we thus start with the proposition that claimant failed to undergo a reasonable diagnostic procedure [by failing to keep the February 7 appointment] and that this weighs against a finding that claimant sustained her burden of proof. The additional evidence is from both parties' experts, Dr. Gaiser for the claimant and Dr. Norton for SAIF. Dr. Norton was more articulate and informative in his explanation of why he thought the claimant's injury did not cause or aggravate her thoracic outlet syndrome condition. On the other hand,

Dr. Gaiser's opinion is bolstered by the fact that he was the treating surgeon who actually viewed claimant's condition at surgery. The evidence is close to being evenly balanced one way or the other. Considering that claimant had the burden of proof, that claimant's failure to undergo a reasonable diagnostic procedure supports an adverse inference and Dr. Norton's well articulated and cogent reasoning on the subject, we conclude that claimant has not sustained the burden of proving compensability of her thoracic outlet syndrome."

Although the question is a close one on the record before us, we conclude that claimant's thoracic outlet syndrome and the surgery are compensable. As the Board recognized, the evidentiary conflict reduces to a difference of opinion between Dr. Gaiser, who believes that claimant's thoracic outlet syndrome was related to the 1978 injury, and Dr. Norton, who does not. Although Dr. Norton's written explanation of his opinion may be somewhat more articulate than Dr. Gaiser's verbal explanation of his conclusion, Dr. Gaiser's explanation is more than adequate.[3] We give his opinion greater weight than Dr. Norton's because of the vast difference in their firsthand exposure to and knowledge of claimant's condition. *Hamlin v. Roseburg Lumber Co.,* 30 Or App 615, 619, 567 P2d 612 (1977). Dr. Gaiser first diagnosed claimant's thoracic outlet syndrome in January, 1979; he saw her several more times in the spring and summer; and he performed the corrective surgery. Dr. Norton, a full-time SAIF consultant, never examined claimant. Furthermore, he admitted that he had not performed thoracic outlet syndrome surgery in 15 years, and he acknowledged that the treatment for that syndrome has shifted in recent years from orthopedists like himself to vascular specialists like Dr. Gaiser. These factors indicate to us that Dr. Gaiser was in a better position

[3] Dr. Gaiser explained in his deposition that claimant was "predisposed to development of thoracic outlet syndrome" by virtue of certain physical characteristics. He went on to state, however, that:

"In some [predisposed] people that are asymptomatic, it is my opinion and conviction that muscle spasms in the neck from any sort of diffuse neck injury elevates the first rib just enough to produce what once was a relatively free access or regress through this space to one in which the vessels and nerves are in fact compressed."

In his opinion, that is what happened to claimant.

than Dr. Norton to render an opinion about the cause and progress of claimant's thoracic outlet difficulties.

Unlike the Board, we are not persuaded by SAIF's argument that claimant's failure to keep her February 7 appointment with Orthopaedic Consultants so weakens her proof that it falls below the preponderance of the evidence standard. The Board's decision rested in part on two opinions from this court. *Finley v. SAIF,* 34 Or App 129, 578 P2d 432 (1978), held that the claimant's refusal to submit to a diagnostic test was "a failure to provide evidence which was reasonably available to him" and that his failure "must be regarded as a weakness in his proof" with respect to the extent and duration of his disability. *Suell v. SAIF,* 22 Or App 201, 538 P2d 84 (1975), held that the claimant's refusal to take a myelogram "must be taken into consideration in determining whether claimant has established that he is permanently and totally disabled." We recognize the principle established by those two cases, but we do not think that any "weakness in proof" resulting from claimant's failure to keep the February appointment is serious enough to negate all the factors that make Dr. Gaiser's opinion the more persuasive one.[4] We therefore reverse the Board's order with respect to claimant's thoracic outlet problems. The referee's order on this issue is reinstated.

SAIF assigns as error (1) the Board's finding that claimant's failure to keep the February 7 appointment does not estop her to contend that SAIF is responsible for the surgery and its consequences and (2) the Board's conclusion that, because claimant had a compensable cervical condition, the cervical surgery and its consequences are automatically compensable.[5]

With respect to the first assignment of error, we agree with SAIF that neither claimant nor Dr. Poulson has

[4] We do not wish to imply that claimants can ignore insurer-requested appointments with impunity. Claimant and Dr. Poulson should have attempted to procure either an earlier appointment or a later surgery date. Their combined failure to do so weighs against claimant, but that weight is not determinative under the facts of this case.

[5] SAIF makes a third assignment of error but does not support the assignment with argument. Its merits are not obvious, and we do not discuss it. *Schmid v. Thorsen,* 89 Or 575, 170 P 930, 175 P 74 (1918).

given a satisfactory explanation why claimant could not have delayed her surgery and kept the appointment.[6] However, claimant's failure does not *estop* her to claim compensability. The elements of estoppel are not present and estoppel is not necessary for a fair resolution of the case.[7]

Turning to the second assignment of error, Dr. Poulson stated in his deposition that claimant's 1978 injury was a "material contributing factor" to the cervical problems addressed by his surgery. He also opined that without the surgery, claimant's condition would have continued to deteriorate, leaving her with "more permanent disability than she would [have had] without the surgery." Dr. Norton, on the other hand, did not think that the surgery was a medical necessity and did not see how claimant's 1978 injury could have "caused a permanent worsening of what is generally felt to be a degenerative process." As the referee pointed out, however, Dr. Norton does not distinguish the complaints that prompted Dr.Poulson to perform the discogram and surgery from the complaints held in *Nelson v. SAIF, supra,* to be the product of claimant's compensable injury. We find no basis for reversal of the Board's finding of compensability.

Affirmed in part; reversed in part; referee's order reinstated as to thoracic outlet compensability.

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[6] Claimant testified that she decided to proceed with the February 4 surgery because she was in pain, she understood that Dr. Poulson had a lengthy vacation scheduled around that time and she did not want to wait until he returned, and she thought—mistakenly—that her "regular" medical insurance would cover the operation if SAIF would not. Dr. Poulson, however, stated that he had no such vacation plans and that her surgery, being elective instead of emergency, could have been rescheduled without difficulty.

[7] OAR 436-54-283(1) requires workers to submit to medical examinations at reasonably convenient times and places when requested to do so by the insurer. Subsection 5 states:

> "The insurer * * * requesting consent to suspension of compensation because of a worker's failure or refusal to submit to a medical examination * * * shall apply to the Compliance Division * * *.
>
> "* * * * *."

This rule provides SAIF with a remedy against uncooperative claimants. It did not seek suspension of compensation in this instance.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Vernon W. Hughes, Claimant.

HUGHES,
Petitioner,
v.
PACIFIC NORTHWEST BELL,
Respondent.

(79-09361; CA A24650)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 29, 1982.

Robert K. Udziela, Portland, argued the cause for petitioner. On the brief were Jeffrey S. Mutnick and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Bruce K. Posey, Portland, argued the cause for respondent. With him on the brief was Pacific Northwest Bell, Legal Department, Portland.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Van Hoomissen, Judge.

JOSEPH, C. J.

Affirmed in part; reversed in part; referee's award for binaural hearing loss reinstated.

JOSEPH, C. J.

Claimant appeals a Workers' Compensation Board order reversing the referee's permanent partial disability awards for binaural hearing loss and tinnitus. The Board reinstated the determination order that awarded claimant 2.5 percent permanent partial disability for loss of hearing in the *left* ear only. We review *de novo* to determine whether claimant's *right* ear hearing impairment is work-related and whether his tinnitus condition is compensable.

Claimant was 54 years old at the time of the hearing and had been working for Pacific Northwest Bell (Bell) since January, 1948. He has been working as a cable splicer for Bell since 1957. Audiograms conducted in 1959, 1960 and 1961 showed essentially normal hearing acuity in both ears. During a period of approximately three months in 1970, while rerouting cables, claimant wore a defective headset that issued sound approximately 32 to 64 times greater than generally considered the safe maximum for prolonged exposure under industrial conditions. Whether he wore the headset on both ears or only on his left ear is an issue.

In September, 1970, after his use of the headset ended, he consulted Dr. Camp, who performed an audiogram that showed mild to moderate nerve deafness with an 84 percent discrimination score for speech in the left ear and nerve deafness in the right ear at the 2,000 cycle range and beyond of about 40 decibles. When he was again seen by Dr. Camp in March, 1974, the test results were essentially unchanged. On June 25, 1978, claimant filed an 801 injury report describing his injury as follows:

> "Toneing [sic] Cable prs. with 20 K. C. inaudible Tone for 8 to 10 hrs. a day for Period of Two months, left me with loss of hearing and continued ringing left ear."

He saw Dr. Camp again in December, 1978. The audiograms showed that claimant had a 25.25 percent hearing loss in the left ear and a 15.24 percent hearing loss in the right ear, or a combined binaural hearing loss of 16.5 percent. The doctor's report said:

> "In the months of April, May and part of June of 1970 [claimant] was assigned to a telephone repair job which

> involved the use of a '20-KC' headset device, *worn in the left ear* and about 90% of the time while working between 8 and 10 hours a day * * *. (Emphasis supplied.)
>
> "* * * * *
>
> "My diagnosis is mild to moderately severe, progressive nerve deafness, *both ears,* left more than right with associated mild loss of speech discrimination. Exposure to a 20-KC headset in the summer of 1970 may have aggrevated [sic] the nerve deafness and tinnitus, but does not explain the progressive to moderate to severe nerve deafness observed in the right ear. Therefore, I must conclude that [claimant] suffers from progressive nerve deafness of combined hereditary and noise induced type, affecting both ears."

In March, 1979, claimant was examined by Dr. Myers at the request of employer. His report said:

> "During April, May and June of 1970 [claimant] was working in a manhole splicing underground cables. A 20 KHz headset was *worn in his left ear* to identify the pair of wires for each circuit. He estimates he wore the 20 KHz headset for approximately seven hours each day." (Emphasis supplied.)

He found a 20.25 percent hearing loss in the right ear and a 22.75 percent loss in the left ear and concluded:

> "In my opinion the difference between the left ear which was exposed to the head set tone generator and the right ear which was not exposed to the head set tone generator would be the percentage induced by the occupational exposure."

A determination order issued on September 20, 1979, awarding claimant 1.5 degrees permanent partial disability for a 2.5 percent loss of hearing in the left ear, with no award for claimant's right ear hearing loss or tinnitus. Claimant requested a hearing.

In May, 1980, before the hearing, he was examined by Dr. Johnson, a hearing specialist at the University of Oregon Health Sciences Center, for tinnitus in his left ear. That doctor reported that claimant had a bilaterally asymmetrical high frequency hearing loss, with the left ear being poorer than the right, and with only fair speech discrimination in both ears. A tinnitus instrument was

tried on claimant's left ear and "found to very effectively mask the tinnitus."[1]

Claimant testified that he wore the defective headset the majority of the time on his left ear and that

> "[m]aybe a half a day I would have it on one ear and the other half on the other ear; maybe, one day I might wear it solely on the left, and the next day I might wear it partially on the right. I really can't give you a percentage of time."

He did not recall telling Dr. Camp that he had worn the headset 90 percent of the time in the left ear or telling Dr. Myers that he had worn the tone generator predominantly in the left ear. In a deposition, Dr. Johnson stated that claimant had reported he had worn the tone generator "mostly in the left ear and some in the right ear." He concluded that the hearing loss in both ears was primarily attributable to noise exposure.

Claimant also testified that the tinnitus in his left ear is extremely annoying, causes him to lose sleep and makes him nervous and irritable. He said:

> "Even with the hearing aid, I still have problems in a group like this. It is either picking up too much noise or background noise or whatever, but it is difficult to adjust to it."

His wife testified that he has difficulty hearing her voice and that he had previously been a "very calm person," but that the tinnitus has caused him to be nervous and upset and to complain frequently of headaches. However, claimant's supervisors testified that they had not noticed irritability or nervousness.

The referee found claimant an "absolutely credible witness" and that he had used the tone generator "predominantly on his left ear although he would alternatively use the instrument on his right ear." He also found that claimant's tinnitus condition in his left ear caused irritability, sleeplessness and fatigue. He concluded:

> "In the broad field of industrial occupations a 'cranky' 54-year-old worker with a sleeping problem is going to have fewer opportunities to obtain and hold gainful employment than one who is not so afflicted."

He awarded claimant 16.5 percent scheduled permanent partial disability for the hearing loss in both ears and 15 percent unscheduled permanent partial disability for the tinnitus.

In reversing the referee's order with respect to the binaural hearing loss claim, the Board stated:

[1] Claimant obtained a hearing aid in 1978 and a masking device to help alleviate the tinnitus in 1980.

"Ordinarily, we give great deference to a Referee's credibility finding. Here, however, the Referee's credibility finding does not advance the decisional calculus. Claimant has presented different versions of what happened in 1970 on his 801 claim form, to Dr. Camp, to Dr. Myers and at the hearing. It is impossible for claimant to have been 'absolutely credible' in all four contexts. We do not imply there was any deliberate misstatement; we only note that there can obviously be memory problems when a claim is asserted long after most statutes of limitations applicable in the judicial system would have run.

"Considering all the evidence, we have sufficient doubts which prevent finding that claimant sustained his burden of proving more than he claimed on the 801 form he executed, i.e., proving compensable binaural hearing after only claiming left ear hearing loss."

A claimant must establish a claim by a preponderance of the evidence. *Hutcheson v. Weyerhaeuser,* 288 Or 51, 602 P2d 268 (1979). Contrary to the Board, we conclude that the evidence preponderates in claimant's favor on the issue of whether his right ear hearing loss is work-related. He testified that he wore the defective headset on both ears, and the referee found him "absolutely credible." Claimant suffered "moderate to severe" nerve deafness in the right ear, that hearing loss being slightly less than that in the left ear. There is no quantitative medical evidence to support the Board's conclusion that the claimant's right ear hearing loss is attributable to "hereditary factors and presbycusis."[2] In our view of the record, claimant's right ear hearing loss is better explained by his version of the facts — that is, that he wore the headset on both ears. We reverse the order of the Board and reinstate the referee's award of 16.5 percent scheduled permanent partial disability for binaural hearing loss.

Claimant also argues that the Board erred in not awarding any compensation for tinnitus, which the parties agree is an *unscheduled* permanent partial disability. Whether claimant's tinnitus condition is compensable depends on whether he has suffered a loss of earning capacity as a result of it. ORS 656.214(5);[3] *Surratt v. Gunderson Bros.,* 259 Or 65, 78, 485 P2d 410 (1971); *Ryf v. Hoffman Construction Co.,* 254 Or 624, 459 P2d 991 (1969). Claimant is still employed as a splicer by employer, and his salary is currently at the top of the salary range for his job classification. For 12 years since his 1970 injury, he has successfully worked as a splicer, with no limitations on his working ability as a result of the tinnitus and no impairment of earnings. Moreover, he made no showing that his ability to obtain other employment, given his skills, intelligence, training, experience and age, was impaired by the condition. The Board properly denied compensation for the tinnitus condition.

Affirmed in part; reversed in part; referee's award for binaural hearing loss reinstated.

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[2] Presbycusis is a natural loss of hearing related to aging.

[3] ORS 656.214(5) was not in effect at the time of claimant's injury. Nevertheless, case law at the time of the injury measured unscheduled disability by the loss of earning capacity. *See Ryf v. Hoffman Construction Co., infra.*

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Garland J. Arnaud, Claimant.

ARNAUD,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(79-10623; CA A23308)

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 Gary M. Galton, Catherine Riffe, and Galton, Popick & Scott, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, Thornton, Senior Judge, and Van Hoomissen, Judge.

RICHARDSON, P. J.

Affirmed on compensability; remanded for a determination of the attorney fees on the separate issue of penalties for unreasonable delay.

RICHARDSON, P. J.

In this workers' compensation case claimant appeals the order of the Workers' Compensation Board reversing the referee's determination that claimant's heart-related disability was compensable. Claimant also contends that he is entitled to attorney fees for prevailing on the issue of penalties for unreasonable delay in processing the claim, independent from the fee awarded for having prevailed on a denied claim.

We have reviewed the extensive medical testimony and expert opinions and conclude, as did the Board, that SAIF correctly denied compensability.

The referee found that SAIF had unreasonably delayed processing the claim and awarded claimant 25 percent of the temporary total disability payments as a penalty. The referee concluded that the claim was compensable. She awarded claimant $3,000 attorney fees but did not designate separate fee awards for prevailing on the denied claim and for prevailing on the penalty issue. SAIF did not raise the penalty award issue before the Board.

The Board's order appears to reverse the order of the referee. We cannot discern whether it intended to reverse the determination of penalties or only the finding of compensability, but because the issue of penalties was not appealed or raised by SAIF, the Board could not rule on that issue. *See Stone v. SAIF,* 294 Or 442, ___ P2d ___ (1983). Claimant is entitled to attorney fees for prevailing on the issue of penalties before the referee. Because that issue was not litigated before the Board, attorney fees are not justified on Board review.

Affirmed on compensability and remanded for a determination of the attorney fees on the separate issue of penalties for unreasonable delay.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Orville A. Bales, Claimant.

BALES,
Petitioner,
v.
SAIF CORPORATION,
Respondent.

(80-03397; CA A23327)

Remanded from the Oregon Supreme Court, *Bales v. SAIF,* 294 Or 224, ___ P2d ___ (1982).

Judicial Review from Workers' Compensation Board.

Submitted on remand December 21, 1982.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, appeared for respondent.

Benton Flaxel, North Bend, appeared for petitioner.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

This case was remanded to us by the Supreme Court for reconsideration in light of that court's opinion that a doctor's testimony may not be discounted solely for the reason that he stated that stress never causes heart attacks, notwithstanding that court's opinion in *Clayton v. Compensation Department,* 253 Or 397, 454 P2d 628 (1969). *Bales v. SAIF,* 294 Or 224, ___ P2d ___ (1982).

The facts are set out both in our prior opinion, 57 Or App 621, 623, 646 P2d 83 (1982), and in the Supreme Court's opinion. 294 Or at 224. It is sufficient to point out here that claimant seeks reversal of the Board's decision affirming the referee's opinion and order that his myocardial infarction is not compensable. In our prior opinion, we discounted one doctor's testimony, because he expressed the opinion that stress does not cause heart attacks, which opinion appeared to be contrary to the statement in *Clayton* that the court rejected the view that exertion or stress can never be a causative factor in these cases. 253 Or at 402. We are instructed on remand that the testimony of that doctor cannot be given "less weight" for that reason.

After reviewing the testimony as a whole, we are more persuaded by the testimony of Dr. Griswold and conclude that the preponderance of the medical evidence establishes that claimant's work-connected exertion was a precipitating factor in the onset of his myocardial infarction. *See Batdorf v. SAIF,* 54 Or App 496, 635 P2d 396 (1981).

Reversed and remanded with instructions to accept the claim.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Terry L. Starbuck, Claimant.

BOISE CASCADE CORP.,
Petitioner,
v.
TERRY L. STARBUCK et al,
Respondents.

(79-04425; CA A23754)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 25, 1982.

Brian L. Pocock, Eugene, argued the cause for petitioner. With him on the brief was Cowling, Heysell & Pocock, Eugene.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent State Accident Insurance Fund Corporation.

Russell W. DeForest, Medford, waived appearance for respondent Terry L. Starbuck.

Before Buttler, Presiding Judge, and Joseph, Chief Judge, and Warren, Judge.

BUTTLER, P. J.

Affirmed.

BUTTLER, P. J.

Self-insured employer Boise Cascade Corporation (Boise) seeks judicial review of a determination by the Workers' Compensation Board (Board) that Boise is responsible for an aggravation of claimant's low back condition. Boise argues that a subsequent employer, insured by SAIF, is responsible under the "last injurious exposure" rule, which this court supposedly applied in *Smith v. Ed's Pancake House,* 27 Or App 361, 364, 556 P2d 158 (1976). We affirm.

Claimant had no history of low-back problems before 1978. His job as a barker saw operator with Boise involved facilitating the moving of logs on a conveyer belt. On April 12, 1978, he filed a claim indicating that the injury had occurred in January. Concerning the cause, claimant indicated: "Not sure. Moving logs with pevee [*i.e.,* peavey: hooked, spiked logging tool] or fell down." The claim was filed after he had experienced low-back pain for about two months and had sought medical treatment in March, 1978. He lost no time from work; the claim was

accepted as non-disabling. At the hearing on that claim, claimant testified that his back problem arose when he lifted too much weight with the peavey; he also mentioned an incident when he had had to lift a broken conveyer ramp. He admitted that there was no occasion when he had "fall[en] down in pain."

Claimant left his job with Boise in June, 1978, and started working for Northwest Quality Cabinets (Northwest), insured by SAIF, in August, 1978. He testified that there was no single, identifiable, injurious incident at Northwest, but that lifting cabinets may have irritated his back. The lifting was occasional, involving weights of about 50 to 60 pounds. He stated that his low-back condition gradually worsened from January, 1978, to January, 1979. In December, 1978, he fell over several times when his leg folded up under him because it was numb. He sought further medical treatment in January, 1979, and was diagnosed as having a herniated disc. He underwent surgery in February, 1979.

There are three medical opinions as to the cause of claimant's condition. Dr. West, who saw claimant in April,

1978, and again in January, 1979, speculated that an acute event of some sort probably happened in January, 1979, and that heavy lifting while claimant was working at Northwest "may indeed have precipitated" claimant's seeking further medical treatment. In contrast, Dr. James, to whom claimant was referred by Dr. West, found a "very strong medical probability" that claimant's herniated disc problem began at the time of the original complaint. Dr. James referred him to Dr. Yamodis for the back operation. Dr. Yamodis thought that claimant's progressive deterioration might not have resulted in surgery had he not sustained further straining, and that it was "possible" that straining at work at Northwest could have exacerbated his low-back pain. Claimant's own testimony establishes that no specific injurious incident or trauma occurred at Northwest.

The referee found that there had been a new injury while claimant was working for Northwest; he designated SAIF as the responsible insurer. The Board reversed, finding that claimant suffered no injury at Northwest:

> "* * * Claimant unequivocally testified there was no injury, trauma or onset of significantly increased symptoms at that job; rather, claimant's story was one of generally constant and gradually worsening back symptoms throughout 1978 and into 1979 following his accepted back injury claim while working at [Boise].
>
> "* * * This record cannot and does not support a finding of a new injury at [Northwest].
>
> "* * * * *
>
> "* * * We find the most persuasive medical reports to be * * * [those that] conclude that claimant's herniated disc most likely originated at the time of his early 1978 claim

while working at [Boise]. * * * Claimant has proven his aggravation claim against [Boise] to our satisfaction."

Boise argues that the application of the last injurious exposure rule operates to assign liability to SAIF as the insurer for the last employer, whether claimant's condition is the result of an injury or is an occupational disease. In oral argument, Boise cited the Supreme Court's opinion in *Bracke v. Baza'r,* 293 Or 239, 646 P2d 1330 (1982), as supporting its position that so long as the working conditions at the last employment *could* have caused the

compensable condition, liability is imposed on the last employer. There is language in the opinion in *Bracke* that would appear to support that result.

Bracke involved an occupational disease claim, and the question was whether the "last injurious exposure" rule precluded the claimant from asserting her claim against an employer other than the last employer, where the working conditions were such that they *could* have caused claimant's disease. The court affirmed this court's decision that the rule *did not preclude* the claim when the medical evidence supported her contention that the disease was, in fact, contracted while she was working for a prior employer. Because that proposition was a variation on the application of the rule, the Supreme Court reviewed the various ways in which the so-called "last injurious exposure" rule has been applied.

The court pointed out that the common reference to the rule "as if it were unitary is somewhat misleading." 293 Or at 245. It went on to point out that there are at least two "last injurious exposure" rules, each serving different functions, and it attempted to explain some of the confusion that has resulted. It characterized one rule as a substantive rule of liability assignment, and the other as a rule of proof. The court said:

> "The substantive rule of liability is perhaps the most common. It operates to assign liability to one employer in cases of successive, incremental injuries. The rule serves as a substitute for allocation of liability among several potentially liable employers, each of whom would otherwise be liable for a portion of the disability. Typically in such cases, causation is readily determinable, but the task of allocation among several partially liable employers would be difficult and impractical. For example, where a worker suffers successive back injuries while working for successive employers, it would be difficult to determine the exact proportion of the resulting disability attributable to each employer. Allocation would also require undesirably duplicative and costly litigation. Instead, the rule assigns liability for the entire aggregate disability to the employer at the time of the last injury and dispenses with the need for allocation. For examples, *see, Cutright v. Amer. Ship Dismantler, supra,* and *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976). In *Davidson Baking v.*

Ind. Indemnity, 20 Or App 508, 532 P2d 810 *rev den* (1975), the rule was applied to incremental, determinable hearing loss.

"The other rule, the rule of proof, was the basis of our decision in *Inkley [v. Forest Fiber Products Co.,* 288 Or 337, 605 P2d 1175 (1980)]. There, the claimant suffered incremental hearing loss caused over a period of time when claimant was subjected to conditions which could cause the disability. During that period, however, his employment was insured by successive insurers. It could not be determined whether employment under the last insurer actually caused any additional hearing loss. This court held that the last insurer would be liable for the entire disability if the conditions of employment were of a nature which could have contributed to the disability. In such a case, the last injurious exposure rule was applied not only as a substitute for allocation, as in the first class of cases, but also for an altogether different purpose: to relieve the claimant of the 'burden of proving medical causation,' as to any specific insurer, 288 Or at 345. Thus, it is seen that one rule is to efficiently assign liability and another distinct rule fulfills a requirement of claimant's burden of proof." 293 Or at 245-46. (Footnote omitted.)

The court also stated that both rules apply to cases of occupational disease as well as to injury cases. 293 Or at 248.

We are not certain what the court meant in *Bracke* when it said there are two rules, each of which applies to occupational diseases and to injury cases. We believe that the court was pointing out two aspects of a single rule. The classic aspect is the one represented by *Inkley v. Forest Fiber Products Co.,* 288 Or 337, 605 P2d 1175 (1980). There, the Supreme Court classified incremental hearing loss as an occupational disease similar to asbestosis and silicosis. 288 Or at 341. The court applied the last injurious exposure rule that this court had adopted in *Mathis v. SAIF,* 10 Or App 139, 499 P2d 1331 (1972), an occupational disease case involving asbestosis. As the court pointed out in *Inkley,* 288 Or at 342, the basis of the *Mathis* rule was Professor Larson's discussion of the last injurious exposure rule as it applied to occupational diseases:

" 'In the case of occupational disease, liability is most frequently assigned to the carrier [or employer] who was

on the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease * * *.

" '* * * * *

" 'It goes without saying that, before the last injurious-exposure rule can be applied, there must have been some exposure of a kind contributing to the condition. So, if a silicosis claimant had been transferred to outside work or to work in a place where dust conditions were not harmful, the carrier on the risk during the later period will not be held liable. But, once the requirement of some contributing

exposure has been met, courts applying this rule will not go on to weigh the relative amount or duration of the exposure under various employers and carriers. * * *' 3 Larson, Workmen's Compensation Law § 95.21 (1971), quoted in *Mathis, supra,* 10 Or App at 144-45."

Inkley [1] makes it clear that the burden on the claimant in occupational disease cases under the last injurious exposure rule is not to prove that the last exposure was, in fact, the medical cause but, rather, to prove only "that the employment environment could have contributed" to the condition. 288 Or at 337. That aspect of the rule was characterized by *Bracke* as the "rule of proof."

It is true, as *Bracke* points out, that there is another aspect of the rule — the assignment of liability to the last employer at which the working conditions were such that they could have caused the disease. Those applications of the rule are typically clear enough in occupational disease cases.

The confusion arises primarily because of Professor Larson's use of the phrase "last injurious exposure" in connection with the imposition of liability in successive injury cases. 4 Larson, Workmen's Compensation Law § 95.12, 17-71—17-78. It is unfortunate, perhaps, that we quoted that language in *Smith v. Ed's Pancake House,* 27 Or App 361, 364-65, 556 P2d 158 (1976). The substance of the rule enunciated by Larson, and applied in *Smith,* is correct, but it is not appropriate to characterize it as a "last

injurious exposure" rule. Rather, it is more accurate to call it "the last injury rule." Omitting Larson's first paragraph, the rule is:

> "'If the second [*i.e.,* last] injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. In this class would fall most of the cases discussed in the section on range of consequences in which a second injury occurred as the direct result of the first, as when claimant falls because of crutches which his first injury requires him to use. This group also includes the kind of case in which a man has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion.
>
> "'On the other hand, if the second [*i.e.,* last] 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 contributes the major part to the final condition. This is consistent with the general principle of the compensability of the aggravation of a pre-existing condition.'" 27 Or App at 364-65, quoting 4 Larson, Workmen's Compensation Law 17-71—17-78, § 95.12 (1976).

[1] There is some question in *Bracke* as to just what kind of case *Inkley* was. The *Bracke* court refers to *Inkley* twice as an occupational disease case, 293 Or at 245 and 246, but in a footnote the court characterizes *Inkley* as a case of "incremental injury." 293 Or at 250 n 5.

Although that rule imposes total liability for a disability on the employer for whom the claimant worked at the time of the last injury, that liability is not imposed (as it would be in the case of an occupational disease) because the work exposure *could* have caused the disability; it is imposed because there was a traumatic incident that contributed independently to the claimant's disability. We believe that the court in *Bracke* intended that application of "the rule" as it relates to *injury* cases when it said that "the substantive rule of liability" applies to them. That is, total liability is assigned to the last employer, even though the prior injury may be the major cause of the claimant's disability following the second injury.

That does not, however, take care of "the rule of proof," and we do not understand *Bracke* to require *only* that a claimant in a successive injury case prove that the working conditions at the last employer *could* have caused

his disability. To the contrary, the court approved our decision in *Smith,* which requires proof of actual, independent contribution of the second employment to the disabling condition. Under the *Bracke* "rule of proof," potential contribution would suffice. Obviously, different results would follow in cases where the proof establishes only potential contribution: under *Smith,* the first employer would be liable; under the *Bracke* "rule of proof" the last employer would be liable. That problem exists here. The preponderance of the evidence establishes not that claimant's work exposure at Northwest actually contributed to his back disability, but only that it could have. If applied, the *Bracke* "rule of proof" would operate to shift responsibility to the last employer, insured by SAIF, whereas application of the rule under *Smith* would render the first employer (Boise) responsible.

We do not believe the court in *Bracke* intended to create that problem or, for that matter, to change the law. The issues in *Bracke* required decisions only on whether a claimant is precluded by the last injurious exposure rule from filing a claim against a prior employer and whether that employer may rely on that rule to impose responsibility on later employers. In resolving those issues, the court discussed the various applications of what it called two rules. In doing so, it accepted Larson's articulation of the two rules as applying to different classes of disabilities. As stated above, Larson says one rule (the rule we adopted in *Smith*) applies to accidental injuries; the other rule (adopted in *Mathis* and approved in *Inkley*) applies to occupational diseases.

Bracke attempts to synthesize the two rules by characterizing the injury cases it cites as cases of "successive, incremental injuries." Evidently, *Smith* itself would be such a case, even though in *Smith* there were two distinct traumas or injuries, one suffered in the first employment and one in the second. But *Bracke* makes no attempt to reconcile the different results that might obtain

from extending the "rule of proof" to injury cases. That question was not involved, and the court's statement that the "rule of proof" applies to injury cases is *dicta.* We believe the court was misled by accepting Larson's characterization of the successive injury cases as "last injurious

exposure" cases, which they are in the sense only of assigning total liability to the last employer. That characterization is confusing and misleading, and we disapprove that portion of the *Smith* language, but we approve the rule we actually applied.

Boise argues that SAIF is responsible whether claimant's condition here is the result of an injury or of an occupational disease. Under our interpretation of *Bracke,* the "rule of proof" it explained is applicable only to occupational diseases. It is therefore necessary to determine which kind of claim this one is. The only Oregon cases of which we are aware that treat back injuries as occupational diseases are those applying the rule in *Beaudry v. Winchester Plywood Co.,* 255 Or 503, 469 P2d 25 (1970), that worsening of a preexisting disease caused by employment is compensable as an occupational disease. *See, e.g., Morgan v. Beaver Heat Treating Corp.,* 44 Or App 209, 212, 605 P2d 732 (1980) (thoracic and cervical condition temporarily worsened by employment; *Geenty v. Hyster, Inc.,* 23 Or App 146, 151, 541 P2d 486 (1975) (unusual twisting of forklift driver's neck worsened underlying cervical disc disease). This is not such a case. Claimant had no history of back trouble prior to his 1978 compensable injury at Boise. Moreover, claimant identified his present claim as being for an injury in his request for hearing and accompanying affidavit, despite an apparent inability at the hearing to describe in any detail a specific episode of trauma.

In *Valtinson v. SAIF,* 56 Or App 184, 641 P2d 598 (1982), we determined that a low-back problem was an injury rather than an occupational disease, because (1) it was not gradual in onset over a long period of time, but evidenced itself within a relatively short, discrete period of time, and (2) it was unexpected, in that the claimant had had no previous back problems, rather than being inherent in continued exposure. Here, claimant's problems evidently surfaced relatively soon after an incident in January, 1978, for in March claimant sought medical treatment because he had had two months of pain. Furthermore, he had experienced no previous back trouble. There is no claim here that the back condition was an inherent hazard of continued exposure to the particular conditions of employment; rather, the record, meager as it is, provides more

support for the conclusion that the problem was the result of an episode of unusual stress encountered in moving logs or a conveyer belt. Under the analysis in *Valtinson,* this claim would be for an injury. We conclude that claimant's back condition was the result of an injury, rather than an occupational disease.

Given that conclusion, the rule of *Smith* applies, and it is not the "last injurious exposure" rule. *Smith* is the rule applied by the Board to find Boise liable on the ground that there was no new injury during the employment with Northwest to contribute independently to the back condition. We agree with the Board. Under the *Smith* analysis, and on the basis of the evidence, both lay and medical, we conclude that claimant's back condition was a recurrence or worsening of the original injury; that is, that was no second injury, and the second employment did not independently contribute to the condition. Boise is the responsible employer.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Samuel Wallace, Claimant.

WALLACE,
Petitioner,
v.
GREEN THUMB, INC.,
Respondent.

(WCB No. 81-02577; CA A24243)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 25, 1982.

Charles S. Tauman, Portland, argued the cause for petitioner. With him on the briefs was Willner, Bennett, Bobbitt, Hartman & Tauman, P.C., Portland.

Emil R. Berg, Portland, argued the cause for respondent. With him on the brief was Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Buttler, Presiding Judge, Joseph, Chief Judge, and Warren, Judge.

WARREN, J.

Reversed and remanded with instructions to accept the claim.

WARREN, J.

Claimant appeals an order of the Workers' Compensation Board affirming the self-insured employer's denial of his claim for benefits. We reverse.

The facts are undisputed. At the time of the injury, claimant was 87 years old and employed as a watchman and caretaker of a rural fire station utilized by a volunteer fire department. His duties consisted of assistance in a "Meals on Wheels" program, security for the fire station, maintenance of the grounds, snow removal, maintenance of the fire trucks (insuring that the gas tanks were full and that the batteries were charged) and response to fire alarms by opening the station doors and starting the fire trucks in preparation for the arrival of the firefighters. He was on call 24 hours a day. Because of the nature of the job, employer required claimant to live on the fire station premises. He lived in a trailer that he had owned before beginning the job. Employer moved the trailer to the fire station premises and provided free utilities. Claimant was injured while preparing dinner in his trailer when his butane stove exploded.

This case presents an issue of first impression in Oregon: the compensability of injuries that arise out of personal comfort activities of workers who are required to live on the work premises.

ORS 656.005(8)(a) defines a "compensable injury" as "an accidental injury * * * arising out of and in the course of employment * * *." In *Rogers v. SAIF,* 289 Or 633, 616 P2d 485 (1980), the court rejected the mechanistic two-stage method of analysis by which "arising out of" and "in the course of" were treated as separate tests, both of which had to be met for an injury to be compensable. Instead, the court adopted a "unitary 'work-connection' approach" and defined the ultimate inquiry as "[I]s the relationship between the injury and the employment sufficient that the injury should be compensable?" 289 Or at 642. The court directed that the inquiry be made in light of the policy behind the Workers' Compensation Act:

> "'[T]he financial protection of the worker and his/her family from poverty due to injury incurred in production,

> regardless of fault, as an inherent cost of the product to the consumer.'" 289 Or at 643, quoting *Allen v. SAIF,* 29 Or App 631, 633, 564 P2d 1086, *rev den* 280 Or 1 (1977).

The court made clear that, by adopting its "work-connection" approach, it was not rejecting the specialized concepts that have been developed to analyze the relationship between the injury and the employment, *e.g.,* personal comfort, special errand and lunch hour cases.

> "In adopting a unitary 'work-connection' approach in place of the customary mechanistic two-stage method of analysis, it is not our intention to substantially change fundamental Workers' Compensation law. [Footnote omitted.] If the injury has sufficient work relationship, then it arises out of and in the course of employment and the statute is satisfied. Existing law regarding proximity, causation, risk, economic benefit, and all other concepts which are useful in determining work relationship remain applicable. * * *" 289 Or at 643.

Although no Oregon cases have concerned injuries arising out of personal comfort activities of resident employees,[1] we have held that injuries arising out of certain personal comfort activities of employees having a fixed time and place for work are compensable. *Halfman v. SAIF,* 49 Or App 23, 618 P2d 1294 (1980) (employee injured crossing street to find restroom and something to drink during coffee break); *Olsen v. SAIF,* 29 Or App 235, 562 P2d 1234, 30 Or App 109, 566 P2d 1202, *rev den* 280 Or 1 (1977) (employee injured while repairing co-worker's bicycle during lunch hour). Further, in *Clark v. U.S. Plywood,* 288 Or 255, 605 P2d 265 (1980), the Supreme Court formulated a specialized test to determine the compensability

[1] We use the term "resident employee" to mean employees who are required to live on the job premises either by their contract of employment or by the nature of their duties.

of injuries from personal comfort activities that occur on the work premises.

Clark involved an employee who was killed while retrieving his lunch, that he had left to warm atop a hot glue press. The court defined personal comfort activites as activities incidental to but not directly involved in the performance of the appointed task, such as preparing for work, going to and from the work area, eating, resting,

going to the toilet, getting fresh air, quenching thirst and engaging in recreational activities during lunch or rest periods. 288 Or at 260-61. The court formulated a test to determine the compensability of injuries arising out of on-premises personal comfort activities and explained its rationale as follows:

> "We believe that the compensability of on-premises injuries sustained while engaged in activities for the personal comfort of the employee can best be determined by a test which asks: Was the conduct expressly or impliedly allowed by the employer?
>
> "Clearly, conduct which an employer expressly authorizes and which leads to the injury of an employee should be compensated whether it occurs in a directly related work activity or in conduct incidental to the employment. Similarly, where an employer impliedly allows conduct, compensation should be provided for injuries sustained in that activity. For example, where an employer acquiesces in a course of on-premises conduct, compensation is payable for injuries which might be sustained from that activity. Acquiescence could be shown by showing common practice or custom in the work place.
>
> "This test squares with the well established requirement that compensation lies for all activities related to the employment if it carries out the employer's purposes or advances the employer's interests directly or indirectly. * * *" 288 Or at 266-67.

Many jurisdictions, including Oregon, award compensation for injuries from on-premises personal comfort activities, whether they occur during fixed working hours or during unpaid breaks. *See Halfman v. SAIF, supra; Olsen v. SAIF, supra;* 1A Larson, Workers' Compensation Law, § 21 (1982). Some jurisdictions to award compensation for on-premises injuries to resident employees that occur outside of the employee's working hours when not on call. 1A Larson, *supra,* § 24.30; *see, e.g., Allen v. D.D. Skousen Const. Co.,* 55 N.M. 1, 225 P2d 452 (1950) (employee injured while cooking breakfast). The great majority of jurisdictions award compensation for injuries from personal comfort activities of resident employees who are continuously on the premises and continuously on call. 1A Larson, *supra,* § 24.21; *see, e.g., Bourn v. James,* 191 Neb 635, 216 NW2d 739 (1974) (ranch hand injured in fire while sleeping in trailer provided by employer); *Leak v. Rockland State School,* 65 AD2d 834, 409 NYS2d 828 (1978) (hospital employee injured when fleeing robbers who entered a

building in which he was socializing with a co-employee); *Texas Employers' Ins. Ass'n. v. Prasek,* 569 SW2d 545 (Tex Civ App 1978) (employee choked to death eating dinner in trailer provided by employer). Larson notes that, although the general rule is that injuries from on-premises personal comfort activities of resident employees on continuous call are compensable, courts must draw the line short of unlimited coverage of everything that happens on the premises. 1A Larson, *supra,* §§ 24.21, 24.22.

We hold that the *Clark* test applies to injuries from on-premises personal comfort activities of resident employees who are on call continuously. An injury is compensable if the employer has expressly or impliedly allowed the conduct in question. The court's rationale for formulating the *Clark* test for nonresident employees with fixed working hours, quoted above, is even stronger when applied to resident employees on 24-hour call. Personal comfort activities of the latter employees clearly advance the employer's interest, because the nature of the employment *requires* that the activities, eating, drinking, sleeping, recreation, and the like, take place at the work site. Further, the *Clark* test squares with the general rule of compensation for injuries from on-premises personal comfort activities of resident employees on call continuously. Lastly, the *Clark* test does not allow for unlimited coverage of everything that happens on the premises.

Claimant's injury is compensable. His duties required that he live on the job premises. He was continuously on call. Employer had to know that he would prepare his meals on the premises. By requiring that he live on the premises and by failing to provide food service for him, employer not only allowed but virtually *required* that claimant prepare his own meals.

Employer argues that the rules for resident employees should not apply to claimant, because he lived in his own trailer and was, therefore, not injured on the work premises. We find this argument unpersuasive. The nature of the employment mandated that claimant have shelter on

the job premises. Because he lived in his own trailer after employer moved it to the job site, employer was not required to provide him shelter or cooking facilities. When an employer requires a claimant to live on the job site and reaps the benefits of the claimant's use of his own trailer, for us to engage in the fiction that the employee was not injured on the job premises and, therefore, deny him compensation would be a draconian result, incompatible with the policy behind the Act.

Employer and the Board relied on *Otto v. Moak Chevrolet,* 36 Or App 149, 583 P2d 594 (1978), *rev den* 285 Or 319 (1979), to support their conclusion that claimant's injury is noncompensable. In *Otto,* we denied compensation for a bookkeeper who had strained her lower back when pulling up her clothes after going to the toilet on the job

premises. We held that the injury did not "arise out of" the employment, because "it is very likely the back condition experienced by claimant could have occurred when she pulled up her underwear after using the toilet facilities at some other place." 36 Or App at 154. Here, employer and the Board both concluded that claimant's injury was not compensable, because he likely would have been living and cooking in his trailer and the injury would have occurred even if he had not been required to live on the job premises.

We conclude that *Otto* has no continued validity. At the time we decided it, we followed the previous Supreme Court opinions setting out the two-step analysis for determining compensability. After *Rogers* and *Clark,* however, *Otto* is no longer an accurate statement of the law. In *Rogers,* the court used *Otto* as an example of the mechanistic two-step analysis that it rejected. 289 Or at 641-42.

Reversed and remanded with instructions to accept the claim.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Robert J. Queen, Claimant.

QUEEN,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(79-03862; CA A24338)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 15, 1982.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Donna M. Parton, Associate Appellate Counsel, Salem, argued the cause for respondent. On the brief was Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem.

Before Richardson, Presiding Judge, Thornton, Senior Judge, and Van Hoomissen, Judge.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Claimant appeals a decision of the Workers' Compensation Board that reversed a hearings referee's ruling that claimant's heart problems were compensably related to his work activity as a woods foreman. The issue is whether claimant has proved by a preponderance of the evidence that his work activity was a major contributing cause of his heart condition. We affirm.

Claimant was age 55 at the onset of his disability. He was employed as a foreman for a logging operation. During the summer of 1978, he had experienced episodes of numbness in his left arm and shortness of breath at work. On August 7 or 8, he experienced a recurrence of these symptoms together with severe chest pain, profuse sweating and nausea. The temperature was 100 degrees that day, and claimant was rushing to get his crew out of the brush before a 1 p.m. fire closure. He was performing strenuous physical labor. He finished the day and continued working until December 8, although he felt a loss of stamina and increasing discomfort after any exertion. On December 11, he sought medical treatment. His doctor admitted him to the Coquille hospital that day with a diagnosis of atrial

fibrillation with congestive heart failure. He was transferred to the progressive cardiac unit at Sacred Heart Hospital in Eugene, where, on December 15, he suffered a cerebral vascular accident. His diagnosis was arteriosclerotic heart disease with atrial fibrillation, angina pectoris, congestive heart failure and probable arteriosclerotic cardiomyopathy. The cerebral vascular accident was considered to be due to cerebral embolus, possibly from a left ventricular mural thrombus.

Dr. Keene, claimant's treating cardiologist, could not relate claimant's illness to his work activity and believed that he has "several disease processes, none of which would be related to his employment." Dr. Kloster, also a cardiologist, reviewed claimant's medical file and said claimant's work activity was not a material contributing cause to the development of the complications of previous myocardial infarctions, impairment of left ventricular functions, congestive heart failure or atrial fibrillation. Dr. Kloster believed that these were the result of "chronic,

natural progression of coronary arterosclerosis and narrowing that his exertion at work simply made manifest, symptoms which could equally and as easily been provoked by equivalent exertion in recreational or other personal activities." Neither doctor believes that work activities are often a material contributing cause of a heart patient's condition.

Claimant contends that the opinions of Drs. Kloster and Keene should be rejected because they do not accept the *legal* standard upon which medical causation is proved in heart compensation cases. Claimant relies on *Bales v. SAIF,* 57 Or App 621, 646 P2d 83 (1982), which rejected a specialist's view because he felt that heart attacks were never caused by on-the-job exertions, a theory seemingly rejected by the Oregon Supreme Court in *Clayton v. Compensation Department,* 253 Or 397, 454 P2d 286 (1969):

> "* * * We have chosen to reject the view that exertion or stress can never be a causative factor in these cases." 253 Or at 402.

Since oral arguments in this case, the Supreme Court, on review of our decision in *Bales v. SAIF, supra,* has had an opportunity to reconsider its language in *Clayton:*

> "* * * It is a strange statement, considering our role under the constitution. We were not required to enter upon factfinding in *Clayton;* we did not cite any other case in which we had made such a finding. The statement is not, and clearly should not have been, a rule of law. We concluded that the evidence in *Clayton* was sufficient to present a case for the jury's resolution as a matter of fact. Our result was correct, but the case does not stand for the proposition that any given witness' testimony is to be disregarded as a matter of law because of the school of medical thought to which he belongs. On the other hand, the testimony of a medical witness should not necessarily be given less weight, as a matter of law, simply because he

> espouses the thoughts of a minority of the medical profession." *Bales v. SAIF,* 294 Or 224, 234-35, ___ P2d ___ (1982). (Footnote omitted.)

The Supreme Court reversed and remanded *Bales* to this court to re-examine the evidence in light of this new construction of *Clayton. See Bales v. SAIF,* 61 Or App 613, ___ P2d ___ (1983). Accordingly, we cannot reject the

opinions of Drs. Keene and Kloster on the ground advanced by claimant; we must weigh them according to their individual merit.

Claimant next contends that Dr. Kloster's opinion is entitled to little weight because, unknown to Dr. Kloster, claimant had symptoms of profuse sweating and nausea while at work. Dr. Kloster agreed that having this information might have made a difference in his opinion that claimant did not have a myocardial infarction while at work, but he did not conclude affirmatively that claimant's condition would have been work-related if he had in fact suffered a myocardial infarction while on the job. Proof of an attack while working could satisfy only the legal causation element of claimant's burden. He must also prove medical causation. *Coday v. Willamette Tug & Barge,* 250 Or 39, 440 P2d 224 (1968); *Thurston v. Mitchell Bros., Contractors,* 58 Or App 568, 649 P2d 605 (1982).

Claimant relies solely on the opinion of Dr. Wysham to prove medical causation. On the basis of the history obtained from claimant and his wife in December, 1979, the doctor believed that it would be reasonable to assume that claimant had a myocardial infarction while at work in August, 1978. He wrote: "It would also appear that the work in which Mr. Queen was engaged at that time may have been related in a material way to the myocardial infarction which presumably occurred at that time." Dr. Wysham's opinion does not establish a causal connection between claimant's heart condition and his work activity. Claimant must prove more than just the possibility of a causal connection to establish compensability of a claim. *Miller v. SAIF,* 60 Or App 557, 562, 654 P2d 1139 (1982); *Lenox v. SAIF,* 54 Or App 551, 554, 635 P2d 406 (1981); *Gormley v. SAIF,* 52 Or App 1055, 1061, 630 P2d 407 (1981). Claimant has not met his burden to prove by a preponderance of the expert evidence a causal relationship between his work activities and his heart problem.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
the Beneficiaries of John P. Ginter,
Deceased, Claimant.

GINTER,
Petitioner,
v.
WOODBURN UNITED METHODIST CHURCH et al,
Respondents.

(81-05811; CA A24675)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 29, 1982.

Richard A. Weill, Canby, argued the cause for petitioner. With him on the brief were R. Roger Reif, and Reif, Reif & Clancy, Canby.

Deborah S. MacMillan, Portland, argued the cause for respondents. With her on the brief were Frank A. Moscato, and Moscato & Meyers, Portland.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Van Hoomissen, Judge.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Claimant appeals[1] an order of the Workers' Compensation Board that reversed a referee's order finding that her husband's May, 1979, myocardial infarction was compensable but that his November, 1979, death was not.[2] She also contends that the carrier's denials were unreasonable and that penalties and attorney fees should have been awarded. The issues are (1) whether claimant sustained her burden of proof on the issue of the compensability of her husband's infarction and (2) whether the carrier unreasonably failed to pay or unreasonably delayed payment of

[1] Claimant, as decedent's widow, is entitled to the same award decedent would have received had he survived. ORS 656.218 provides:

"(1) In case of the death of a worker entitled to compensation, whether eligibility therefor or the amount thereof have been determined, payments shall be made for the period during which the worker, if surviving, would have been entitled thereto.

"(2) If the worker's death occurs prior to a determination having been made under ORS 656.268, the insurer or the self-insured employer shall so notify the director and request the claim be examined and compensation for permanent partial disability, if any, be determined.

"(3) If the worker has filed a request for a hearing pursuant to ORS 656.283 and death occurs prior to the final disposition of the request, the persons described in subsection (5) of this section shall be entitled to pursue the matter to final determination of all issues presented by the request for hearing.

"(4) If the worker dies before filing a request for hearing, the persons described in subsection (5) of this section shall be entitled to file a request for hearing and to pursue the matter to final determination as to all issues presented by the request for hearing.

"(5) The payments provided in subsections (1), (2), (3) and (4) of this section shall be made to the persons who would have been entitled to receive death benefits if the injury causing the disability had been fatal. In the absence of persons so entitled, a burial allowance may be paid not to exceed the lesser of either the unpaid award or the amount payable by ORS 656.204.

"(6) This section does not entitle any person to double payments on account of the death of a worker and a continuation of payments for permanent partial disability, or to a greater sum in the aggregate than if the injury had been fatal."

[2]The Board found that decedent's May, 1979, infarct was a material contributing cause of his death and that if the underlying infarct claim is compensable, then the death benefits claim is compensable also. The Board affirmed the denial of death benefits "solely on the ground that the myocardial infarction claim is not compensable." Although the insurer has not cross-appealed, it does not accept the Board's *dictum* that the death benefits claim would be compensable if the heart attack claim is compensable. Because we affirm, we need not address that issue.

compensation from December, 1979, until April, 1980. On *de novo* review, we affirm.

In May, 1979, claimant's husband, a 66-year-old minister, suffered a myocardial infarct while performing a wedding. His claim was initially accepted as compensable. In November, 1979, while on vacation, he suffered severe abdominal pain. He was hospitalized and found to be suffering from an enlarged abdominal aortic aneurysm. His doctor believed that surgery was necessary despite his May infarct. Following surgery he was placed in intensive care. He died shortly thereafter. On December, 26, 1979, the insurer denied responsibility for the death claim. On April, 9, 1980, it denied the infarct claim that it earlier had accepted.

The referee found "absolutely no medical evidence that [decedent's] work was in any way related to his aneurysm." He concluded, however, that decedent's infarct was compensably related to job stress and remanded the claim to the insurer for determination of the extent of permanent disability resulting from the infarct.

Both insurer and claimant appealed. The Board found that decedent's infarct was a material contributing cause of his death and that the compensability of both claims rested on the cause of the infarct. The Board concluded that the expert evidence preponderated against a finding of medical causation. The Board did not reach the issue of penalties and attorney fees. Claimant appeals, contending that the medical evidence shows that the stress under which decedent worked was a material contributing factor in his myocardial infarct.

Decedent had had a prior heart attack in 1964. His recovery was apparently satisfactory, although he was being treated for hypertension at the time of his 1979 infarct. He was under considerable stress at the time. He was soon to retire and was displeased over the selection of his successor. He was working hard to get several things done before his retirement. He was attempting to solve problems with

the church budget. He was described by acquaintances as an aggressive, nervous, ambitious and anxious person, a perfectionist in his demands on himself. During the week before the infarct, he had experienced acute substernal

chest pain and went to the hospital after the pain grew extreme. The diagnosis was preexisting coronary artery disease with an acute inferior myocardial infarct.

We conclude that decedent was exposed to sufficient stress in his work to establish legal causation. *Coday v. Willamette Tug & Barge,* 250 Or 39, 48, 440 P2d 224 (1968); *Thurston v. Mitchell Bros., Contractors,* 58 Or App 568, 575, 649 P2d 605 (1982). However, claimant has not established medical causation. All four cardiologists who gave opinions on medical causation were familiar with decedent's work stress. Drs. Bruton, Rogers and Sutherland concluded that that stress did not contribute to his infarct. Dr. Kloster acknowledged that stress was a possible factor aggravating decedent's preexisting coronary artery disease and contributing to his infarct, but he was uncertain to what extent it was a causal factor when compared to other risk factors found in decedent's history. Dr. Kloster's inconclusive statement that a *possible* relationship existed is insufficient to persuade us that decedent's work stress was a material contributing factor in producing the heart attack. *See Miller v. SAIF,* 60 Or App 557, 625, 654 P2d 1139 (1982); *Lenox v. SAIF,* 54 Or App 551, 554, 635 P2d 406 (1981). We conclude that claimant has failed to sustain her burden to prove medical causation.

Claimant also contends that the insurer's denials were unreasonable and that penalties should be assessed. The first denial, dated December 26, 1979, was a partial denial addressing the compensability of decedent's death. The second denial, dated April, 9, 1980, addressed the compensability of decedent's infarct. Claimant contends that the insurer changed its position on the infarct claim in an attempt to avoid liability on the death claim.

At the time of the denials, the insurer had received Dr. Bruton's December 18, 1979, opinion that raised doubts as to the compensability of both claims. An insurer is not estopped to deny liability after paying compensation if its denial is based on a defense other than lack of notice. *Frasure v. Agripac,* 290 Or 99, 619 P2d 274 (1980); *Saxton v. Lamb-Weston,* 49 Or App 887, 621 P2d 619 (1980), *rev den* 290 Or 727 (1981). In light of the medical evidence available to the insurer at the time of the denials, we

cannot say that its actions were unreasonable. Therefore, penalties are not indicated. *Mayes v. Boise Cascade Corp.,* 46 Or App 333, 611 P2d 681, *rev den* 289 Or 373 (1980); *Norgard v. Rawlinsons,* 30 Or App 999, 569 P2d 49 (1977).

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Ishbel Brewer, Claimant.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Petitioner,
v.
BREWER et al,
Respondents.

(80-10782 and 81-759; CA A22996)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 9, 1982.

Darrell E. Bewley, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for petitioner.

Daniel Lorenz, Portland, argued the cause for respondent Ishbel Brewer. With him on the brief was Des Connall, Portland.

Emil R. Berg, Portland, argued the cause for respondents Heritage Convalescence Center and EBI Companies. With him on the brief was Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

YOUNG, J.

Reversed; referee's order reinstated except as to the determination that claimant's claim against Viking is barred for failure to give timely notice.

YOUNG, J.

The dispositive issue in this workers' compensation case is whether claimant suffered an aggravation of a prior compensable back injury or sustained a new injury. The resolution of that question determines which of two insurers, SAIF or EBI Companies (EBI) is responsible. The Workers' Compensation Board reversed the referee on that issue and determined that it was a new injury for which SAIF was responsible. SAIF appeals. We review *de novo,* ORS 656.298(6), reverse the Board, and reinstate, in part, the referee's order.

On April 1, 1979, claimant injured her neck and back while working as a nurse's aid for Heritage Con-

valescence Center (Heritage). Dr. Hickerson diagnosed the injury as upper and lower back strain with neck tenderness. EBI was the responsible insurer. Claimant underwent brief, conservative treatment and was awarded temporary total disability from April 3 through May 2, 1979.

From May, 1979, until September 13, 1980, claimant continued to have periodic back problems. She restricted her activities but did not seek further medical treatment. She was able to work at various jobs during that time as long as she did no heavy lifting.[1] In September, 1980, claimant began working at Viking Industries, doing relatively light work that included handling material that weighed between two and five pounds.

On Saturday, September 13, 1980, her fourth day at Viking, claimant left early after a few hours because she thought she had the flu and felt pain in her back exactly like that from her injury at Heritage. She did not complain of this condition to Viking but, in effect, told her husband

that she "had done it again."[2] She worked an eight-hour shift at Viking on Monday, September 15, but did not work the rest of that week. She then quit because of her back problems.

That same week, she saw Dr. Hickerson again. His report states that claimant had back pain syndrome secondary to muscle strain in the lumbar and cervical region, "probably a recurrence of the previous injury * * *." His prognosis was "that her pain would tend to recur, as long as she is involved in manual labor." In reliance on Dr. Hickerson's diagnosis, claimant filed an aggravation claim with EBI. After attempting a new job that involved vacuuming, claimant had regular medical treatment for her back for two months from Dr. Motz. Dr. Motz' report and records

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[1] At the hearing claimant described her back symptoms between May 1, 1979, and September, 1980.

> "I had problems on lifting. I did have continual problem, but it's yes and no. I did but I didn't. * * * If I went and lifted something that I shouldn't or grocery shopping or something like that, a lot of times my back ached more than what it would have before that happened. But I even had jobs where I was fine. * * * I kind of did what [Dr. Hickerson] said and I slept on the floor and it worked."

[2] Claimant described the incident at Viking and the onset of pain:

> "On the fourth day, I think which was Saturday, I went in, and because it was overtime day I was put on a different job which didn't involve any lifting at all. I was just putting steel rods into a machine and pushing it. And I had asked earlier anyway — earlier than that day because I didn't feel good, to go home. And as I was working on that about 9:00, I made this kind of a motion with my hand (indicating), and I said oh my God. And it was sharp sudden pain right in my back. It was in the top and lower part, and it felt exactly like the injury when I had injured my back at Heritage Convalescent Home. And because of that, I did not go into the office and say, oh, I hurt my back because it was so similar to me in my mind of the same thing, and I didn't feel good so I just went home."

indicate that she had no knowledge of claimant's prior condition and related claimant's pain to the Heritage injury only because claimant so related the pain. Dr. Motz diagnosed claimant's condition as chronic right sacroiliac and thoracic strain. EBI then denied the aggravation claim on the ground that what had happened at Viking was a new injury.

Viking then prepared an 801 form, which claimant did not sign, and filed it with SAIF on December 4, 1980. SAIF denied the claim on December 30, on the ground that it was an aggravation and not a new injury. A consolidated hearing was held on both denials, together with issues pertinent to the claim for the original injury at Heritage.

This is a successive-injury case and is governed by the "last injury" rule[3] adopted in *Smith v. Ed's Pancake House,* 27 Or App 361, 364-65, 556 P2d 158 (1976):

> "In *Cutright v. Amer. Ship Dismantler,* 6 Or App 62, 486 P2d 591 (1971), we tacitly accepted the Masachusetts-Michigan rule in cases involving successive injuries and successive insurance carriers. As stated in 4 Larson, Workmen's Compensation Law 17-71--17-78, § 95.12 (1976):
>
> "* * * * *
>
> "'*If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second.* In this class would fall most of the cases discussed in the section on range of consequences in which a second injury occurred as the direct result of the first, as when claimant falls because of crutches which his first injury requires him to use. *This group also includes the kind of case in which a man has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion.*
>
> "'On the other hand, if the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. This is consistent with the general principle of the compensability of the aggravation of a pre-existing condition.'" (Emphasis supplied.)

We disagree with the Board's conclusion that claimant's "injury" at Viking contributed independently to her final condition. The Board apparently relied on Dr. Motz's diagnosis of chronic sacroiliac and thoracic strain and on claimant's testimony that her symptoms have persisted to establish a worsened condition. Yet nothing in Dr.

[3] *See Boise Cascade Corp. v. Starbuck,* 61 Or App 631, ___ P2d ___ (1983) (distinguishing *Bracke v. Baza'r, Inc.* 293 Or 239, 646 P2d 1330 (1982)).

Motz's report indicates that she found claimant's condition was worse or her disability greater than before. Dr. Hickerson determined that claimant's condition was a recurrence and would tend to recur. Nothing in his report indicates that the severity of the condition had worsened or would worsen on recurrence. Claimant testified that Dr. Hickerson had told her in April, 1979, that she had to restrict her activity to avoid lifting. That and claimant's testimony of intervening periodic back symptoms indicates that she had

chronic back problems from the time of the injury at Heritage.

There is no persuasive evidence that claimant's work at Viking contributed to the *causation* of the chronic back condition; rather the evidence shows only that the Viking work aggravated the continuing back problem and culminated in a second period of disability. *Calder v. Hughes & Ladd,* 23 Or App 66, 541 P2d 152 (1975). EBI is responsible for the aggravation claim.

Because of our disposition of the successive-injury issue, we need not reach the issue of whether the new-injury claim against Viking and SAIF was timely. The referee had decided that the claim was time-barred, and the Board reversed. We reinstate the referee's order except for the determination that the claim against Viking was barred for failure to give timely notice.

Reversed; referee's order reinstated except as to the determination that claimant's claim against Viking is barred for failure to give timely notice.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Kristie Paresi, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Appellant,
v.
PARESI,
Respondent.

(77-06083; CA A24668)

Appeal from Circuit Court, Multnomah County.

Charles S. Crookham, Judge.

Argued and submitted November 19, 1982.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for appellant.

Noreen K. Saltveit, Portland, argued the cause for respondent.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

YOUNG, J.

Reversed.

YOUNG, J.

The State Accident Insurance Fund (SAIF) appeals from an order of the circuit court awarding claimant attorney fees to be paid by SAIF. The dispositive issue is whether the circuit court has the authority to award a claimant reasonable attorney fees pursuant to ORS 656.388(2) for legal services performed in this court and the Supreme Court. The award of attorney fees was without statutory authority, and we reverse.

We first address claimant's contentions that this court lacks jurisdiction. Claimant's copy of the notice of appeal filed by SAIF apparently does not reflect proof of service of the notice of appeal "on the clerk of the trial court." ORS 19.023(2)(b). The proof of service filed in this court shows proper service.

Claimant also contends that the proceeding in circuit court to settle claims for attorney fees is a summary proceeding, ORS 656.388(2), and is not appealable. We disagree. Nothing in ORS 656.388(2) prohibits an appeal to this court. Instead, ORS 19.010(4) provides:

> "An appeal may be taken from the circuit court in any special statutory proceeding under the same conditions, in the same manner and with like effect as from a judgment, decree or order entered in an action or suit, unless such appeal is expressly prohibited by the law authorizing such special statutory proceeding."

We said in *SAIF v. Peoples,* 59 Or App 593, 595, 651 P2d 1359 (1982):

> "* * * This court has jurisdiction on appeal, because the order is final, affects a substantial right and was entered in a special statutory proceeding with respect to which the authorizing law does not expressly prohibit an appeal."

It is necessary to explain this claim's "checkered career." SAIF denied claimant's claim for psychological injuries. The referee and the Workers' Compensation Board found the claim compensable. SAIF appealed. We affirmed the Board, *Paresi v. State Accident Insurance Fund,* 44 Or App 689, 606 P2d 1172 (1980), and awarded claimant an attorney fee of $2,000. ORS 656.382(2). SAIF then petitioned for review, and the Supreme Court remanded to this court. *Paresi v. SAIF,* 290 Or 365, 624 P2d

572 (1981); *see also James v. SAIF,* 290 Or 343, 624 P2d 565 (1981) (companion case). This court then remanded to the Board. *Paresi v. State Accident Insurance Fund,* 51 Or App 201, 624 P2d 644 (1981).[1] The Board then reaffirmed its prior decision and found the claim compensable.

After the decision in *Paresi v. SAIF, supra,* 290 Or 365, claimant petitioned the Supreme Court for an award of attorney fees. That was denied on the basis of a per curiam opinion in *James v. SAIF,* 290 Or 849, 626 P2d 881 (1981). After the Board, on remand, affirmed its earlier decision, claimant petitioned the Board for an award of attorney fees for services before this court and the Supreme Court. The Board denied the petition.[2] Considering that she had a dispute with the Board over entitlement to attorney fees on appeal, claimant then petitioned the circuit court for attorney fees pursuant to ORS 656.388(2). The circuit court reinstated the $2,000 attorney fee previously allowed by this court and awarded an additional fee of $1,500 for services before the Supreme Court.[3] This appeal followed.

Attorney fees in workers' compensation cases are permitted only when authorized by statute. *Brown v. EBI Companies,* 289 Or 905, 618 P2d 959 (1980); *SAIF v. Peoples, supra,* 59 Or App at 596. Claimant's entitlement to attorney fees arises from ORS 656.382(2).[4] The circuit court's power to award attorney fees is no broader than the authority provided by statute. ORS 656.388 provides in pertinent part:

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[1] The award by this court of the $2,000 attorney fee to claimant was extinguished when the Supreme Court entered its mandate remanding to this court. The mandates of both courts awarded SAIF its costs and disbursements in connection with the appeal.

[2] Claimant also petitioned the Supreme Court for reconsideration of its denial of attorney fees. That petition was denied.

[3] The circuit court also awarded claimant an attorney fee in the sum of $2,000 for services before the referee and $500 for each of two appearances before the Board. SAIF does not dispute that award.

"(1) No claim for legal services or for any other services rendered before a referee or the board, as the case may be, in respect to any claim or award for compensation * * * shall be valid unless approved by the referee or board, *or if proceedings on appeal from the order of the board in respect to such claim or award are had before any court, unless approved by such court.* (Emphasis supplied.)

"(2) If an attorney and the referee or board cannot agree upon the amount of the fee, each forthwith shall submit a written statement of the services rendered to the presiding judge of the circuit court in the county in which the claimant resides. The judge shall, in a summary manner, without the payment of filing, trial or court fees, determine the amount of such fee. This controversy shall be given precedence over other proceedings."

The circuit court determines the amount of the attorney fees when the "attorney, referee or board cannot agree upon the amount of the fee." ORS 656.388(2). The circuit court's authority is derivative of the power of the Board. If the Board could award an attorney fee, then so too may the circuit court in a summary proceeding under ORS 656.388(2). The question becomes whether the Board has the authority to award attorney fees for legal services in the appellate courts. We hold that the Board does not.[5]

ORS 656.388(1) requires that claims for legal services in proceedings on appeal be "approved by such [appellate] court. The circuit court was not such an appellate court. Under ORS 656.388(2) the circuit court's authority to determine fee disputes is limited to those situations when the attorney and the referee or the Board cannot agree upon the amount of the fee *before* the referee or the Board. This conclusion is reinforced by the language of ORS 656.386(1) concerning attorney fees on rejected claims, which provides in part that:

"* * * 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 fee; *however, in the event a dispute arises as to the*

amount allowed by the referee or board, that amount may be settled as provided for in ORS 656.388(2). * * *" (Emphasis supplied.)

Reversed.[6]

---

[4] 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."

[5] *Bracke v. Baza'r, Inc.*, 294 Or 483, ___ P2d ___ (1983) holds that ORS 656.382(2) does not grant to the Supreme Court the authority to award fees for legal services in the Supreme Court to a claimant who sucessfully defends an award of compensation by the Court of Appeals.

[6] We recognize this to be an inequitable result, because it does not appear to comport with the objectives of the Workers' Compensation Act. *See* ORS 656.012(2). It is a legislative function to remedy the inequity.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Willard Evans, Claimant,

EVANS,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(80-11378; CA A24723)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 15, 1982.

David C. Force, Eugene, argued the cause for petitioner. On the brief were Peter W. McSwain and Malagon & Velure, 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.

WARDEN, J.

Reversed and remanded for an order requiring SAIF to provide medical services, and to pay claimant a penalty based on the cost of medical services to date, together with reasonable attorney fees for prevailing on the medical services issue.

WARDEN, J.

In this workers' compensation case, claimant sought additional medical services pursuant to ORS 656.245. Claimant appeals the Workers' Compensation Board's reversal of the referee's opinion that disapproved SAIF's *de facto* denial of the requested medical services and awarded claimant penalties and attorney fees. We reverse.

Claimant was a 28-year old furniture salesperson when he sustained a compensable injury to his legs on May 1, 1975. Surgeries were performed in 1976 and 1977. The case was closed September 5, 1978, and claimant was awarded compensation for permanent disability for 20 percent loss of each leg.

Claimant received further treatment by orthopedic

surgeons for recurring pain in his knees in May and October, 1979.[1] On December 19, 1980, claimant, through counsel, requested a hearing, alleging that his condition had become aggravated, and indicated that a medical report would follow. On January 20, 1981, SAIF received a report from Dr. J. H. Friesen, a California physician, stating:

> "Mr. Evans was in our office December 29, 1980 complaining of problems with his knee. He states the knee 'pops, crackles, and goes out.' Apparently patient had surgery on his knee in Oregon three years ago as the results of an industrial injury.
>
> "We would like for Mr. Evans to be checked by an Orthopedist in Fresno, California and are requesting authorization from you for same."

SAIF did not respond to Dr. Friesen until a letter dated February 21, which stated in pertinent part:

> "I want to advise you that Mr. Evans' claim has been closed since June of 1978, and his attorney has recently requested a hearing on an aggravation. Under these circumstances, it is Mr. Evans and his attorney's responsibility to furnish me with a medical report showing current problems are related to the industrial injury of May 2, 1975.
>
> "Therefore, at this time I cannot authorize any treatment or consultations for Mr. Evans."

Claimant filed a supplemental request for a hearing on May 5, 1981, raising the issues of unreasonable failure either to authorize or provide medical treatment and of penalties and attorney fees. SAIF responded by letter dated June 10, 1981:

> "Pursuant to your Supplemental Request for Hearing, I cannot and will not authorize treatment on the basis of a letter such as Dr. Friesen submitted. However, Mr. Evans does have the right to seek treatment and have the reports and bills submitted to us for consideration of relationship.
>
> "Furthermore, I interpret ORS 656.273 as reading that a medical report showing the need for further treatment and/or increased compensation is necessary before we actually have a claim for aggravation. Your request for Hearing dated December 18, 1980 indicates you will supply the necessary medical documentation and I am waiting for you to do so."

The referee found that Dr. Friesen's letter constituted a valid claim for medical services. He further found SAIF's *de facto* denial to be unreasonable and ordered that claimant be paid compensation

> "equal to 25 percent of the cost of medical services and of any temporary disability compensation which may ultimately be held to have been due and payable when the aggravation claim has been either accepted or litigated on its merits."

[1] The record does not disclose whether claimant made a claim for these medical services.

The Board reversed, finding that claimant had not made a valid claim for medical services. Claimant concedes that the only issue on appeal is entitlement to medical services under ORS 656.245.

It is apparent that some confusion resulted from the fact that claimant requested a hearing on aggravation and subsequently requested additional medical services. The confusion may have resulted from an apparent ambiguity in the statutory scheme. ORS 656.245 provides that injured workers shall receive "medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires." The aggravation statute, ORS 656.273, also refers to medical care: "An injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury."

Although some doubt exists as to the interrelationship of these provisions, it is clear that the right to additional medical services is independent of the right to compensation for medical services for an aggravation. *Amlin v. Edward Hines Lumber Co.,* 35 Or App 691, 582 P2d 54 (1978); *Wait v. Montgomery Ward, Inc.,* 10 Or App 333, 499 P2d 1340 (1972). Consequently, the fact that a claimant has not suffered an aggravation of his previous injury does not affect his entitlement to further medical services as provided in ORS 656.245. *Browser v. Evans Products Company,* 270 Or 841, 530 P2d 44 (1974); *Wetzel v. Goodwin Brothers,* 50 Or App 101, 622 P2d 750 (1981). Claimant's concession on appeal that he did not present a valid aggravation claim does not prejudice his asserted claim for additional medical treatment.

The question remains whether a valid claim was made under ORS 656.245. We find that Dr. Friesen's report constituted such a claim. The request was addressed to the Oregon Workers' Compensation Department and was received less than 15 months after the last report on claimant's condition; it enumerated claimant's present problems regarding the previously injured area, referred to the industrial injury and explicitly requested authorization for further medical services. *See Wetzel v. Goodwin Brothers, supra.*

SAIF admits that diagnostic medical services are compensable under ORS 656.245 but maintains that claimant has to prove that the procedure is reasonably necessary and causally related to his industrial injury. *Brooks v. D. & R. Timber,* 55 Or App 688, 639 P2d 700 (1982). He has met that burden. We agree with the referee that "Dr. Friesen's report constituted a *prima facie* valid claim for medical services." That *prima facie* showing was not rebutted by SAIF.

In finding that Dr. Friesen's report was a *prima facie* valid claim for medical services, we do not mean that SAIF had no option but to authorize treatment. If SAIF had reasonable cause to doubt the report, it could have designated a doctor of its choice to evaluate the need of further treatment and the causal relationship to the industrial injury, or it could have issued a denial of the claim and

informed claimant of his right to a hearing. Such an interpretation of the duty imposed by ORS 656.245 promotes the policy underlying the Workers' Compensation law "to provide * * * prompt and complete medical treatment for injured workers." ORS 656.012(2)(a).

The remaining issue is the reasonableness of SAIF's *de facto* denial. We agree with the referee that SAIF's conduct was unreasonable. By advising claimant that he should go to an orthopedist and take his chances on payment of the expense, SAIF effectively denied claimant medical services. It viewed the claim only as one for aggravation; it should have recognized that Dr. Friesen's letter was sufficient as a request for further medical treatment. Payment of medical expenses under ORS 656.245 does not amount to acceptance of a previously filed aggravation claim, nor does it estop the insurer to contest the causal connection between the previously determined compensable injury and the claimant's present symptoms. *Jacobson v. SAIF,* 36 Or App 789, 585 P2d 1146 (1978). SAIF's failure either to authorize the evaluation or to select another doctor was unreasonable. Claimant is entitled to a penalty based on the cost of the medical services provided. ORS 656.262(9). Claimant shall also be awarded a reasonable attorney fee for prevailing on the issue of medical services, but the award shall not include attorney fees on the claim for aggravation, because he did not prevail on that claim, ORS 656.386(1).

Reversed and remanded for an order requiring SAIF to provide medical services and to pay claimant a penalty based on the cost of medical services to date, together with reasonable attorney fees for prevailing on the medical service issue.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Steven Bauman, Claimant.

BAUMAN,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(80-04870; CA A24941)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 18,

Gerald C. Doblie, Portland, argued the cause for petitioner. With him on the brief was Doblie Francesconi & Welch, PC, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, and Van Hoomissen and Newman, Judges.

RICHARDSON, P. J.

Reversed and remanded with instructions to reinstate acceptance of October, 1977, claim and for further proceedings consistent with this opinion on issues of aggravation, compensation for 1980 condition and treatment and penalties.

RICHARDSON, P. J.

Claimant appeals from an order of the Workers' Compensation Board. The principal issue is whether the Board was correct in concluding that it was permissible for SAIF, the insurer for claimant's former employer, to reconsider and deny his previously accepted claim for a nondisabling occupational disease.[1] We reverse.

In 1977, claimant was employed as a tool and die maker for Omark Industries. His job required some heavy lifting and regular overhead work with his arms. He experienced increasingly disturbing pain in his right shoulder and, in October, 1977, he filed a claim for a bursitis-type condition. SAIF accepted the claim the following month and paid for claimant's medical treatment from that time to 1980. Claimant's symptoms worsened. In February,

[1] Claimant quit his job approximately one year after the claim was accepted, for reasons not directly related to the condition giving rise to the claim.

1980, his physician notified SAIF that claimant was "in need of further treatment" and requested that the claim be reopened. SAIF's initial response was that, "unless there is time loss and/or impairment involved, it is not necessary that we reopen the claim to pay for the necessary treatment." In April, 1980, claimant underwent surgery to repair a tear in the right rotator cuff. Claimant asserts and SAIF denies that the surgery was authorized by SAIF.[2] In May, SAIF notified claimant that it had denied reopening of his claim "because there is insufficient medical evidence to relate [the] current treatment as arising out of and/or significantly caused by the medical problems for which the October 1977 claim was filed." On November 26, 1980, after reviewing the claim and receiving reports from physicians, SAIF notified claimant:

> "* * * State Accident Insurance Fund is now of the opinion that you never sustained either compensable injury by accident or compensable occupational disease in your right shoulder arising out of and in the course of your employment at Omark Industries, Inc. and your claim to have done so is therefore denied, as is your request to have the claim reopened for further medical care and treatment,

> the payment of medical and hospital bills, temporary and/or permanent disability attributable to your shoulder condition by whatever name it shall be given.
>
> "The reason for the denial, is among other things SAIF's, and your employer's opinion, that on October 10, 1977 and thereafter while working at Omark Industries, Inc. you incurred no more than a symptom of a pre-existing and personal degenerative disease condition in your shoulder and that your work at Omark Industries, Inc. neither caused nor materially contributed to the normal progression of the disease process and/or your need for medical care and treatment on and following October 10, 1977."

The Board relied on *Frasure v. Agripac,* 290 Or 99, 619 P2d 274 (1980), and *Saxton v. Lamb-Weston,* 49 Or App 887, 621 P2d 619 (1980), and concluded that SAIF had authority to deny the previously accepted claim. It is correct that those cases hold, under their facts, that an insurer's or employer's acceptance of a claim is not always inconsistent with its subsequent denial of compensability or responsibility for the claim. However, in our view, the holdings in those cases do not extend to these facts.

In *Frasure,* the claimant sustained a compensable back injury in 1972, which resulted in an award of permanent partial disability. In 1975, while working for a different employer, he suffered further symptoms. The first employer and its insurer accepted the claimant's aggravation claim but awarded time loss only. Claimant requested a hearing. Between the time of the award and the hearing

[2] The parties dispute whether SAIF's letter and other communications from SAIF to the physician constituted an authorization for the surgery. In light of our disposition, we do not reach that issue.

there was a sharp change in the opinion of claimant's doctors as to whether his symptoms were due to an aggravation or a new injury. The Supreme Court reversed this court's holding that the first employer and insurer were estopped by their earlier acceptance of the claim from denying responsibility at the hearing initiated by the claimant. *See* 41 Or App 7, 596 P2d 1015, *adhered to* 41 Or App 649, 598 P2d 1248 (1979). The Supreme Court reasoned:

> "One of the manifest purposes of Oregon's Workers' Compensation law is to achieve prompt payment of claims to injured workers. * * * ORS 656.262(7) [now ORS 656.262(8)] provides:

> " '[8] Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability, nor shall mere acceptance of such compensation be considered a waiver of the right to question the amount thereof.'[3]
>
> "* * * * *
>
> "We believe that the statutory policy requiring prompt payment of benefits is inconsistent with the holding of the Court of Appeals. As Judge Buttler succinctly stated in *Jacobson v. SAIF,* 36 Or App 789, 793, 585 P2d 1146 (1978):
>
> " '* * * It is better to encourage prompt payment than it is to discourage it by holding that the insurer who makes payment of medical expenses under ORS 656.245 is estopped to contest coverage with respect to an aggravation claim under ORS 656.273. We hold that the payment of medical expenses under ORS 656.245 following the filing of a claim for aggravation does not amount to an acceptance of the aggravation claimed by the employer or the insurer, and does not estop the employer or insurer from contesting the causal connection between the previously determined compensable injury and the claimant's present symptoms.'
>
> "* * * * *
>
> "The policy underlying the statutes recognizes that prompt processing of claims by employers and carriers is a goal of the Workers' Compensation Law, to the benefit of injured wage earners. At the same time, the statutes assure employers and carriers that they will not be prejudiced by prompt payment of claims when they receive new information which reveals their nonliability for a claim." 290 Or at 105-07.

In *Saxton v. Lamb-Weston, supra,* we affirmed the Board's ruling that the claimant's condition was medically stationary and that it was noncompensable because it was not occupationally caused. We followed *Frasure* and rejected the claimant's argument that her employer's acceptance of the claim and payment of temporary benefits estopped the employer from denying compensability at the hearing. In *Jacobson v. SAIF,* 36 Or App 789, 585 P2d 1146, *rev den*

[3] The court's characterization of the statute as providing that *acceptance* of a claim does not prevent subsequent *denial* of the right to compensation is an extrapolation from the statutory language that *paying compensation* is not to be considered an *acceptance* or admission.

284 Or 521 (1978), which the Supreme Court quoted with approval in *Frasure,* we held that the insurer's payment of medical expenses pursuant to ORS 656.245 did not estop the insurer from contesting coverage of an aggravation claim, because the payment of expenses "following the filing of a claim for aggravation does not amount to an acceptance of the [claim]." 36 Or App at 793.

The major difference between this case, on the one hand, and *Frasure, Saxton* and *Jacobson,* on the other, is that the claim here resulted in an arrangement of compensation which was not challenged by a request for hearing or otherwise. Accordingly, before SAIF purported to deny the claim, responsibility for claimant's condition was as conclusively established as it would have been if the insurer had initially denied the claim and claimant had ultimately prevailed before the Supreme Court. Conversely, in *Saxton,* the claimant was receiving temporary benefits, and closure was the principal issue in the review process where compensability was contested; in *Jacobson,* the aggravation claim was never accepted; and in *Frasure,* the claimant's request for hearing after the insurer's award left his aggravation claim in an unresolved posture at the time the insurer changed its position on the issue of responsibility.

We did not hold in *Saxton* or *Jacobson,* and we do not understand the Supreme Court to have held in *Frasure,* that there can *never* be finality to an employer's or insurer's acceptance of a claim. The principle of those cases is that an employer's or insurer's initial acceptance of a claim does not automatically foreclose it from contesting coverage before there is an award or arrangement of compensation or while agency or judicial review of the award or arrangement remains available or is taking place.

Beyond that point, the policy reasons expressed in *Frasure* have no logical application. The goal of prompt processing and payment of claims needs no further encouragement after a claim *has* been processed and an arrangement of compensation has been made. Similarly, beyond that point, there is no further need to protect the right of employers and insurers to comply with the statutory time requirements for payment and processing and, at the same time, preserve their ability to deny claims after making

further inquiry; they are simply not entitled to a third bite at the apple. Equally fundamentally, to read *Frasure* and our decisions as permitting SAIF's denial of this claim at this stage would introduce an element of tentativeness into the process that the relevant statutes do not seem to contemplate and which is alien to virtually all administrative and adjudicative processes.[4]

For the foregoing reasons, we agree with claimant that it was not permissible for SAIF to reconsider and deny the previously accepted claim and that the Board's contrary ruling was error.

Claimant's remaining arguments require brief discussion. He contends that the Board erred by affirming the referee's finding that claimant failed to establish the compensability of his 1977 claim at the hearing following the November, 1980, denial of the claim. Because SAIF had no authority to deny the claim at that time, the Board erred by reaching the question of whether compensability was proved.

Claimant next argues that the Board erred in affirming the referee's conclusion that the 1980 symptoms were not compensable as an agravation of the 1977 condition. The basis for the referee's and Board's conclusion was that the aggravation issue was moot, because SAIF was not responsible for the *original* claim. Because we hold that SAIF is responsible for the 1977 claim, we remand the aggravation issue to the Board for reconsideration.

Claimant's remaining arguments relate to the Board's rulings regarding compensation and penalties for the 1980 treatment and condition. As earlier noted, *see* n 2, *supra,* claimant contends that SAIF communicated to his physician that the April, 1980, surgery was authorized. The Board concluded that SAIF was responsible for paying claimant's medical expenses incurred before the May, 1980, denial of reopening. The Board explained:

> "* * * Under these (unique, we hope) circumstances in which medical services were rendered in reasonable reliance on apparent authorization from SAIF while the underlying claim was in accepted status, we think it only equitable that SAIF pay for those medical services."

However, the Board reversed the referee's award of a penalty pursuant to ORS 656.262(9).

Claimant argues that the penalty should have been assessed and that SAIF's

> "* * * authorization to perform surgery constituted a voluntary acceptance and reopening of the claim requiring [SAIF] to accept the natural consequences of the surgery including medical expenses, temporary total disability benefits and permanent partial disability benefits."

Those arguments seem to us to turn at least in part on whether the 1980 condition is compensable as an aggravation. Consequently, those arguments should also be considered by the Board on remand.

Reversed and remanded with instructions to reinstate acceptance of October, 1977, claim and for further proceedings consistent with this opinion on issues of aggravation, compensation for 1980 condition and treatment and penalties.

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[4] It is noteworthy, in this connection, that the Workers' Compensation Law does contain certain express provisions relating to modification or reexamination of awards: *e.g.,* ORS 656.278 and ORS 656.325; *see Bentley v. SAIF,* 38 Or App 473, 590 P2d 746 (1979). However, nothing in the statutes authorizes ongoing *unilateral* adjustments to compensation or reconsideration of liability on the employer's or insurer's own motion.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Barbara Beattie, Claimant.

MT. MAZAMA PLYWOOD COMPANY,
Petitioner - Cross-Respondent,
v.
BEATTIE,
Respondent - Cross-Petitioner,
STATE ACCIDENT INSURANCE FUND CORPORATION,
Cross-Respondent.

(80-05477; CA A24563)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 29, 1982.

Jeffery D. Herman, Springfield, argued the cause for petitioner - cross-respondent. With him on the brief was Wiswall, Svoboda, Thorp & Dennett, P.C., Springfield.

Martin J. McKeown, Eugene, argued the cause and filed the brief for respondent - cross-petitioner.

Donna Parton, Associate Counsel, SAIF Corporation, Eugene, argued the cause for cross-respondent. On the brief was Darrell E. Bewley, Appellate Counsel, SAIF Corporation, Salem.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Affirmed in part; reversed in part; remanded for determination of attorney fees not inconsistent with this decision.

VAN HOOMISSEN, J.

Employer appeals from an order of the Workers' Compensation Board affirming a referee's finding that claimant's back and psychiatric condition are compensable. Claimant cross-appeals, contending that the Board erred in reversing the referee's award of penalties and in failing to award attorney fees for her successful defense of an employer-initiated appeal before the Board.

After hurting her back pulling veneer at work, claimant was diagnosed as having lumbosacral strain and fibrositis. She later developed functional overlay and depression that she contends are directly related to her physical difficulties and to harassment by her employer when she attempted to return to work. Employer accepted responsibility for the strain but denied responsibility for the fibrositis and psychiatric condition.

The compensability issue presents only questions of fact. On *de novo* review, we agree with the Board that the medical evidence preponderates in favor of a finding of compensability for claimant's fibrositis and psychiatric condition. No useful purpose will be served by a lengthy recitation of the medical evidence. *See Bowman v. Oregon Transfer Company,* 33 Or App 241, 576 P2d 27 (1978).

Claimant asserts that penalties are justified because of the insurer's (1) failure to reopen the claim and pay time loss benefits; (2) delay in denying the fibrositis and psychiatric condition; and (3) closure of the claim. The actions by the insurer were erroneous; however, that fact alone is not sufficient to mandate penalties. ORS 656.262(9) provides for penalties only in the event of unreasonable delay or refusal to pay compensation or unreasonable delay in acceptance or denial of a claim. We agree with the Board that under the circumstances SAIF's disposition of the claim was not unreasonable.

At the time it decided to close the claim, SAIF had medical evidence that claimant's condition was stationary and that closure was appropriate. Claimant relies on Dr. Holland's report as evidence of her need for further psychiatric treatment. However, his report indicated that the

necessity for treatment was predominantly caused by non-work-related stresses. Claimant would not be entitled to compensation for her psychiatric condition based solely on that report. *SAIF v. Gygi,* 55 Or App 570, 639 P2d 655, *rev den* 292 Or 825 (1982). Although Dr. Holland later modified his opinion, SAIF's decision must be judged in the light of evidence available to it at the time it acted.

We do not find either that SAIF's denial of claimant's fibrositis and psychiatric condition was so unreasonably delayed as to justify a penalty. Although Dr. Benge diagnosed fibrositis a year earlier, his opinion on a causal relationship to claimant's work injury was vague, and, at the time, claimant was being treated for her compensable strain and was receiving time loss benefits. Dr. Benge indicated that he felt she was stable enough to work during the summer of 1980. His opinion that her physical condition had deteriorated first surfaced in October, 1980. SAIF denied the fibrositis claim on October 16, 1980. Dr. Rogers' report, received by SAIF on November 20, 1980, indicated a need for psychiatric treatment, although it did not show time loss. Before accepting Dr. Rogers' request for authorization, SAIF asked Dr. Holland for a second opinion. SAIF promptly denied the psychiatric claim on receipt of his December 18, 1980, opinion.

Both denials constituted a revocation of acceptances made months earlier which an insurer may do under certain circumstances. *Frasure v. Agripac,* 290 Or 99, 619

P2d 274 (1980); *Bauman v. SAIF,* 62 Or App 323, ___ P2d ___ (1983); *Ginter v. Woodburn United Methodist Church,* 62 Or App 118, ___ P2d ___ (1983); *Saxton v. Lamb-Weston,* 49 Or App 887, 621 P2d 619 (1980), *rev den* 290 Or 727 (1981). Claimant's claims, involving conflicting medical opinions on her lumbosacral strain and fibrositis and the cause of her psychiatric condition, presented complicated issues. We agree with the Board that SAIF's actions were not so unreasonable as to warrant the imposition of a penalty.

SAIF had information that claimant's back was stable during the summer of 1980. It denied her fibrositis condition in October, 1980, and believed, on the basis of Dr. Holland's report, that her psychiatric condition was caused

by nonwork-related sources. SAIF's refusal to reopen the claim in December, 1980, for what it believed to be noncompensable back and psychiatric treatment, was not unreasonable.

On the cross-petition, SAIF concedes that claimant should have been awarded attorney fees for successfully defending the referee's award of compensation at the Board level, even though she lost on the issue of penalties. *See Bahler v. Mail-Well Envelope Co.,* 60 Or App 90, 652 P2d 875 (1982); *Mobley v. SAIF,* 58 Or App 394, 648 P2d 1357 (1982). We therefore reverse and remand to the Board for determination of reasonable attorney fees.

Affirmed in part; reversed in part; remanded for determination of attorney fees not inconsistent with this decision.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

IN THE MATTER OF THE COMPENSATION OF
DILLARD JOHN GRAVES, CLAIMANT

DILLARD JOHN GRAVES, Petitioner

v.

STATE ACCIDENT INSURANCE FUND CORPORATION, Respondent

(WCB 81-09411; CA A24821)

Judicial Review from Workers' Compensation Board.
Argued and submitted November 15, 1982.
David C. Force, Eugene, argued the cause for petitioner. On the briefs were Peter W. McSwain and Malagon & Velure, Eugene.
Donna M. Parton, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. On the brief was Darrell E. Bewley, Salem.
Before Gillette, Presiding Judge, and Warden, and Young, Judges.

YOUNG, J.

Reversed; referee's order reinstated.

YOUNG, J.

In this workers' compensation case the sole question is whether claimant's temporary total disability benefits should be terminated following a subsequent, off-the-job injury. We reverse the Board's order and reinstate the referee's order, which continued benefits.

Claimant injured his lower back at work on July 23, 1980, while cutting a log. He filed a claim, and SAIF accepted it. X-rays indicated that he had suffered a herniated disc between the fourth and fifth lumbar vertebrae. On September 15, 1980, a laminectomy and discectomy were performed, and disc material was removed. Following the surgery, the surgeon described claimant as improved but continuing to suffer a "significant disability in his back function" with a "list to the right" and pain in the left groin area during "straight leg raising." Claimant was referred to Dr. Bond for follow-up care. The doctor found claimant suffering from low back pain and spasms, numbness and tingling in his left thigh, cold feet, and groin pain, related to an inability to bear weight well on his left leg. An x-ray on November 24 showed "minor interspace narrowing at L4-5," but the spine appeared otherwise normal.

At about the same time a friend, John Roney, witnessed claimant's condition. He testified:

> " * * * We were playing pool one day, and I backed up and barely tapped him. And he went like he was going to fall and grabbed me so he didn't hit the ground. His left side kind of gave out on him.

> "The second time was just before Thanksgiving. And he went to move to his left and the same thing happened. He grabbed the pinball machine to keep from going down."

On December 15 and 19, claimant saw Dr. Bond and demonstrated that he could walk straight and could bend forward about 70 degrees. His back was tight, reportedly from having picked up walnuts with his family. The doctor thought, but did not note at the time, that claimant was medically stationary and would soon be able to return to work. He did not, however, release claimant for work.

What is claimed to be the second injury occurred while claimant was shopping on December 23, 1980. He turned to speak to another person and bumped into a shopping cart. He testified:

> " * * * [M]y legs wouldn't turn with my body. I couldn't get my feet to turn with my shoulders.
>
> "I turned around to show her and * * * like my leg went dead. Nothing there, just numb. Just like there wasn't anything there."[1]

Claimant's symptoms took a turn for the worse. He suffered pain and burning in his low back, and his left leg "throbbed like a toothache." He remained unable to work; nevertheless, SAIF stopped paying temporary total disability benefits. When claimant protested, SAIF issued what it termed a "partial denial" and refused to make further payments. SAIF claimed that the shopping cart incident was a new, intervening injury. On February 16, 1981, an x-ray revealed a herniated disc at the same location as before, between the fourth and fifth lumbar vertebrae.

The referee found that claimant had suffered an exacerbation of his on-the-job injury.[2] The only issue before us is the correctness of the Board's reversing the referee and finding a new injury for which SAIF is not responsible. SAIF has stressed that Dr. Bond believed that claimant was medically stationary shortly before the shopping cart incident. SAIF's emphasis is misleading. Whether or not claimant had been medically stationary, the question is whether his original on-the-job injury was a material, contributing cause of his current disability. Grable v. Weyerhaeuser Company, 291 Or 387, 631 P2d 768 (1981).

We find that claimant's on-the-job injury in July, 1980, was a material, contributing cause of his worsened condition. First, the period of time between his laminectomy on September 15 and the flareup of symptoms after December 23 is relatively short, and his leg and lumbar symptoms continued during this interim period. Second, the manner of claimant's apparent leg failure on December 23 is substantially similar to the episodes described by witness Roney as occurring in November. Third, after December 23, claimant suffered, not new or different

symptoms, but heightened symptoms similar to those after the on-the-job injury and surgery. The identical lumbar disc was found herniated after the July 23 incident and after the December 23 incident. Finally, although Dr. Bond acknowledges hypothetically that relatively minor impact could cause a normal person to suffer a herniated disc, he concludes that claimant's

> "present disability is a continuation of his disability resulting from his initial industrial accident."

Claimant suffered a worsening of his compensable injury, and he is entitled to benefits. See Grable v. Weyerhaeuser Company, supra.

The Board's order is reversed; the referee's order is reinstated.

FOOTNOTES

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1 It is not clear from the evidence whether claimant fell after bumping the shopping cart.

2 Although the referee found "aggravation," he did so in a medical sense only. This is not an aggravation claim, procedurally speaking. This claim was an open claim from the original on-the-job injury, and it has not been closed by a determination order. See ORS 656.268.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Compensation of
Sharon Bracke, Claimant.

BRACKE,
Petitioner on Reconsideration/Respondent on Review,
v.
BAZA'R, INC. et al,
Respondents on Reconsideration/Petitioner on Review,
ALBERTSON'S FOOD CENTERS et al,
Respondents on Review.

(CA 17587, SC 27825)

On respondent's motion for reconsideration of Supreme Court order of September 14, 1982, denying respondent's petition for attorney fees. Former opinion filed June 22, 1982. 293 Or 239, 646 P2d 1330 (1982).

Eugene L. Parker, Parker & McCann, Portland, for petitioner.

Scott M. Kelley, Cheney & Kelley, P.C., Portland, for respondents Baza'r, Inc., and General Adjustment Bureau.

No appearance by respondents Albertson's Food Centers, O.J.'s 42nd Avenue Thriftway, Aetna Insurance Company, and Industrial Indemnity Company.

Before Lent, Chief Justice, and Peterson, Campbell, Carson and Jones, Justices.

LENT, C. J.

Petition for attorney fees denied.

*Judicial review of order of Workers' Compensation Board, 51 Or App 627, 626 P2d 918 (1981).

LENT, C. J.

The issue is whether under ORS 656.382(2) a workers'[1] compensation claimant is entitled to an award of attorney fees in this court where the employer and its insurer petitioned this court for review of a Court of Appeals' decision and the compensation to be awarded claimant under that decision was neither disallowed nor reduced by our decision. That statute provides:

"If a request for hearing, request for review or court appeal is initiated by an employer or insurer, and the

[1] In 1965, the law was denominated the "Workmen's Compensation Law" and the Workmen's Compensation Board was created. The law is now known as the "Workers' Compensation Law" and the name of the Board has been changed accordingly. ORS 656.001 and 656.005(4). Throughout this opinion we shall use the current designation.

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."

The course of this litigation on the merits is found in *Bracke v. Baza'r,* 51 Or App 627, 626 P2d 918 (1981), and *Bracke v. Baza'r,* 293 Or 239, 646 P2d 1330 (1982). In summary, the claim was originally denied. The claimant requested a hearing. ORS 656.283. The referee sustained the denial, ORS 656.289, and the claimant requested review under ORS 656.295 by the Workers' Compensation Board, which affirmed denial of the claim. The claimant then initiated an appeal to the Court of Appeals, ORS 656.298, which found that the claimant had a compensable claim for compensation for occupational disease and that, of three employers for whom claimant had worked, Baza'r was the responsible employer. The Court of Appeals ordered that the matter be remanded to the Board to determine whether the responsibility for payment of compensation was that of Baza'r's insurers or of Baza'r as a self insurer.

Under ORS 2.520, Baza'r filed two petitions for review by this court, one on Baza'r's own behalf and one through an insurer. We affirmed the Court of Appeals with

some modification not important to the issue now before us. One effect of our decision was that the award of compensation due to the claimant under the decision of the Court of Appeals was not "disallowed or reduced."

Claimant petitioned this court for an award of attorney fees to be paid by the employer and its insurer who petitioned this court for review. We originally denied the petition, and the claimant has requested that we reconsider that action.

The first question to be addressed is whether discretionary review in this court is within the term "court appeal" found in ORS 656.382(2).

Prior to the 1965 wholesale revision of the laws relating to workers' compensation, the statutory provisions for attorney fees were sparse indeed. The system was then administered by the State Industrial Accident Commission (SIAC), which was both the insurer and the body that initially adjudicated disputes between itself and claimants. Prior to 1951, if a claimant desired to challenge "any order, decision or award" of SIAC, the claimant had to present an "application for rehearing" to SIAC. OCLA § 102-1773. If claimant improved his position on rehearing, his attorney fees came out of his increased compensation, and the amount was set by SIAC. OCLA § 102-1775. If claimant were dissatisfied after rehearing, he could appeal to circuit court. OCLA § 102-1774. If he improved his position there, his attorney fees were payable out of his increased compensation and were set by the court. OCLA § 102-1775.

Either the claimant or SIAC could appeal to this court. OCLA § 102-1774. In 1945, the legislature decreed that in case this court affirmed a circuit court judgment on an appeal to this court by SIAC, the claimant could recover attorney fees to be fixed by this court in addition to the compensation payable by reason of the circuit court judgment. Or Laws 1945, ch 303, § 1. This appears to be the first legislative authorization for a claimant to pay or recover attorney fees except as a portion of his award of benefits.

Further legislative action in 1951 gave to the claimant the right to receive reasonable attorney fees to be paid by SIAC in addition to his compensation where

claimant prevailed in an appeal to the circuit court from a SIAC order rejecting his claim. Or Laws 1951, ch 330, § 2. Six years later, it was provided that the claimant should recover attorney fees in addition to compensation where he prevailed before SIAC itself on an "appeal" from a decision rejecting his claim. Or Laws 1957, ch 558, § 1.

In 1965, the legislature undertook a sweeping revision of the statutes pertaining to workers' compensation. SIAC was abolished, and employers or the State Compensation Department (SCD) became responsible for the payment of benefits to injured workers. The adjudication of disputes between claimants and those responsible for payment of benefits was given in the first instance to the newly created Workers' Compensation Board (Board). Hearings upon questions concerning claims were to be conducted by hearing officers of the Board. Any party could request review by the Board itself. Thereafter, any party could appeal to circuit court, and any party disappointed there could appeal to this court. If the appellant in this court were the employer or SCD and if the circuit court judgment were affirmed, the claimant was to be allowed an attorney fee fixed by this court and paid by the appellant in addition to compensation. Or Laws 1965, ch 285, § 38, amending then ORS 656.292.

During the testimony before legislative committees considering the 1965 revision, opponents of HB 1001 (the vehicle for revision) expressed fear that the adversarial position of the employer or SCD, on the one hand, and the claimant, on the other, might result in the former pursuing appeals at each level for the purpose of wearing down or harassing claimants. The answer was to provide that where the employer or SCD initiated "a request for hearing, request for review or court appeal" and the claimant successfully defended his award, the employer or SCD, as the case might be, would become liable for reasonable attorney fees in addition to the award of benefits.[2] Or Laws 1965, ch 285, § 42(2). That section became ORS 656.382(2), providing as follows:

> "If a request for hearing, request for review or court appeal is initiated by an employer or the department, and

[2] Debate upon HB 1001 in the House of Representatives, March 3, 1965.

> the hearing officer, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or department shall be required to pay to the claimant or his attorney a reasonable attorney's fee in an amount set by the hearing officer, board or the court for legal representation by an attorney for the claimant at the hearing, review or appeal."

ORS 656.292, which had been amended as above noted, was renumbered as ORS 656.301; therefore, the situation obtaining immediately after the 1965 revision was that a claimant who successfully defended his award upon attack by the employer or SCD was entitled to attorney fees in addition to compensation at every level of scrutiny by virtue of either ORS 656.282(2) or 656.301.

We conclude that because there was a preexisting, separate, statutory right to recover fees in this court by reason of former ORS 656.292, which was carried forward as ORS 656.301, the reference to "court appeal" in the entirely new provision in Oregon Laws 1965, chapter 285, section 42(2), which became ORS 656.382(2), was meant to apply to the appeal to circuit court.[3]

In 1969, the legislature created the Court of Appeals. Or Laws 1969, ch 198, § 1, as amended by Or Laws 1969, ch 591, § 262a. *See,* ORS 2.510. The Court of Appeals was given exclusive direct appellate jurisdiction of circuit court judgments in compensation cases, but there were no amendments to ORS chapter 656 reflecting that state of affairs. ORS 656.301, by its terms, continued to mandate the allowance of attorney fees on appeal, and the Court of Appeals cited ORS 656.301 as authority for awarding attorney fees in its first two reported decisions in workers'

compensation cases. *See, Cunningham v. Compensation Dept.,* 1 Or App 127, 459 P2d 892 (1969), and *Boorman v. Compensation Dept.,* 1 Or App 136, 459 P2d 885 (1969).[4]

It was not until 1977 that the place of the Court of Appeals in the scheme of things was recognized in ORS chapter 656. ORS 656.298, which had provided since 1965

[3] The referent of the term "request for review" should also be identified. Oregon Laws 1965, chapter 285, section 35a, which became ORS 656.295, provided for Board review of the order of a hearing officer upon "request for review." Oregon Laws 1965, chapter 285, section 36(1), which became ORS 656.298(1), provided for a "request for judicial review" by the circuit court. Subsections 3, 4, 5, 6 and 7 of section 36 referred to the judicial review as an "appeal." Since, as discussed in the body of this opinion, the term "court appeal" in ORS 656.382(2) referred to the appeal to the circuit court, and, since the Court of Appeals was not yet in existence and, therefore, there was no ORS 2.520 providing for "review" in this court, we conclude that the term "request for review" found in ORS 656.382(2) referred only to a request for review by the Board of the hearing officer's order. We have found nothing to indicate that the legislature ever later meant to encompass within that term the discretionary review in this court under ORS 2.520.

[4] Although ORS 656.301 had not been directly amended in either 1967 or 1969, by 1969 the section referred to "State Accident Insurance Fund" rather than the "department." This was because of redesignation of the State Compensation Department as State Accident Insurance Fund (SAIF) by Oregon Laws 1969, chapter 247, section 1, as amended by Oregon Laws 1969, chapter 597, section 63.

for appeal to the circuit court from decisions of the Board, was amended to delete reference to the circuit court and to substitute therefor the Court of Appeals. Or Laws 1977, ch 804, § 11. ORS 656.301, which had provided for appeal from circuit court, was repealed. Or Laws 1977, ch 804, § 55.

The upshot was that the only court still mentioned in the part of ORS chapter 656 pertaining to the procedure for obtaining compensation, ORS 656.262 to 656.330, was the Court of Appeals.

After creation of the Court of Appeals in 1969, cases reached this court from that court only on petition for discretionary review under ORS 2.520. This court, when it allowed review of a workers' compensation case, had continued, under the terms of ORS 656.301(1), to review the facts as well as the law on the entire record made before the Board. In *Surratt v. Gunderson Bros.*, 259 Or 65, 81-82, 485 P2d 410 (1971), a dissenting opinion took the position that this court should no longer "review de novo" upon the record. One of the reasons assigned by the dissenters was that ORS 656.301 applied to "appeals" from the judgment of the circuit court and that a proceeding before this court upon granting a petition for review under ORS 2.520 was "not literally an appeal from a judgment of the circuit court." In *Sahnow v. Fireman's Fund Ins. Co.*, 260 Or 564, 491 P2d 997 (1971), this court "accept[ed] the reasoning" of the dissent in *Surratt* that "appeals from the judgment of the circuit court are now to the Court of Appeals."

This court's decision in *Sahnow* in 1971, taken together with the 1977 amendment to ORS 656.298 and repeal of ORS 656.301, present a strong case that the only

court to which "court appeal" in ORS 656.382(2) could refer is the Court of Appeals. We so hold; therefore, there is no authority arising from that subsection for this court to award attorney fees in this court to the claimant who successfully defends an award upon a petition for review from the Court of Appeals.

It has been argued that the "court appeal" mentioned in ORS 656.382(2) refers to the entire proceedings in the court system, i.e., both to the appeal under ORS 656.298 and discretionary review in this court under ORS 2.520.[5] If that is so, however, it is of no avail to the claimant in this case. ORS 656.382(2) is applicable only when the court appeal is "initiated" by the employer or insurer. If the entire proceedings in the Court of Appeals and this court is one appeal, it was initiated by the claimant in this instance because it is the claimant who initiated the appeal from the Board to the Court of Appeals upon the issue of compensability of her claim.

We have herein considered again the claimant's request for an allowance of attorney fees under ORS 656.382(2) and find that it must be denied.

[5] *Compare*, our allusion to such a hypothesis in *Brown v. EBI Companies*, 289 Or 905, 618 P2d 959 (1980).

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Compensation of
Marvin Peterson, Claimant,

PETERSON,
Respondent on review,
v.
EUGENE F. BURRILL LUMBER,
Petitioner on review.
(CA A20708; SC 28773)

In Banc*

On review from the Court of Appeals.**

Argued and submitted November 1, 1982.

Richard W. Davis, of Lindsay, Hart, Neil & Weigler, Portland, argued the cause and filed a brief for petitioner on review.

David A. Force, Hillsboro, argued the cause for respondent on review. On the brief was Steven C. Yates of Malagon, Velure & Yates, Eugene.

PETERSON, J.

Affirmed.

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* Tanzer, J., resigned December 31, 1982. Linde, J., did not participate in the decision of this case.

**Appeal from Order on Review of Workers' Compensation Board. 57 Or App 476, 645 P2d 567 (1982).

PETERSON, J.

In *Grable v. Weyerhaeuser Co.*, 291 Or 387, 631 P2d 768 (1981), a worker suffered an on-the-job back injury and his employer accepted the claim. After the employee returned to work, he reinjured his back at home and made a claim against his employer, claiming that the worsening of his back problems resulted from the on-the-job injury. We held, under ORS 656.273(1), that if the worker establishes that the on-the-job injury is a material contributing cause of the worsened condition, the employer is liable for the payment of compensation benefits.

In the case at bar, the claimant sustained an on-the-job back injury and received an unscheduled permanent partial disability award. His back condition deteriorated in later years, during which the worker was self-employed in an occupation involving bending and lifting. He made a claim for additional compensation against the employer under ORS 656.273(1), asserting that his worsened condition resulted from the original injury. We granted review to decide whether the rule of *Grable* applies to a worsening occurring while a claimant is self-employed and

whether the last injurious exposure rule[1] is applicable. The employer claims that the *Grable* rule does not apply because the worsening occurred while claimant was a self-employer and that the last injurious exposure rule does

apply because claimant was employed— self-employed—at the time of the worsening.

Claimant injured his back in December, 1975, while employed by the respondent. He made a worker's compensation claim and received an award of five percent unscheduled permanent partial disability. He continued to work for the employer until May, 1976, when he left to become a self-employed cedar gleaner, salvaging cedar logs from logging sites. The work involved bending, stooping and lifting. His back pain gradually increased until December, 1978, when he could no longer tolerate exertion. In January, 1979, he filed a request that his claim be reopened so that he could obtain additional medical services and disability compensation.

The employer denied the request to reopen the claim, and claimant thereafter filed a request for hearing. The referee found that the claimant's "* * * present condition is related to his 1975 injury and is a worsening of that condition" and ordered the acceptance of the claim. The Workers' Compensation Board reversed. The Court of Appeals, reviewing de novo, found that the claimant's condition was related to the 1975 injury, reversed the Board, and ordered the reinstatement of the referee's order.

This case involves what is often referred to as a claim for aggravation.[2] ORS 656.273 provides in part:

> "(1) 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.

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[1] In *Bracke v. Baza'r,* 293 Or 239, 244-45, 646 P2d 1130 (1982), we quoted Professor Larson's discussion of the last injurious exposure rule.

> " '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. In this class would fall most of the cases discussed in the section on range of consequences in which a second injury occurred as the direct result of the first, as when claimant falls because of crutches which his first injury requires him to use. * * *
>
> " 'On the other hand, if the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. This is consistent with the general principle of the compensability of the aggravation of a pre-existing condition.' (Footnotes omitted). * * *" (Quoting 4 A. Larson, The Law of Workmen's Compensation § 95.12, at 17-71 to 17-78 (1982)).

"* * * * *.

"(7) A request for hearing on any issue involving a claim for aggravation must be made to the department in accordance with ORS 656.283. * * * If the evidence as a whole shows a worsening of the claimant's condition the claim shall be allowed."

We make no independent findings of fact because under *Sahnow v. Firemen's Fund Ins. Co.*, 260 Or 564, 568, 491 P2d 997 (1971), the findings of fact of the Court of Appeals are binding upon us, and our review is limited to errors of law. As stated, the Court of Appeals found that the claimant's worsened condition resulted from the 1975 injury.[3]

This court adopted the last injurious exposure rule in *Inkley v. Forest Fiber Products Co.*, 288 Or 337, 343, 605 P2d 1175 (1980), an occupational disease case. The last opinion of this court discussing the last injurious exposure rule was in *Bracke v.Baza'r*, 293 Or 239, 646 P2d 1130 (1982), another occupational disease case. *See* footnote 1, supra. In *Grable v. Weyerhaeuser Company, supra,* after discussing the last injurious exposure rule we held:

"* * * We conclude that if the claimant establishes that the compensable injury is a 'material contributing cause' of his worsened condition, he has thereby necessarily established that the worsened condition is not the result of an 'independent, intervening' non-industrial cause. We hold that an employer is required to pay worker's compensation benefits for worsening of a worker's condition where

the worsening is the result of both a compensable on-the-job back injury and a subsequent off-the-job injury to the same part of the body if the worker establishes that the on-the-job injury is a material contributing cause of the worsened condition." 291 Or at 400-01.

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[2] ORS 656.273(1) entitles an injured worker to additional compensation "for worsened conditions resulting from the original injury." Other subsections of ORS 656.273 refer to such a claim as a claim for aggravation. Subsection (2) states:

"(2) To obtain additional medical services or disability compensation, the injured worker must file a *claim for aggravation* with the insurer or self-insured employer. * * *" (Emphasis added.)

Subsection (3) states:

"A physician's report indicating a need for further medical services or additional compensation is a claim *for aggravation."* (Emphasis added.)

Subsection (4) also refers to such a claim as a "claim for aggravation" and subsection (7) provides:

"(7) A request for hearing on any issue involving a claim for aggravation must be made to the department in accordance with ORS 656.283. * * * If the evidence as a whole shows a worsening of the claimant's condition the claim shall be allowed."

Although claims such as this are popularly and statutorily referred to as "aggravation" claims, the claim is for increased compensation on account of a worsened condition, *See, e.g., Grable v. Weyerhaeuser Co.*, 291 Or 387, 396, 631 P2d 768 (1981), and should be distinguished from a worker's claim for an acceleration in the development or deterioration of a preexisting condition which acceleration is caused by an industrial injury or an industrial exposure. *See* Committee on Continuing Legal Education, Oregon State Bar, Workers' Compensation § 10.1 (1980).

[3] The employer also asserts that there is no evidence to support the Court of Appeals' finding that the first injury materially contributed to claimant's later disability. There is such evidence (which is discussed in the Court of Appeals opinion, 57 Or App at 479-80).

Although there was no explicit holding in *Grable* that the second off-the-job injury was also a material contributing cause of the worsened condition, the opinion suggests that a claimant who is subsequently injured off-the-job makes out a compensable claim for workers' compensation benefits for a worsening of the original injury merely by establishing that the prior compensable injury was a "material contributing cause" of the worsened condition, even if the second injury is also a "material contributing cause." 291 Or at 400-01. That conclusion is consistent with ORS 656.273(1) ("* * * an injured worker is entitled to additional compensation * * * for worsened conditions resulting from the original injury").

In *Grable,* we pointed out two purposes of the last injurious exposure rule in a successive injury context: allocating responsibility between successive carriers where two employment-related injuries contribute to the disability; and freeing the worker from establishing which of the successive carrier or employer is responsible for the payment of compensation if the worker establishes that the second injury was a material contributing cause of the disability. Because in *Grable* neither purpose would be furthered by the application of the rule, we held the rule inapplicable. 291 Or at 402.

The opinion of the Court of Appeals in the case at bar suggests that the court believed that it was unnecessary to consider whether the claimant's self-employment was a material contributing cause of the disability and the related question whether the last injurious exposure rule was applicable because the claimant "* * * had not elected to be covered by workers' compensation."[4] 57 Or App at 479

n 1. We do not reach the question whether the rule would apply if the second injury occurred during claimant's self-employment because it is not presented under the evidence. We express no opinion as to the correctness of the quoted statements in footnote 4, *supra.*

In the instant case, for the last injurious exposure rule to apply at all under the employer's successive-injury

[4] The Court of Appeals opinion contains this footnote:

"The present case is not the type of off-the-job injury case presented in *Lemons* [*Lemons v. Compensation Department,* 2 Or App 128, 467 P2d 128 (1970)] (off-the-job fall), *Standley* [*Standley v. SAIF,* 8 Or App 429, 495 P2d 283 (1972)] (off-the-job incidents injuring the low back), and *Christensen* [*Christensen v. SAIF,* 27 Or App 595, 557 P2d 48 (1976)] (slip and fall in bathtub). Nor does the present case involve the issue of which of two worker's compensation carriers should be liable for a later injury. *See Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976) ("last injurious exposure" rule); *Grable v. Weyerhaeuser Company, supra,* 291 Or at 401-402. In the present case, the later injury, strictly speaking, occurred on the job; however, claimant had not elected to be covered by workers' compensation. Therefore, claimant's position is analogous to the *Lemons, Standley,* and *Christensen* situations, and the question is whether the prior on-the-job injury is a 'material contributing cause' of the claimant's worsened condition at the time he filed his claim for aggravation." 57 Or App at 478 n 1.

theory of the case, there must be evidence of a second injury which materially contributed to the claimant's disability. We have carefully searched the record and find no such evidence. Indeed, in the employer's opening brief before the Workers' Compensation Board we find this statement: "It is very doubtful whether claimant has sustained either a new injury or an aggravation of a prior industrial injury." The principal contention of the employer before the Board and before the Court of Appeals was that there was no worsening from the 1975 industrial accident; rather, that the claimant's problems were due to a long-existing chronic back problem.[5]

The statutory rule is clear: An injured worker is entitled to compensation for worsened conditions resulting from the original injury. That has been established by the finding of the Court of Appeals, a finding which is supported by the evidence. The factual showing for the court-made last injurious exposure rule in successive injury cases—material contribution of the second employment—is lacking.[6]

Affirmed.

[5] The claim that the last injurious exposure rule applies in this case was first raised in the employer's petition for review, possibly in response to the language quoted in footnote 4, *supra*. The employer did not make the claim before the Court of Appeals or the Board.

[6] *See Boise Cascade Corp. v. Starbuck and SAIF*, 61 Or App 631, ___ P2d ___ (1983), in which the Court of Appeals considered the last injurious exposure rule in a successive-injury context.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Robert W. Teel, Claimant.

TEEL,
Petitioner on Review,
v.
WEYERHAEUSER COMPANY,
Respondent on Review.

(CA A23460, SC 29001)

Appeal from an order of the Court of Appeals, dated September 17, 1982, denying petitioner's petition for attorney fees.*

Argued and submitted December 29, 1982.

David C. Force argued the cause for petitioner on review. On the petition was Christopher D. Moore, Eugene.

Ridgway Foley argued the cause for respondent on review. On the response to the petition for review were Mildred J. Carmack and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Lent, Chief Justice, and Linde, Peterson, Campbell, Roberts and Carson, Justices, and Jones, Justice pro tempore.

LENT, C. J.

Reversed and remanded to the Court of Appeals.

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* Judicial review of order of Workers' Compensation Board. 58 Or App 564, 649 P2d 610 (1982).

LENT, C. J.

Does an employer who challenges a Workers' Compensation Board's holding that a claim is compensable initiate an appeal within the meaning of ORS 656.382(2) where that challenge takes the form of a cross-appeal to an appeal by the claimant, requesting an award of attorney fees? 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."

We hold that the word "initiated" encompasses raising issues that would otherwise not be dealt with by the reviewing body, and thus an initiation may take the form of a cross-appeal. A claimant's successful appellate defense of

an award by the Board challenged by an employer on cross-appeal warrants an award of attorney fees under ORS 656.382(2).

Claimant's claim for benefits for an injured back was denied by the employer. A Board referee held the claim to be compensable. The employer challenged the referee's determination before the Board and lost. In upholding the referee's determination, the Board inexplicably failed to award claimant attorney fees as required by ORS 656.382(2).

The claimant appealed to the Court of Appeals, asking only that it review the Board's denial of attorney fees. Before the Court of Appeals the employer conceded that the Board was required to award reasonable attorney fees to claimant for prevailing on the issue of compensability before the Board. The employer cross-appealed to the Court of Appeals, seeking to reverse the Board's approval of the referee's award of compensation. In the absence of the cross-appeal, there would have been no occasion for the Court of Appeals to review the factual issue of compensability. The Court of Appeals upheld the Board's

determination on that issue and remanded the case back to the Board for an award of reasonable attorney fees.

Claimant applied to the Court of Appeals for an award of reasonable attorney fees for his defense of the Board's award before the Court of Appeals. The Court of Appeals denied claimant's request and claimant petitioned this court for redress.

On court appeal, the compensation awarded to claimant was not disallowed or reduced. The issue is whether the employer "initiated" that appeal on the issue of compensability. We hold that the party responsible for bringing the issue before the court, here the cross-appellant, initiated the appeal within the meaning of ORS 656.382(2). In reaching this holding, we have looked to the history and purpose of that section. That history and purpose was recently examined by this court in *Bracke v. Baza'r*, 294 Or 483, ___ P2d ___ (1983), and we shall not repeat that examination here. We there found that a purpose of the statute was to discourage harassing or wearing down a claimant. That codified purpose is served by awarding attorney fees on initiation of a cross-appeal as well as initiation of an appeal. The employer or insurer could wear down or harass his opponent through cross-appeal as well as through first appeal. Here, the cross-appeal forced claimant to defend his award and the Court of Appeals to review the entire record. ORS 656.298(6). Absent the cross-appeal the employer could not have challenged an attorney fee award by arguing that the factual issue of compensability was wrongly decided.

The Court of Appeals' order denying the application for attorney fees before that court is reversed, and the case is remanded to that court for an award of reasonable attorney fees.

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