CIRCUIT COURT SUPPLEMENT 2 for VOLUME I of

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

The following Circuit Court dispositions have become available since the publication of our first Circuit Court Supplement incident to Volume I.

Vol. I

Add to Page

9 Edington, Mary Josephine, WCB #692; Affirmed.

12 Scoggins, Ben, WCB #67-92; Affirmed.

65 Schenck, Glenn, WCB #67-708; Affirmed except claimant allowed $18.50 for cervical traction device.

76 Hoppus, Victor W., WCB #67-412; Award increased to 40% loss arm.

80 Elkins, L. M., WCB #926; Hay-J; "This matter is a review on appeal from an order filed and entered by the Workmen's Compensation Board on February 14, 1968, which affirmed the findings and conclusions of the hearing officer made and entered on November 14, 1967 finding the disability of claimant for permanent partial disability to be equal to 60% loss of function of an arm with 35% allocated to the unscheduled disability of the lumbar spine and 25% allocated to the unscheduled disability of the dorsal spine. The record discloses that the claimant suffered an accidental injury on August 28, 1964, and the sole issue in this case is the extent of permanent partial disability proximately caused by this injury. The evidence further reflects that claimant had suffered an earlier non-compensable injury on January 1, 1963 involving his lumbar spine, but that he had become symptom free from any effect of the earlier injury prior to his injury of August, 1964. The evidence further discloses that claimant suffered an incident on February 8, 1967, as a result of marital relations which resulted in the necessity of nearly a week of rest and medical treatment. The Court finds, as did the hearing officer, that the incident of February 8, 1967 was not an accident, but rather a serious exacerbation of the preexisting difficulty in the low back which had previously been caused by the compensable injury of August 28, 1964.

"After a review of the evidence in the record, both from medical witnesses as well as lay witnesses, the Court finds that claimant was suffering serious difficulty with his low back at the time of the hearing which limited seriously his activities both at work and off the job. The evidence discloses that claimant had, prior to the August, 1964 accident, led a normal, active life, and that as a result of the August, 1964 accident, he has been forced to give up gardening, bowling, dancing, fishing, playing the organ and piano, carrying the family groceries, and inability to engage in normal marital sexual relations as evidenced by the incident of February 8, 1967, and that he seldom experiences pain free days.

"The Court finds that the disablement which the claimant suffers is reasonably connected to the compensatory injury suffered on August 28, 1964 by the credible medical evidence received and supported by ample

Vol. I

Add to Page

80 evidence of lay witnesses. Although there has been some suggestion that the treating physician's testimony is somehow discredited by his having changed his opinion as to the degree of disability during the course of his treatment, and further, by his admitted friendship to the claimant, the Court finds no reason to discredit the attending physician's testimony as there is no indication that the Doctor was false in any respect.

"From the entire record, the Court finds that the order of the Board dated February 14, 1968 affirming the previous findings and award of the hearing officer determining the extent of permanent partial unscheduled disability is inadequate and not supported by the substantial credible evidence, and is, accordingly, vacated and set aside. The Court concludes that the claimant is entitled to be granted an award of permanent partial unscheduled disability to his back to be equal to 75% loss of function of an arm with 50% allocated to the lumbar spine and 25% allocated to the dorsal spine. Counsel for claimant may prepare an order consistent with the foregoing."

96 Schrier, Frances, WCB #67-443; Award increased to 25% loss use arm.

114 Prodzinski, Carl E., WCB #67-1444; Affirmed.

115 Husted, Patricia E., WCB #67-967; Hay-J; "Claimant seeks judicial review of the Order of the Workmen's Compensation Board dated April 30, 1968 which affirmed the Order of the hearing officer which has allowed permanent partial disability to the claimant equal to 10% loss of an arm by separation. The claimant seeks an order reversing the Order of the Board and directing the Board and the State Compensation Department to furnish claimant further treatment, or in the alternative, asks the Court to rate the claimant's permanent partial disability at not less than 50% loss of an arm.

"The principal question on appeal is the admissibility of the report of Dr. Arthur C. Jones dated March 26, 1968, and based upon an examination of the claimant made on March 20, 1968, which was after the hearing and before the Order of the Workmen's Compensation Board. Dr. Jones' letter was appended to claimant's reply brief filed with the Board on April 10, 1968, and in these proceedings specially marked as claimant's exhibit one. The admissibility of this report must be determined by a determination of the meaning of ORS 656.298 (6) which provides: '...However, the judge may hear additional evidence concerning disability that was not obtainable at the time of the hearing. ...'. There is no indication from the evidence that Dr. Jones' examination and report could not have been obtained prior to the hearing, and the Court concludes therefore, the claimant's exhibit one, Dr. Jones' report, is not admissible in evidence in connection with the Circuit Court review. Disregarding the report of Dr. Jones, the Court concludes that there is no credible evidence in the record to indicate that the claimant's condition medically is anything but stationary. The Court feels that the evidence supports the findings of the hearing officer as affirmed by the Board and the award of 10% loss of an arm by reason of unscheduled disability to the back is an adequate award.

"Counsel for the Department may prepare a judgment affirming the Order of the Board."

Vol. I

Add to Page

124 Truax, Roger, WCB #67-886; Edison-J; "Having received no response to my letter of December 11, 1968, I assume that counsel did not wish to submit any further memoranda of law and I shall therefore proceed to decide this matter on the record and in light of previous oral argument.

"It would appear from ORS 656.002 (7) that a workman's compensation for injury includes medical services as are entailed in this case. It further appears that this case in making an award of attorney's fees is controlled by ORS 656.386 (2) which requires such attorney's fees to be paid from the workman's award of compensation. Since the award to this particular workman was for additional medical services, there is no monetary compensation from which payment of attorney's fees may be made. It cannot therefore be said that the Workmen's Compensation Board acted inappropriately in making its order of June 26, 1968. In that regard, this Court's attention has not been invited to any decision or other authority which would construe the 1966 Workmen's Compensation Law so as to allow any other course of action, nor has the Court's own reading of the law revealed anything of the kind.

"It would be appropriate to observe, however, that the conscience of this Court is disturbed by the basic unfairness of this situation. Obviously the 1966 act should have provided the Court with the power to award attorney's fees in this case, probably in the manner specified in ORS 656.386 (1), in addition to the award of increased medical services. It therefore seems apparent that the Claimant's only remedy lies with the Legislature and if this Court can lend assistance to such an endeavor it will be pleased to do so.

"I will ask Mrs. Sorensen to prepare an order pursuant to this opinion affirming the Board's order."

134 Doud, Dean N., WCB #67-531; "Review...dismissed on the ground that the Workmen's Compensation Board had no jurisdiction to enter the Order appealed from because no copy of claimant's Request for Review filed with the Workmen's Compensation Board was mailed to the State Compensation Department as required by ORS 656.295 (2)."

137 Kreier, Richard L., WCB #67-1513; Affirmed.

153 Wing, Michael Spencer, WCB #67-1005; Affirmed as to compensation but reversed as to attorney's fees.

156 Bryant, Herbert J., WCB #67-1440; Affirmed.

157 Waibel, Joe, WCB #67-181; Additional temporary total disability allowed.

159 Fretwell, Willie B., WCB #67-1040; Dismissed for improper notice of appeal.

167 Lemons, Bill R., WCB #67-845; "IT IS HEREBY ORDERED and ADJUDGED That the order on review of the Workmen's Compensation Board dated July 24, 1968, be and the same is hereby reversed, and the State Compensation Department be and it is hereby ordered to provide to claimant medical care and services and hospital care and services proximately resulting from his accidental injury of September 23, 1966, and specifically, to-wit, those medical and hospital charges for care and services, together with all other medical benefits as provided by the Workmen's Compensation Act commencing May 23, 1967, and subsequent thereto as this Court has found related to the accident of September 23, 1966, and further to provide claimant such temporary total disability benefits and permanent partial

Vol. I

Add to Page

167 disability benefits as shall be appropriate and consistent with the opinion of this Court, and such other benefits as claimant shall be entitled to under the Workmen's Compensation Law of the State of Oregon as then in force and effect."

173 Johnson, Virgil R., WCB #67-772; Burns-J; "This workmen's compensation appeal was brought here by Claimant, who was employed as a welder for Zidell Exploration. He had been working for about 2½ months at that job when, on March 24, 1966, while he was on a scaffolding, the cable broke and he flipped over backwards, falling 6 or 7 feet, and landing on an I-beam. He felt severe low back and shoulder pain, was treated by his family physician, and returned to work on Monday the 28th of March.

"Thereafter, he worked regularly for Zidell during April, but by April 28th low back pain and numbness in his right thigh was troubling him. Whereupon, he returned to Dr. Peterson. He was admitted to Salem General Hospital May 2, 1966, for conservative treatment. After about two weeks in the hsopital he returned to work and in June, 1966, lost one working day because of back problems. Dr. Peterson cleared him for return to work May 16th, and the claim was closed on August 16, 1966.

"He received some further treatment during the summer, but after being laid off, he filed for unemployment benefits.

"Thereafter, he was hired as a welder by another company in October, 1966, and stated that he still was having back pain at the time. On November 26, 1966, he saw an osteopath during the morning because his back was giving him so much trouble that it was difficult for him to get out of bed. The osteopath's diagnosis tended to indicate that claimant had a lumbo-sacral disc disorder. Coincidentally, on the evening of that day, Claimant received extensive injuries when his automobile went out of control and struck a power pole. He was hospitalized 12 days in the Gresham General Hospital receiving treatment for a fractured clavicle, cuts and bruises, an ankle sprain, and a lumbo-sacral back sprain. He suffered back and leg pains while he was in the hospital and complained of this. He was referred to his local doctor for follow-up care.

"By March, 1967, the only symptoms remaining from the auto accident were low back and right thigh pain. Claimant was then referred to Dr. Mueller, an orthopedist. He specifically told Dr. Mueller that he had been injured in the auto accident described, and stated that he had no previous injuries to his back. He made no mention whatsoever of the industrial injury on which this claim was based.

"Following a myelogram, which showed a disc protrusion, a laminectomy and exclusion of the disc was performed. The hospital record does contain a notation relative to the industrial injury with related back pain.

"Claimant was subsequently discharged by Dr. Mueller in September, who felt he was medically stationary, but should continue exercising and should avoid heavy lifting and activity.

"Claimant was examined by Dr. Lawrence Cohen, who discounted the affect of the industrial injury as productive of the continuing back pain, emphasizing rather injuries earlier than 1966. Dr. Cohen did not

feel that the disc problem operated on by Dr. Mueller was related to job injury, but he did feel that the industrial accident aggravated his previous back condition.

"The Hearing Officer wrote a comprehensive opinion in which he noted four 'puzzling contradictions' in the evidence, all of which tended to negate the validity of his claim that any of his symptoms after November 26, 1966, were causally related to the industrial accident as opposed to the automobile accident. The Hearing Officer made a permanent partial disability award for unscheduled disability of 25% loss by separation of an arm, plus payment of all medical care and treatment described in the order by the carrier; she further ordered temporary total disability from March 11, 1967, to September 8, 1967. From this order, the State Compensation Department appealed to the Board.

"The Board reversed the order of the Hearing Officer in its entirety, declaring that medical expenses in April and May, 1967, and any subsequent temporary total and permanent partial disabilities were not related to the industrial accident.

"Following this order, the Claimant appealed. Brief oral testimony was taken at the hearing before me. Claimant urged vigorously that the 'puzzling contradictions' were not, in fact, contradictions at all, and that the Board's rationale in reversing the Hearing Officer was erroneous.

"As all involved know, rules governing on appeal of this kind are still governed by two cases, Coday and Romero. As I have mentioned in a number of previous opinions, Coday orders me to try the case de novo; Romaro orders me to accord deference to adminstrative agency expertise. Romero, of course, did not involve a case such as this one in which the agency 'experts' disagree. The 'expertise' of the Hearing Officer led her to conclude that the back problems in 1967 were causally related to the industrial accident. The 'expertise' of the Board led all three of its members to conclude precisely the opposite.

"Frankly, I am unsure as to compulsion in this posture by Romero. If I were to try this case entirely de novo, I would rule against the Claimant. I do not believe the medical evidence is sufficient to justify a finding of causation between the industrial accident and the back surgery in 1967 and its following effects. If I follow the expertise of the Board, I would have to affirm. If I follow the expertise of the Hearing Officer, I would have to reverse and reinstate the award of that officer.

"I do not believe Romero requires me to follow the expertise of the Hearing Officer when the Board reaches an opposite conclusion. Accordingly, I affirm the ruling of the Board. The Department, in accordance with its usual practice, filed a request for special findings under ORS 17.431. Accordingly, I make the following special findings:

"1) Claimant suffered an accidental injury arising out of and in the course of his employment on March 24, 1966, involving back pain which produced temporary total disability from then until May 16, 1966;

Vol. I

Add to Page

173

2) Claimant suffered back and other injuries in a non-industrial accident on November 26, 1966;

3) Hospitalization occurring in April and May, 1967, was not causally related to the industrial accident;

4) Claimant suffered no permanent partial disability resulting from the industrial accident;

5) Claimant suffered no temporary total disability in the period following April, 1967, from the industrial accident.

"I conclude, as a matter of law, that the employer's carrier was not liable for the hospitalization in April and May, 1967; I further conclude that Claimant was not entitled to temporary total disability during the period from March to September, 1967, nor is he entitled to any permanent partial disability as allowed by the Hearing Officer. Mr. Knapp should prepare an order."

177 Sain, John J., WCB #68-532; Reversed and remanded for hearing on merits.

180 Fullerton, Savola, WCB #67-1180; Permanent total disability allowed.

SUPPLEMENT

CIRCUIT COURT ORDERS AND OPINIONS

Add to Page

1 Seratt, Kelly L., WCB #67-29; Motion to quash service of summons be granted.

3 Voigt, Fred W., WCB #67-119; Affirmed.

3 Luck, Maury Gene, WCB #67-3; Affirmed.

5 Freeman, Loren B., WCB #855; Affirmed.

7 McGill, Myrnaloy, WCB #123; Remanded for consideration of further medical reports.

7 Mace, Eugene R., Jr., WCB #67-366; "Finds and concludes:

(1) That this Court may affirm, reverse, modify or supplement the order appealed from and may make such disposition of the case as the Court deems appropriate upon the record.

(2) That the claimant has sustained as a result of his accidental personal injury of April 13, 1966, injuries to his back as well as to his feet, and his present back trouble is directly attributable or causally related to his jump from the ladder on said date.

(3) That the claimant is entitled to compensation for temporary total and/or temporary partial disability as the case may be for his back condition and medical care and treatment therefore.

(4) That this claim be and the same is hereby remanded to the Workmen's Compensation Board and to the State Compensation Department for further proceedings in conformance with this order and not inconsistent herewith.

(5) The law firm of Pozzi, Levin and Wilson are entitled to an attorney fee equal to 25% of the increased award of compensation for either temporary or permanent disability to be paid to the claimant by virtue of this order, now, therefore,

IT IS HEREBY ORDERED that the order on review of the Workmen's Compensation Board be and the same is hereby reversed as is the order of the hearing officer dated June 12, 1967, and ...."

7 Borland, John L., WCB #67-204; Wells, J.; "Plaintiff filed a claim seeking to recover compensation for a slowly developing inguinal hernia. Upon a finding by the hearing officer and the Board in his favor, the Department has appealed, contending that the evidence referred to in the Board's order was insufficient to sustain its finding.

"There is no dispute between the parties that medical testimony is required that the hernia was work related in order for the plaintiff to prevail. As stated by counsel for the Department, what is required is that it be more probable than not that the hernia developed as a consequence of the employment of the plaintiff. Considerable testimony was introduced during the hearing relative to the causes of inguinal hernias. The Department contends, however, that the testimony of the

Add to Page 7

doctor was inconclusive with respect as to whether the hernia of the claimant was work related. It is contended that the statement of the treating doctor that,

> As far as can be determined Mr. Borland's recurrent inguinal hernia was due to heavy lifting in his floor work

was insufficient testimony as to causation, as a matter of law, and should be stricken from the decision of the Board and the matter re-referred to it for further consideration as to whether there was sufficient evidence aside from that statement to justify an award.

"The Department has cited Howerton v. Pfaff, 84 Adv Sh 473 for authority that the doctor's statement does not rise to the stature of a 'reasonable degree of medical certainty'. It is noted that in the cited case the testimony merely indicated that the accident was 'the possible source of the plaintiff's difficulty'. The same is true of the testimony in Crawford v. Seufert, 236 Or 369. It is hornbook law that "possibilities" are not enough to sustain the element of causation.

"Rather than to take the one statement of the treating physician out of its entire context, the Court has read the full testimony, as well as examined the exhibits and is convinced that that part of the Board's opinion which states,

> While not couched in so-called magic words, the Board concludes the doctor's evaluation is equivalent to a statement that the injury probably resulted from the work stress

is a finding by the Board that the testimony indicated that it was probable that the claimant's condition was casually connected with his employment.

"It was suggested in oral argument that the Board had abdicated its responsibility in not making a specific finding to this effect, and this Court should require the Board to exercise its responsibility rather than accepting its general finding as follows:

> There being substantial competent evidence to support the findings and conclusions of the Hearing Officer, they are adopted as those of the Board and the order subjected to review is affirmed.

While it may be better procedure for the Board to adopt this suggestion, this Court in fairness to the claimant does not believe he should be subjected to further litigation solely to establish proper procedures for the Board. The Court has, therefore, reviewed the entire record and based thereon hereby affirms the decision of the Board."

9 Elliott, Sandra, WCB #811; Affirmed.

13 Moffet, Fred, WCB #606; Award set aside because claim not filed within 100 days.

16 Kelley, Maurice E., WCB #67-177; Award increased to 35% forearm.

18 Fairchild, Clayton D., WCB #67-142; Affirmed.

Add to Page

19 Thompson, Sally Jane, WCB #779; Affirmed.

19 Hayden, William A., WCB #533; Affirmed.

20 Oreskovich, Joe N., WCB #67-63; Wells, J.; "Plaintiff has appealed from a decision of the Workmen's Compensation Board which affirmed a finding by the Hearing Officer of a ten per cent disability resulting from an injury sustained on June 23, 1966.

"Appellant has not contested the finding of the Hearing Officer regarding the facts but does contend that there has been an error in the principle evoked in requiring the claimant to prove 'the specific degree of disability which is attributable to the injury of June 23, 1966'. He contends that he is required only to show that he was disabled as a result of an accident and is entitled to receive the amount of disability existing as the result of the accident.

"Claimant was sixty-seven at the time of his injury and was employed as a longshoreman for the City of Portland, Commission of Public Docks. While in the process of cleaning up the railroad yards at Pier No. 2, he lifted the end of a large timber, approximately 16 feet long and weighing 600 pounds, which was balanced near its center, a fork-lift truck shifted the timber from its point of balance so as a result much more of the weight of the timber was placed upon the claimant and he suffered a strain of his back.

"Claimant is unable to work at the present time in any form of longshore work or to obtain any gainful employment of any type. He has considerable loss of motion in his lower back associated with constant pain. His total disability, however, has been attributed to additional factors other than the accident of June 23, 1966. In the course of his work as a longshoreman he has sustained a number of prior injuries. Despite these previous awards for disability, however, he was able to work as a longshoreman on the 'old man's board', which was assigned lighter work.

"His physical injuries are superimposed upon the usual problems associated with a man of his age. The doctor reported that he has 'severe degenerative arthritis', scoliosis and emphysema. Dr. Patton's report of December 29, 1966, expressed the opinion that the claimant's 'other conditions of emphysema and obesity are probably causing him more trouble than his back pain.' Despite these disabilities, however, he worked regularly on a full time basis up to the time of the accident. During the six months of 1966 prior to the accident he had earned $4,400.00.

"Under the law, an employer takes the workman as he finds him and is responsible when an accident lights up, accelerates or aggravates a pre-existing condition. Armstrong v. SIAC 146 Or. 569. The fact that a claimant may have previously received an award does not preclude an award for injury to the same place. The Workman's Compensation Law must be liberally interpreted in favor of the workman.

The law contemplates that the injured workman may, and perhaps will, again become employed in industry in some capacity. It would indeed be unjust if, while gainfully employed, the

Add to Page 20

> workman suffered another accident proximately resulting in additional permanent partial disability, he were denied any compensation therefor. We do not believe the legislature intended any such harsh result. The Workmen's Compensation Law must always be given a liberal interpretation. It is just a coincidence that plaintiff's second injury involved the same part of his body as that injured in the first accident, and that fact can have no bearing upon plaintiff's right to compensation for the permanent injury actually suffered as the result of the second accident. Payments for his first permanent partial disability award had long since terminated. Green v. SIAC, 197 Or. 160, 169.

"Attorney for the Workmen's Compensation Department has cited Cain v. SIAC, 149 Or. 29 for the proposition that a workman who repeatedly suffers the same type of injury is entitled to receive no greater compensation because of the recurrence of the hurt to the same part of his body than is warranted by the additional degree of disability brought about by the specific injury for which he seeks compensation. Assuming for the moment that this may be the law, the facts in the cited case are dissimilar to the instant one. The Court assumes that one of the purposes of the act is to restore the injured workman as soon as possible to a condition of self-support and maintenance as an able-bodied workman. That this was accomplished in the instant case is evident from the fact that at the time of his most recent injury he was engaged in a gainful occupation on a full time basis. As the result of his injury he now, however, is permanently and totally disabled from performing any gainful employment.

The Hearing Officer stated:

> Claimant's evidence clearly proves the existence of a large degree of disability, probable total disability. Nevertheless, there is no clear evidence establishing the extent of this disability as related to the injury of June 23, 1966. Such disability as claimant suffers must be prorated between emphysema, age, prior disabilities, obesity and degenerative arthritis. It is not necessary to allocate a specific amount of disability to each of these, but it is necessary to allocate the specific degree of disability which is attributable to the injury of June 23, 1966.

"It is not necessary that the accident be the sole cause of the disability or that it be pro-rated. A better view is that adopted by the Ninth Circuit Court of Appeals in Independent Stevedore Company v. O'Leary, 357 F. 2nd 812 where the claimant, at the time he was hurt on several previous occasions. As the result of spinal fusion associated with preexisting osteoarthritic changes in the lumbosacral spine the claimant was permanently and totally disabled. The Court stated:

Add to
Page

> While it is true that a doctor testified that only forty per cent of the employee's total disability was due to the spinal fusion, the fact that the fusion was not the sole cause of the disability is irrelevant. 'It is well settled in compensation law that it is sufficient to justify an award if the accident was only a concurring cause ***.' Old Dominion Stevedoring Corp. v. O'Hearne , 218 F. 2d 651, 653 (4th Cir. 1955). *** It is enough if the accident 'aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought' (1 Larson, Workmen's Compensation Law Sec. 12.20 p. 192.23), and 'the relative contribution of the accident and the prior disease is not weighed.' 1 Larson, supra, pp. 192.48-.49.

"Counsel for the State Compensation Department contends that since the claimant was working past the normal retirement age, and within a week of the injury retired from the labor market by applying for his social security benefits he should not be entitled to total disability. The Court believes this fact is irrelevant to the issue.

> If an employee is incapacitated from earning wages by an employment injury which accelerates a condition which would ultimately have become incapacitating in any event, the employee is incapacitated 'because of' the employment injury, and the resulting 'disability' is compensable under the Act. Old Dominion Stevedoring Corp. v. O'Hearne, Supra at 815.

"For the foregoing reasons the Court is of the opinion that there has been an erroneous application of the law in requiring the claimant to 'allocate the specific degree of liability which is attributable to the injury of June 23, 1966.' The award for permanent partial disability equal to ten per cent loss of an arm by separation for an unscheduled disability will be set aside and the claimant granted an award of permanent total disability."

25 Kautz, George, WCB #67-469; Affirmed.

25 Byers, John F., WCB #67-175; Award increased to 40% loss of arm for unscheduled injury and disability.

26 Cooper, Robert B., WCB #67-50; Affirmed.

26 Rios, Carlos V., WCB #67-432; Claim reopened for further care and treatment.

28 Alexander, Howard, WCB #67-550; Affirmed.

Add to Page

30 Ayres, Thomas H., WCB #67-577; "Claimant sustained serious injuries in his accident of September 12, 1966, and as a result has sustained serious and permanent disability in his left lower leg and in his back. That such disabilities drastically interfere with his ability as an iron worker and would interfere with his ability to work at any livelihood. That the disability sustained by the claimant is equal to 50% loss function of the left foot and the equivalent of 50% loss of an arm by separation for his unscheduled disabilities.

"There is no evidence in the record to support a conclusion by the Board that the Accident Commission had established an administrative interpretation and policy that a loss of sense of taste or smell could not be a permanent partial disability under the Oregon Workmen's Compensation Law.

"There was no evidence submitted sufficient to sustain a finding that claimant suffered any permanent partial disability based on the claim of loss of sense of taste.

"Conclusions of Law: The Workmen's Compensation Board was in error in holding that the loss of taste or smell is not an injury known in surgery as permanent partial disability.

"NOW, THEREFORE, based upon the Findings of Fact and Conclusions of Law, the Court enters its judgment in favor of the claimant and remands this matter back to the State Compensation Department directing it to enter an order granting to the claimant an award of permanent partial disability equivalent to 50% loss of function of his left foot and 50% loss of an arm by separation for his unscheduled disabilities, being an increase of 30% loss of an arm for his unscheduled disabilities."

31 Fullmer, Anthony, Jr., WCB #664; Affirmed.

33 Bridge, Dale Eugene, WCB #315; Affirmed.

34 Loper, James F., WCB #67-207; "That the Order on Review made and entered by the Workmen's Compensation Board of the State of Oregon on November 21, 1967, be and the same hereby is affirmed, reversed and remanded as follows:

(1) The findings of proximate cause set forth in said Order of June 9, 1967, hereby are affirmed.

(2) The imposition of penalty for the delay in 2 payments in February, 1967, be and the same hereby is affirmed.

(3) The imposition of penalties for seeking to terminate compensability, being the penalties for unreasonable resistance of claim set forth in said Order, be and the same hereby is reversed.

(4) The award of attorneys' fees set forth in said Order hereby is affirmed.

(5) This matter hereby is remanded to the said Workmen's Compensation Board of the State of Oregon for determination of the following issues (a) whether Claimant's condition is temporary or stationary; (b) if temporary, whether Claimant is in need of further medical, including psychiatric, treatment; or (c) if stationary, whether Claimant has any permanent disability, and if so, the extent thereof."

Add to Page

35 Johnson, Beno, WCB #799; Affirmed.

35 Guy, Thomas, WCB #852; Award increased to 25% loss of function of left forearm.

38 Richert, Erwin L., WCB #67-437; Award increased to 15% arm for unscheduled disability.

38 Benedict, William J., WCB #67-294; Temporary total allowed April 21 - June 8, 1967. Permanent partial increased to 35% of arm for unscheduled.

39 Stephens, Edward F., WCB #67-535; Award increased 20% loss function of left foot.

40 Carlson, Ludvick W., WCB #67-397; Award increased to 42½% loss of arm for unscheduled.

41 Simmons, Frank A., WCB #67-287; Remanded for further evidence.

42 Williams, Thomas H., WCB #67-410; Remanded for acceptance.

43 Thornbrugh, Leonard E., WCB #67-395; Award increased to 60% loss of arm for unscheduled.

45 Kilgore, Eddie L., WCB #67-284; Affirmed.

47 Tourville, C. J., WCB #67-301; Award increased to 25% loss function of right arm and 15% loss of arm for unscheduled disability.

48 White, John Virgil, WCB #67-372; Affirmed.

50 Serles, Wilbert O., WCB #67-382; Dismissed.

52 Smith, William Raymond, WCB #67-363; Award increased to 50% loss of arm for unscheduled disability.

55 Turvey, Roy B., WCB #67-541; Remanded for further evidence.

55 Finley, Sam, WCB #67-148; Affirmed.

56 Desgrange, Michael J., WCB #67-55; Affirmed.

56 Egr, Corinne Bernice, WCB #67-504; Reversed with instructions to accept claim.

57 Gonsalves, Alexander H., WCB #67-351; Award of 50% loss of an arm by separation for unscheduled injuries and disabilities and 10% loss function of a leg.

57 Hewlett, Charles W., WCB #67-711; Award increased to 20% loss of arm for unscheduled disability.

58 Cunningham, Hiram S., Sr., WCB #705; Dismissed.

58 Henrikson, Robert, WCB #67-98; Affirmed.

59 Schulz, Ray, WCB #67-709; Affirmed.

59 Swink, William Floyd, WCB #67-67; "This matter having come on regularly before the above entitled Court and the undersigned Judge, upon the request of the claimant for Judicial Review of the order on review of the Workmen's Compensation Board dated the 10th day of January, 1968, on the entire record forwarded by the Workmen's Compensation Board to this Court, and this Court does find that the State Compensation Department did unreasonably delay the payment of compensation for temporary total disability as found by the hearing officer in his

Add to Page 59

order dated the 30th day of August, 1967, and in addition thereto, the Court finds that the State Compensation Department did unreasonably resist the payment of compensation for temporary total disability benefits for the periods therein indicated, now, therefore,

"IT IS HEREBY ORDERED that the law firm of Pozzi, Levin and Wilson be and they are hereby awarded an attorney fee in the amount of $400.00 in the representation of the claimant before the hearings officer, on the request for review, and on appeal to this Court to be paid to them by the State Compensation Department, and said attorney fees are not to be assessed against the increased compensation awarded to the claimant herein, and

"IT IS FURTHER ORDERED that the order on review and the order of the hearing officer, awarding to the claimant further compensation for temporary total disability be and the same is affirmed by this Court, and

"IT IS FURTHER ORDERED, that this case and claim be and the same is hereby remanded to the Workmen's Compensation Board and/or the State Compensation Department of the State of Oregon for further proceedings in conformance with this order and not inconsistent herewith, ..."

61 Belding, Aretta, WCB #67-614; Affirmed.

61 Cole, Donald T., WCB #67-876; Affirmed.

62 Antoine, Leona, WCB #67-840; Award of temporary total disability on five-day-per-week basis.

63 Bradley, Estil, WCB #67-1168; Affirmed.

63 Williamson, Joe W., WCB #67-200; Award increased to 40% loss function of left leg.

66 Smith, Thomas L., WCB #67-771; Affirmed.

66 Butcher, Clifford, WCB #67-671; Remanded with instructions to accept claim.

67 Matson, Earl L., WCB #67-803; Affirmed.

70 Leech, Willis E., WCB #67-110; "ORS 656.204 (8), relating to payments after the death of a workman who has sustained a compensable injury, provides:

'If a child is an invalid at the time he becomes 18 years of age, the payment to him shall continue while he remains an invalid.'

In this case, the deceased workman was survived by an invalid child who had already attained the age of 18 years.

The statute is capable of these constructions:

1. That payments begun prior to the death of the workman will be continued after his death for an invalid child.

2. That a child becoming an invalid before attaining 18 years of age, as distinguished from a child becomeing invalided after attaining the age of 18 years, will continue to be entitled to payment despite becoming over-age.

Since the statute is capable of two constructions, it is ambiguous. The manifest purpose of the act was to make a child, who becomes invalided during non-age, a dependent so long as that condition continues."

Add to Page

71 Printz, Carl A., WCB #67-498; "Finds and concludes:

(1) The State Compensation Department's Notice of Denial dated November 2, 1966 (Exhibit No. 7) was not mailed or received by the claimant, Irene L. Printz, the widow of the deceased workman, either the original or copy thereof, and

(2) the order of the State Compensation Department dated November 2, 1966 is a nullity and does not bar the claimant to her right of a hearing before the Workmen's Compensation Board on the issue of the compensability of her claim for widow's benefits and

(3) the claimant's request for hearing was and is a timely appeal from the Notice of Denial mailed by the State Compensation Department March 15, 1967, and

(4) the claimant's attorneys, Pozzi, Levin and Wilson are entitled to attorney fees in the sum of $1,500.00 as reasonable attorney fees to be paid to them as costs to the State Compensation Department."

72 Satterfield, Charles E., WCB #67-477; Langtry, J.; "This is an appeal from the Workmen's Compensation Board's decision which reversed a hearing officer's decision. The latter allowed a claim, the former disallowed it. The reversal is based largely on the conclusions of the board that the hearings officer was wrong in placing the burden on the department to show that it was prejudiced by claimant's failure to give timely notice.

"Claimant's allegation is that his back condition resulted from two incidents on the job. The first incident was on January 3, 1967, while lifting a tire weighing about 60 pounds onto a trimming machine (Tr. p.8). Claimant testified that he did not report this on that day, but did mention to the foreman on the following day, January 4, 1967, that his back was bothering him (Tr. p. 15). On cross-examination he said that this was just a matter of conversation and was not intended as a report of an injury (Tr. pp.56-57).

"The second incident was on January 5, 1967, while loading some tires on a truck at Santry Tire Co. (Tr. p. 18). Claimant testified that on his return to employer's premises he asked the bookkeeper if there was a company doctor and stated that he had done something to his back. (Tr. pp. 18-19). On cross-examination he testified that when he was talking to the bookkeeper he was not claiming an on job injury (Tr.pp.57-58).

"On January 6, 1967, claimant was laid off at Burns Bros. Forty-nine days later, on February 23, 1967, claimant filed his claim for injuries (Tr. p.62). In the meantime he had done other extensive physical labor, any or all of which could easily have aggravated an injured back. He had received medication and an outpatient checkup on his back a few days after his termination at Burns Bros., but at that time made no compensation claim. ORS 656.265 (1) provides:

> Notice of an accident resulting in an injury or death shall be given immediately by the workman or his dependent to the employer, but not later than 30 days after the accident. *****.

Add to Page 72

"ORS 656.265 (4) provides:

> Failure to give notice as required by this section bars a claim * * * unless:
>
> (a) The contributing employer or direct responsibility employer had knowledge of the injury or death, or the department or direct responsibility employer has not been prejudiced by failure to receive the notice; or
>
> * * * *
>
> (c) The notice is given within one year after the date of the accident and the workman or his beneficiaries establish in a hearing he had good cause for failure to give notice within 30 days after the accident.

It is obvious that this claim is barred unless the facts of the case can be brought within the exceptions of ORS 656.265 (4).

"Claimant testified that he did not tell his employer that he had hurt himself on the job (Tr.pp.56-58). He did testify that on two occasions he mentioned that his back was bothering him. The foreman, Mr. Fluharty, testified that he did not recall any conversation with claimant in which claimant mentioned his back bothering him or of any claim of an injury on the job (Tr. pp. 117-118). A fair appraisal of the evidence leads to the conclusion that the employer did not have and could not have had knowledge of the claim.

> Actual knowledge of employer within compensation act provision excusing written notice of the accident or injury, means knowledge of a compensable injury and involve more than knowledge of the mere happening of an accident or than merely putting upon inquiry, and notice in casual conversation or mere notice to employer that the employee became sick while at work is insufficient. Ogletree v. Jones, 106 P.2d 302.

"Even though there was no timely written notice filed, and no actual knowledge of the accident and injury on part of employer, claimant may recover if the employer has not been prejudiced thereby. Time itself may work as a prejudice.

> The requirement of the Workmen's Compensation Act that the employer have actual knowledge or be given written notice of the accident and injury is for the protection of the employer in order that he may investigate the facts and circumstances and question witnesses, and to prevent filing of fictitious claims when lapse of time makes proof of genuineness difficult. Ogletree v. Jones, supra.

Further, if notice were timely given, there would be an opportunity to prevent aggravation of injury by unwise activity.

"There seems to be a split of authority in other states on the question of burden of proof regarding prejudice to the employer.

Add to Page 72

Individual statute should govern, but the Oregon statute gives no guidance. Reason indicates the better rule is that the claimant should carry the burden. His position as to availability of evidence is as good or better than that of the employer. The delay was his, unless he was misled. Thus, this Court agrees with the board that the claimant had the burden to prove that he is protected by the exception in the statute. Regardless of the burden in this regard, the evidence makes it hard to believe the delay in notice was anything but prejudicial to the employer.

"Timely notice is also excused under ORS 656.265 (4) (c) if notice is given within one year of the accident and the workman establishes in a hearing that he had good cause for a failure to give notice within 30 days. Claimant testified that he had only a sixth grade education, and that he did not understand that he could still make a claim for an on the job injury even though he had been laid off (Tr. p.69). Claimant has had two prior on the job back injuries, one in 1956 and one in 1962 (Tr. pp. 4 & 7). It is reasonable to assume he had some knowledge of the Workmen's Compensation Law. Adequate reason in this regard has not been given for failure to file a timely notice.

"Claimant says that the Department waived any defect as to notice by not raising it sooner than it did. If the Workmen's Compensation Department is to defend on the basis of lack of timely notice, it must be raised as provided in ORS 656.265 (5).

> The issue of failure to give notice must be raised at the first hearing on a claim for compensation in respect to the injury or death.

This was properly done at the hearing June 22, 1967 (Tr. p.34). Therefore, it must be concluded that since there was no timely notice, the claim must be denied.

"While the Court will ordinarily not disturb the fact finding of the hearing officer when it is based upon evidence, in this case it appears that the reversal by the board was properly based upon questions relating to the law. (Adams v. Compensation Dept., 86 Adv. Sheets 597, at p. 600). The decision of the board is affirmed."

73 McDaniel, Joe R., WCB #67-815; Remanded with instructions to reopen claim

74 Mott, Robin A., WCB #917; Affirmed.

74 Schanno, Arthur, WCB #67-754; Affirmed.

75 Withers, Ernestine, WCB #67-283; Affirmed.

77 Lawson, Alfred F., WCB #67-837; Remanded for payment of benefits.

77 Beagle, John H., WCB #67-1028; Award increased to 75% loss of an arm by separation for unscehduled injuries; 50% loss function of a forearm for injury.

79 Tooms, James W., WCB #67-167; Affirmed.

80 Parker, Charlie, WCB #67-870; Affirmed.

Add to Page

81 Bogard, Linda, WCB #67-850; Award increased to 25% loss function of forearm.

82 Perry, Carl, WCB #67-1061; Affirmed.

82 Mayes, Jesse J., WCB #67-609; Remanded for award of permanent total disability.

84 McCarty, H. A., WCB #67-963; Award increased to 50% loss of use of right arm.

84 Hough, Janice Marie, WCB #67-656; Award increased to 15% loss arm for unscheduled disability.

85 McGilvra, Robert D., WCB #67-1122; Award increased to 25% loss arm for unscheduled.

86 DeVaul, Vincent S., WCB #67-1103; Award of 33-1/3% loss of use of his right middle finger; 50% loss of use of his right ring finger; 10% loss of use of his right thumb for opposition with the right middle finger, and 10% loss of use of his right thumb for opposition with the right ring finger.

88 Edmonds, Francis Wayne, WCB #67-1088; "Claimant, Francis Wayne Edmonds, is entitled to an award of permanent partial disability of a scheduled member, his left arm, in the amount of 65% loss function of the left arm; and an award for the permanent partial disability of an unscheduled part of his body, his left shoulder, equivalent to 50% loss use of an arm."

91 Anderson, James A., WCB #67-217; Affirmed.

91 Shlim, Harriet, WCB #67-499; Award increased to 25% loss arm for unscheduled.

92 Reames, O. L., WCB #871; Langtry-J; "This is an appeal from the decision of the Workmen's Compensation Board. Claimant was awarded 15% loss function of an arm for unscheduled disability by the Hearing Officer. Claimant appealed to the board, claiming that he should have received 50% loss function of an arm for unscheduled disability, 15% hearing loss and 25% for loss of use of the right arm. The board affirmed. Awards for loss of hearing and loss of use of the right arm are claimed in this appeal.

"Claimant testified (Tr. p. 23) that prior to the accident he had had no difficulty hearing, and that subsequent to the accident he had difficulty hearing. In a letter to the State Compensation Department, which has been marked Defendant's Exhibit B, Dr. Petroff states:

> It is my belief that hearing impairment can occur from a blow to the head in certain individuals and in view of this man's history, it is felt that at least some of his hearing impairment can be attributed to the injury. * * * * It is, therefore, believed that his hearing impairment probably exceeds 15% in total but it would be fair in my belief to assign a 15% impairment that might be attributed to the injury.

On p. 2 of the order on review, it is stated:

Add to
Page
92

> The real problem in this instance is that even Dr. Petroff uses the terms that disability 'can be caused' in this manner and 'a 15% impairment that might be attributed to the injury.' The words 'might' and 'can' are not equal to probabilities.

"Thus, it would appear that both the Hearing Officer and the Workmen's Compensation Board concluded that there was no competent evidence as to the causal relationship between the injury and the hearing loss. This conclusion seems to be based on the choice of words used by the doctor in Defendant's Exhibit B. However, it is a reasonable conclusion from Uris v. Compensation Department, 84 Or. Adv. Sh. 851, that the use of a particular form of words is not determinative.

"In Uris, in which this trial court was reversed, the testimony of Dr. Grossman was taken by deposition only, and his reported words having to do with causal relation were very sketchy. The Supreme Court held this testimony, combined with that of the claimant, to be sufficient:

> In the compensation cases holding medical testimony unnecessary to make a prima facie case of causation, the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his superior and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event would not have been the cause of the injury.

"In Uris, the question of immediate consultation with medical aid is referred to, but the necessity for it is somewhat skirted. For instance, the opinion refers several times to claimant's having gone to Dr. Gregg Wood immediately after the accident. A fairer statement would have said that claimant said he went to Dr. Wood, but Dr. Wood had no record or recollection of such a visit. The quoted language from Uris is partly in point in the instant case, and the instant case is partly distinguishable from it.

"This judge as a pro tem. on the Supreme Court wrote the opinion in Adams v. Compensation Department, infra. With such experience relating to the questions involved here, the best the writer can say is that it is difficult to find a rule applicable to some causal situations, and the instant case appears to be one such.

"However, the statement of Dr. Petroff in Defendant's Exhibit B, taken with the testimony of claimant that prior to the accident he had no hearing problems, appears to be competent evidence under Uris to show a causal relationship between the accident and the hearing loss. This court is not overlooking the Hearing Officer's belief there was a preexisting hearing loss, but the doctor's testimony is based on the history as well as his examination, and it does use the word 'probably' in assessing the loss. Cf. Sentilles v. Inter-Caribbean Shipping Corp., 361 U. S. 107 (1959); Ford v. Blythe Brothers Company, 242 N.D. 347, 87 S.E.2d 879 (1955); Foley v. Coca-Cola Bottling Co. of St. Louis, 215 S.W. 2d 314 (1948); Henderson v. Union Pacific R.R. Co., 189 Or. 145, 219

Add to Page 92

P.2d 170 (1950). The Court concludes the disability for hearing loss should be allowed in the amount indicated by the doctor, namely, 15%.

"Claimant testified (Tr. p. 27) that about a month after this accident he noticed a tingling sensation in the little finger of the right hand extending to above the elbow. He further testified (Tr. p.33) that he first noticed it after a back injury on February 21, 1966. Dr. Gray's report (Claimant's Exhibit 1) states that this injury is attributable to the head injury. All together, the evidence does not indicate that the disability to the arm is connected with the head injury.

"Under the new act, the Court will not disturb the fact finding of the Hearing Officer when it is based upon competent evidence. See Adams v. Compensation Department, 86 Or. Adv. Sh., 597 at 600.

"The decision of the board is affirmed in part and reversed in part."

93 Krewson, Jay Glenn, WCB #67-1179; Bradshaw, J; "It is the Court's opinion that the Order on Review of the Workmen's Compensation Board dated March 18, 1968, from which this appeal has been taken, is in error, in that that Order affirmed the Order of the Hearing Officer entered January 16, 1968, and which denied claimant's claim for permanent partial disability.

"The Order of the Board of March 18, 1968, was based upon the fact that there was substantial competent evidence to support the conclusion of the original determination as affirmed by the Hearing Officer, and in that Order the Board stated 'the conclusion of the Hearing Officer is best supported by the medical report of Dr. Borman of January 26, 1967, setting forth his opinion that the 'symptoms are highly functional'.

"This Court finds the Board's Order in error because although there may be some evidence to support the Order of the Hearing Officer, in this Court's opinion it is minimal, while on the other hand, it is the opinion of this Court that the evidence as a whole overwhelmingly is preponderant in proving some permanent disability of the claimant. In other words, it is this Court's opinion that the opinion and order of the Hearing Officer and the Order of the Board are entirely contrary to the evidence in this case, and that the evidence unquestionably indicates some permanent partial disability.

"The opinion and order of the Hearing Officer briefly reviews the medical opinions in evidence but fails to arrive at a conclusion as to what that medical evidence indicates. The Hearing Officer then discusses certain marital relationships of the claimant and points out that he was a medical corpsman and concludes by stating that these bits of evidence are signficant and in his opinion claimant's complaints are either psychogenic or simulated.

"This Court realizes that the Hearing Officer had the opportunity of observing the demeanor and attitude of the claimant as a witness and is entitled to use this observation in determining his credibility and if he feels, through this observation, that the claimant is unreliable in his statements, then he should so find. However, this Court can find

Add to Page 93

no basis for determining that the claimant's complaints are psychogenic or simulated simply because of his marital problems and the fact that he was a medical corpsman. This is true particularly in light of the fact that such a finding would be contrary to the other evidence in the case.

"The Board in its Order on Review refers to the report of Dr. Borman of January 26, 1967, which the Board felt was the principal evidence supporting the Hearing Officer's opinion. In that report Dr. Borman also, because of the nature of the case, suggested that another orthopedic surgeon, namely Dr. Clarke, be brought into the case. Dr. Clarke did examine the claimant on February 22, 1967, and found objective symptoms. Later Dr. Borman after suggesting a myelogram, reported on May 1, 1967, prior to the original date of closing by the Board, that objective findings were minimal but consistent and Dr. Borman recommended closing the case with minimal permanent partial disability.

"It would appear therefore to the Court that the Hearing Officer and Board selected a statement of Dr. Borman out of context that the symptoms were functional and ignored the fact that he went to great lengths to determine this man's condition by consulting other doctors and in the end, he himself recommended closing the case with some permanent partial disability.

"Dr. Burton in Boise, Idaho, on January 10, 1967, found spasms. Dr. Heatherington in his reports found subjective symptoms. Finally, Dr. Clarke on January 3, 1968, was of the opinion that 'there will be some permanent partial impairment.'

"Therefore, the Court makes the finding that the Board's Order on Review was in error; that the Hearing Officer's opinion and order was in error, and the Board's original closing as of April 28, 1967,in not awarding permanent partial disability, was in error, for the reason that the great preponderance of evidence in this case shows some permanent partial disability, and that the findings in those instances were not supported by the evidence presented.

"Based upon this finding the Court concludes that the claimant is entitled to an award of permanent partial disability on account of injury to his back equal to 15% loss of an arm."

94 Bergh, Emma Jeanne, WCB #67-1302; Affirmed.

95 Stricker, Edwin, WCB #423; Affirmed with additional temporary disability.

97 Boorman, Irven S., WCB #67-85; Allen -J; "Claimant on April 13, 1966 suffered an accidental injury arising out of and in the course of his employment while employed by Siuslaw Valley Veneer, Inc. It is undisputed that as a direct and proximate result of this accident it was necessary that the claimant's right eye be surgically removed and that claimant suffered a serious impairment of his left eye resulting in a loss of vision of considerable magnitude.

Add to Page 97

"Dr. George McCallum, one of claimant's treating physicians and an ophthalmologist, who practices in Eugene, has testified on several occasions before this court, and the court has had an opportunity to be exposed to testimony concerning his qualifications and experience. Dr. McCallum who possesses an unimpeachable reputation in his field, by special findings and an expressly stated formula rendered his opinion that the visual efficiency of claimant's left eye was 11.2% and, of course, an opinion of 100% loss of vision of claimant's right eye. (Defendant's Exhibit D).

"The Workmen's Compensation Department on October 11, 1966 closed daimant's claim, and by a process of legerdemain kept within its bosom and not ascertainable in the record, made an award of 100% loss of vision to claimant's right eye and 63% loss of vision of claimant's left eye for a binocular loss of vision of 72%. (Defendant's Exhibit C).

"The claimant requested a hearing before a Hearing Officer of the Workmen's Compensation Board and the Hearing Officer in his opinion and order dated August 18, 1967, found that claimant had suffered in addition to 100% loss of vision to his right eye, a loss of vision of 88.8% of claimant's left eye, a finding in accordance with the report of Dr. McCallum. In addition the Hearing Officer also found that the claimant was totally and permanently disabled as a result of his accident of April 13, 1966, and the disability resulting therefrom.

"The State Compensation Department appealed the decision of the Hearing Officer and the Workmen's Compensation Board, by its order dated March 26, 1968, reversed the Hearing Officer on the issue of permanent total disability, but found in addition to 100% loss of vision of right eye that claimant had sustained a 78% loss of vision of his left eye and awarded claimant compensation for a combined binocular vision loss of 85%. The Workmen's Compensation Board's determination of the loss of vision of claimant's left eye is based upon a formula which from the record before the court it is impossible for counsel for the claimant, counsel for the State Compensation Department, or the court to ascertain whether or not this formula was the proper formula to apply, or whether or not if the formula was correct, it was correctly applied.

"Assuming the Workmen's Compensation Board was correct in its evaluation of loss of vision of claimant's left eye at 78%, under the provisions of ORS 656.214 (2) (i), an award to the claimant should have been 83½% loss of combined binocular vision, instead of 85% loss of combined binocular vision awarded by the Workmen's Compensation Board. This error by itself tends to cast some doubt upon the Workmen's Compensation Board's mathematical ability to accurately compute a loss of vision. Also the Workmen's Compensation Board has on two different occasions, and a Hearing Officer of the Workmen's Compensation Board on a third occasion arrived at entirely different findings as to loss of vision of claimant's left eye. With such inconsistencies appearing in the record emitting from the Workmen's Compensation Board and a Hearing Officer thereof, small wonder that a claimant feels compelled to appeal to the courts to resolve the differences of opinion within the Workmen's Compensation Board itself.

Add to Page 97

"In ascertaining the percentage of loss of vision of claimant's left eye, this court is faced with almost the same task as was the Supreme Court of this State in the case of Raymond Romero vs. State Compensation Department, May ___, 1968, where the three tribunals which preceeded it had fixed claimant's disability respectively at 20%, 35%, and 60%. In Romero, the Supreme Court stated 'without any criteria for judgment it is impossible to say that any of these percentages is wrong. We do not have the benefit of any testimony directed to the problem of fixing the degree of disability' and for the reasons stated in the opinion adopted the rating made by the Hearing Officer and affirmed by the Workmen's Compensation Board. The differences between this case and Romero are (1) that the Hearing Officer and the Workmen's Compensation Board do not agree as to the percentage of loss of vision of claimant's left eye sustained as a result of his accidental injury, and (2) the court has the benefit of Dr. McCallum's report which specifically finds that claimant has a visual efficiency of his left eye of 11.2%. Based upon Dr. McCallum's report, the only competent evidence in the record as to the percentage of loss of vision of claimant's left eye, this court finds, as did the Hearing Officer, that claimant has suffered a loss of vision of his left eye of 88.8%, which under the formula established by ORS 656.214 (2) (i), combined with 100% loss of vision of claimant's right eye establishes a 91.6% loss of combined binocular vision.

"In this case the State Compensation Department has advanced two propositions in the alternative. (1) That as a result of claimant's injury and disability he is not in fact permanently incapacitated from regularly performing work in a gainful and suitable occupation, (2) and even if he is in fact permanently incapacitated from regularly performing any work at a gainful and suitable occupation, that, as a matter of law, as claimant's disability is limited to loss of vision, and because the claimant has some minimal useful vision in his left eye, the court cannot make an award of permanent total disability, as claimant's injury and disability is limited to those parts of the body (eyes) for which compensation is provided under a schedule of permanent partial disability.

"The claimant, of course, urges that both contentions of the State Compensation Department are erroneous.

"In the Matter of the Compensation of Ben Scoggins, Claimant, in this court, case no. 86810, (WCB case no. 67-92, SDC Claim No. B 12 9549) the Workmen's Compensation Board stated, 'The Workmen's Compensation Law schedule of benefits is inflexible. Injuries which are listed such as feet, hands or eyes may in actuality result in a high degree of unemployability, but the benefit payment is limited to that set forth by statute by the specific loss.' This court, in its opinion in the Scoggins case stated, 'In affirming the order of the Workmen's Compensation Board subjected to review in this proceeding, the court does not necessarily concur with the conclusion of law reached by the Board that the Workmen's Compensation Law is inflexible. In an appropriate case when considered together with the workman's age, education, training and experience and other pertinent factors, injury and disability to parts of the body for which compensation is provided for what is commonly

Add to Page 97

referred to as scheduled permanent partial disability may well constitute such paralysis or other condition permanently incapacitating the workman from regularly performing any work at a gainful and suitable occupation.' The case of the claimant herein, Irven S. Boorman, is such a case.

"In construing the provisions of ORS 656.206 (1), which defines permanent total disability, the court is of the opinion that this statute provides that a claimant may be totally and permanently disabled as a matter of law or he may be permanently and totally disabled as a matter of fact.

"If the claimant has suffered a loss, including a preexisting disability, of both feet or hands, or one foot and one hand, or total loss of vision, as a matter of law he is permanently totally disabled.

"For example, an accountant, or a lawyer, or a judge who loses one foot and one hand as the result of an accident arising out of and in the course of his employment would by statute be entitled to an award of total permanent disability and yet such an individual as a matter of fact may well be able to perform all of the duties regularly required by him in his chosen profession with no loss of income whatsoever. This would constitute permanent total disability as a matter of law. On the other hand, a workman with little education and limited work experience, training and mental capability, as a result of injury and disability to part of the body for which compensation is provided under the schedule designated as permanent partial disability, may in fact be permanently incapacitated from regularly performing any work at a gainful and suitable occupation. This constitutes permanent total disability as a matter of fact.

"If the State Compensation Department is correct in its interpretation of the law, if the claimant herein, in addition to 100% loss of vision of his right eye, and 78% loss of vision of his left eye (if one assumes that the Workmen's Compensation Board's order on review of March 26, 1968, is correct concerning loss of vision and which this court specifically finds was not correct) had suffered in the same accident loss by separation of his right leg and 90% loss of use of left leg, 90% loss of use of his right arm and 90% loss of use of his left arm and was obviously and factually an unemployable hopeless cripple, he would not be entitled to an award of permanent total disability. If this is the law, one must agree with the pronouncement of Mr. Bumble in Charles Dicken's Oliver Twist when he said, 'if the law supposes that', 'the law is an ass, and idiot.'

"In the opinion of this court the legal proposition advanced by the State Compensation Department cannot be supported by reason, logic, common sense, legislative intent, or statutory construction, and it is clearly erroneous. That the Workmen's Compensation Law is to be liberally construed on behalf of the injured workman is axiomatic.

"Subsequent to the hearing held before this court in this case and in fact after this opinion had been written in its proposed final form, counsel for the State Compensation Department presented to the court a copy of the opinion of the Supreme Court of this State in the case of Walter Ray Jones vs. State Compensation Department, May 22, 1968.

Add to Page 97

In Jones the court makes reference to the illustration in Kajundzich vs. SIAC, 164 Or 510, 102 P2d 924, of the equality under the compensation law as to the compensation to be awarded to the violinist and the ditch digger each of which have lost fingers in the course of his employment, even though such injury would differ greatly their respective impairment of ability to earn a livelihood. Such construction of the compensation law is correct only if the permanent disability is partial and despite his permanent disability the workman is still capable of regularly performing some work at a gainful and suitable occupation.

"The Supreme Court in Jones concedes that the language used in ORS 656.206 (1) is apparently subjective, but then declines to adopt a subjective standard in determining whether or not a workman is permanently totally disabled when his disability is limited to a disability for which compensation is provided in the statutory schedule for permanent disability, stating, 'There is nothing in the case at bar to justify a departure from a settled rule.'

"With all due respect to the present members of the Supreme Court and their illustrious predecessors this court is of the opinion that ORS 656.206 (1), establishes both an objective standard and a subjective standard to be applied in determining whether or not a workman is permanently totally disabled and has attempted to support such opinion by the analysis and examples cited herein distinguishing between permanent total disability as a matter of law and as a matter of fact.

"If upon its review de novo the Supreme Court determines that claimant is in fact permanently incapacitated from regularly performing any work at a gainful and suitable occupation as has the Hearing Officer and this court, ample reasons exist to not only 'justify a departure from a settled rule' but also to adopt a rule consistent with reason, logic, statutory construction and the philosophy of the Workmen's Compensation Law, and to affirm this court's award of compensation to the claimant of permanent total disability.

"Based upon the entire record before the court, the court specifically finds that even though claimant's disability concerning his work ability is limited to a loss of vision, that a combination of the total loss of vision of claimant's right eye and the fact that claimant has only minimal remaining vision in his left eye constitutes such paralysis or other condition permanently incapacitating the workman from regularly performing any work at a gainful and suitable occupation when considered together with the workman's age, education, training and experience and other pertinent factors, and therefore claimant herein is permanently and totally disabled. The Hearing Officer's opinion and order contains an excellent and accurate evaluation of the testimony and the exhibits which comprise the record herein, which fully support his findings that the claimant is permanently and totally disabled as a matter of fact.

"As the Supreme Court stated in the Romero case concerning subjective complaints of pain ' * * * the opportunity to observe the claimant and the other witnesses is of prime importance. The Hearing Officer is in a position to make this observation and we are not.' The position taken by the Supreme Court in the Romero case supports the concurrence of this court in its acceptance of the Hearing Officer's finding that claimant is permanently and totally disabled as a matter of fact.

Add to Page

97 "Based upon the foregoing, the order of the Workmen's Compensation Board dated March 26, 1968 should be reversed and the claim of the claimant Irven S. Boorman, referred back to the State Compensation Department and the State Compensation Department be ordered to make an award of compensation to the claimant of permanent total disability and to pay to the claimant the benefits therefore as provided by law.

"The court further finds that a reasonable additional attorney fee to be allowed to claimant's attorneys, Babcock and Ackerman, is a sum equivalent to 25% of the additional compensation awarded to claimant by virtue of this appeal, provided however said additional attorney fees when added to the fee previously allowed herein, the sum total thereof shall not exceed the sum of $1,500.00, said fee to be a lien upon said additional compensation and to be paid out of said additional compensation by the State Compensation Department to claimant's attorneys, Babcock and Ackerman.

"Mr. Ackerman is requested to prepare a judgment order in accordance with this opinion of the court and the finding made herein, submit the same to Mr. Malagon for approval as to form and to submit the same to the court for signature."

99 Schaefer, Melitta, WCB #67-491; Affirmed.

99 Birkhans, Vigo, WCB #67-1337; Affirmed.

101 Seidel, Sandra, WCB #67-712; Reversed for reason that no compensable claim.

101 Kociemba, Emil A., WCB #67-925; Award increased to 75% loss of arm for unscheduled.

103 Cox, John M., WCB #67-1105; Affirmed.

105 Eckert, Wesley, WCB #67-1441; Affirmed.

106 Walton, Jack Arnold, WCB #67-1132; Affirmed.

107 Nelson, Melvin C., WCB #67-835; Langtry - J; "This matter is before the Court for a de novo review of the determination of the Hearing Officer and the Workmen's Compensation Board of Melvin C. Nelson's claim on account of injuries to the great toe on a foot. Claimant asserts that he should be allowed disability for injury affecting the use of his feet. The testimony of medical experts was to the effect that the injury was confined to the great toe. Claimant himself asserts that the pain running into the metatarsal area of his foot has caused him a disability of the use of the rest of the foot as well as the toe.

The Court has read all of the testimony produced before the Hearing Officer and all of the briefs and arguments submitted by respective counsel. The Court finds that the receipt in evidence of Damasch Hospital records was not prejudicial, and has some probative value. So far as precedents are concerned, Graham v. State Industrial Accident Commission, 164 Or. 626, is most closely in point. In that case the injury was confined to the thumb and there was no evidence tending to show injury to the hand or unexpected complications. The Court held that the injury to the thumb could not be made the basis of injury to the hand. The Court has reviewed In the Matter of the Compensation of Edward F. Stephens, WCB case No. 67-535, submitted by claimant's counsel and does not believe that it changes the Graham v. SIAC holding.

Add to Page 107

"In the instant case, this Court does not believe that the evidence produced shows any unexpected complication in the foot from the injury to the toe - at least, there was a large quantum of evidence sustaining such a position upon which the Hearing Officer made his decision which affirmed for the Board.

"The language in Romero v. Compensation Department, 86 Or. Adv. Sheets 819, is in point:

> Under these circumstances we feel that the appraisal made by the Hearing Officer and which was affirmed by the Board should be adopted. As counsel for plaintiff at the hearing admitted, 'Much of a disability rating is based, and very properly so, on the subjective complaints of pain.' In this subjective area the opportunity to observe the claimant and the other witnesses is of prime importance. The Hearing Officer is in a position to make this observation and we are not. Moreover, although we must review the record de novo, we are entitled to take into account the administrative agency's expertise which develops out of dealing with hundreds of similar cases. As has been pointed out, 'industrial commissions generally become expert in analyzing certain uncomplicated kinds of medical facts (and we would add none-medical facts also), particularly those bearing on industrial causation, disability, malingering and the like.' 2 Larson's Workmen's Compensation, 79.53, p. 303 (1961). Further, it would seem that in the type of case we have before us, where the criteria for appraising disability is at best vague and highly subjective, the administrative agency should have some leeway in developing, if possible, a pattern of decision-making by a comparison of the many cases which are presented to it.

"See also the concluding language in Adams v. Compensation Department, 86 Or. Adv. Sheets, 597. The language on pp. 753, 754 and 755 of Coday v. Willamette Tug & Barge, 86 Or. Adv. Sheets, is not inconsistent - at least in the context used here, with the language quoted above.

"For these reasons the Court finds that the Hearing Officer's determinations are correct, and concludes that his award is justified. This memorandum decision shall be filed, and inasmuch as the defendant has demanded that the Court make special findings of fact and state separately its conclusions of law therefrom, the memorandum decisions shall stand as the same. If the defendant wants anything more definitive, it may submit what it wants to see if the Court will sign it."

109 Philibert, Bobby Gene, WCB #67-1257; Affirmed.

109 Osler, Louis E., WCB #67-916; Award increased to 25% loss arm for unscheduled and 20% loss leg.

112 Myers, Jerry G., WCB #68-67; "The advance payment of money to the claimant did not constitute a waiver of any rights he may have to a hearing."

113 Baigert, Conrad F., WCB #67-963; Affirmed.

113 Wunder, Gladys M., WCB #67-1046; Remanded for consideration on merits of cerebral-vascular accident.

Add to Page

114 Lewis, Ira C., WCB #67-1016; Affirmed.

115 Haney, W. J., WCB #67-1064; Affirmed.

117 McClendon, Henry E., WCB #67-1044; Affirmed.

118 Lunsford, Richard L., WCB #67-987; Affirmed.

121 Mayes, Edward Thomas, WCB #67-1365; Affirmed.

122 Jordan, Robert G., WCB #67-668; Affirmed.

125 Campbell, Emmett D., WCB #67-701; Affirmed.

126 Westfall, Burlin O., WCB #67-1509; "...the Demurrer...is sustained and the matter be referred back to the Workmen's Compensation Board, and/or the State Compensation Department for further proceedings."

127 Winburn, Marion Lee, WCB #67-1278; Affirmed.

129 Berglund, Gerald B., WCB #67-1271; Award increased to 40% loss arm for unscheduled.

129 Dement, Arthur, WCB #67-1296; Lumbar award increased to 10% loss arm.

130 Washburn, Norman O., WCB #838; Remanded for consideration of effect of compression fracture at D-12.

131 Trent, Tobe, WCB #67-705; Award of permanent total allowed.

132 Snead, Lawrence, WCB #67-1065; Award increased to permanent total.

135 Cumpston, James Arthur, WCB #67-924; Right leg award increased to 25%.

136 Chaffee, Floyd G., WCB #67-1165; Additional temporary disability; unscheduled award increased to 30%.

138 Wershey, Mildred L., WCB #67-628; Award "of 90% loss of function of her right arm and 25% loss of function of an arm for unscheduled disability."

141 Schafroth, Arthur L., WCB #67-1206; Affirmed.

142 Bell, John C., WCB #67-1391; Unscheduled award increased to 40%.

145 Fitzhugh, Lloyd E., WCB #68-286; Dismissed.

146 Olson, Robert O., WCB #504; Affirmed.

146 Hill, John H., WCB #67-1609; Affirmed.

154 Wrightsman, Yvonne, WCB #67-769; Affirmed.

158 Levesque, Gilbert, WCB #67-969; Claim ordered accepted.

177 Bean, Clifford S., WCB #67-677; Additional attorney fees allowed.

179 Risener, Charles C., WCB #67-1361; Affirmed.

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

VOLUME I

--Edited Reports of Workmen's Compensation Cases--

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PREFACE

It is our intention to provide a ready reference to Workmen's Compensation decisions on the administrative level in a coherent and organized manner. While Supreme Court decisions on Workmen's Compensation are readily available, they represent only the tip of the iceberg. Many litigated cases never go beyond the administrative level, but there is no feasible way for the practitioner to keep abreast of administrative decisions.

We have edited, summarized and comprehensively indexed the cases which have been appealed to the Board. Both the original Hearing Officer's Order and the Board's Order have been reviewed in preparing these summaries. Over 2,000 pages of opinions have been edited to appear in this volume.

Every effort has been made to capture all significant facts, issues and reasons, but no doubt, as with any major editing job, omissions, and perhaps even misleading statements may have crept into our work.

In cases involving permanent partial disability, an attempt has been made to describe both the nature of the injury and the award. Where adequately concise statements have been found in the original opinions, they have been quoted directly or paraphrased. However, we recommend consultation with the original opinions in situations where one word, sentence or implication could be critical. If you have no other access to them, these opinions are available through our offices for a handling charge of $2.00.

To enhance the value of this service as a research tool, every effort has been expended to index the cases, although some still defy logical classification.

We are well aware that the most recent case reported is August 1968. It was our desire to continue the publication from the point the Oregon Workmen's Compensation Reporter, published by the Oregon Association of Defense Counsel, ceased. Our binder, however, limited us to about 200 pages.

We are deeply indebted to the Association and to Mr. Daryll Klein for their cooperation in the launching of this service. We are hopeful another volume prepared by early fall will bring the cases up to date, and thereafter we will be able to keep current.

It should also be directed to your attention that some case appearing herein may have been reversed or modified by appeal to the courts. We have no facilities to ascertain these results, but we have noted in the index which cases have been appealed and the county in which the appeal has occurred.

Robert VanNatta

January 1969

Fred VanNatta

WCB #689 August 17, 1967

Margaret K. Walsh, Claimant.
H. L. Pattie, Hearing Officer.
Clifford Olsen, Claimant's Atty.
Harold W. Adams, Defense Atty.

Claimant, a forty-five year-old secretary and clerk-typist, suffered lacerations of her leg as a result of stepping into a hole in the floor. The injuries were variously described as deep and severe and as superficial. She missed only part of a day's work, returning to work the following day and working steadily thereafter, other than time required for medical treatment. About two months later she was discharged from her employment. She testified that this was because she missed three hours per day, three days per week for treatment, but her employer claims she was discharged for being inefficient and undependable. Hearing Officer found no compensation payable to claimant immediately following the injury as the employer kept her on full pay; however, claimant was awarded temporary total disability from date of her discharge. WCB reversed an award of attorney fees, holding that the fact that the employer continued to pay full wages during the absences of the employee, when the employer could have paid temporary total disability rates instead, indicates that there was no unreasonable resistance on the part of the employer.

WCB #67-29 August 17, 1967

Kelly L. Seratt, Claimant.
H. L. Seifret, Hearing Officer.
S. E. Scoville, Claimant's Atty.
Owen E. McAdams, Jr., Defense Atty.

Claimant slipped and fell suffering a lower back injury. Both a myelogram and a lumbar laminectomy were performed. Claimant was able to return to work about two months later, and was transferred to light work and awarded a 25% disability. Claimant continued to suffer pain in his lower back, making it difficult for him to work. Dr. Molter found some early degenerative changes of claimant's spine, and recommended a lumbo sacral fusion, although he felt that the claimant could perform light work. Dr. Rockey recommended a lumbar spinal fusion, but would not urge same, because of his concern about residual impairment of function in the back. Claimant was awarded an additional 15% disability. He refused further surgery, and demands permanent total disability. The claim was denied because total disability contemplates a disability of such magnitude as to render the one no longer capable of regularly performing any work at a gainful and suitable occupation, hence the fact that the workman cannot return to his former occupation doesn't prove permanent total disability when the workman can regularly perform lighter work.

Ed. Note: Upon hearing and review, there is substantial discussion concerning claimant's refusal to undergo surgery upon his spine. The Board recognizes the claimant's right to refuse surgery, but concludes his fears are not based upon medical records. Refusal to have surgery must be considered when extent of disability is determined.

WCB #67-71 August 17, 1967

William Aarnio, Claimant.
Page Pferdner, Hearing Officer.
Quintin B. Estell, Defense Atty.

Claimant received first and second degree burns to his face when a can of ether used for starting diesel engines exploded after being placed too close to a warming fire. Injury occurred on December 1, 1966; claimant filed request for hearing on January 19, 1967, and he received a notice of claim acceptance on January 26, 1967.
The first issue regards the computation of the temporary total disability. Claimant was not hospitalized and his total disability lasted for less than fourteen days. The first three days under ORS 656.210(14) are to be construed as working days. This is including the day of the injury, since he left work that day. Claimant is entitled to compensation for normal working days missed thereafter, which in this case is four. Under Workmen's Compensation Board Administrative Order No. 9, issued November 14, 1966, claimant is entitled to monthly benefit of $225 prorated for four working days, which is $41.43. This is exactly what the claimant was paid. Penalty for late payment is allowed because no payment was made before the fourteenth day after notice of claim. The fact that State Compensation Department did not receive the physician's report until 29 days after the injury, and did not receive complete information on the accident report until 51 days after the accident, is no excuse. However, under ORS 656.382(1) attorney fees are not allowable, because the Department paid the compensation as soon as it was apprised of the claim, and thus, did not resist the claim at all, and if there is no resistance, there can be no unreasonable resistance.

WCB #599 August 18, 1967

Lawrence E. George, Claimant.
H. L. Seifert, Hearing Officer.
No Claimant's Atty.
Carlotta Sorensen, Defense Atty.

Claimant, an engineer of the State Highway Department, went on a four-day business trip to Eastern Oregon. Claimant had been in good health for a long time, but on the way back from Eastern Oregon he experienced moderately severe abdominal cramping pains and diarrhea. Claimant had eaten in several restaurants during the trip. The medical evidence was conflicting. Dr. Steinfeld, the treating physician, first diagnosed claimant's condition as rheumatoid arthritis, but after further consideration, stated that it was probable that the claimant's illness and resulting hospitalization were entirely the result of salmonella infection. Traveling employees usually are protected by Workmen's Compensation coverage when the injury has its origin in a risk created by the necessity of sleeping and eating away from home; hence, if claimant in fact contracted the salmonella infection in the course of the trip, it will be considered to have arisen out of and in the course of employment. The circumstances here substantiate claimant's contention, that he contracted the poisoning on the trip. He had had annual checkups during prior years and was in good health until this trip. It would be an impossible burden to cast

upon a travelling employee, the duty to prove where in his journeys he was subjected to the poisoning. It is sufficient if, in retrospect, it can be said from the course of events, that the salmonella poisoning was probably contracted while traveling in the course of employment.

WCB #67-119 August 18, 1967

Fred W. Voigt, Claimant.
George W. Rode, Hearing Officer.
Richard Kropp, Claimant's Atty.
Earl Preston, Defense Atty.

Claimant is 61 years of age and has an extensive history of back trouble. He testified that he had had no symptoms from October 15, until the date of his injury, November 23, 1966. On this date he put a dividing head on his milling machine, weighing approximately 90 to 100 pounds. He stated that he felt a terrific pain at the base of his back around his belt line. He testified that he suffered considerable pain over the weekend, but worked on Monday. On Tuesday he went to the hospital, but did not tell Dr. Williams of the job incident for the reason that he had taken considerable pain pills and his mind was somewhat confused at the time. The first knowledge the production manager received of this injury was on December 9, 1966, when the claimant's wife came into the office to pick up a pay check. The explanation for not reporting it sooner was that the claimant and his wife were under the impression that unless the industrial accident was witnessed, it could not be compensable. The hearing officer dismissed the claim for want of proof, but the WCB reversed, holding that when an episode is unwitnessed, the decision must turn upon testimony of the claimant, whether that testimony is accepted, and the various circumstances such as observations of other persons, medical reports, and whether the conduct of the claimant with respect to reporting the injury is consistent with having suffered the injury. The Board felt that the Hearing Officer had given undue weight to the delay in reporting the accident.

WCB #67-3 August 18, 1967

Maury Gene Luck, Claimant.
H. L. Seifert, Hearing Officer.
E. B. Sahlstrom, Claimant's Atty.
Earl Preston, Defense Atty.

The deceased worked with equipment loading trucks and on occasion ate his lunch sitting in a truck operated by a fellow employee. On the day in question, the fellow employee drove the truck a half mile to a grocery store, where the claimant purchased items to add to his lunch. While sitting at the grocery store in the truck, the decedant apparently choked while eating a potato chip, and fell from the truck. He received head injuries from which he subsequently died. There were no facilities for lunch at the job site, and the men usually ate in the trucks. It was permissable for the men to eat off the job site and to eat in these trucks. The Hearing Officer denied the claim, holding that the injury was out of the course of employment. A compensable injury is an accidental injury...arising out of and in the course of employment

...ORS 656.002(6). Two conditions must be met before a workman can be entitled to compensation under the Act: The injury must both arise out of an in the course of employment. The words are used conjunctively and therefore both elements must exist, for neither alone is sufficient. The words "out of" point to the origin or the cause of the accident and are descriptive of character or quality (Larsen v. SIAC 135 or 137). If the injury can be seen to have followed a natural consequence of the work, and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arose "out of employment", but it excludes an injury which cannot be fairly traced to the employment as a contributing prosimate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. Stuhr v. SIAC, 186 Or 629, P2d 450).

The phrase "in the course of employment" points to the time, place, and circumstances under which the addident took place, that is, the circumstances under which the accident arises in the course of employment when it occurs within a period of employment at a place where the employer reasonably may be in performance of his duty, as where the employee reasonably may be in the performance of his duty and while he is fulfilling these duties or engaged in something incidental thereto. (Stuhr v. SIAC, supra).

Consideration will first be directed as to whether or not the accident in this case arose "out of" the employment.

There must be some causal relation between the employment and the injury, and the causative danger must be peculiar to the work and not common to the neighborhood. (Snyder Workmen's Compensation Text, Section 1633). Ordinarily when the lunch period is not subject to the employer's control or restricted in any way, and the employee is free to go where he will at that time, if he is injured on the public street off the premises of the employer, the injury does not arise out of the employment. (Snyder Workmen's Compensation Text, Section 1634). In Schwartz v. Industrial Commission, 379 111, 139, 39 NE 2d 980 (1942) claimant was poisoned by food from an outside restaurant. Here there was found to be no connection between the employment of decedent and ingestion of the food. The causative danger, the food, was not peculiar to the work or incidental to the employment because it did not belong to, or was it in any way connected with, what the decedent had to do in fulfilling his labor contract. The food poisoning was held to be in the course of, but not arising out of the employment and therefore was not compensable. Any injury arises "out of" the employment when there is apparent to the rational mind upon consideration between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximal cause, and which comes from a hazard to which the workman would have equally been exposed apart from the employment.
An injury arises "out of" employment when it is reasonably apparent from all circumstances that a causal connection exists between the conditions under which the employee's work is required to be done and the resultant injury, and it must be the rational consequence of some hazard connected with the employee's duties.

(Sweeny v. Sweeny Tire Stores Co., (Mo) 49 SW2d 205). The evidence in the instant case shows that decedent was permitted to select his own eating place and he had the discretion, within limits, to choose his own time and place for dinner. The Hearing Officer found no connection between the decedent's employment and the ingestion of food. The causative danger, the food, was not peculiar to the work or incidental to the employment, as it did not belong to, nor was it in any way connected with what the deceased had to do in fulfilling his labor contract.

WCB #855 August 22, 1967

Loren B. Freeman, Claimant.
H. L. Seifert, Hearing Officer.
Theodore R. Conn, Claimant's Atty.
Earl Preston, Defense Atty.

The claimant decedent was regularly employed in the Pendleton area by the employer we here identify simply as Rockhill. Rockhill contracted with another employer, here identified as Vail, whereby Rockhill, Freeman and Rockhill's equipment were used in the performance of work for Vail near Chemult, Oregon. Rockhill and the decedent were placed on the payroll of the Vail Company. Decedent continued to service Rockhill's equipment and was provided agreed transportation to and from the Vail work site by his regular employer, Rockhill. It was while riding with Rockhill back to their temporary living quarters that a collision occurred, resulting in death to Freeman. Some deviation from the work site had been made to discuss a work cessation with other workers, but the trip back to living quarters had resumed at the time of the fatal injury. The Board specifically ruled that the detour to Chemult was without legal significance. The Hearing Officer had ruled that Freeman was not in the course of employment. The Board concludes that pursuant to the cases of Brazeale v. SIAC, 190 Or 565, Morey v. Redifer, 204 Or 194, and Penrose v. Mitchell Bros. Crane Division, Inc. 84 Adv. 651(656-7), 426 P2d 861, the decedent, Freeman, was in the general employment of Rockhill, and the fact that Freeman was actually paid by Vail, did not remove Freeman from being in course of employment for Rockhill at the time of the accidental injury. The Board further concludes that the decedent, in riding with his regular employer, according to an agreed arrangement with that employer, was in the course of employment and was not furthering his own interest, as though it was a normal trip to and from work outside the scope of employment. It is, perhaps, significant that both Rockhill and decedent were being paid a $4.50 travel allowance. WCB here reversed the Hearing Officer's finding of no compensible injury and granted compensation and a reasonable attorney fee of $750.

WCB #864 August 22, 1967

Ernie Manthe McBride, Claimant.
H. L. Siefert, Hearing Officer.
Herbert B. Galton, Claimant's Atty.
James A. Blevins, Defense Atty.

This is an occupational disease claim for a loss of hearing. Claimant had been an operating engineer for over 25 years and had been around noisy machinery for over 40 years. There was a report of some hearing loss in 1960, but no audiogram was performed. From August 15 to September 5, 1966, claimant

operated a D-8 Cat with a broken exhaust stack, which caused excessive noise. An examination on September 10, 1966, by Dr. Young revealed that claimant had a purulent otitis media (infection) of the left ear. It was Dr. Young's opinion that noise would not cause infection of the middle ear. Claimant, complaining of a general decrease in hearing and tinnitus, obtained an audiogram which revealed a bilateral sensori-neural type hearing loss (this involves the high tones especially, and is of the noise-damage configuration.) Discrimination scores were 68% for the left ear and 80% for the right ear, and his hearing impairment between 15-20%. The Hearing Officer attributed the hearing loss to the middle ear infection and relied on Dr. Young's opinion that same would not be caused by noise, and therefore denied the claim. The Medical Board of Review held otherwise, ruling that although claimant had worked at a noisy occupation for at least 25 years and has had symptoms of acoustic trauma due to noise on at leat one occasion in the past, it was the opinion of the Medical Board that the patient "suffered an aggravation of this condition by exposure to extremely loud noise during a period of about two weeks from the middle of August until the first of September, 1966." It was a further opinion of the Medical Board, that the disability was 15%. WCB allowed $500 attorney fees.

WCB #67-45 August 24, 1967

Sherman Smith, Claimant.
George W. Rode, Hearing Officer.
Richard Allen, Claimant's Atty.
Owen McAdams, Defense Atty.

Claimant is a 76 year-old clerk in the Goodwill Store in Salem. A fellow employee observed the claimant in a dazed condition, and further observed him talking incoherently. He was taken to the hospital and the condition continued for some six weeks. The condition was apparently caused by a vascular insufficiency, i. e. an insufficient supply of blood to the brain. This could have been caused by a small stroke, but there was no clinical evidence to this effect. Dr. Sanders, the treating physician, testified that it was some six weeks after the accident before he was able to get a story out of the claimant as to what happened. At this time the Claimant said that he had lost his balance while handling a bundle of rugs and had fallen backwards, striking his spine at a point midway between his shoulders on a sharp corner of the table. This alleged fall was unwitnessed. The Hearing Officer denied the claim upon a finding that the claimant's memory was somewhat confused and the physical facts wouldn't permit the accident to have happened exactly as he said it did. The WCB reversed the finding that there was medical testimony, that it was probable that the claimant fell as alleged, and that the fall preceded and contributed to the stroke or cranial blood deficiency, and that confusion and delay in relating the story is consistent with this theory. The Board further holds that, even if the fall was from unknown causes, compensation should be granted, because it occurred at a time and place where employment created what is generally known as a positional risk. Attorney fees of $600 allowed.

WCB #123 August 24, 1967

Myrnaloy V. McGill, Claimant.
Page Pferdner, Hearing Officer.
Edwin A. York, Claimant's Atty.
Gerald C. Knapp, Defense Atty.

The claimant had, what appeared to be, a minimal injury in stepping out of a trailer and losing her balance. Medical reports throughout a year and a half of treatment recite bizarre symptoms and numerous subjective complaints. Efforts at placing her back to work proved fruitless and raised grave doubts about claimant's desire to return to employment. It appears that the thought or prospect of either home work or return to employment produces pain in areas of the spine not involved in the original claim. Hearing Officer disbelieved claimant's testimony of permanent partial disability and nothing else in the record supported same, so claim denied and WCB affirmed same.

WCB #67-366 August 24, 1967

Eugene R. Mace, Jr., Claimant.
Page Pferdner, Hearing Officer.
Don R. Wilson, Claimant's Atty.
Gerald C. Knapp, Defense Atty.

Claimant appeals from a denial of his back injury. He was caused to jump from a twelve-foot stepladder and lost less than three days work. There was no initial claim of back injury. About three months later, while reaching for his lunch box, he felt an excruciating pain in his back, and about three months after this he attributed his back problem to his fall six months earlier. There was no other explanation for the injury. The Hearing Officer denied, and the WCB affirmed claim for back injury. Although there is no doubt that the claimant suffers from a low back pain radiating into his legs, claimant failed to sustain his burden of showing a causal connection.

WCB #67-204 August 24, 1967

John L. Borland, Claimant.
H. L. Pattie, Hearing Officer.
R. P. Smith, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.

Claimant is 60 years of age and has been working in a hospital. On November 1, 1966, he was transferred to an adult ward, where his duties included lifting patients into and out of bed. Claimant worked nine days in November and nine days in December. A medical examination in January revealed a right inguinal hernia which was duly reported to his employer, but the claim forwarded to the Department showed only a hiatus hernia, and the employer showed no record of injury. The Department denied the claim. The Hearing Officer ordered the claim accepted and allowed penalties and attorney fees. Claimant sustained a weakening in his inguinal area or groin area, that probably developed over a period of time, but the exact time is unknown, according to the Hearing Officer's

findings. This general weakening made him susceptible to an inguinal hernia, which was probably triggered around November 15, 1966, by the lifting of patients in the Ward. Also notice of the inguinal hernia by the employer is considered notice by the Department. WCB affirmed.

WCB #93 August 28, 1967

Evalena Mae Storm, Claimant.
George W. Rode, Hearing Officer.
Charles W. Creighton, Claimant's Atty.
Harold Adams, Defense Atty.

Claimant suffered what is apparently a whiplash injury, when the car in which she was riding was struck from the rear. This is an appeal from the State Compensation Department award of a permanent partial disability award equal to the loss of use of 50% of an arm. The Hearing Officer sustained this award, but the WCB with consent of counsel heard additional medical testimony and increased the award to total and permanent disability. The Board's reasoning was that the workman was a good worker before the accident. She was employed by the State of Oregon, which has over 22,000 employees, yet the workman had been unemployed for over three years, and the state had not been able to find regular and suitable employment for her. WCB considers this strong evidence that workman is unemployable, and as such, it is not in keeping with a finding of a partial disability. The workman has suffered from a total disability which has for three years not yielded to treatment and such must be found to be a permanent and total disability. When and if the claimant becomes reemployable in regular and suitable employment, the matter can be reconsidered to then award a disability which is permanent but partial. Attorney fees allowed.

WCB #892 August 29, 1967

Thomas Burk, Claimant.
Harold W. Adams, WCB Atty.
Peter R. Blyth, Claimant's Atty.
Thomas S. Moore, Employer's Atty.

Claimant's claim for injuires was denied by the defendant employer, contending that it is engaged in farming or work incidental thereto within the meaning of ORS 656.090, and is therefore not subject to the Workmen's Compensation Act. Employer did not comply or attempt to comply with the Act. The employer was operating as an independent contractor and was in the business of providing pickers to harvest farmers' crops and providing transportation therefore. Employer had no interest in the land or the crops. Employer was licensed as a farm labor contractor by the State of Oregon Bureau of Labor. The claimant's duties included supervision of the pickers and driving a bus. The Hearing Officer ruled that this was an ORS 656.090 occupation as ownership of the land or crop is not necessary, and picking a crop and transporting pickers is surely farming. WCB affirmed, commenting that intent of the Legislature was to exempt farming from the Act, and that the Board should not interfere with this intent by making technical exceptions.

WCB #692 August 29, 1967

Mary J. Edington, Claimant.
George W. Rode, Hearing Officer.
Garret Romaine, Claimant's Atty.
Harold Adams, Defense Atty.

Claimant appeals from an award allowing no permanent partial disability. Claimant had received an injury to her head and shoulders when a trap door fell on her. She testifies to experiences of pain and limitation of motion. Two medical reports indicate no permanent partial disability and one report indicates a chronic arthritis and a 15% disability, but is completely devoid of details upon which the estimate was made. The Hearing Officer dismissed the claim for want of proof, holding that the complaints appear to be subjective in nature; there was no showing that the arthritis, if it exists, has any relationship to the injury; there is no medical showing of loss of motion in any of the joints; and that testimony only established a certain amount of pain which didn't interfere with her employment and her ability to earn a living. WCB affirmed, adding that pain, per se, is not the basis of award of permanent partial disability. It is only the disabling effects thereof which may be compensated.

WCB #811 August 29, 1967

Sandra Elliott, Claimant.
H. L. Pattie, Hearing Officer.
R. Dale Kneeland, Claimant's Atty.
Richard Bemis, Defense Atty.

Claimant suffered a back injury, while carrying a twenty-pound box of coils Claimant was still suffering pain over four months later, and the treating physician proposed surgery. The insurance carrier protested the proposed operation, but the treating physician performed the surgery anyway, and it was a success. The physician testified that the claimant required the operation, and that it was not performed to cure a functional overlay, notwithstanding the fact that no herniated disc was found during the operation. The Hearing Officer terminated temporary total disability without permanent partial disability and without payment of medical services as of the date of the operation. The WCB reversed, holding that the employer or insurer has no power to direct the medical care of a treating doctor. The Board can suspend compensation for a claimant's refusal to undergo reasonable surgery, but not for possibly unnecessary surgery. The insurance carrier must pay the bills and the compensation, nonetheless, and its remedy is to proceed against the erring doctor for malpractice, ORS 656.583. Even if the doctor was guilty of malpractice, the employer or carrier would be liable for the claimant for all of the consequences of the accident including the malpractice. Wimer v. Miller, 235 Or 25.

WCB #785 August 29, 1967

Henry Sminia, Claimant.
H. L. Pattie, Hearing Officer.
Darrell L. Cornelius, Claimant's Atty.
Gerald C. Knapp, Defense Atty.

Claimant, a fifty-six year-old grocery clerk, was struck by the handle of a grocery cart, causing him a fracture of the nose and severe bleeding. He has already been awarded temporary total disability for his time lost from work, but seeks permanent partial disability. The Hearing Officer found no physical impairment as the result of the injury. Dr. Doyle found "a mild nasal deformity which.....partly and possibly all" preexisted this injury, no internal nasal disease, and he felt that reassurance and possible short-term use of an oral antihistamine decongestant would solve the problem. WCB affirmed the finding of no permanent partial disability. The Board comments that "much contention is made, that a slightly reddened skin constitutes a cosmetic defect, which entitled the claimant to an award. If the claimant concludes that the Board has heretofore ruled that cosmetic injuries, per se, are compensible, the Board herewith disavows any such interpretation of the law. Permanent disabilities must be those known to surgery to be permanent partial disability." Cosmetic defects are not compensated.

WCB #67-189 August 30, 1967

Bobby Gene Philibert, Claimant.
George W. Rode, Hearing Officer.
E. B. Sahlstrom, Claimant's Atty.
Wayne Williamson, Defense Atty.

Claimant was struck in the upper left quadrant of the abdomen by a board which kicked back from a saw. The claimant sustained a lumbosacral strain and lost one day from work. The question present here is whether lower back pains, which appeared some two months later are AOE/COE. Claimant had a history of back trouble, and two years previous, had received a compression fracture of L4. However, Dr. Royal's uncontradicted testimony, taken as a whole, unequivocally established that most recent accident did materially worsen claimant's back condition. The Hearing Officer found that claimant had met the burden of proving by competent medical evidence, that the accident was a material contributing cause of his condition. Attorney fees allowed.
Ed. Note: The record of this case was somewhat confused and the extent of disability; the only ruling being that there was additional disability resulting from the board accident.

WCB #67-505 August 31, 1967

Elbert E. Thompson, Claimant.
J. David Kryger, Hearing Officer.
Elmer Sahlstrom, Claimant's Atty.
John McCulloch, Defense Atty.

Claimant suffered a fractured left pelvis after being struck by a log on December 22, 1966. His recovery was satisfactory, and he received no medical treatment after February 27, 1967. On May 23, 1967, he commenced work at Huntington Shingle Co., where his duties consisted of pulling on the planer chain. Claimant complains of lower back pains during the latter part of the working day, and says that he is very fatigued and tired after a day's work. The medical reports indicate that no permanent disability exists, and apparently the symptoms do not interfere with his work. On this basis, it was determined that there was no permanent disability.

WCB #681 August 31, 1967

James D. Woosley, Claimant.
John F. Baker, Hearing Officer.
D. R. Dimick, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.

Claimant suffered first, second and third degree burns about the face, neck, head, arms, right hand and back, resulting from hot ore, while working for Hanna Nickel Smelting Co. After several weeks' loss, claimant returned to the same job he held before the injury, and is performing his work satisfactorily. The issue is permanent partial disability. Dr. Resner's examination found, with regard to the right hand and arm, a slight limitation of the extension of the fingers of the right hand as compared to the left, diminished contractile strength on the right as compared to the left, pain on pressure of the fingers to the palmar surface on the right, a 20-degree loss of wrist flexion, and a 10-degree loss of flexion of the right elbow joint. The Hearing Officer found all of this equal to 10% loss function of the right arm. The Hearing Officer denied compensation for well-healed scars on the front of both knees, which were painful on pressure and in kneeling or squatting. There was no restriction of motion. The WCB modified the award to 15% of the loss of the function of an arm, and for the residual tenderness of the knees awarded a permanent disability equal to the loss of use of 5% of each leg.

WCB #67-315 August 31, 1967

Ethel M. Wasson, Claimant.
H. L. Pattie, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Clayton Hess, Defense Atty.

Claimant, a thirty-two year-old fry cook, after working in a restaurant for two and one-half months, filed a claim alleging "contact derm. hands." The claim was accepted as an occupational disease claim, and temporary total

disability payments were made. On November 25, 1966, the treating physician reported that the estimated length of further treatment would be one month. Upon failure to receive any further word from the doctor, payments were discontinued on December 15, 1966. For this stoppage the Department was assessed penalties for late payment. Temporary total disability payments should have continued until reports showed, that the claimant's condition is medically stationary, or showed that she had been released to return to her regular employment, or showed that she had actually returned to work. The Hearing Officer further found, that the claimant sustained an occupational disease of contact dermatitis, and that claimant has a continuing sensitivity to detergents and other cleaning compounds used in and about restaurants, and this condition is expected to continue, and that the claimant has sustained a permanent partial disability consisting of sensitized skin condition, which disables her from indulging in general restaurant work, and that, whereas this excludes her from employment in the only field in which she has any experience or special training, claimant is entitled to an award equivalent to 10% loss of the right forearm and 10% loss of the left forearm. Attorney fees allowed. The claimant filed a motion, seeking to strike the review of the Hearing Officer upon the grounds, that it is the State Compensation Department, which characterized the claim as involving an occupational disease. The Hearing Officer founded liability upon occupational disease. The WCB, after claimant's motion, suggested that claimant make an election, if the basis of the motion was that the claim was for accident, instead of occupational disease. WCB denied the motion as the claimant refused to elect, and had not requested review of the Hearing Officer order classifying the claim as one of occupational disease.

WCB #67-92 August 31, 1967

Ben Scoggins, Claimant.
John F. Baker, Hearing Officer.
William A. Babcock, Claimant's Atty.
Earl M. Preston, Defense Atty.

The claimant, a sixty-three year-old logger, with an eighth-grade education, suffered a foot injury, which produced some symptoms in the knee while healing. Claimant has not worked since the injury and has since applied for retirement benefits under Social Security. The State Compensation Department awarded 75% loss of use of the right foot. The Hearing Officer increased this to 80% loss of use of the leg. The WCB affirmed noting that the schedule of benefits under the Workmen's Compensation Law is inflexible. Injuries which are listed, such as feet, hands or eyes, may in actuality result in a high degree of unemployability, but the benefit payment is limited to that set forth by statute for the specific loss (Chebot v. SIAC, 106 Or 660). Hence, total disability may not be awarded.

WCB #757 September 1, 1967

Samuel N. Dupuis, Claimant.
John F. Baker, Hearing Officer.
William A. Babcock, Claimant's Atty.
Earl M. Preston, Defense Atty.

Claimant appeals for award of 35% loss of function of the right forearm. He is a 35 year-old logger, and was injured when a chain saw cut deeply into his right wrist. The ulna nerve was completely severed and many vessels and tendons, including extensor tendons to the index, middle ring and little fingers. Claimant is right-handed, and testified of greatly reduced strength in his right hand and forearm. The Hearing Officer increased the award to 50% loss function of right forearm. The WCB affirmed, recognizing that there are many aspects of the claimant's usual occupation of logging, which he cannot perform. His inability to perform certain functions with the arm are considerations which enter the determination of disability. If the loss of function of the arm in no way affects his usual occupation, he would still be entitled to award for whatever loss he sustained to the arm.

WCB #606 September 5, 1967

Fred Moffet, Claimant.
Fulop, Gross & Saxon, Claimant's Atty.
State Compensation Dept., Defense Atty.

This case involves a claim for compensation based upon occupational disease of asbestosis, which was denied by the State Compensation Department. The claimant, upon hearing, was found to have sustained a compensable occupational disease. The order of the Hearing Officer was rejected and the matter was referred to a Medical Board of Review, which has now made its answer to the questions pursuant to ORS 656.812. The Medical Board decided, that claimant is permanently and totally disabled with respect to returning to his previous occupation, because of severe limitation of lung function. This impairment is due, both to the effects of asbestosis, and to chronic obstructive pulmonary disease. It is not possible to assign a percentage of impairment, which could reasonably be attributed to each condition with and degree of accuracy; however, it would be reasonable to estimate that almost fifty per cent of this man's pulmonary impairment could be charged to asbestosis and the rest to factors unrelated to his occupation.

WCB #790 September 8, 1967

Marvin Tevepaugh, Claimant.
George W. Rode, Hearing Officer.
Reese Wingard, Claimant's Atty.
Evohl Malagon, Defense Atty.

Claimant is a 57 year-old sawyer, who suffered a back injury in a fall. The sole issue is the extent of the permanent disability. There is no doubt, that

the back injury is severe. Claimant has undergone three laminectomies and has had three myelograms since this accident. He had also had a laminectomy following an injury of 1961. Claimant worked some after the accident, but the job terminated on April 1, 1966, when the mill went out of business. Claimant did not apply for unemployment compensation and claims an inability to work at this time. Medical evidence tended to indicate that claimant was likely to have a rather poorly functioning back. The Hearing Officer found the evidence insufficient to sustain a content of permanent total disability, but did increase award to equivalent to 100% loss of function of an arm. The WCB modified to permanent and total disability. The WCB found that the Hearing Officer had erred in discounting the functional element. The WCB considered Dr. Hickman's report that, "Although he has a long, stable work record, he actually has relatively few positive personality resources; he is suffering from considerable undifferentiated psychological distress, much of which seems to be related to his injury and to his subsequent failure to respond to treatment... He is not likely to return to full-time, productive work." The WCB concludes that "A functional element produced by a serious injury and numerous associated surgical insults, can be a compensable factor. Accordingly, an order of permanent and total disability was entered.

WCB #67-48 September 8, 1967

Wilfred E. James, Claimant.
John F. Baker, Hearing Officer.
Thomas A. Huffman, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.

This case involves the extent of disability resulting from a punch press being accidently activated against the back of claimant's right hand. Claimant was awarded the equivalent of loss of 40% of the right index finger, 25% of the right middle finger, and 10% of the right ring finger. The Hearing Officer increased the 40% disability to 65%; affirmed the award for the right middle and right ring finger and found a 10% disability in the right little finger, for which no award had previously been made. The WCB affirmed the disability to the right middle and right ring finger at 25% and 10% respectively and added an award of the loss of the thumb of 35%. The claimant had contended that the award should be based on the "hand". The WCB rejects this, holding that the metacarpal portion of the fingers encased within the palm of the hand are still fingers, as distinguished from the forearm. The basis for the disability of the thumb is as follows: The injury reduced the span between the thumb and index finger from 19 to 13 centimeters, though he can't clear the thumb in preparation for grasping, and though the index finger overlaps the long finger. The Board concludes there is a 35% loss of the thumb from these factors, 20% of which is intrinsic in the thumb, and 15% is due to the lack of opposition due to the overriding of the index finger over the long finger. The WCB disallowed the 10% disability for the little finger.

WCB #296 September 8, 1967

Glen E. Huitt, Sr., Claimant.
George W. Rode, Hearing Officer.
Hale Thompson, Claimant's Atty.
John McCulloch, Defense Atty.

Claimant appeals an award of 25% disability for back injury. A summary of the medical reports indicate that claimant's subjective complaints are not supported by objective medical findings, and there is abundant evidence of psychological problems or functional overlay, contributing to claimant's condition. Hearing Officer affirmed prior award, and WCB affirmed. The claimant had a long history of back injury, and it appeared here that the claimant's difficulties in a large measure were psychological, and where these are not caused by industrial injury, there appears to be little or no basis either for award or reward, when the industrial injury is incidental to the real problem.

WCB #67-219 September 8, 1967

Carl B. Ellingson, Claimant.
George W. Rode, Hearing Officer.
Hale Thompson, Claimant's Atty.
Earl Preston, Defense Atty.

Claimant was injured on July 17, 1964. He suffered a prior low-back injury on January 3, 1957, and February 15, 1963, both of which resulted in permanent disability totalling 75%. The State Compensation Department awarded an additional 30% for the current claim and claimant appeals. Claimant's complaints are of continuous pain in the lower part of the back and the leg, and stated that on occasion his left leg gives out. It appears that the claimant has a firm belief in his own unemployability. Here the complaints are largely subjective, and the Hearing Officer was inclined to have reservations about the claimant's credibility, hence the prior award was sustained. WCB affirmed, noting that it appeared from the record that claimant has work skills which could be effectively used. Mere unemployment or mere recitals that "I can't," or "I don't think I can," don't suffice to establish extent of disability.

WCB #67-39 September 12, 1967

Charles Raymond Dobson, Claimant.
H. L. Seifert, Hearing Officer.
Gary M. Bullock, Claimant's Atty.
Clayton Hess, Defense Atty.

This case involves a 24 year-old laborer with a back injury. The medical evidence was confusing and conflicting. The best summary of same would be that the doctors didn't seem to know what was wrong with the claimant. The Hearing Officer ruled that, since the burden of proof rests on the claimant to establish every essential element, and that the presence of a medical-

causal relationships between the job-connected accident and the disability resulting therefrom is such an element, that the claim should be dismissed. For medical testimony to have probative value, it must not rest on speculation or the possibility that an injury was related to an accident. The testimony must show with reasonable certainty, that the accident and the injury are related. Washburn v. Simmons, 213 Or 418; Crawford v. Seufert, 236 Or 369. The WCB remanded the case with instructions to Hearing Officer to have claimant examined by other orthopedic specialists to determine the extent and cause of the claimant's cisability, if any.

WCB #67-375 September 12, 1967

Claude E. Weakley, Claimant.
George W. Rode, Hearing Officer.
John E. Ferris, Claimant's Atty.
John R. McCulloch, Jr., Defense Atty.

On September 7, 1966, claimant who was working as a rod-chainman in a survey party, jumped down on a rock and landed rather heavily. He sustained a sprained ankle in this fall. On December 7, 1966, claimant complained of a pain in the right buttock, extending down the right thigh. This condition was diagnosed as a herniated lumbosacral disc with meuropathy on the right. A laminectomy was performed soon thereafter. Dr. Lynch's medical report states, that "It would be reasonably possible for this injury to have initiated the herniated disc. Of course, I am unable to correlate this particualr injury to the herniated disc with full certainty." On this basis the Hearing Officer found that the medical reports did not establish the requisite medical probability. The WCB reversed. The Supreme Court in Plowman v. SIAC, 144 Or 138, refused to rule against a workman merely because he did not immediately or correctly diagnose his back disability. In Uris v. SCD, 84 Adv 851, a late developing back disability was not to be disallowed merely because of the passage of time from accident to disability or possible other causes for the disability. Also the claimant noted some immediate pain, and suffered a progression of tiredness in his back for the intervening months.

WCB #67-177 September 13, 1967

Maurice E. Kelley, Claimant.
J. David Kryger, Hearing Officer
E. B. Sahlstrom, Claimant's Atty.
Earl Preston, Defense Atty.

Claimant was a janitor who broke his left wrist, when he fell over a bicycle rack. The claim was accepted, and claimant was awarded a 15% loss function of the forearm. While falling, claimant sustained a bruise approximately five inches above his right knee. Approximately thirteen months subsequent to the injury a "Baker's cyst" was discovered and removed, for which climant now seeks compensation. Claimant was awarded an additional 10% loss function of left forearm to a total of 25%, but denied compensation for the "Baker's cyst." The Hearing Officer ruled, that the claimant had failed to sustain his burden of showing a

medical-causal relationship between the accident and alledged injury. This is exclusively a medical question for expert opinion (Orr v. SIAC, 217 Or 249). Here the medical evidence does not in any way relate a causal relationship between the existence of the cyst and the prior injury.

WCB #67-42 September 28, 1967

Evelyn L. Shadduck, Claimant.

This is a WCB order filing report of Medical Board of Review. This involves a claim for occupational disease, consisting of symptoms of coughing and expectorating blood, allegedly due to exposure to paint fumes and further identified by the Hearing Officer as pneumonitis. From the order of the Hearing Officer allowing the claim, the State Compensation Department filed a rejection of the decision and the matter was referred to a Medical Board of Review. The Medical Board by majority found that there was no occupational disease or infection, and all concurred that there was no disability at present.

WCB #67-931 September 28, 1967

Joseph Lee Peck, Claimant.
H. L. Seifert, Hearing Officer.

A Workmen's Compensation Board Determination was made April 25, 1966, in which claimant was awarded temporary total disability. Claimant now objects and filed a request for hearing with the Workmen's Compensation Board on August 2, 1967. Request for hearing was denied by reason of failure to comply with ORS 656.319(2)(b) requirement that request be filed within one year. The WCB affirmed, but advised the claimant that he could have the claim opened within five years of the Determination date by filing a claim for aggravation. Such a right requires claimant to obtain a written report from a doctor that there are reasonable grounds to support a claim that there has been an aggravation of the disability resulting from the injury.

WCB #67-549 September 29, 1967

Benjamin Castricone, Claimant.
George W. Rode, Hearing Officer.
Richard Noble, Claimant's Atty.
Evohl Malagon, Defense Atty.

Claimant bumped his shoulder on a table. He suffered a lump at the end of the left clavicle and some loss of strength. Claimant was allowed permanent partial disability equal to 15% loss function of left arm, and in addition, an unscheduled disability equal to 10% loss function of an arm. Review was requested before the WCB. However, WCB permitted withdrawal of request. The Board regrets the record reflects that claimant cites financial distress as the reason for the withdrawal. The Board, however, assumes that the Hearing Officer and those charged with administering ORS 656.268, properly performed their functions.

WCB #748 September 29, 1967

Guy E. Shannon, Claimant.
George W. Rode, Hearing Officer.
Maurice V. Engelgau, Claimant's Atty.
Hugh Cole, Defense Atty.

The Hearing Officer allowed reasonable transportation expenses incidental to medical treatment. He found a custom and usage for such payment, and further found that the workman's right to a free choice of a doctor would indicate such a right to reimbursement. (The actual amount calculated on the basis of 8¢ per mile for seven trips between North Bend and Eugene, was stipulated by counsel.) Georgia-Pacific requested review before the WCB, and then withdrew same. WCB permitted withdrawal, but assessed $50 reasonable attorney fees against Georgia-Pacific in payment for work the counsel for claimant had done in connection with the review.

WCB #67-142 October 4, 1967

Clayton D. Fairchild, Claimant.
George W. Rode, Hearing Officer.
Lynn Moore, Claimant's Atty.
Earl Preston, Defense Atty.

Claimant slipped and fell from a cement truck, hitting his back on the truck and suffering what was finally diagnosed as a back sprain. Claimant wants permanent disability, claiming his back hurts. Claimant's employment since this accident has been extremely spotty. He claims to have left one job because of his inability to lift heavy sacks of cement. Since this time claimant has held several other jobs, and claimant admitted that none of these jobs were terminated because of any physical condition of claimant (unless drunkeness is a physical condition). The Hearing Officer found the evidence in this case is most consistent with the finding that the claimant has a poor work record, a low motivation for working, severe personal problem, and as is indicated by his drinking problem, and that the problems that he has do not stem from the foregoing injury. (He was separated from his wife at the time.) WCB affirmed finding of permanent disability.

WCB #67-405 October 5, 1967

Billy Joe Sisson, Claimant.
George W. Rode, Hearing Officer.
C.S. Emmons, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.

Claimant sustained an admittedly compensable injury on August 15, 1966, when he fell a distance of somewhere between 5 and 15 feet, injuring his right sacrum and buttock. On October 7, 1966, claimant was operated on for the removal of a kidney stone from the claimant's left kidney. The issue is none other than whether the expert medical evidence established that the accident was a material contributing cause of the kidney stone condition. The medical

evidence is in conflict, but the most favorable evidence indicated that the kidney stone "could have been shaken loose by the fall." The Hearing Officer found that this was too speculative, and hence claim denied. The WCB affirmed, noting that the medical testimony must be relied upon to establish the causal relationship. Uris v. State Compensation Department, 84 Adv 851, 427 P2d 753.

WCB #779 October 5, 1967

Sally Jane Thompson, Claimant.
H. L. Pattie, Hearing Officer.
Stephen S. Walker, Claimant's Atty.
Daryll E. Klein, Defense Atty.

This is a claim of aggravation of a non-job connected back injury. Claimant, a 22 year-old woman, was a bank teller. She worked part-time during the latter part of her convalescence, and then went to work full-time after she was released for same by her doctor. Claimant related no specific event or happening or any fixed or determinable time, when she suffered an injury to her already weakened back. Claimant testifies to a greatly increased work load, but employer's records indicate the claimant's heaviest week of 42 hours is but 4½ hours above normal, or less than one hour per day average. The Hearing Officer found that the claimant has sustained an increase in back symptoms, and especially increased pain, following her return to full-time employment, but also found claimant's increased back pain is not an accident arising out of and in the course of her employment, even applying the "accidental result theory" now incorporated in Oregon's Compensation Law. There was no admissible medical testimony of causation. The Hearing Officer recognizes that in cases where the evidence shows a sequence of events, and a sudden transition of claimant from health to weakness, the progressive and increasing disability beginning at the time of the accident, an award may be sustained notwithstanding the uncertainty of medical testimony, Crowley, 153 Atl. 184(1931). But here non-medical testimony was found to be somewhat less than credible. A majority of the WCB affirmed the Hearing Officer's denial of the claim, but Mr. Callahan, dissenting, points out that the treating physician recommended fewer hours of work than were performed. He further notes that in the latter weeks worked, the claimant did not always have coffee breaks and sometimes had short lunch periods, and eventually her condition became worse, and she was forced to discontinue employment. This, Mr. Callahan suggests, requires a finding that the condition was aggravated by the work.

WCB #533 October 9, 1967

William A. Hayden, Claimant.
H. L. Seifert, Hearing Officer.

The following are supplemental findings after a remand from the WCB with instructions to hear further medical testimony as to possible permanent injury and personality change. The claimant had sustained on January 8, 1966, skull and back injuries from a fall, and the former findings were to the effect, that there was no permanent disability. Dr. Smith's examination concluded that claimant had sustained a cerebral concussion contusion and in

addition injury to the dorsal spine including possible mild compression of T-9, 10, 11 and a fracture of the spinus process of T-9. For these injuries claimant appeared to have made an excellent recovery. Dr. Hickman's psychological evaluation revealed that claimant has bright normal to superior intellectual resources in both the verbal and nonverbal areas. He found no evidence suggestive of organic brain damage, but found that the claimant was experiencing moderately severe depresssive reaction in schizoid personality. Dr. Hickman suspected that the claimant is being pressured by his father to persist in his complaints for compensation purposes. The Hearing Officer found this evidence insufficient to establish permanent partial disability. The WCB affirmed, summarizing Dr. Smith's report as an "excellent recovery from his injuries," and Dr. Hickman's report as indicating that any symptoms of psychopathology present were in existence prior to the accident.

WCB #67-63 October 11, 1967

Joe N. Oreskovich, Claimant.
H. L. Pattie, Hearing Officer.
Bernard Jolles, Claimant's Atty.
Gerald C. Knapp, Defense Atty.

Claimant is a 67 year-old longshoreman. He has suffered from several prior injuries over the years, and the diagnosis of the incident in question was a strain of the lumbar muscles and ligaments. This is an appeal from an award for permanent partial disability equal to 10% loss of an arm by separation for an unscheduled disability. The claimant had been gainfully employed until the accident in question, although he had been confined to the "old man board." Now he can still walk, but suffers a considerable loss of motion in his lower back as well as pain. The evidence is clear that he will never be able to go back to longshoring. The evidence also indicates that he is suffering from severe degenerative arthritis and scoliosis. The Hearing Officer holds that there is no clear evidence establishing the extent of this disability as related to the injury of June 23, 1966. Such disability as claimant suffers, must be prorated between emphysema, age, prior disabilities, obesity and degenerative arthritis. It is further held, that the burden of showing how much of claimant's admittedly large degree of disability, was attributable to the compensible accident was not met. The WCB, Mr. Callahan dissenting, affirmed, noting that there was no medical evidence indicating that the claimant cannot do a more sedentary type of work, and thus the sum of his disabilities does not meet the definition of permanent and total disability. Mr. Callahan would find permanent and total disability, since the claimant had worked regularly until the accident and is now unable to do so.

WCB #67-180 October 11, 1967

Bror E. Nelson, Claimant.
Page Pferdner, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Roger R. Warren, Defense Atty.

Claimant was a rigger and truck driver for Gunderson Bros. He was 51 years old. He suffered a smashed hand. Claimant has suffered a loss of grip and probably

will not be able to work again as a rigger or truck driver, but can work as a fry cook. The original determination was made on the basis of the loss of function of the respective fingers. The Hearing Officer found, the Board concurs, that the loss of grip function is compensible and should be recognized as a factor in addition to the indicated disability of the separate fingers. The Hearing Officer awarded a permanent partial disability of 20% loss of use of his left forearm as compensation for the loss of grip, in addition to the awards for the respective finger disabilities. On review before the Board, an issue was formed on whether an award for loss of grip may be expressed in terms of the forearm. The standard practice for the analogous situation, loss of opposition by a finger to a thumb, is, of course, awarded in terms of the thumb. The Board finds that this practice is easily and effectively adapted to the needs of expressing an award for grip loss (or loss of "palmar opposition"). The WCB, therefore, modified the Hearing Officer's order, deleting the award of 20% loss of use of the left forearm and substituting a 40% loss of use of the left thumb due to loss of grip. The Claimant's counsel was awarded $200 as reasonable attorney fees.

WCB #67-221 October 11, 1967

Calvin R. Miller, Claimant.
H. L. Pattie, Hearing Officer.
Donald S. Richardson, Claimant's Atty.
James A. Blevins, Defense Atty.

Claimant suffered a mashed left thumb. He was treated by Dr. G. J. McGowan at Holladay Park Hospital. His thumb was X-rayed and bandaged, and he was released immediately and returned to work. The Claimant here seeks a permanent partial disability. Claimant offers no medical evidence, only his own. The treating physician's report on Form 827 indicates that the doctor anticipated the only time loss to be the "rest of the day." The Hearing Officer found that the claimant had failed to sustain his burden of proof as to disability. The WCB affirmed, summarizing the Claimant's testimony as indicating that there was a numbness in his left thumb, and that he had soreness and loss of strength in the injured hand. Held: This testimony does not demonstrate disability of a permanent nature.

WCB #67-197 October 12, 1967

Forrest C. Lamm, Claimant.
J. David Kryger, Hearing Officer.
A. C. Roll, Claimant's Atty.
Earl Preston, Defense Atty.

Claimant is a 56 year-old logger who suffered a crushed right leg in a logging accident. Dr. Brooke diagnozed it as a severely comminuted fracture of the mid-portion of the tibia and fibula of the right leg. In this case the claimant was referred to the Rehabilitation Center at the time that he was released by the treating physician for some form of work. The claimant alleges that he is entitled to temporary total disability payments during the period of rehabilitation. The Hearing Officer denies this claim and discusses both the pre-1966 law and the present law. The old law (ORS656.246) prohibited the

final settlement of a claim until restoration was complete. The Hearing Officer relies on Dimitroff v. SIAC, 209 Or 316; and Vader v. SIAC, 163 Or 492 for the interpretation that restoration means only medical restoration. The new law (ORS 656.268) prohibits closing the claim until the workman's condition becomes medically stationary. Here the Hearing Officer rules that it is "obvious that the term 'Medically stationary' is limited to medical treatment alone, and does not include rehabilitative processes." Hence, under either law temporary total disability payment need not be continued during the process of rehabilitation, because the claim may be closed when the claimant's condition is found to be medically stationary. The Hearing Officer sustained a previous determination of permanent partial disability of 50% loss function of his right leg. The WCB remanded, directing the Hearing Officer to hear further testimony so as to find out the significance of claimant's testimony, if any, that there was a "slippage" in his knee, which he hadn't reported to the doctor.

WCB #67-33 October 12, 1967

Jeanne E. Belanger, Claimant.
Harold M. Gross, Hearing Officer.
Don Wilson, Claimant's Atty.
James Blevins, Defense Atty.

Claimant suffered a lower back injury, while working in a nursing home, when an elderly patient resisted an attempt to put her to bed. The claimant immediately felt a stabbing pain in the low back. Claimant, although a mother of seven, had no history of back problems. Since she was released for employment, she has been working on a turkey ranch with her husband and having continuing problems with her back. The Determination had awarded her permanent partial disability equal to 10% loss of an arm by separation. The Hearing Officer raised the same to 20%. The turning issue in this case is whether the claimant's condition is medically stationary. The treating physician had suspected a herniated disc, but no myelogram was done, apparently because of the claimant's pregnancy. Despite the continuing doubt as to the seriousness of the claimant's problems and a possible need for a laminectomy, the defendant's physician, Dr. Linquist, declared the claimant medically stationary. It is this declaration the claimant protests. The Hearing Officer refused to disturb Dr. Linquist's finding that the condition was stationary, absent definitely contrary medical opinion, although he would have preferred the use of a myelogram to further investigate the possible need for a laminectomy. The WCB with agreement of counsel for claimant obtain a further examination by an orthopedic surgeon. The latter recommended that a myelogram be effected, and accordingly the case is remanded to the Hearing Officer to obtain a myelogram.

WCB #859 October 13, 1967

Albert R. Wolverton, Claimant.
Harold M. Gross, Hearing Officer.
Maurice V. Engelgau, Claimant's Atty.
Evohl Malagon, Defense Atty.

Claimant, a grocery stock shelver, injured his back on February 10, 1966, when he slipped while holding a box weighing from 25 to 40 pounds. He is now 68 years old. His past medical history includes two laminectomies, one in 1948, and the other in 1965. A basic underlying condition in his back is identified as advanced degenerative lumbar disc disease. Nonetheless the uncontracted evidence was that the claimant had been able to perform his duties as a grocery clerk with no difficulty prior to the accident. Claimant testified that he had undertaken a job as a night shift caretaker at the Elks Club, but had to give it up because of the pain and discomfort of his back. Claimant testified, that he thought he could do a few hours a day of light office janitorial work, but that he had been unable to find same. The treating physician says that this is unrealistically optimistic, and the fact is that the claimant cannot perform regularly useful work. The Hearing Officer finds that this meets the requirements for permanent total disability under ORS 656.206(1). The Hearing Officer found the overwhelming evidence, "both medical and lay indicated that whatever claimant's preexisting medical condition in February, 1966, it did not create disability until the accident of February, 1966, from which we may assume that this accident was the instigating cause." The WCB affirmed the Hearing Officer, finding substantial evidence to support the findings, conclusion and order of total permanent disability.

WCB #67-338 October 17, 1967

Phillip E. Lowe, Claimant.
Harold M. Gross, Hearing Officer.
Wesley Franklin, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.

The Hearing Officer made the following finding of fact:

> "That while engaged in horseplay while working for the above-named employer (a cannery), on February 23, 1967, claimant was struck by a blow to his chest area, above the area of a surgical scar from a preexisting ulcer operation. That such blow came while claimant was engaged in 'horseplay,' but was not the result of any intentional act by anyone. That claimant has failed to prove that he suffered any injury as a result of this accidental contact while working, and that claimant's subjective complaints are neither supported by objective findings of three examining and treating physicians, nor do they exclude the possibility that such complaints arise out of the preexisting ulcer condition, were not brought on by the blow to claimant's body."

The claimant described the incident as a "judo chop right across his incision," and that as a result, he tasted blood five minutes later. Dr. Long's suggestion for treatment was "reassurance and encouragement." The Hearing Officer denied the claim. The WCB rejected a request for review, because it was filed more than 30 days after the order of the Hearing Officer.

WCB #224 October 18, 1967

Schmidt Brothers Farms, Employer.
Complying Status.

WCB recinded a default order of June 14, 1967, declaring Schmidt Brothers Farms a noncomplying employer.

After a personal investigation by Chairman Callahan and Commissioner Cady, the Board found that Schmidt Brothers Farms pellet mill is an activity defined as farming within Oregon's Workmen's Compensation Law.

WCB #894 October 23, 1967

Robert T. Delamare, Claimant.
H. L. Seifert, Hearing Officer.
John M. Ross, Claimant's Atty.
John McCulloch, Defense Atty.

Claimant fell through a roof and injured his shoulder. Pain in the left shoulder persisted and corrective surgery (acromionectomy) for a torn rotator cuff was performed in April. Substantial limitation of motion still exists. This is a claim arising under former procedure, in which the State Compensation Department established the initial award. The practice under that procedure was to place primary reliance on a specific statement of percentage by the treating physician. The treating physician in this instance, a highly qualified orthopedic surgeon, recommends an award of 50% loss of use of the left arm. Neither the Hearing Officer nor the Board found any reason to disagree with that percentage.

WCB #863 October 23, 1967

Cathy Bertha Delamare, Claimant.
H. L. Seifert, Hearing Officer.
John M. Ross, Claimant's Atty.
John McCulloch, Defense Atty.

Claimant was injured, when a roof fell, striking her on the head and back. She was awarded permanent partial disability equal to 10% loss of an arm for unscheduled disability. The medical reports ranged from "little evidence of serious injury" to "chronic lumbar strain." However, claimant testifies to pain sitting, working, lifting and cannot sleep. Hearing Officer stated, "Having seen and heard the claimant, and having considered all the evidence in the case, I cannot find that the determination awarded claimant is unfair, unjust or disproportionate." WCB affirmed.

WCB #67-469 October 26, 1967

George Kautz, Claimant.
H. L. Pattie, Hearing Officer.
Garret L. Romaine, Claimant's Atty.
Roger Warren, Defense Atty.

Claimant is a 51 year-old cherry picker operator, who received an injury to his right foot, involving the fifth metatarsal (big toe) and the end of the tibia (one of the bones between the knee and the ankle). He is capable of performing light duty, but since his regular job is light duty, he has been able to return to his regular job and work steadily. His foot, however, continues to suffer from swelling and pain. The determination was made at 20% loss of function of the right foot. Dr. Puziss rated the claim at 15% loss of function at or above the right ankle. The Hearing Officer denied an increase in permanent partial disability, citing Wilson v. SIAC, 189 Or 114: "It is not the intention of the law to compensate for pain, suffering or nervousness, in and of themselves, but the disabling effect of such may be considered in determining the disabling effect of any particular injury." Claimant's argument on review is that the claimant's ability to follow his former occupation was taken into consideration in determination of his award. The WCB denied that this had been done, and stated that "Claimant's evaluation of disability was made despite his ability to hold his former job." The Hearing Officer was affirmed with the usual recitation, that the findings were supported by substantial evidence.
Ed. Note: It is curious here, that the Hearing Officer's opinion under the heading of "Findings," devotes about half of his space to discussion of the claimant's ability to perform his present job.

WCB #67-175 October 26, 1967

John F. Byers, Claimant.
J. David Kryger, Hearing Officer.
Dan O'Leary, Claimant's Atty.
D. J. Grant, Defense Atty.

Claimant suffered a lower back injury. A successful laminectomy was performed, and claimant was able to return to his duties as a millwright. He suffers from no pain, but has some limitation of motion and can't work quite as fast. The Hearing Officer affirmed the permanent partial disability Determination of 20% loss of an arm by separation, ruling that "Claimant has the burden of showing the Board Determination to be unjust and erroneous." Citing Dimitroff v. SIAC, 209 Or 316. On WCB review, "The claimant in effect argues that he has no burden to prove the order subjected to hearing was an error. Regardless of semantics, it does not appear that the Hearing Officer gave evidentiary value to the previous determination. There is certainly a burden upon the claimant to prove the disability is in excess of the amount awarded by the Determination. Without a cross-request from the other party for hearing, the extent of disability could not be reduced by the Hearing Officer, even though the Hearing Officer concluded the disability was less."

WCB #67-50 October 26, 1967

Robert B. Cooper, Claimant.
H. L. Pattie, Hearing Officer.
Gary Gregory, Claimant's Atty.
Clayton Hess, Defense Atty.

This case presents the problem of timeliness of the request for the Hearing. Notice of Denial was dated and mailed November 14, 1966, by the State Compensation Department. The request for hearing was prepared by the claimant personally and is dated January 11, 1967. It was mailed to "State Compensation Dept, Labor and Industries Bldg., Salem, Oregon," and was postmarked January 11, 1967, and was stamped "Received SCD, January 12, 1967." This was the 59th day from the date of the mailing of the Notice of Denial. This was a Thursday. The SCD kept the letter until the 60 days had expired, and then delivered to the Hearings Division of the Workmen's Compensation Board, where it was stamped "received" on January 16, 1967, the 63rd day, and a Monday. The Hearing Officer found that the request for hearing must be direct to or actually received by the Workmen's Compensation Board. He further found that the sixty days begins to run from the date of mailing of the notice of denial. Here the Hearing Officer relies on past WCB rulings, that the "notified of denial" means "notice of denial mailed," (Claude E. Riggle, WCB #663; Ruth Pastermak, WCB #139.). The WCB affirmed ruling that "Whatever duty...to... protect the citizen from his mistakes is not really at issue, unless it could be said the record reflected a deliberate effort to take advantage of that error or mistake." "The legal issue should be treated as though the document had been improperly forwarded to the Insurance Commissioner, Labor Commissioner or to the employer or private insurance carrier. The WCB ordered that future notices to claimants should include the address of the Workmen's Compensation Board.

WCB #67-432 October 27, 1967

Carlos V. Rios, Claimant.
H. L. Seifert, Hearing Officer.
Francis F. Yunker, Claimant's Atty.
Wayne A. Williamson, Defense Atty.

The claimant was struck by a gyrating bolt and suffered multiple contusions. X-rays indicated no broken bones. Claimant complains of soreness in the shoulders, neck, back, legs and arms, as well as tightness across the kidneys and an upset stomach and a prickly sensation in both ears. Dr. deVries found a weakness of grip of the left hand. Dr. Tooms found little physical disability. Dr. Hickman gave a psychological evaluation and found claimant extroverted and aggressive emotionally, and that he displayed evidence of moderately severe chronic neurotic reactions with some suggestion of a personality trait disturbance, and was evasive and deceitful whenever he felt it served his purpose to do so. Dr. Kosterlitz found psychophysiological reaction, manifested by multiple complaints and compensation motivation overt. The Hearing Officer denied any permanent partial disability, and the WCB affirmed.

WCB #67-435 October 27, 1967

Everett N. Gray, Claimant.
H. L. Seifert, Hearing Officer.
C. H. Seagraves, Jr., Claimant's Atty.
Earl Preston, Defense Atty.

This is an occupations disease claim pertaining to a condition of the lungs because of dust exposure while loading lumber. The determination for this lung condition was an award of permanent partial disability equivalent to 70% loss of function of an arm for unscheduled disability. Pulmonary function studies indicated that the claimant's vital capacity was 60% of normal. The diagnosis indicated chronic obstructive bronchitis and a moderate degree of pulmonary emphysema. The claimant wants total permanent total disability. It is apparently impossible to tell what percentage of claimant's vital capacity is impaired by emphysema and what percentage by bronchitis. Dr. Isert felt that claimant was impaired approximately 40% to 50% of the whole man, which was found equivalent to 67% to 83% of an upper extremity. The Hearing Officer affirmed the determination of 70% loss of function of an arm. The matter next went to the Medical Board of Review. The latter found that "it was the opinion of the Board that Mr. Gray's impairment is 50%, and that he should be awarded a 50% total disability rather than attempt to base the disability on a percentage loss of extremity." The WCB filed the opinion, raising the question of the Medical Board's not following the statutory scheme of disabilities.

WCB #67-776 October 27, 1967

Stanley H. Raney, Claimant.
Page Pferdner, Hearing Officer.
Ben T. Gray, Claimant's Atty.

Claimant appeals a Determination of no permanent partial disability. On July 28, 1966, claimant suffered an acute left lumbosacral strain while working for Avison Lumber Co. He was released to return to work on August 15, 1966. On September 10th, he went to work for the post office, and the following April 1st, claimant again hurt his low back. Medical reports after the latter injury indicated "congenitally anomalous lumbo-sacral joint with transitional vertebrae," and "developmental anomaly at L-5 or the upper sacral area with a sacralization of the transverse process of the upper sacral segment." Claimant had not consulted any doctor between August 15, 1966, and April 5, 1967. The Hearing Officer found that the post office injury was a new injury and could not be charged to Avison Lumber Co., and that there was no evidence of impaired earning capacity as a result of the prior injury. Appeal to the WCB was made and withdrawn by claimant's counsel. Compensible disability is inability as a result of work-connected injury, to perform or obtain work suitable to claimant's qualifications and training. The degree of disability depends upon impairment of earning capacity, which in turn is presumptively determined by comparing pre-injury earnings with post-injury earning capacity. An intervening injury does not discharge the Hearing Officer from the onerous duty of determining the extent of disability resulting from the original injury, but here it appeared that there was none.

WCB #933 October 27, 1967

Lester E. Carr, Claimant.
H. L. Pattie, Hearing Officer.
Thomas F. Levak, Claimant's Atty.
Roger Warran, Defense Atty.

Claimant, a 53 year-old boilermaker, was thrown from a scaffold and suffered multiple bruises and abrasions and a fracture of the pelvis in the acetabulum near the head of the left femur. He was released from the hospital after about four weeks, but required to use crutches. When claimant became ambulatory (on crutches), a left inguinal hernia was discovered. He had had a right inguinal hernia of long duration, which predated the accident, but it was necessary to repair both hernias by surgery. The SCD paid medicals on left, and claimant must pay for the right one. No permanent partial disability allowed for the hernia. The medical evidence indicated that the fracture was very serious and irrepairable, and some progression of degenerative changes. Dr. Clarke recommended a disability award of 60% of any arm for unscheduled disability, but acknowledges that his rating is in anticipation of future disability rather than present disability. The Hearing Officer noted that anticipated future aggravation is not basis for present award, and claim must be brought for same when aggravation occurs. Claimant's leg is now sore, although he has been able to return to work, so here there is no actual loss of earnings, but permanent partial disability may be awarded for actual physical impairment, too. Accordingly, an order was entered granting permanent partial disability equivalent to 30% loss by separation of an arm for an unscheduled disability, to the pelvis. It was also found that claimant suffered edema of the legs and a permanent partial disability of 10% loss of function of the left leg, and 10% loss of function of the right leg was awarded. Claimant's counsel withdrew request for review by WCB.

WCB #67-550 October 27, 1967

Howard Alexander, Claimant.
H. L. Seifert, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Gerald C. Knapp, Defense Atty.

Claimant suffered a left hand and wrist injury on May 4, 1966. On May 11th, claimant underwent surgery on his left wrist, in which the carpal tunnel was explored and the median nerve dissected. Postoperatively claimant developed urinary retention, which required catherization. Following the urinary complication, claimant has suffered from sexual impotence. Claimant has trouble using his hand to hold tools, which he must do as a heavy-duty mechanic. He suffers a loss of strength in his ring and little fingers, which affects his ability to grip and use his hand tools. The Hearing Officer awarded a permanent partial disability of 25% loss function of the third finger and a 25% loss function of the fourth finger. On review the claimant urged a disability of the forearm. WCB ruled that "it is true that finger disabilities affect the ability to use the hand proper, the forearm and entire arm, but ratings of disability must be limited to the area disabled. There is substantial evidence, that the disability is limited to the fingers." As to the sexual impotency, the Board

ruled: "Sexual complications, though not the subject of any Oregon Supreme Court decisions, are normally not compensated, unless it appears there has been an interference with the workman's ability to work. This was not established by the evidence in this case."

WCB #67-422 November 3, 1967

In the Matter of the Question as to
Whether the Estate of Mary Catherine Smith
and Nan Carnahan, Grants Pass, Oregon,
is Subject to the Workmen's Compensation
Act of 1965,

with the State Compensation Department
being a necessary party.

John Bowman, Claimant.
H. L. Seifert, Hearing Officer.
C. H. Seagraves, Claimant's Atty.
Louis F. Schultz, Jr., Employer's Atty.

Claimant was injured when he fell from a ladder while remodeling a warehouse, so that it could be rented out by the Estate of Smith. Defendant did not contribute to the industrial accident fund or qualify as a direct responsibility employer under ORS 656.016, and had not filed a rejection in this case. Claimant was to be paid $2.50 per hour, and it was anticipated that there would be ten days to two weeks work. Claimant was to work with Gladwin Smith, who was to be in charge of the job. Gladwin Smith was paid no set rate, he merely submitted a bill. After the claimant was injured, a general contractor was employed to finish the job. It took him and two carpenters sixteen hours to finish the work at the cost of $65.00. Tests of employee or contractor relationship:
(1). Amount of control reserved: While the evidence indicates that claimant and Gladwin Smith worked together as a team, it appears that claimant took orders in his job from Gladwin Smith. Gladwin Smith had already started the job, and claimant was called in to help him. Gladwin Smith was in charge of seeing that the job was completed, which would indicate that claimant was in the position of an employee.
(2). On the right to terminate: There were no elaborate contractural arrangements in this case. Claimant was injured on the first day of his employment, and the only arrangement was that he was to be paid an hourly rate. The duration of the job was approximate; however, it appears that claimant was only to be paid for the hours he worked on the job, which would indicate that he was an employee.
(3). On furnishing equipment: Claimant here furnished his own carpenter tools; however, this was in accordance with the practice of the trade. The other material was furnished by the defendant. He had no right to employ assistance, and he received wages based merely upon the time employed, rather than on the amount of work he accomplished; all of which would point to an employer-employee relationship.

(4). Claimant had worked previously for defendant on an hourly basis. On this basis, the Hearing Officer found an employer-employee relationship existed between John M. Bowman and the Estate of Smith.
The Hearing Officer went on to find that claimant was not a casual worker within the provisions of ORS 656,027 (3). The WCB reversed, holding that the claim was not compensible within the terms of Oregon Workmen's Compensation Law. The WCB stated as follows:

> "The true legal issue for an accident which occurred in 1966 does not reach the casual exemption applied commencing January 1, 1966. By virtue of O. L. 1965 Ch 285, Sec 9a, no employer with less than four workmen employed in one day is subject unless the employer was engaged in one of the occupations defined as hazardous by ORS 656.084. There appears to have been fewer than four employees in this instance."

The Board went on to find that claimant was not engaged in one of the ORS 656.084 hazardous occupations. Then, this final comment was added, "The Board concludes, that if the injury had occurred on or after January 1, 1967, the order of the Hearing Officer could have been affirmed. However,...the Board concludes, that Mr. John Bowman was not a subject workman, nor was the employer a subject employer on the date of Mr. Bowman's injuries."

WCB #67-577 November 3, 1967

Thomas Ayers, Claimant.
H. L. Pattie, Hearing Officer.
James B. Griswold, Claimant's Atty.
James A. Blevins, Defense Atty.

Claimant is an ironworker and welder. This is an appeal from a Determination granting claimant "an award for permanent disability equal to 20% loss function of left foot and 15% loss of an arm by separation for unscheduled disability." Claimant was dealt a glancing blow from a falling steel column. Claimant sustained a 2½ inch laceration on his scalp and three fractures in the left leg between the knee and the ankle. An operation was performed on the leg and two parallel screws were placed in the lower end of the tibia to fix one of the fractures in place. The other fractures were reduced by cast or splint. All the claimants upper teeth were extracted surgically, and claimant was fitted with a full upper plate. Claimant suffered a loss of taste also. Further, there was evidence of a mild compression fracture of the first vertebrae. Claimant now suffers from one-third to one-half limitation of motion in his ankle and is unable to put his weight on the ball of his foot, which makes it impossible for him to climb a ladder, hence drastically limiting his ability as an ironworker. The claimant's back hurts most of the time, which restricts him to lighter work. The Hearing Officer awarded an unscheduled disability equivalent to 20% loss of an arm by separation for injury to his back and mouth (loss of taste), and a 50% loss function of the left foot. The State Compensation Department requested a review to protest the inclusion of the loss of taste among the compensible factors of unscheduled injuries. The WCB took notice of the policy of the old SIAC, that loss of taste or smell was not an injury known to surgery as permanent partial disability. However, the Board reviewed the evidence as to the includable, nonscheduled elements and found such disabilities are equivalent to the loss by separation of 20% of an arm.

WCB #67-538 November 7, 1967

Henry H. Brown, Claimant.
H. L. Seifert, Hearing Officer.
Robert J. McCrea, Claimant's Atty.
John E. Jaqua, Defense Atty.

Claimant, a 51 year-old mechanic, injured his elbow when a wrench slipped. Since this time, claimant has suffered from a marked weakness of the hand and a tendency to drop objects because of this awkwardness. An operation under the name of a medical epicondylar stripping was performed on the claimant. The medical evidence indicated a minimal permanent partial disability. The Determination was made for permanent partial disability equal to 10% loss function of the left arm. After recovery from the operation, claimant did not return to the mechanic's work, but instead went to work in the less demanding job of a service station employee. Claimant still complains of weakness, numbness and pain, when he attempts to lift. There is no limitation of motion. The Hearing Officer affirmed the determination and request for review was withdrawn by claimant's counsel with reservation to file claim for aggravation later. WCB noted that there was a statutory right to file claim for aggravation, and it was not waived by a dismissal of a review of present award.

WCB #664 November 8, 1967

Anthony Fullmer, Jr., Claimant.
Harold M. Gross, Hearing Officer.
Donald Atchinson, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.

Ed. Note: The Hearing Officer's opinion in this case, although reversed by a majority vote of the WCB, Mr. Callahan dissenting, preeents an excellent summary of the law in this area. It is approximately 5,000 words long and carefully documented.

This is an AOE/COE case in which the claimant is an 18 year-old high school senior, who was working for Sherwood Logging Co. The logging camp was some 70 to 78 miles one way from the claimant's home over something less than the best roads. There was "supposed to be" a ride for the claimant, but there wasn't, so the claimant was driving his own car. This was not the first weekend that the claimant had brought his own car, but, apparently, the second. The accident occurred about 2:45 A.M., when claimant went to sleep behind the wheel and drove off Highway 101, near Port Orford, and sustained a fractured skull. A more detailed description of the arrangements for transportation, as extracted from the opinion of the WCB is as follows: Claimant had worked for the same employer under conditions where he received his transportation to and from the job site in a crummy. With respect to the job site involved at the time of injury, there was no such provision for transportation. From a camp site in the woods to the job site, the employer provided transportation. The issue is whether the contract of employment encompassed the travel in question on weekends to and from home to the camp site. The most that can be said for the conversation between the employer and claimant is that the claimant was to contact a fellow employee, or that other truck drivers might be contacted. It is

admitted, that the fellow employee with whom he might otherwise have ridden, at the most received some gas for driving from home to the camp site, and this was consideration for hauling some of the employer's equipment and not as compensation for the personal travel. He received neither time nor mileage for his pickup. It is, perhaps, worth noting, that the Hearing Officer found that among other things, that the employer had more or less offered transportation as an inducement for the employee to take the job. Accordingly the Hearing Officer found that the claim should have been accepted. The majority of the Board, Mr. Callahan dissenting, reverses, stating that, "The trip from home to camp site in a personal car without pay for the time and no discussion between employer-workman about the workman's use of the car, does not reflect an extension of the course of employment to cover such activity."

WCB #67-462 November 9, 1967

Velma Cochran, Claimant.
H. L. Seifert, Hearing Officer.
Gary G. Jones, Claimant's Atty.
Carlotta Sorensen, Defense Atty.

Claimant, a hospital aide, fell and fractured her right wrist, while roller skating with patients. Her complaint, nine months later, was inability to regain strength and hold objects in her right hand. Dr. King examined at this time, January 3, 1967, and found that movement was good, and there was no apparent weakness. Dr. Puziss examined on January 19, and found that the claimant lacked about 15 degrees of complete normal ulnar deviation, but found normal dorsiflexion, palmar flexion and radial deviation, and there was almost no difference between the grips. Dr. Kion on reexamination found a demineralization of the bones of the wrist, but said that this was getting better. The Determination was set equal to 10% loss of function of right forearm. Claimant's testimony collaborated by two witnesses was that she had loss of grip in her hand and is continually dropping things. She has a lump on her right wrist. Dr. Puziss indicated, that the best thing that could happen to claimant, is for her to get back to work, use the hand and forget about her injury. The Hearing Officer affirmed the Determination, and the WCB affirmed the Hearing Officer.

WCB #67-58 November 9, 1967

George Baker, Claimant.
H. L. Pattie, Hearing Officer.
Darrell L. Cornelius, Claimant's Atty.
Peter R. Blyth, Defense Atty.

Appeal from determination of no permanent partial disability. Claimant, a grocery clerk, was loading groceries into a station wagon, when same was hit from the front by another car, knocking it into the claimant. The tailgate struck claimant's knees and the upper portion of the car struck his head, throwing him backwards to the pavement, again striking his head and injuring his shoulders and back. Claimant testified to headaches, ache in his shoulders, low back, left leg, hip and knee. None of this subjective testimony can be

contradicted by the insurance carrier. The medical examination by Dr. Cohen revealed slightly diminished reflexes in the knees and tenderness in the spine at the cervical, dorsal and lumbar areas. The Hearing Officer found no compensible permanent partial disability by reason of the headaches and miscellaneous aches and pains to which he testifies. However, the Hearing Officer did find that claimant has sustained a permanent partial disability for pain in his cervical, dorsal and lumbar spine, equivalent to 10% loss of an arm by separation, and that claimant has sustained a disability to his left knee, equivalent to 10% loss function of the left leg, primarily because he walks with a limp, and this impedes his walking ability as a grocery carry-out boy. In the letter it is to be noted that there was no disability rating by either examining doctor, but such is not necessary. On review by the WCB, the comment was made, that "The Board has not, and cannot, rule out subjective complaints as a basis of award. Even if all the complaints were subjective, a duty remains to determine whether the complaints are founded in fact and, if so, the extent of disability resulting therefrom." WCB affirmed and allowed $200.00 attorney fees to claimant's attorney.

WCB #67-468 November 9, 1967

James F. Coleman, Claimant.
George W. Rode, Hearing Officer.
Herbert Galton, Claimant's Atty.
Clayton Hess, Defense Atty.

Claimant suffered a back strain lifting a patient, while working for a hospital. A determination awarded no permanent disability. Claimant strongly protested that the doctors at the hospital had not treated or evaluated him dispassionately. Accordingly another doctor was appointed for an examination and on the basis of his report, a permanent partial disability award equal to 10% loss of function of an arm was entered by the Hearing Officer. The review before the WCB pertains to the schedule of benefits. It was noted, that under prior law the "schedule" for unscheduled injuries was customarily stated in terms of equivalent to loss of use of an arm. However, the 1965 Act deleted the modifying words "of use" after loss, and at the same time increased the maximum allowable to the award, which would be made if an arm were lost by separation. The Board, having reviewed the record, concludes that the only conclusion which can be drawn from the evidence is that claimant does have permanent disability in his back, equal to the loss by separation of 10% of an arm. This modifies the order of the Hearing Officer by substituting the words "by separation" for "of function."

WCB #315 November 13, 1967

Dale Eugene Bridge, Claimant.
Page Pferdner, Hearing Officer.
Mitchell Crew, Claimant's Atty.
Clayton Hess, Defense Atty.

Claimant had a prior injury for which he had been awarded a total of 40% loss function of an arm for an unscheduled lower back injury. Claimant suffered another lower back injury on December 21, 1965. Medical evidence indicated,

that claimant had a mild nerve root compression to which he seemingly over-reacted. The Hearing Officer found permanent partial disability resulting from injuries to his back did not exceed 40% loss function of an arm for unscheduled disability. On review the question of the effect of the Hearing Officer's violation of ORS 656.289(1), which requires that orders be issued within 30 days, was raised. The WCB concluded that the purpose of the statute was to expedite the hearing process and same would be defeated, if the order were declared void and a new hearing required. A second contention complains of the refusal of the Hearing Officer to admit into evidence the portion of medical report, which undertook to assume the ultimate decision of the extent of permanent disability. Rule 5.05 (B) (10) favors the production of medical reports expressed in terms of impairment of physical function, rather than for the doctor to assume the responsibility of rating the ultimate disability. This is not mandatory, and when a report is tendered, it should not be refused into evidence. The WCB finds this error, but not reversible error. The Board also holds that the Hearing Officer missed the issue in fixing the compensation. "The issue is not whether the claimant now has a total of 40% or any other fixed percentage of disability in his back as compared to an arm...Taking the claimant as he was on ... the date of the injury in question, what, if any additional permanent diability has claimant suffered as a result of that injury...?" The WCB then found that the injury in question caused the claimant to suffer an increase in the permanent disability in his back, and that this additional permanent disability is equal to the loss of use or function of 20% of an arm.

WCB #67-207 November 21, 1967

James F. Loper, Claimant.
George W. Rode, Hearing Officer.
A. C. Roll, Claimant's Atty.
Paul Geddes, Defense Atty.

Claimant suffered noncompensible injuries to his neck and shoulder on November 12, 1966, when he fell in an attempt to elude a low-flying airplane. The injury in question was sustained on December 23, 1966, when claimant stepped off a platform and landed on his head. The insurance carrier first accepted the claim and paid temporary total disability until March 22, 1966, when the claimant was advised by letter, that no further payments would be made, and on the same day a form "802" was submitted to the WCB with copy to claimant bearing the remarks, "Claim denied after further investigation." The Hearing Officer heard the matter on the merits and found that the claimant's condition was materially contributed to by the accident of December 23, 1966. The WCB ruled, that "if the two documents were intended to be a claim 'denial' they fall short of the requirements of ORS 656.262 (6), in that no reason for the denial is set forth. The accidental injury remains admitted by the employer, and the only issues are thus extent of disability and penalties against the employer for delay and resistance to payment of compensation." The WCB found "that the failure of the employer to either properly deny the claim or submit the issue to the Board for Determination pursuant to ORS 656.268, constitutes an unreasonable resistance to the payment of compensation." Claimant's attorney awarded a fee of $200.00.

WCB #799 November 21, 1967

Beno Johnson, Claimant.
Harold M. Gross, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.

Claimant sustained a fracture of the right wrist on May 13, 1966. An excellent result was obtained from the treatment and healing of that fracture. The medical reports indicate that no permanent disability resulted from that accident. Both the Hearing Officer and the WCB so found. The issue is whether failure of the Hearing Officer to issue his order within the 30 days specified by ORS 656.289 (1) goes to jurisdiction. The Board finds not, stating, "There is no indication of legislative intent, that loss of jurisdiction was a sanction intended by the Legislature in enforcement of the cited section. Also, in any event, the jurisdiction of the Board continues."

WCB #852 November 21, 1967

Thomas Guy, Claimant.
Page Pferdner, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
Clayton Hess, Defense Atty.

Claimant was a roofing foreman, who suffered a broken left arm. The Determination awarded no permanent partial disability. Dr. Cohen's examination revealed that motion in dorseflexion is limited by 10 degrees. Motion in palmar flexion is slightly limited by 5 to 10 degrees. Supination is good, but limited slightly by 5 degrees. Pronation is limited 10 degrees. Claimant testified that his arm hurt after a day's work and felt a little weak. The Hearing Officer awarded permanent partial disability of 10% loss of use of left forearm. The remaining issue pertained to whether some shots in the shoulder were compensable. The defendant insisted that they were palliative rather than curative and, hence, not compensable. There was no medical testimony on the point. The Hearing Officer found that they were palliative and not compensable. The WCB agreed as to the law, citing Tooley v. SIAC 239 Or 466. However, the WCB was concerned over the factual question. It felt that the amount concerned wasn't sufficient to justify remanding for further evidence, so "It is suggested that claimant obtain a report from the doctor, and that the State Compensation Department acknowledge its responsiblity under ORS 656.245, if the treatments were other than palliative."

WCB #67-57 November 21, 1967

Robert W. Reischel, Deceased.
Page Pferdner, Hearing Officer.
Jack L. Kennedy, Petitioner's Atty.
Clayton Hess, Defense Atty.

Decedent was killed in an industrial accident. Petitioner seeks to show herself to be his common-law wife. ORS 656.226 was held inapplicable, because there were no children living "as a result of that relationship." The alleged

marriage is based upon a temporary visit to Idaho in 1963, when the parties lived together in a motel for a few weeks. The decedent has identified the claimant herein as an "aunt" on an insurance application after the Idaho sojourn. Further, the parties maintained separate bank accounts, filed separate tax returns, and the claimant continued to use her former name on employment records in the years following the alleged Idaho marriage. The WCB considered this substantial evidence to support a finding that no valid common-law marriage was ever consummated in Idaho. Claim denied.

WCB #67-408 November 21, 1967

Janell L. Piatt, Claimant.
John F. Baker, Hearing Officer.
John J. Pickett, Claimant's Atty.
John E. Jaqua, Defense Atty.

Claimant had a neck injury. She said it happened while at work. The employer produced two employees at the hearing to impeach the claimant's testimony. Both witnesses were in substantial agreement as to statements made in their presence by the claimant. The employer's witnesses allege that claimant stated that she got hurt over the weekend, but was going to claim that she was hurt on the job; and, that if the witnesses would "stick up for her," she would "split" with them. Hearing Officer denied claim, and WCB affirmed.

WCB #433 November 21, 1967

Joseph A. Lescard, Claimant.
H. L. Seifert, Hearing Officer.
Frank Mc K. Bosch, Claimant's Atty.
Gerald C. Knapp, Defense Atty.

This is a claim by a 62 year-old painter for a pulmonary disease, complicated by a secondary infection and possible allergy, allegedly caused by exposure to inhalations while spray painting in close quarters in early November, 1965. Claimant had smoked two packs of cigarettes per day since 1916. Claimant, here, ascribes the precipitating cause of his illness to the inhalation of paint spray. The medical opinion, here, is conflicting. Dr. Richards believes, that claimant has had a problem of chronic obstructive pulmonary disease for some time. His diagnosis at the hospital was acute pneumonitis, due to inhalation of respiratory irritants. The test is whether or not there is a medical causal relationship between claimant's condition and his employment. Here, a pre-existing disposition to a pulmonary disease does not furnish grounds to deny compensation, if an accidental injury substantially causes the disability, or materially contributes to hasten disability earlier than would have otherwise occurred (Elford v. SIAC, 141 Or 284.). The Hearing Officer found that evidence was sufficient to establish a compensable injury within ORS 656.002(6). There was great confusion on Review. It seems as if the SCD had paid the temporary total disability claim as an occupational disease, and the Hearing Officer apparently found that was an accident. The Hearing Officer ordered the claim accepted. It had been accepted, and the real issue, apparently, was

the amount of disability. However, the SCD had requested review, and the only issue raised is whether it was accident or disease. The WCB ducked this issue, stating that the Medical Board should decide that, and remanded to the Hearing Officer for a finding of the extent of disability, if any, resulting from the claimant's compensable injury. The WCB further ruled that recourse to the Medical Board of Review for a determination of whether an occupational disease, should not be limited to the claimant.

WCB #923 November 21, 1967

Robert M. Rhode, Claimant.
Page Pferdner, Hearing Officer.
William E. Gross, Claimant's Atty.
Clayton Hess, Defense Atty.

Claimant suffered severe burns over 60% of his body, 20% of which were second degree burns and 40% of which were third degree burns. Numerous grafts were made to his face, arms, hands, neck, chest, back and abdomen. Plastic surgery including Z-plasty, dermabrasion, rhinoplasty and others were performed. Claimant received vocational rehabilitation at Oregon Polytechnic Institute and now earns $3.00 per hour as a draftsman, whereas before, he made $1.75 as a common laborer and truck driver. Nonetheless, claimant suffers from the following principle problems:

(1). Facial disfigurement and the psychological effect.
(2). Burned areas sensitive to sun, wind, cold and chemicals.
(3). Reduced manual dexterity.
(4). Rash.
(5). Diminished strength.
(6). Diminished lung capacity.
(7). Diminished vision.
(8). Impaired motion of the right arm and loss of circulation.
(9). Tenderness and supersensitivity of his hands.

Scars, as such, are not compensable, unless they interfere with the ability to work. Here, the extensive scars have resulted in some impairment of mechanical function, and have severely damaged claimant psychologically. The Hearing Officer awarded a permanent partial disability of 15% loss of function of his right arm; 10% loss of function of his left forearm; 65% loss of funcion of an arm for unscheduled disabilities, including unscheduled eye disabilities. The issue on review was the award of unscheduled disability for a visual deficiency. The medical evidence was that vision in both of claimant's eyes could be restored to normal by refraction. "The Workmen's Compensation Board concludes that there is no authority in the law to convert visual losses to unscheduled disabilities. The Board does not construe the law to deny to a workman, compensation for loss of industrial vision caused by damage to eyelids, which must shield the eyes or tear ducts, which must lubricate the eyes. The Board concludes the sagging eyelid, the watering and blurring of the eyes, and the lack of usual accommodation to changes in light intensity, is equal to loss of 20% of the binocular vision of the claimant." The Board modified the Hearing Officer's order as follows:

(1). The award of unscheduled disability is reduced from 65% loss of an arm to 50% of an arm.

(2). Claimant is awarded scheduled disability for the 20% loss of binocular vision.
(3). The award of permanent disability with respect to the right arm is increased from 15% to 30% of the arm.

The latter was based on poor circulation of the arm, as well as limitations caused by scarring and sensitivity thereof.

WCB #67-437 November 21, 1967

Erwin L. Richert, Claimant.
John F. Baker, Hearing Officer.
John J. Pickett, Claimant's Atty.
James F. Larson, Defense Atty.

Claimant is a 27 year-old logger, who sustained injury to his lower neck, left shoulder and dorsal spine, when hit by a flying sledge hammer. The Determination allowed permanent partial disability of 5% of an arm by separation for unscheduled permanent partial disability. Claimant testified to pain, numbness, and severe headaches. There was no medical evidence, other than that available at the determination, and this indicated a very minimal injury. Complicating factors are that the claimant had suffered a serious lower back injury some nine months earlier, for which compensation is still pending. The determination was affirmed.

WCB #67-294 November 22, 1967

William J. Benedict, Claimant.
John F. Baker, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Wayne A. Williamson, Defense Atty.

Claimant hurt his right knee and back, while working on the green chain on April 23,1966. Claimant received various back treatments in 1966. He enrolled in Advertising Art School, but dropped out on April 5, 1967, and went to work parking cars, but his back bothered him, and he worked only for about a week. Claimant alleges that he stopped work on the advice of Dr. Rask. However, the only evidence presented, bearing on this time period, was a note from Dr. Rask dated June 8, 1967, which states, "Please be advised, that Mr. Benedict is under my care for a back injury, and is now released for light work duty." The Hearing Officer ruled, "It should have been a simple matter to establish that Dr. Rask saw the claimant in April, and advised him not to work. Evidence on this point was not produced by the claimant and is presumed to be adverse to his interests." Accordingly, the claim for temporary total disability for the period from April 20th to June 8th, 1967, was disallowed. On review, claimant produced medical bills showing office calls between April 20th and June 8th, but the WCB refused to consider same, calling them "new evidence."

A second issue is whether claimant is entitled to temporary total disability from February 2, 1967, until March 13, 1967, the date that Dr. Rask issued the release. The insurance carrier stopped payments for temporary total disability on February 1, 1967, and on February 15th, the Determination of the Board,

pursuant to ORS 656.268(2), found that the claimant's condition was medically stationary as of February 2, 1967. The claimant wanted penalties for this stoppage, but the Hearing Officer ruled that the subsequent ratification of the conduct by the determination took them off the hook, both as to possible penalties and attorney fees. On review, the WCB found that the determination was in error, but this provides no bases for assessment of penalties or attorney fees against the carrier. Accordingly, WCB awarded temporary total disability from February 2nd until March 13th, 1967, the time at which the treating physician had released the claimant for work.

Thirdly, the claimant had contended that some time loss payments prior to February 1, 1967, had been unreasonably delayed. To this, the Hearing Officer ruled, "Where a claimant demands penalties for late payment, it is his responsibility to indicate with particularity, including dates and amounts, the basis for his demands."

Fourthly, there was the issue of permanent partial disability. The most recent medical report in evidence was that of Drs. Marxer and Harder, dated February 2, 1967. Its diagnosis was "Calcification or spur formation, slight, of D8 and D9 anterior vertebral bodies due to a sprain or slight compression injury at this juncture." The medical evidence also indicated that the claimant would be "unable to engage in an occupation which requires heavy lifting. Accordingly, an award was allowed granting an additional 10% loss of an arm by separation for a total award equal to 25% loss of an arm by separation for unscheduled permanent partial disability. WCB affirmed this.

WCB #67-535 November 22, 1967

Edward F. Stephens, Claimant.
H. L. Pattie, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Roger Warren, Defense Atty.

Appeal from determination of no permanent partial disability for a left foot injury. Claimant was a welder, and a metal object toppled over, striking his foot. The first metatarsal suffered a transverse fracture near the end closest to the big toe. The second metatarsal suffered an oblique fracture at the end nearest to the ankle. The latter actually consisted of one long splinter, approximately an inch and a half long on the side of the bone nearest the inside of the foot. The fractures have healed quite well, but the blow was of sufficient force to damage much of the cartilage, ligaments, muscle, skin and other soft tissue surrounding the bones. The latter are not detectable on X-rays. An examination at the hearing indicated a full-range motion without pain except in dorsal flexion. There was still tenderness and some deep pain. None of these symptoms had appeared at the time of the closing and determination. Hence, closing the claim without an award for permanent partial disability was proper. The symptoms appearing at the Hearing are what is known as residual symptoms, and Dr. Burgermeister indicated that it was too early to tell, if they were permanent, although Dr. McKillop felt there would be some permanent impairment. The pain, which the claimant has suffered since the closing, has not kept him from work. The Hearing Officer found that whatever the problem, it was not shown permanent at this time, and if it so turned out, a claim for aggravation should be filed. The WCB reversed, holding that the

very reason for allowing a year for requesting a hearing on a disability determination is to allow for compensation of symptoms that show up after the closing. The WCB found a 10% loss of a left foot. The Board observed that the Hearing Officer had disregarded the weight of the evidence. There were two doctors. One said it was too early to tell, and the other said there was some permanent disability. Further, eight months had passed, and "While time alone is not the sole test, and eight months is not a certain test, the fact that disability admittedly exists under working conditions some eight months after injury, is a factor which, with the medical opinion, leads the Board to find...permanent partial disability."

WCB #685 November 22, 1967

Joseph A. Bonner, Claimant.
Harold M. Gross, Hearing Officer.
Wesley A. Franklin, Claimant's Atty.
Gerald Knapp, Defense Atty.

Claimant fell backwards on some horizontal pilings, and as a result suffered a back injury. He had some history of congenital back condition. The medical evidence indicated a spondylolisthesis at the lumbo-sacral level which might need treatment. There was evidence of inability to do heavy lifting. The Hearing Officer ordered an award equal to 20% loss of an arm by separation for unscheduled disability, and further ordered SCD to provide claimant with myelography and such other, and further medical services as might be so indicated. The SCD observed on review that the Hearing Officer had, in effect, ruled that the claimant's condition was medically stationary and ordered curative surgery too! The Board found that ORS 656.245 authorizes medical services only for maintenance of a workman who has a permanent disability. However, in the instant case, it is conceivable that the proposed medical procedures would end any permanent diability. Accordingly the WCB found that the order of the Hearing Officer was inconsistent and premature, and remanded the matter to the Hearings Division for further medical treatment and proceedings.

WCB #67-397 November 22, 1967

Ludvick W. Carlson, Claimant.
H. L. Pattie, Hearing Officer.
Garret L. Romaine, Claimant's Atty.
Clayton Hess, Defense Atty.

Claimant suffers from a chronic lumbosacral sprain related to his employment. The myelogram was negative, and the patient refused hospitalization for traction or for surgery, but the pain from which the claimant has been suffering, is severe. The evidence is that the extent of pain which the claimant suffers would cause a normal person to lose time from work, but the claimant worked on, avoiding narcotic pain killers, because they caused a lightheadedness which might be hazardous, as he works around furnaces. The determination, equivalent to the 25% loss of an arm for unscheduled disability is affirmed. The WCB also affirms.

WCB #67-287 November 22, 1967

Frank A. Simmons, Claimant.
George W. Rode, Hearing Officer.
Lynn Moore, Claimant's Atty.
Earl Preston, Defense Atty.

The Determination awarded claimant permanent partial disability equal to 20% loss of an arm by separation for unscheduled disability and 10% loss function of right foot for permanent aggravation of pre existing condition. Claimant alleges he is permanently, totally disabled. Claimant suffered a lower back injury in a fall, for which he underwent a laminectomy and has since been wearing a body and leg brace. Several witnesses testified that claimant had been able to carry on a full range of activities prior to this accident, although in 1946 or 1947, claimant had been awarded a 40% disability pension by the Veterans' Administration, which had since been raised to 80% disability. Claimant now asserts that he is completely unable to do any work and cannot walk more than a block at a time. The Hearing Officer found that the claimant's motivation for returning to work was extremely low. Accordingly, the Hearing Officer awarded a permanent partial disability equal to 45% loss of an arm by separation for unscheduled disability, but made no mention of the foot disability, which had been allowed in the determination. On review the WCB remanded, concluding that the matter was incompletely tried, since upon hearing, without explanation and contrary to the evidence, no award was made for the foot. WCB also directed further consideration of permanent total disability, directing that "If there is gainful and suitable employment, which the claimant may regularly pursue, the record should so reflect."

WCB #67-190 November 22, 1967

Nita Mullins, Claimant.
J. David Kryger, Hearing Officer.
Dan O'Leary, Claimant's Atty.
John Jaqua, Defense Atty.

Claimant, while pulling a loaded cart of plywood, fell, landing on her buttocks and claims permanent partial disability to the low back area. Her job involves standing, lifting, twisting and turning. Claimant complains of pain in the left hip, numb spells in the right leg from the knee to the ankle, a stiffness of the left arm and the neck, and periodic pain in the lower back area. The doctors concurred that there was a low back strain, but none made any substantial objective findings. There were nine doctors who examined claimant. Also the medical evidence indicated that the subjective complaints were probably true, and the Hearing Officer so found. The Hearing Officer awarded an additional 15% for a total of 30% loss of an arm by separation for unscheduled disability to her back. In justification he ruled, "However pain and suffering can be considered in determining the effect which the pain and suffering has upon the disability of the claimant (Wilson v. SIAC, 189 Or 114). Obviously, claimant's pain in the lower back and the upper back areas have limited her earning capacity in that she is now unable to return to her regular course of employment. Therefore, the pain and suffering has affected her ability to work." The WCB affirmed.

WCB #67-410 November 27, 1967

Thomas H. Williams, Claimant.
Page Pferdner, Hearing Officer.
Burl L. Green, Claimant's Atty.
Scott M. Kelley, Defense Atty.

This is an appeal from a Notice of Denial on the grounds, "...the alleged accident did not occur during the course of employment with Publishers' Paper Company, during the time coverage was provided by us and for failure of the workman to give written notice within the time required under Oregon Workmen's Compensation Law." Apparently claimant sustained a back injury on April 30, 1966. Claimant had had a fusion in 1958, but apparently little trouble until the date of injury. Claimant did not consult a doctor until May 16. 1966. Claimant submitted a Supervisor's Report of Accident on May 24, 1966, in which he alleged he was injured May 23, 1961 (sic); although, it is assumed he meant 1966. He filed a claim on March 14, 1967, some ten months later and alleged the injury was on either March 19 or March 26, 1966. To confuse matters even more, claimant stated that the accident was in "Mill O," when it was in "Mill E," and that he was "lifting iron," when he was operating a chain hoist to lift the heavy channel iron. The real date of claimant's injury was not known by anyone until the time of the hearing, when claimant's time cards were perused. The issue is whether there is Notice within 30 days after the accident under ORS 656.265(2). It is to be noted that the Supervisor's report of May 24, was filed within 30 days of April 30, but it had the date of May 23, as the date of the accident. The Hearing Officer holds that honest errors could be overlooked, but a deliberate misstatement, which effectively prevented the employer from investigating the accident, is too much. No other notice within 30 days was given, and the only explanation for failure was "I should have given notice." Accordingly, the claim is barred for want of notice and the Notice of Denial sustained. The WCB affirms and observes that there is a showing of prejudice to the employer, if it was to be required under ORS 656.265 (4)(a).

WCB #67-69 November 27, 1967

Everett G. Hodgson, Claimant.
Harold M. Gross, Hearing Officer.
Allen T. Murphy, Claimant's Atty.
Clayton Hess, Defense Atty.

This is an appeal from a determination of no permanent partial disability. Claimant had suffered a prior back injury in 1964, for which he was eventually awarded 30% loss of function of an arm for unscheduled disability, together with 7½% loss of function of the right leg. Notwithstanding the awards, claimant was apparently able to carry out his work as a cement finisher fairly well prior to the injury in question. Now, apparently, the claimant has pain down both legs; pain down the right arm; stiffness in the back of the neck; headaches; tenderness in the dorsal area; tenderness all up and down the cervical spine, particularly right under the occiput; tenderness of the web of the neck and across the lumbosacral junction, particularly on the right; and calf tenderness on the right and sciatic notch tenderness on the right and sacroiliac

tenderness on the right. Claimant also missed some work. The Hearing Officer awarded a sum equal to 5% loss of function of an arm for unscheduled disability to the cervical and dorsal spine. On review the Board admonished that unscheduled disabilities should be stated in terms of loss by separation and not by loss of use. The WCB concluded that the claimant was not compensated for any cervical-dorsal disability for the prior injury, and that same was a new injury, and that this cervical-dorsal disability suffered is equal to the loss by separation of 15% of an arm.

WCB #67-252 November 27, 1967

Albert Dewitt, Claimant.
H. L. Seifert, Hearing Officer.
Burce W. Towsley, Claimant's Atty.
James Blevins, Defense Atty.

This is an appeal from a determination of permanent partial disability equal to 15% loss of an arm by separation for a dorsal back sprin in a 65 year-old janitor. Claimant demands total disability. The problem is complicated by the fact that claimant had been suffering from severe emphysema and had been considering retirement or partial retirement. Claimant has not been able to return to work. The WCB comments, "The disabling effect of an injury upon a workman who does not return to work is contended to be a prima facie permanent total disability. Against this is balanced the fact that much of the philosophy of hiring the handicapped may be lost by the financial hazard of continuing employment of workmen with conditions such as emphysema. The issue in each such case is whether the additional disability caused by compensable injury renders the claimant totally disabled or only partially disabled. Failure to return to work is not a prima facie test. It may be considered and has been in this instance." The award of 15% loss of arm by separation for unscheduled disability was affirmed.

WCB #67-395 November 30, 1967

Leonard E. Thornbragh, Claimant.
John F. Baker, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.

Appeal from determination of 30% loss of arm by separation for unscheduled disability to the lower back, resulting from a fall from a running board of a truck. Claimant was 65 years old. Claimant complains of sharp low back pain extending down the right leg. The treating physician's initial diagnosis was a low back strain--exacerbation of degenerative disc disease at L4 and L5 level. Claimant has not responded to any medical treatment. Dr. Rockey found considerable impairment in the function of the back as the result of osteoarthritis and lumbar disc degeneration. Claimant had received a disability award for a back injury in 1937, but since that time has regularly engaged in strenuous physical labor without substantial difficulty. Claimant is now unable to

return to his former employment as a sander operator, but thought that he could do bench work or work as a night watchman, if he didn't have to walk too much. The Hearing Officer increased the award to permanent partial disability equal to 40% loss of an arm by separation. On review the WCB affirmed, commenting that "The problem of evaluating disabilities is even more difficult where the workman injured is approaching retirement."

WCB #67-364 November 30, 1967

Fred Koch, Claimant.
H. L. Pattie, Hearing Officer.
William F. Gross, Claimant's Atty.
Gerald C. Knapp, Defense Atty.

Appeal from determination of permanent partial disability equivalent to 40% loss of an arm for unscheduled disability for a back injury. Claimant requested additional temporary total disability and medical care and treatment, or in the alternative, if his condition was found to be medically stationary, additional permanent partial disability. Claimant, now 52, suffered a jarring back injury when he hit his head on a trailer while scrambling out from under it, after he feared it was slipping from the jack that was supporting it. Claimant did not respond well to treatment, and apparently treatment of the lumbosacral injury actually aggravated a cervical problem. A myelogram performed on January 1965, indicated a herniated disc at the L-4-5 level. Subsequent surgery revealed no herniated disc, but a spinal fusion was performed on L-4, L-5 and S-1. The fusion was not solid as to L-4 and L-5, so a further operation was carried out which was successful. Hearing Officer denied any compensation for the cervical injury. He increased the award of permanent partial disability to the equivalent of 60% loss function of an arm, finding that the balance of the claimant inability to participate in industrial employment is the result of his mental attitude, variously described as functional overlay or laziness. The WCB modified the order to be total disability. WCB found that the cervical problems should have been considered. If medical treatment, even malpractice, creates additional disability, the additional disability is also compensable as a result of the industrial injury. Some medical evidence indicated that claimant will "never pursue regular gainful employment." The WCB justifies an award of total disability as follows: "An able-bodied workman with a history of stability is injured. He undergoes several years of inactivity and medical treatment including major surgeries with indifferent success on the part of the treatments. Some of the doctors feel the workman has been restored physically to a point where he may be able to do some work. Mechanically it appears that the claimant now has a stable low back. If the claimant has a 'functional overlay' or a loss of the will to again become a useful productive worker, it is only fair to assume this is the result of the injury under the facts in this case."

WCB #67-284 December 4, 1967

Eddie L. Kilgore, Claimant.
Page Pferdner, Hearing Officer.
Charles J. Strader, Claimant's Atty.
Wayne A. Williamson, Defense Atty.
Request for Review by Employer.

Claimant was 38 years old and had no history of back difficulties. He had worked as an off-bearer for some ten months prior to injury, but three days prior to the injury, the mill began running cheese box shook, which is small, light, dry lumber. This job required considerable twisting and stooping. Claimant was found to have a spondylolisthesis at the L-5, S-1 level, secondary to spondylolisis. Eventually a posterior lateral, bi-lateral fusion was performed. Defendant contends that claimant did not sustain a compensable injury, since the condition came on gradually and claimant cannot pinpoint any specific time that the injury occurred. The Hearing Officer found that the "time of accident is sufficiently definite, if either the cause is reasonably limited in time or the result materializes at an indentifiable point." Here the cause was reasonably limited in time and the result materialized at an identifiable point. The other problem in the case was the medical-causal relationship. The Hearing Officer found that the evidence was inadequate and solicited counsel for further medical evidence. It came in the form of a letter from Dr. Lilly, which states that "The spondylolisthesis for which Mr. Kilgore was treated could have been incurred from an on-the-job injury in my opinion." The Hearing Officer then found that the medical-causal relationship was established and ordered the claim accepted. On review the WCB found that a medical opinion in terms of "could have" or possibility, was probably insufficient in light of Howerton v. Pfaff, 84 Adv 473. However, in light of Uris v. SCD, 84 Adv 851, sufficient competent evidence was found in the record to support the record, so the Hearing Officer was affirmed.

WCB #67-587 December 4, 1967

Maynard B. Bowles, Deceased.
George W. Rode, Hearing Officer.
C.S. Emmons, Beneficiary's Atty.
Donald J. Howe, Defense Atty.
Request for Review by SCD.

The only issue in the case is as to whether or not the workman's heart attack and subsequent death arose out of the employment. The decedent was a log scaler who worked in the water. During his lunch break a fellow employee became injured and the decedent assisted, carrying the fellow employee from the mill pond to an ambulance. Ten or so minutes later the workman was found lying out over the top of his car with a yellow, sickly appearance. Soon after his arrival at the hospital his heart went into fibrillation, and by 4 P. M. he was dead. No autopsy was performed, but the treating physician diagnosed the cause of death as acute coronary thrombosis. The decedent had no history of heart trouble, and the treating physician, a general practitioner, expressed his opinion that as a matter of reasonable probability,

the workman's death was substantially contributed to by the exertion of running for the water, of helping lift the stretcher and the excitement attendant thereon. Dr. Adams specifically ruled out the probability of death having been occasioned by pulmonary embolism, Stokes-Adams, paracardiosis, or heart valve disease or rupture of a valve. Dr. Campbell testified as a specialist, and stated that it was his opinion and the opinion of a majority of cardiac specialists that physical exertion has no relationship whatsoever to acute coronary occlusion. The Hearing Officer noted the sequence of events and ordered the claim accepted. The WCB expressed embarrassment at being the forum for the resolution of medical issues with respect to which there are disputes among respected and capable members of the medical profession. The WCB then observed that the position adopted by the Hearing Officer was that of a general practitioner, while a specialist had testified contra. However, the WCB affirmed, declaring that "The Board in its policy on review does not substitute its opinion for that of the Hearing Officer, unless there is obvious error, or unless the decision of the Hearing Officer is not supported by substantial competent evidence."

WCB #67-275 December 4, 1967
WCB #67-276 December 4, 1967

Page William Medford, Deceased.
Gordon Dee Medford, Deceased.
Harold M. Gross, Hearing Officer.
William F. Frye, Beneficiaries' Atty.
Earl M. Preston, Defense Atty.
Request for Review by SCD.

Claimants' decedents were killed simultaneously in an auto collision. The decedents had gone to Eastern Oregon to do some bird hunting around Vale, and then to buy some cattle at Paisley, Oregon. Both decedents were officers and employees of the employer corporation. One was a regular buyer and the other had gone along for the experience. They had finished hunting at Vale and were on the highway to Paisley, when the accident occurred. This was a weekend trip in October, but there was evidence to corroborate the intent to buy cattle. The decedents had checked their credit arrangements and told several people what they were going to do prior to and during their trip. The Hearing Officer cited two theories, either of which would allow compensation in this case. The first is Justice Cardozo's dual-purpose doctrine in Mark's Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181 (1929), which specifies that, if the work was the motivating reason for the trip, and it would not have taken place but for the work, then the employee is in the course of his employment. There was evidence in the record that one of the decedents had said that, if they made up their minds, that they were going to go over and buy beef, then they would go hunting also. The second theory is that even if it is clear that the main trip was characterized as personal, a "business detour retains its business character throughout the detour." Here the decedents had completed the hunting and were on the highway to Paisley. A dual-purpose trip, "with a completed personal errand put behind, and a business destination remaining to be reached, there is the clearest kind of coverage.": Parr v. New Mexico Highway Department, 54 N.M. 126, 215 P2d 602 (1950). The SCD attempted to

get a review, but their filing for same was beyond the 30-day limit of ORS 656.289, and the WCB found that this went to jurisdiction even though there was evidence that the SCD didn't actually know that the Hearing Officer had filed his opinion.

WCB #67-301 December 4, 1967

C. J. Tourville, Claimant.
J. David Kryger, Hearing Officer.
Don Wilson, Claimant's Atty.
James Blevins, Defense Atty.
Request for review by Claimant.

Claimant fell on his right side and was found to have permanent injury to his shoulder and arm. The Hearing Officer found that the right shoulder was within the scheduled area of the arm, and accordingly awarded permanent partial disability to the extent of 25% loss function of the right arm for scheduled disability. On review the WCB found:

1. One cannot assume that, if segregation is required, it would be in addition to the arm award.
2. There is no Oregon case law involving the arm-shoulder upon which to rely. A recent decision upheld awarding disability in the leg for the back injury. It did not discuss a separate rating upon the back.
3. If there is a shoulder injury and all of the disability is manifested by limitations of function of the arm, the issue of disability should be restricted to a rating on the arm.
4. If we assume a useless or separated arm, what function remains with respect to the shoulder associated with that arm? It could affect the use of artificial prosthesis. It could cause disabling pain. It could conceivably limit neck and head movement.
5. We do not agree that shoulder injuries either require or are to be denied unscheduled disabilities. The record should clearly reflect that there is a disability over and above the function of the shoulder as an adjunct of the arm, before making two separate awards
6. It appears in this instance that the only real permanent disability suffered by the claimant may properly be expressed in terms of loss function of the right arm, even though some of that loss of function originates in the shoulder.

Hence, the Hearing Officer is affirmed.

get a review, but their filing for same was beyond the 30-day limit of ORS 656.289, and the WCB found that this went to jurisdiction even though there was evidence that the SCD didn't actually know that the Hearing Officer had filed his opinion.

WCB #67-301 December 4, 1967

C. J. Tourville, Claimant.
J. David Kryger, Hearing Officer.
Don Wilson, Claimant's Atty.
James Blevins, Defense Atty.
Request for review by Claimant.

Claimant fell on his right side and was found to have permanent injury to his shoulder and arm. The Hearing Officer found that the right shoulder was within the scheduled area of the arm, and accordingly awarded permanent partial disability to the extent of 25% loss function of the right arm for scheduled disability. On review the WCB found:

1. One cannot assume that, if segregation is required, it would be in addition to the arm award.
2. There is no Oregon case law involving the arm-shoulder upon which to rely. A recent decision upheld awarding disability in the leg for the back injury. It did not discuss a separate rating upon the back.
3. If there is a shoulder injury and all of the disability is manifested by limitations of function of the arm, the issue of disability should be restricted to a rating on the arm.
4. If we assume a useless or separated arm, what function remains with respect to the shoulder associated with that arm? It could affect the use of artificial prosthesis. It could cause disabling pain. It could conceivably limit neck and head movement.
5. We do not agree that shoulder injuries either require or are to be denied unscheduled disabilities. The record should clearly reflect that there is a disability over and above the function of the shoulder as an adjunct of the arm, before making two separate awards
6. It appears in this instance that the only real permanent disability suffered by the claimant may properly be expressed in terms of loss function of the right arm, even though some of that loss of function originates in the shoulder.

Hence, the Hearing Officer is affirmed.

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J. David Kryger, Hearing Officer.
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5. We do not agree that shoulder injuries either require or are to be denied unscheduled disabilities. The record should clearly reflect that there is a disability over and above the function of the shoulder as an adjunct of the arm, before making two separate awards
6. It appears in this instance that the only real permanent disability suffered by the claimant may properly be expressed in terms of loss function of the right arm, even though some of that loss of function originates in the shoulder.

Hence, the Hearing Officer is affirmed.

WCB #67-372 December 4, 1967

John Virgil White, Claimant.
George W. Rode, Hearing Officer.
E. B. Sahlstrom, Claimant's Atty.
Earl Preston, Defense Atty.
Request for review by Claimant.

Claimant suffered bi-lateral fractures of both the left and right scapula, when the truck in which he was riding was knocked off the road by a falling snag during the Oxbow fire. The determination awarded a permanent partial disability of 5% loss function of the left arm. Claimant says this is inadequate. Claimant's job record since the accident has been rather spotty, but none of the job terminations was attributable to physical disability. Dr. Degge's report, which was not available at the determination, indicated "This workman has sustained a fracture of both scapulii which are well-healed with moderate to minimal residual symptoms." Claimant asserted a pain in the neck, but there was no medical confirmation of this and no award was allowed. Further, a claim of low back pain was made. This is accounted for in the report of the claimant's physician, who reports that there is trophism in the last lumbar vertebra, which would make claimant's back vulnerable to heavy stress and cause pain. This trophism was attributed to the fact that claimant has six lumbar vertebra, whereas the normal number is five. Any lower back pain was found to be attributable to the congenital condition, and hence not compensable. An award for permanent partial disability equal to 5% loss function of the left arm and 5% function of the right arm was entered, which was affirmed by the WCB.

WCB #857 December 6, 1967

Beaver Sports Properties Inc., Employer.
Harold M. Gross, Hearing Officer.
L. Guy Marshall, Employer's Atty.
Robert M. Christ, Beneficiary's Atty.
Clifford Allison, SCD Atty.

Claimant's decedent died at the age of 16 in a tractor accident on the Vernonia Golf Course. The issue before the Hearing Officer was whether the employer was subject to the Workmen's Compensation Act. Since the accident happened in September 1966, there are two possible bases for holding the alleged employer subject to the Act: Beaver Sports Properties Inc. will be subject to the Act, if on or before the date in question they employed four or more employees, or if they had one or more employees and were engaged in a "hazardous occupation." There is no doubt that there were three employees working at the golf course snack bar operation. The problem here is whether the decedent himself was an employee. The decedent's father was the manager of the golf course and an agreement had been set up whereby the father was to get an extra $5.00 per week for the benefit of the boy. No separate accounting was made of this on the corporation's records, and witholding records included this amount in the father's gross pay. After the boy's death the $5.00 per week was no longer in the father's pay. It is not unreasonable for the father

and manager of operation to hire son in behalf of the corporation. Whitlock v. SIAC 233 Or 166, 377 P2d 148 (1962) makes direct payment for services unnecessary. It is not clear here whether the boy actually got the money or not. If he did, then Michaux v. Gates City Orange Crush Bottling Co., 205 N.C. 786, 172 S.E. 406(1934) would be controlling. The mere fact that money was paid for his services is sufficient to place the claimant squarely within the definition of a workman under ORS 656.002. The Hearing Officer found that the employer was a subject one. On review the sole issue was whether the claimant was entitled to attorney fees. The WCB ruled yes, noting that if the employer were merely found subject and the claim were found not compensable, no attorney fees could be allowed, but where the claim is otherwise compensable as here, the conduct is equivalent to a denial of the claim. Accordingly, an order was entered, allowing claimant's attorney a $500 fee over and above compensation to which the claimant is entitled.

WCB #67-440 December 6, 1967

Electra Enterprises, Employer.
J. David Kryger, Hearing Officer.
James B. Griswold & Allen T. Murphy, Jr., Claimant's Atty.
Harold Adams, SCD Atty.

Lindel F. Filey alleges he was injured on the job, while employed for Electra Enterprises. The compensability of the claim is not an issue as the issue was limited to that of subjectivity. The employer alleges, generally, that he did not have four or more employees and more specifically, that the vacuum cleaner salesmen were independent contractors rather than employees. The operation of Electra Enterprises called for a manager, an assistant manager, three telephone girls and six to eighteen salesmen. There is no doubt that the assistant manager and the three telephone girls were employees making the necessary four. The question remains whether the salesmen were independent contractors. The primary test for independent contractor status is the right of control and direction: Bowser v. SIAC 182 Or 42; Butts v. SIAC, 193 Or 417. Here Electra Enterprises required daily sales meetings, prescribed sales techniques, regulated the prices of the vacuum cleaners, regulated sales territories, arranged for sales appointments, required the use of Electra's financing program, required all checks be made out to Electra enterprises rather than the salesman. The Hearing Officer found that this test indicated employer-employee relationship. The secondary tests are as follows: 1) Right to terminate; salesmen could quit at any time. 2) furnishing equipment; Electra furnished demonstrators and all advertising. 3) Specific piecework; salesman made complete sales, indicating contractor status. 4) Right to employ assistance; all hiring was subject to approval of Electra. 5) Mode of Compensation; Commission basis with no tax withholding. 6) Former relationship; none, except claimant had sold for a predecessor of Electra under the same arrangement. 7) Services for others; Salesmen could not sell other vacuum cleaners, but could hold regular jobs in other occupations. 8) Use of own Methods; salesmen were specifically trained and advised in techniques for selling, all sales were in the name of Electra and all major repairs had to be made in Electra's repair shop. The Hearing Officer found that all indicia save two, namely that salesman was hired for a specific piecework basis and paid on

a commission with no tax withholding, indicated a employer-employee relation. The Hearing Officer denied attorney fees, and this issue was reversed on review by the WCB which held, as in Beaver Sports Properties, Inc. decided this day, that employer's conduct is equivalent to the denial of a claim by an employer which was allowed upon hearing. $500 attorney fee allowed.

WCB #67-382 December 7, 1967

Wilbert O. Serles, Claimant.
H. L. Seifert, Hearing Officer.
Laurence Morley, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Employer.

Claimant suffered severe lacerations of the right hand, when it was caught by a revolving shaft. Claimant suffers pain, swelling, numbness and loss of grip in the right hand and fingers. The determination allowed permanent partial disability equal to 35% loss function of the right index finger; 25% loss function of the right middle finger; and 20% loss function of the right ring finger. Claimant was able to continue his employment on the plywood tape machine, but his injury would foreclose some more lucrative employment, especially since he is unable to handle tools and wrenches. Medical opinion established that claimant may have traumatized the median nerve at the wrist or in the hand. There was evidence that the pain extended to the elbow and of painful swelling of the wrist and hand. The Hearing Officer concluded that the wrist joint was involved in the disability also. Accordingly an additional award of permanent partial disability of 15% loss use of the right forearm was ordered. On review the WCB held that, "An award on the forearm must be based upon some disability at or above the wrist joint." The WCB then went on to observe that the evidence was somewhat vague, as it was expressed in terms of "hand," "to the wrist," without clarifying whether "to the wrist" meant "to and including the wrist." The WCB concluded that the evidence was sufficient to conclude that the references included the wrist joint, and hence the award was affirmed.

WCB #67-517 December 7, 1967

William D. Martin, Claimant.
Page Pferdner, Hearing Officer.
Don G. Swink, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Employer.

The claimant had a history of some back complaints for as long as fifteen years. On June 9th, 1966, the accident occurred upon which this claim is based. A fellow workman dropped the other end of a 20-foot 4 x 12, the two were carrying. Claimant returned to work on June 20, 1966. In February of 1967, claimant's condition became worse, and he instituted proceedings by way of this claim for aggravation. The employer's position is that claimant's worsened condition resulted from his participation in the sport of bowling,

and it appears that the activity of bowling is one that people with low back problems should avoid. The Hearing Officer found that inasmuch as there is no evidence of an on-the-job or off-the-job accident, and there is evidence the claimant's back condition was worse, and since both doctors are of the opinion that claimant's herniated disc condtion resulted from the June 9, 1966 injury, there was aggravation. The WCB found that this is not a situation where the continuity of liability from the compensable injury was interrupted by a new injury solely responsible for the increased disability. "At most, the claimant engaged in non-occupational activity which may have contributed to the symptoms. Whether a person is bedfast or active, it must be assumed that every compensable claim for aggravation involves acts of the claimant which contribute to the aggravation. The situation becomes one of resolving on a 'but for' basis the responsibility of the original compensable injury." The order directing acceptance of the claim is affirmed. No additional penalties were assessed against the employer; however, $200 attorney fees were allowed the claimant's attorney.

WCB #67-121 December 7, 1967

Eddie Green, Claimant.
H. L. Pattie, Hearing Officer.
Bernard K. Smith, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

Ed. Note: This is one of those cases where the respective slant of the facts by the Hearing Officer and the WCB are so inconsistent as to be hardly recognizable as speaking of the same case.
The claimant was a catskinner. Claimant had suffered an injury in 1963, for which he had been compensated for treatment and one or more relapses by a private insurance carrier. He worked as a catskinner from October 2 until October 17, 1966, immediately after which he was hospitalized for traction, and eventually a laminectomy. Claimant apparently believed that the responsibility for his back problem lay in the insurer of the 1963 accident, as the initial story he told was designed to "get Aetna," the 1963 insurer. Sometime around December 1966, the story began to change, and on December 6, 1966, a claim was filed with the October 1966 employer. The claim said the date of the injury was October 17, 1966. He told the doctors October 10, 1966, and at the date of the hearing, he said October 4, 1966. Apparently on or about October 4, the claimant did drive his cat into a hole which was approximately 15 feet deep; the cat hit the bottom of the hole with such force, that it broke a track on impact. The claimant's foreman substantiates that this even happened. The Hearing Officer sustained the denial of the claim, finding that "so many inconsistencies are noted in claimant's testimony, that his position as a whole becomes doubtful." The WCB reversed and ordered the claim accepted. The WCB cited additional testimony of the foreman, who stated that on the day after the incident (cat falling in the hole), the claimant would get off the tractor to "lay down on the ground and roll and stretch, you know, because he was definitely in pain. There is no two ways about it." The foreman also testified that the claimant's back troubles were obviously greater after the incident

in question. The claimant continued to work to the point where he was attempting to work with the use of a cane. The Board ruled that it was not concerned with any untruthfulness as to Aetna, but rather as to whether claimant had been hurt when the cat fell in the hole, and the Board found he had.

WCB #67-655 December 7, 1967

William T. Dunlap, Claimant.
H. L. Seifert, Hearing Officer.
James A. Pearson, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for review by Claimant.

Claimant, a 44 year old concrete block machine operator, injured his lower back while lifting a wheelbarrow. The medical evidence indicated a right sacroiliac sprain and spondylolisthesis at L-5. Claimant is unable to do heavy lifting, and can't return to his former employment. Claimant had a history of a couple of back injuries and, of course, the congenital spondylolisthesis of the 5th lumbar vertebra. Claimant suffered from considerable pain, especially upon attempting lifting. One doctor felt that the most likely cure would be a spinal fusion from L-4 to the sacrum. Another felt that the problem was not serious enough to warrant surgery. Claimant refused surgery. The determination awarded claimant disability equal to 15% loss of an arm by separation for unscheduled disability. The Hearing Officer ordered the award increased to 25% loss of an arm by separation. The claimant sought 60% on review. The WCB affirmed the Hearing Officer. The Board recognizes that in many instances a claimant's refusal to undergo major surgery may be reasonable, but such a refusal may be considered as a factor in evaluating the disability. For example, would claimant be more amenable to surgery, if he suffered from 60% disability? This factor is not determinative, however.

WCB #67-363 December 12, 1967

William Raymond Smith, Claimant.
John F. Baker, Hearing Officer.
Vince Ierulli, Claimant's Atty.
James Cronan, Defense Atty.
Request for Review by Claimant.

Claimant is a 43 year-old logger who sustained injury to his back when a chain saw kicked back, throwing him against a log behind. Claimant has not worked since the injury, but feels he could do light work as a gas station attendant, but does not want to. Lateral bending of the lumbar spine was limited to 10 degrees on the left and almost nonexistent to the right. There was almost no rotation and hyperextension was limited. There was evidence of muscle spasm on the right, and the diagnosis was a chronic lumbosacral sprain superimposed upon degenerative lumbar disc disease. The Hearing Officer ordered the determination equal to 10% loss of an arm by separation be increased to 30%. WCB affirmed on review, although claimant wanted total disability. The mere fact that a workman does not return to work is not necessarily proof of inability to work, especially where the workman has made little effort to seek employment and has failed to take advantage of employment opportunities within his work capabilities.

WCB #708 December 12, 1967

Garland O. Delaney, Claimant.
J. David Kryger, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
John R. McCulloch, Jr., Defense Atty.
Request for Review by SCD.

Claimant, a lumber stacker, suffered a lower back injury on June 29, 1966, for which he received temporary total disability until August 24. He suffered a reinjury on October 19, 1966. The latter was treated as an aggravation claim, and no separate claim was filed. The Hearing Officer found that the closing and determination of October 6 was reasonable, and hence re-occurrence of back problems subsequently had to be an aggravation of pre-existing injury. Penalties were assessed but no unreasonable resistance was found in the failure to make temporary total disability payment due to the confusion in treating this as an aggravation claim in comparison to acting under the Board determination dated October 6, 1966. The Hearing Officer ordered temporary total disability to be paid from October 19, 1967, to March 31, 1967, plus 25% penalties. A 30% loss function of an arm for unscheduled disability due to an aggravation of a pre-existing condition was awarded for permanent partial disability. The WCB reversed in part, finding that there was no aggravation claim for procedural reasons. It appears that through counsel two days after October 19, 1966, claimant made a simple request for a "hearing regarding the closing order, which was mailed October 6, 1966." This is not a compliance with ORS 656.271. Therefore, this was a hearing regarding possible erroneous determination and not an aggravation claim, hence there is no basis for penalties. The Board concludes that the record contains substantial competent evidence to support a finding that claimant, as a result of his injury of June 29, 1966, again became temporarily and totally disabled on October 19, 1966, and that this condition prevailed until March 31, 1967. The order was modified to read 30% loss of arm by separation, rather than by loss of function, too.

WCB #67-546 December 12, 1967

Dewey B. Bias, Claimant.
H. L. Seifert, Hearing Officer.

Appeal from a denial of compensation by an inmate of the Oregon State Penitentiary on the grounds that the filing of the claim was not within 90 days pursuant to ORS 655.520 (3). The SCD is given the discretion to waive the time for filing claims, and this authority was not granted to the Workmen's Compensation Board. The Workmen's Compensation Board conceives that the extent of its review authority would be to determine whether the State Compensation Department acted arbitrarily or otherwise abused its discretionary authority in refusing to waive the time for filing a claim. No such abuse was found here. Claim denied.

WCB #67-632 December 12, 1967

Mac B. Benjamin, Claimant.
H. L. Pattie, Hearing Officer.
Garry Kahn, Claimant's Atty.
James G. Breathouwer, Defense Atty.

This is an appeal from a notice of denial. The insurance carrier first accepted the claim, and then withdrew the acceptance upon further investigation. The further investigation had revealed that claimant had had a prior injury in 1960, about which he was advised by his doctor that the "only hope of recovery was surgery." The alleged unwitnessed industrial accident and the 1960 injury were both to the right shoulder. Claimant had not revealed this prior injury to defendant's claims adjuster. Claimant's wife, with whom there was a pending divorce, testified to the complaints of claimant about his shoulder difficulties in the Summer of 1966. The date of the alleged injury is October 1, 1966. Another witness testified to a conversation with the claimant on December 31, 1966, in which claimant stated that he had actually injured his shoulder falling off a diving board in Washington, near his sister's place, but that he had a smart attorney and was going to get $60,000 from the telephone company and never have to work again. The Hearing Officer affirmed the denial of the claim. The request for review was dismissed for want of a timely filing. Claimant claimed that he was not notified of the Hearing Officer's decision, because the order had been sent to the claimant's former address, and he had not received the order until after the 30 days had run. WCB notes that the claimant's counsel was properly notified, and that there is no contention that the claimant was not properly notified through counsel. The Board concludes that the notice to claimant's counsel was a compliance with the statutory requirement of notice to the parties.

WCB #67-602 December 13, 1967

Alden Wright, Claimant.
Page Pferdner, Hearing Officer.
Lester L. Rawls, Claimant's Atty.
James A. Blevin, Defense Atty.
Request for review by Claimant.

Claimant, a union steamfitter, had taken a job on the side to do some work for a friend's company. While operating an electric drill there, he found the strength of his right arm was substantially diminished, and the grip of his right hand was so impaired that he could not hold the drill. The price that the claimant had quoted was the union rate plus mileage. Claimant first tried to make out a claim against his union health and welfare carrier, but didn't succeed. He then pursued this claim. The Hearing Officer found that he was an independent contractor, because it was a non-union job and no payroll taxes were withheld. Claimant had some control of what he was doing, as he was a specialist in the field. The employer was familiar with the machines and instructed claimant on what he wanted done; he didn't instruct on how to do it. Claimant furnished some of his own tools, and apparently set his own hours. The Hearing Officer affirmed the SCD denial of the claim. The WCB ordered the

claim accepted, finding that the claimant engaged his services at the regular union wage and performed them in the same manner as would have been employed had the claimant's name been placed on the employer's payroll. The claimant could have quit or in turn been terminated at will. The right to direct and control the services was not reliquished by the employer. Hence was employee.

WCB #67-541 December 20, 1967

Roy B. Turvey, Claimant.
H. L. Seifert, Hearing Officer.
T.W. Churchill, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.
Request for review by Claimant.

Appeal from the determination on the issue of the extent of permanent partial disability. Claimant suffered a severe concussion and a 7-inch stellate laceration to the right parietal area of the scalp, when he was struck by a flying rock from a blasting operation. X-rays found no fracture of the skull, and subsequent examination revealed no structural injury to the brain. Claimant complained of headache and dizziness. No medical explanation for this was found. Claimant is presently employed as a janitor, and expresses fear that if he were to return to his former employment of a power shovel operator, he would injure a fellow employee. There was medical opinion that the claimant should be given assurances and sent back to work. The Hearing Officer affirmed the determination which awarded a 20% loss of hearing for the right ear. The WCB also affirmed, observing that "The mere fact that a workman makes this choice (to return to work as a janitor instead of a heavy equipment operator) is no absolute proof that the choice is necessitated by physical disabilities."

WCB #67-148 December 22, 1967

Sam Finley, Claimant.
H. L. Pattie, Hearing Officer.
Berkeley Lent, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by SCD.

Claimant suffered an eye injury, when compressed air blew rock particles into his eyes. Claimant's visual function was not impaired, but the injury made his eyes photo sensitive. One doctor's report said, "On microscopic examination both corneas look somewhat like cracked glass, and these scars produce photo sensitivity....It is logical to assume that this light sensitivity is due to the permanent subepithelial and stromal changes in the corneas." Claimant is unable to work out-of-doors during the daytime. He had been working as a plumber's helper. The Hearing Officer concluded that this injury didn't come within the purvue of ORS 656.214 (h) (i). An award was made, equal to 10% loss by separation of an arm under the "all other cases" category of ORS 656.214 (4). The WCB found that the meaing of "loss of vision" is not restricted to optimum obtainable under strict clinical conditions. Accordingly the WCB modified the award to the claimant to 25% combined binocular visual loss. Attorney fees were assessed against the SCD, because although they prevailed on the legal issue, compensation was not reduced or disallowed.

WCB #67-55 December 27, 1967

Michael J. Desgrange, Claimant.
Page Pferdner, Hearing Officer.
L. M. Giovanini, Claimant's Atty.
Peter R. Blyth, Defense Atty.
Request for review by Employer.

Claimant had a back injury. He had been operating a 10 to 14 pound grinder in a stooped position. He suffered a severe spasm, as a result of which he was "frozen" into a semi-crouch position, and he was lifted out of the immediate work area by an overhead crane and taken to the hospital lying down in the back of a station wagon. Argonaut Insurance Co. first accepted the claim, and later denied any responsibility for the disability to the claimant's low back, on the theory that low back symptoms were the responsibility of a previous accident. No temporary total disability was paid. The prior injury was to his congenitally defective low back, and he had received no treatment for it for three months prior to the accident in question. A new injury was found under the rule of Armstrong v. SIAC, 146 Or 569. The WCB notes some confusion in the Hearing Officer's record, but seems to rely upon the dramatic onset of the symptoms to establish that there was a new injury as opposed to an aggravation. The claim was ordered accepted, but the Hearing Officer assessed double penalties, one for "unreasonable delay" and the second for "unreasonable refusal" to pay the very same compensation. WCB found that assessment of double penalties under ORS 656.262(8) was unauthorized, citing C.J.S. rule that statutory penalties are to be strictly construed.

WCB #67-504 December 29, 1967

Corinne Bernice Egr, Claimant.
H. L. Seifert, Hearing Officer.
William Wiswall, Claimant's Atty.
John R. McCulloch, Jr., Defense Atty.
Request for review by claimant.

A restaurant employee asserts that she slipped while carrying a tray and suffered a low back injury. No report of the incident was made to the employer for a period of three weeks, though claimant worked during this time. The claimant did relate that her back "went out" for the first time, when she stooped to pet a dog at home, and there is testimony that she related to her supervisor that the back was hurt while getting out of bed. The SCD denied the claim. The Hearing Officer affirmed, and the WCB affirmed.

WCB #67-664 January 4, 1968

James Nathan Clem, Claimant.
Page Pferdner, Hearing Officer.
Thomas G. Karter, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by SCD.

Appeal from notice of denial. Claimant was a choker setter on a gypo logging operation. As a result of a wrong signal given by the whistle punk, the claimant was struck in the right chest by the bullrigging. His employer was

operating the yarder. The diagnosis was "chest injury, contusions to right lower ribs, chondrocostal tear." The accident occurred on August 11, 1966, and although claimant's share of the accident report was filled at the doctor's office, the employer stalled and finally left the state. No claim was filed until December 5, 1966. Claimant kept thinking that he would get better. The SCD claims to have been prejudiced by the delay, since the employers have left the state. But the evidence indicates that notice of injury is excused under ORS 656.265 (4) (a), in that the employer actually knew of the accident; hence, the real source of any prejudice to the SCD is the employer's failure to notify the Department. The insurer has the burden of demonstrating that the employee's alleged failure is the operative cause of the lack of notice by employer to insurer. In this case the burden was not met. Claim must be accepted.

WCB #67-351 January 4, 1968

Alexander H. Gonsalves, Claimant.
Page Pferdner, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for review by Claimant.

Claimant suffered a lumbosacral strain in a minor fall. A congenital spondylolisthesis was also found at the L-4, L-5 level. It was a medical opinion that claimant's lower back would remain unstable, until he underwent a fusion. Claimant is unwilling to undergo a fusion at this time, being hopeful that by being careful and doing his prescribed exercises, he can avoid same. Claimant is now 23 years old and is working as a draftsman. He is appealing a determination of 15% loss of an arm by separation for unscheduled disability. The Hearing Officer found, and the WCB affirmed that the disability was equal to 30% loss by separation of an arm for unscheduled disability, not withstanding the anticipated future instability of the lower back. The Hearing Officer found that a fusion is a radical treatment, which carries no guarantee; and, although it is reasonably certain he is not likely to improve without a fusion, it is not certain he would improve with one, either. A refusal under the circumstances is not capricious or arbitrary.

WCB # 67-711 January 4, 1968

Charles W. Hewlett, Claimant.
John F. Baker, Hearing Officer.
Gerald R. Hayes, Claimant's Atty.
Request for review by Claimant.

Appeal from a determination of disability equal to 5% loss of an arm by separation. Claimant suffered a cervical strain while removing a brake drum from a truck. During recovery a lower back problem developed, for which a back brace was prescribed. Claimant had no history of pre-existing back or neck problems. The most recent medical report indicates slow back movements with moderate pain and a moderate spasm of lumbar muscles from L-3 to L-5 on both sides with some limitation of lumbar movement. Claimant has some trouble pulling on the green chain, but can do the job. The Hearing Officer ordered a total award equal to 15% loss of an arm by separation for unscheduled permanent partial disability. WCB affirmed.

WCB #705 January 4, 1968

Hiram S. Cunningham, Claimant.
Page Pferdner, Hearing Officer.
Robert W. Hill, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding claimant "45% loss of an arm for unscheduled disability, 5% of right leg." Claimant was crushed beneath a lumber stacker. He suffered contusion of the back and chest, strain of the muscles and ligaments of his back, conjunctival hemorrhages and hemorrhages in his palate in addition to a hiatus hernia, and difficulties with his knees. Claimant contends, he also incurred traumatically induced narcolepsy (neurotic drowsiness). Claimant's employer testified that he had seen claimant sleeping at work on at least three occasions prior to the accident, but that he now falls asleep more frequently. Claimant's wife testified, that "it occurs at least once every day and usually more than once a day." The medical evidence was divided as to whether claimant had narcolepsy. The Hearing Officer found not and affirmed the determination. The WCB remanded, expressing some concern that claimant had been denied some right, and recommending that the issues be better explored, and specifically that a "special diagnostic procedure for detection of narcolepsy, referred to in Dr. Dow's report," be undertaken.

WCB #67-98 January 4, 1968

Robert Henrikson, Deceased.
Harold M. Gross, Hearing Officer.
Wesley A. Franklin, Claimant's Atty.
Eldon F. Caley, Defense Atty.
Request for review by employer.

Decedent, a 42 year-old logger, died of a heart attack. Claimant had no history of any heart trouble. The onset of symptoms began before work in the morning, when claimant complained of some indigestive type of pain and shortness of breath at breakfast. He went to work and spent the morning laying out grade lines for a road. At lunch claimant didn't feel much like eating, but ate anyway. Work was resumed after lunch for a short time, and claimant complained that he could not get any wind and could not breathe, and that he had a severe pain in his chest. He was taken to the local hospital, where he expired within the hour. An autopsy found that the cause of death was coronary arteriosclerosis, severe, with acute occlusive thrombosis of the left circumflex coronary artery; with patch myocardial fibrosis. The Hearing Officer found that the work activity of the claimant, which included the climbing and descent of moderate slopes, and considerable walking, caused an overexertion of an already impaired heart, which in turn used up the claimant's heart reserve, and materially contributed to the acceleration of claimant's death as a result of myocardial infarction. One doctor felt that claimant would probably have died anyway, even if he had gone to bed instead of going to work the day of his death, but the Hearing Officer did not subscribe to this position. The claim was ordered accepted. The Hearing Officer ordered an attorney fee of $1,200. The WCB affirmed, finding that the case was not unlike Olson v. SIAC, 222 Or 407.

WCB #67-709 January 4, 1968

Ray Schulz, Claimant.
Harold M. Gross, Hearing Officer.
Request for review by Claimant.

Appeal from determination awarding no permanent partial disability. Immediately prior to the hearing the parties settled the case, and a stipulation was entered at the hearing that claimant was entitled to an award for permanent partial disability equal to 5% loss of function of an arm for unscheduled disability. Claimant now seeks to have the order of the Hearing Officer set aside by petition for review. The WCB remanded for a hearing on the merits. The Board is seriously concerned about setting a precedent, which could be abused under ORS 656.313, whereby a claimant might obtain compensation on a stipulation which the claimant might not be obligated to repay, if a finding on the merits reduces the award. It will be the position of the Board that, when such a settlement is disowned by the claimant, a stay of compensation will be effected, and an obligation to repay compensation paid on the stipulation might attach.

WCB #67-67 January 10, 1968

William Floyd Swink, Claimant.
J. David Kryger, Hearing Officer.
Garry Kahn, Claimant's Atty.
John R. McCulloch, Jr., Defense Atty.
Review requested by Claimant.

The issue is whether claimant is entitled to temporary total disability on some eight periods over the course of nine months. The claim was on a low back injury, and the medical reports indicated that the injury wasn't too serious. The evidence revealed that the claimant had worked on some of the dates claimed, but that others were with merit. The Hearing Officer made awards for five periods and awarded penalties for late payment in four of these. Claimant's attorney was awarded 25% of the additional compensation, not to exceed $400. On review claimant's attorney complained that his fee only amounted to $31.00, as the total additional compensation allowed was $124. WCB said that this was too bad, but on the merits found, that the claimant was entitled to an additional period of temporary total disability from February 13 to March 7, 1967, and the claimant's attorney is entitled to a fee of 25% of this too. The hearing involved more than 50 pages of sworn testimony.

WCB #854 January 10, 1968

Willis Adams, Claimant.
H. L. Seifert, Hearing Officer.
D. R. Dimick, Claimant's Atty.
Eldon F. Caley, Defense Atty.
Request for review by Claimant.

Claimant, a 61 year-old night watchman, fell suffering a fracture of the left humerus on March 26, 1966. Claimant has not recovered. A January 23, 1967, examination revealed a superimposed osteomyelitis with destructive abcesses in the head of the humerus. Fusion of the shoulder was considered but not acted upon for fear of lighting up the osteomyelitis. A determination was made March 10, 1967, awarding permanent partial disability equal to 45% loss function of the left arm. Claimant's doctor has never released him for work and continued treating him after the closing. The shoulder suffered from much pain and swelling and the abcesses sometimes flare up, sometimes draining themselves and sometimes needing draining. The doctors at the hearing felt that some sort of fusion would be necessary to stabilize the joint, but were not eager to perform the operation for fear of complications. The Hearing Officer found that the closing order of March was correct, but ordered the claim to be reopened for further medical services and temporary total disability payments effective June 10, 1967. The Hearing Officer also ordered a set-off for all unemployment compensation received during the period of temporary total disability. On review the WCB found that it was improper to credit the employer with the unemployment compensation received. The WCB also found that the denial of temporary total disability from March to June was an error, as claimant had never been released by the doctor and was unable to work during this time. It further appeared from the evidence, that the claimant's condition had never been medically stationary, even to the date of the hearing. The WCB also found unreasonable resistance and assessed charges under ORS 656.-382 (1).

WCB #897 January 10, 1968

Roger A. Spencer, Claimant.
H. L. Seifert, Hearing Officer.
Kendrick M. Mercer, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for review by Department.

Appeal from determination of disability of 30% loss function of foot. Claimant is a 50 year-old logger who suffered a fractured left ankle. Dr. Degge concluded that claimant had sustained a minimally displaced fracture of the posterior third of the distal tibial articular surface and a possible undisplaced fracture of the medial malleolus, both of which were entirely healed. There was some limitation of the dorsiflexion of the foot, a moderate amount of reactive synovitis in the ankle joint associated with swelling and thickening of the capsule of the ankle joint. It was on this basis that the determination was made. Subsequently claimant attempted to return to logging

and had trouble with his ankle. At present he walks with a limp and had to give up logging to the extent of working for others and is now a self-employed logger. His leg swells substantially after some use, and he must rest frequently. The Hearing Officer increased the award to permanent partial disability equal to 45% loss function of a left foot. On review WCB affirmed, finding it quite proper to consider the fact that claimant's work tolerance turned out to be less than was anticipated on a clinical basis. The very purpose of the Hearing is to correct mistakes of determination.

WCB #67-614 January 10, 1968

Aretta Belding, Claimant.
J. David Kryger, Hearing Officer.
Dale D. Liberty, Claimant's Atty.
Richard C. Bemis, Defense Atty.
Request for review by Employer.

Claimant suffered a contusion and a lumbar sprain upon falling into a gutter. The defendant's doctor found a prespondylolisthesis. He recommended a corset and a heel lift on the right. One of the problems concerned temporary total disability, as the injury occurred just prior to the time the claimant was due to be laid off, as she was a seasonal worker. The treating doctor said that "possibly" she was injured to the extent that she couldn't have returned to work. The Hearing Officer found this too speculative and denied temporary total disability. As to the permanent partial disability the claimant has had no prior back trouble and has been a steady and hard worker. There is no doubt now that claimant is suffering pain now on a continuing and apparently permanent basis, and that this is affecting her ability to work. There is medical testimony that the symptoms are now attributable to a congenital defect. Such testimony as this case, simply presents another possible alternative conclusion to the Hearing Officer. The basis for an award is still present: Uris v. SCD, 84 Adv Sh 851. The Hearing Officer awarded and the WCB affirmed 20% loss of an arm by separation for unscheduled disability. Claimant's attorney allowed $200 for services connected with review.

WCB #67-876 January 11, 1968

Donald T. Cole, Claimant.
John F. Baker, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Roger Warren, Defense Atty.
Request for review by Claimant.

Left ankle injury to 32 year-old longshoreman. The determination allowed 5% loss function of left foot for permanent partial disability. On the date of injury the diagnosis was "old fracture medial malleolus left ankle. New incomplete fracture base internal malleolus." Claimant presently complains of swelling and discoloration in the ankle. Pain is experienced from any movement which puts extra weight on or which jars the ankle. Dr. Cohen's examination revealed a little swelling on the inside of the ankle with the

skin slightly darkened. Dorsi and plantar flexion motion was normal, although some pain was encountered at the extremes of motion. The base of the internal malleolus was slightly tender. The posterior tibial pulse could not be felt. The Hearing Officer increased the award to 15% loss of use on a left foot. Claimant appeals, insisting that the doctor's report indicating that this disability was equal to 20% loss use of left foot. The WCB notes that the responsibility for determining the disability is now placed on the Workmen's Compensation Board under ORS 656.268. The Board, in order to establish a maximum degree of uniformity in evaluation of disabilities, has discouraged solicitation and submission of medical reports, which express the ultimate conversion of physical findings into percentage awards.

WCB #67-840 January 11, 1968

Leona Antoine, Claimant.
Page Pferdner, Hearing Officer.
Gary Kahn, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for review by Claimant.

The issues pertain to temporary total disability. There was some confusion as to whether claimant was a part-time employee or a full-time employee. Claimant had only worked three days prior to the lower back injury and four days following the injury for a total of eight days. Claimant testified that she was hired as a full-time employee and would not have taken the job, if it had been part-time work (three days per week). The employer testified that it was part-time work, and the employer had not any need for any more full-time nurse's aides and would not have hired claimant on a full-time basis. The work schedules that were posted were part-time. The Hearing Officer found that claimant was a part-time employee. The WCB affirmed, Mr. Callahan dissenting. The other issue in the case was that the insurance carrier made payments of temporary total disability in the form of sight drafts, which the claimant was unable to cash until the claimant's attorney guaranteed same. The Hearing Officer found and the WCB affirmed that payment by sight draft, which claimant was not able to freely negotiate, constitutes an unreasonable delay in payment of compensation within the meaning of ORS 656.262(8), and accordingly awarded penalties for all temporary total disability payments which had been paid by sight draft. Employer was also ordered to pay $150 attorney fees.

WCB #67-631E January 11, 1968

Herbert Dean Young, Claimant.
H. L. Seifert, Hearing Officer.
Frederick L. Decker, Claimant's Atty.
Richard C. Bemis, Defense Atty.
Request for review by Employer.

Appeal from closing and determination of permanent partial disability equal to 50% loss of an arm by separation for low back injury. Claimant had a prior injury, for which he was receiving 10% loss function of an arm payments. As to the present injury, claimant asserts that he is not medically stationary. He

was operated on, on February 14, 1966, for excision of a herniated intervertebral disc L-4, L-5 on the left. On June 1, 1966, claimant underwent exploratory laminectomy and spinal fusion. On January 9, 1967, Dr. Lebold X-rayed and found a solid fusion from L-4 to the sacrum, and considered claimant's condition medically stationary. Subsequent examination by Dr. Rockey indicated that there was an ununited spinal fusion with motion at L4-5. Dr. Schuler felt that another operation was not absolutely necessary. Claimant suffers sharp pain, when he attempts to lift anything, also. The Hearing Officer accordingly found that the claimant's condition was not medically stationary. Employer is allowed to credit permanent partial disability payments made toward total temporary disability payments. The Hearing Officer also allowed crediting of unemployment compensation received, but the WCB reversed as to this, stating, "If the claimant received unemployment compensation to which he was not entitled, the proper adjustment and recompense should be made to that agency. Application for and acceptance of unemployment compensation may be evidence of ability to work, but it is not conclusive nor does it relieve the employer as noted."

WCB #67-1168 January 16, 1968

Estil Bradley, Claimant.
H. L. Seifert, Hearing Officer.
Charles O. Porter, Claimant's Atty.
Earl Preston, Defense Atty.
Request for review by Claimant.

Claimant suffered a contusion and sprain of his right foot, when a log rolled over it. The determination found the residual disability to be 10% loss function of the foot. There was no limitation of motion, visible swelling or deformity. There is no interferance with walking, except an irritating tingling sensation in the ball of the foot oftentimes. Twisting and running or climbing causes pain. There was some atrophy, probably due to disuse of the gastrocnemius muscle. There was also a complaint of weakness in the big toe. At the time of claim closure, there was no evidence of degenerative arthritis around the healed navicular fracture, and it seems that the most persistent symptomology was due to fibrosis of the extensive crushing of the foot. The Hearing Officer affirmed the determination, and the WCB also affirmed.

WCB #67-200 January 16, 1968

Joe W. Williamson, Claimant.
Page Pferdner, Hearing Officer.
Edwin A. York, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding claimant "permanent partial disability equal to 20% loss function of left leg." Claimant suffered a knee injury, when he was struck by the bucket of a power shovel, while working as an oiler. The injury ruptured the medial collateral ligament, the anterior and posterior cruicate ligaments and tore the medial miniscus, requiring its removal. When

claimant was released to return to work, he went to work as a welder for Gunderson Bros. Some three months later claimant was thrown from a horse, causing a skull fracture, a fracture of the tenth dorsal vertebrate and a fracture of the left lateral tibial plateau. This constitutes an intervening knee injury. It is the rule of Lilly Fay May, WCB #731, that an intervening injury doesn't relieve the Hearing Officer of the duty of determining the extent of permanent partial disability resulting from an industrial injury; it merely makes the job more difficult. The Hearing Officer found that the claimant now has permanent partial disability of 40% loss of use of his left leg, and that the early chondromalacia, increased effusion, and increased instability resulting from the horse accident, is responsible for 10% of claimant's permanent partial disability. Accordingly, claimant was awarded permanent partial disability of 30% loss of use of his left leg. WCB affirmed.

WCB #67-891 January 16, 1968

W. B. Coleman, Claimant.
Page Pferdner, Hearing Officer.
Tyler E. Marshall, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for review by Claimant.

Claimant suffered a compensable low back injury, which required the removal of a completely herniated disc at L4 and L5. A couple of months after the surgery, claimant claims he contracted diarrhea on the way home from a visit to his doctor. He had to answer nature's call at the nearest restroom, and while he was there, he was assaulted and his back was again injured, requiring futher disc surgery. It is the medical expense of this latter surgery that this dispute is about. The only problem with the case is that the evidence indicates no visit to the doctor on the day of the assault. The denial of the claim was affirmed by the Hearing Officer, but on review was remanded on stipulation for further evidence to clarify the inconsistency.

WCB #67-471 January 19, 1968

Marvin H. Funk, Claimant.
H. L. Pattie, Hearing Officer.
James F. Larson, Defense Atty.

Appeal from determination "for permanent partial disability equal to 15% loss function of right arm." Claimant is a 60 year-old carpenter who ruptured the biceps muscle of his right arm. He had a long history of chronic tendonitis of the right shoulder, but with occasional treatment, this preexisting condition did not interfere with his ability to work. Claimant proceeded in this matter without counsel. Claimant has full motion of his arm, but suffers from a loss of strength and a high factor of fatigue in the use of the arm. This makes him unemployable as a carpenter, and he knows no other trade. Claimant says that he has contributed to the accident fund for many years, and he is not impressed with the prospect of being unemployable for the next five years.

He estimates his loss of income to be $48,000. The Hearing Officer observed that in the general industrial field, there were lots of jobs for people with weak right arms. He affirmed the determination. The WCB raised the disability to 75% loss of use of an arm, stating, "In terms of the claimant's trade, the arm is apparently disabled to the point that he cannot successfully compete. The arm is not, however, useless and cannot be measured solely upon ability to continue in the same work."

WCB #67-679 January 19, 1968

Kathy Tackett, Claimant.
Page Pferdner, Hearing Officer.
Milton O. Brown, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Claimant.

Claimant was an 18 year-old waitress who suffered a lower back strain allegedly while lifting a can of ice cream. This is an appeal from a notice of denial. The problem was confused, because there was evidence that back problem could be the result of the birth and care of her twins, which occurred prior to the alleged injury, and there was evidence that the claimant could have hurt her back subsequently thereto at Jantzen Beach in the bumper cars. The Hearing Officer found that there was a compensable injury arising out of the lifting of the ice cream can, and that there was an intervening noncompensable injury prior to her admission to the hospital, presumably arising out of the Jantzen Beach bumper car incident. Accordingly the Hearing Officer remanded to the SCD for acceptance. On review the WCB found that the evidence did not support the finding of the intervening injury. The WCB found, that since there appeared to be a substantial dispute over the temporary total disability due, that further adversary proceedings would be necessary so, instead of referring the matter pursuant to ORS 656.268 for determination, the case was remanded to the Hearing Officer for further proceedings to determine the extent of temporary total disability and permanent partial disability, if any.

WCB #67-708 January 19, 1968

Glenn Schenck, Claimant.
Page Pferdner, Hearing Officer.
TylerE. Marshall, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for review by Claimant.

Appeal from determination of "40% loss of thumb by separation and function, 10% loss of left index finger due to loss of opposition, and 10% loss of left middle finger due to loss of opposition." Claimant suffered a traumatic amputation of the tip of his thumb in a saw. He was a trim sawyer, lumber grader and pallets nailer. Claimant jerked back sharply at the time of the injury. When the claimant returned to work some four months later, he commenced complaining of a pain in the neck. The medical evidence was split,

as to whether there was a medical, causal relationship. Dr. Kimberly felt that, although some of the claimant's problems were psychosomatic, there was a direct causal relationship between the chronic cervical radicultitis and the thumb injury. He believed that some cervical traction treatments plus some suggestive therapy would clear up the neck. The Hearing Officer rejected this opinion and found no medical, causal relationship. On review the WCB, Mr. Redman dissenting, remanded the matter to the Hearing Officer for further development and investigation as to the relationship of the neck injury to the thumb.

WCB #67-771 January 19, 1968

Thomas L. Smith, Claimant.
Mercedes F. Deiz, Hearing Officer.
Milton O. Brown, Claimant's Atty.
Roger Warren, Defense Atty.
Request for review by SCD.

Appeal from Notice of Denial. Claimant was employed by L & G Brokerage, Inc. to unload their trucks at a designated point of delivery. Other workmen were there to unload truck deliveries for other concerns. Claimant was paid according to the number of trucks that he unloaded for his employer. It was apparently the local custom at the dock for the lumpers (truck unloaders) to assist one another in unloading the trucks. But, apparently they were only paid when one of "their" trucks came in. It is not clear whether the employer knew of this work trading or not, but the Hearing Officer found that he was estopped to deny knowledge. The WCB found that knowledge was unnecessary. It is noted that the practice was to the benefit of the employer, as all trucks were unloaded faster. Needless to say, the claimant was injured while helping to unload another truck. It was found that there was at least implied authority to trade services, and hence the claimant was in the scope of his employment. The Hearing Officer relied on Gant v. Industrial Commission, 263 Wis 64, 56 N.W.2d 525(1952) for authority. The claim was ordered accepted.

WCB #67-671 January 19, 1968

Clifford Butcher, Claimant.
H. L. Pattie, Hearing Officer.
Gerald R. Hayes, Claimant's Atty.
Marshall C. Cheney, Jr., Defense Atty.
Request for review by Claimant.

Appeal from notice of denial. Claimant was the general handyman for Alpenrose Farms. He alleges that the sustained an umbilical hernia, as a result of a struggle with a power mower. The medical evidence confirmed that the hernia was of recent origin and was compatible with the history of trauma. The alleged accident was unwitnessed. There was evidence that the claimant had an uncontrollable temper, and that on or about the same day as the alleged lawnmower accident, the claimant became enraged about the condition of his television set. He picked up the television set, carried it to the porch railing, and either dropped or threw it over the railing onto the ground.

The burden of proving a compensable injury is on the claimant: Patty v. Salem Flouring Mills, Co., 53 Or 350. There were also various contradictions in the story of how the lawnmower incident happened. The Hearing Officer sustained the denial. On review the majority, Mr. Callahan dissenting, concludes, there is no burden upon a defendant in such a case to prove a claimant received his injury in some other manner. The majority of the Board in voting to sustain the Hearing Officer, conclude that in most instances a decision in such a case is best made by one who has had an opportunity to observe the witnesses.

WCB #846 January 19, 1968

Erwin A. Murray, Claimant.
H. L. Seifert, Hearing Officer.
James A. Blevins, Defense Atty.
Request for review by Claimant.

Appeal from an award of no permanent partial disability for a contusion to the right rib cage. X-rays taken the following day reportedly showed a fracture of the right rib. Claimant complains of pain in the area of the right shoulder blade and thoracic spine. The medical reports showed little in the way of objective findings. Claimant had complained of some stiffness after pulling on the green chain for four days. Over the past years claimant had accumulated unscheduled disability equal to 75% loss of an arm for lumbosacral injuries. The claimant's employment was terminated, because of unexplained absences. The Hearing Officer affirmed the denial of permanent partial disability. WCB affirmed, noting that past awards seemed somewhat generous for one who was pulling on a green chain.

WCB #67-803 January 23, 1968

Earl L. Matson, Claimant.
J. David Kryger, Hearing Officer.
Garry Kahn, Claimant's Atty.
Robert P. Jones, Defense Atty.
Request for review by Claimant.

Claimant, a carpenter, fell and injured his right shoulder and arm. The determination awarded permanent partial disability equal to 20% loss of use of the right arm. There is an issue of whether the shoulder should be compensated as a scheduled or unscheduled disability. Here the medical reports indicate that the sources of difficulty are a bursitis, a strain of the shoulder girdle and an aggravation of a preexisting adverse condition of the acromioclavicular joint. It is the rule of C. J. Tourville, Claimant, #67-301, that the arm radical includes the shoulder joint and intervening structures, and therefore the shoulder joint and intervening structures are a part of the scheduled area of the arm rather than an unscheduled disability. As to the extent of the permanent partial disability, the medical evidence indicates that the claimant lacks 10 degrees of complete forward flexion of the right arm and

lacks 10 degrees of complete elevation of the right arm. There is also a mild degree of weakness of the right deltoid and a weakness of grip of the right arm. Some tenderness exists over the right greater tuberosity of the humerus. The Hearing Officer found that this was insufficient to sustain an award greater than 20% loss of use of the right arm. WCB affirmed on review and stated that it "continues to adhere to the position that the disability award should be directed to that part of the body, which actually demonstrates the disability. Here that disability is found in limitation of motion and use of the arm."

WCB #499 January 23, 1968

Theodore P. VanArsdale, Claimant.
H. L. Pattie, Hearing Officer.
Wayne C. Annala, Claimant's Atty.
Donald E. Howe, Defense Atty.

This is an appeal from a notice of denial for "the reason that it (claimant's condition) is not an occupational disease arising out of and in the scope of the employment." Claimant was an oiler on a diesel powered backhoe involved in the construction of the John Day Dam. It is taken as fact that the claimant worked in a sump with the backhoe and was exposed to substantial concentrations of diesel exhaust fumes, possibly because of a defective exhaust system. The claimant developed lesions on his lips (Leukoplakia), burning in his throat and nasal passages, and other symptoms. The medical records involve over three years of observations, from the principle exposure complained of in March of 1964, until March of 1967. The Hearing Officer concluded that there is a very noticeable and close correlation, with two exceptions, between claimant's periods of employment around diesel equipment and the outbreak of lip lesions and other symptoms since March 1964, and that frequent exposure to gasoline or diesel exhaust fumes is the direct and probable cause of claimant's symptoms. He further concluded that the claimant sustained an overexposure to a particularly strong or concentrated dose of diesel exhaust fumes in March 1964; that the claimant has developed a special sensitivity to diesel exhaust fumes beginning in March 1964, and that claimant's special sensitivity is an occupational disease arising out ofand in the course of his March 1964 employment. The Hearing Officer ordered the claim accepted. The Medical Board of Review composed of Drs. Leonard L. Hoffman, Leon Ray, and Raymond R. Suskind examined the claimant on January 4, 1968, and concluded that his respiratory complaints and leukoplakia are not of occupational origin. Their letter stated in part:

> In the opinion of the Board, the exposure to diesel engine exhaust fumes in March 1964, which the claimant alleges was responsible for the ulceration of his lip, could not possibly have caused the cellular changes of leukoplakia. The latter is a precancerous problem which usually takes years to develop and results from repeated and prolonged exposure to either chemical irritants as in smoking or natural ultraviolet light. There is also an individual susceptibility factor to such agents. There is no evidence that Mr. Van Arsdale was exposed to high concentrations of chemical irritants. At the present time the claimant has dryness of the lips and one

keratotic lesion on the left side of the lower lip. It is understandable that this condition, which is not of occupational origin, may be made more uncomfortable by organic vapors and fumes. The claimant's report that sores in the nose and mouth occur following automotive exhaust exposure has not been confirmed by descriptions of such findings by attending physicians.
This Board found no evidence of a causal relationship between the recurrent but tansient complaints of burning sensations in the nose and throat, lightheadedness, and occasional nausea which the claimant alleges occurs in exposures to automotive exhausts (diesel, standard automobile, power saws), as well as from paint fumes and the alleged diesel exhaust exposure of March 1964. It is quite possible, however, that the claimant does have a low threshold of irritation of respiratory mucous membranes, which accounts for his recurrent symptoms when exposed to organic vapors or fumes. That this low threshold is the result of the alleged diesel exhaust exposure of 1964, cannot be proven.

These findings, in effect reversing the Hearing Officer and concluding that the claimant does not have an occupational disease, are by ORS 656.814 made final and binding.

WCB #67-531 January 23, 1968

Dean N. Doud, Claimant.
John F. Baker, Hearing Officer.
Ben Anderson, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for review by Claimant.

Claimant is a welder who alleges aggravation of a pre-existing respiratory condition while at work. This is an appeal from a denial of the claim. He alleges a compensable injury and not an occupational disease. Claimant suffered an attack of coughing, wheezing, shortness of breath and chest congestion on February 22, 1967. In April 1964, claimant inhaled gases while welding galvanized material and filed a claim for which some benefits were paid. The medical evidence was to the point that the inhalation of noxious gases would cause irritative bronchitis. However, the claimant had been working as an assembly welder, and was welding on mild steel the day of the accident, as well as for approximately seven weeks immediately preceding. There was evidence that smoke is produced in the work the claimant was doing, but there was no evidence of emission of particular gases or fumes. Some smoke is produced, regardless of the material being welded. The employment was found not to be a substantial contributing factor to the claimant's injury. Claim denied. The WCB dismissed the request for review, because, although the request for review was filed with the Workmen's Compensation Board, no copy of that request for review was mailed to the State Compensation Department as required by ORS 656.295. The WCB relied on Sevich v. SIAC, 142 Or 563 for authority. It was also observed that the SCD probably could be charged with knowledge that a review had in fact been requested within the 30-day period. A liberal construction of the compensation law does not permit waiver of those steps required by statute to preserve rights to hearing and review. (This order was set aside February 16, 1968; see below. Ed.)

WCB #67-110 January 23, 1968

Willis E. Leech, Deceased.
J. David Kryger, Hearing Officer.
Tyler Marshall, Claimant's Atty.
John Jaqua, Defense Atty.

Decedent was fatally injured in an industrial accident. He is survived by his widow and his daughter who was 28 years of age at the time of the accident and is, and apparently has been since birth, mentally incompetent. The daughter has been and is totally dependant upon her parents for support and maintenance. This sole issue is whether the invalid daughter is entitled to benefits under the Workmen's Compensation Act. Claimant alleges that she is an ORS 656.002(2) beneficiary in that she is either a child or a dependant. The Hearing Officer found that the claimant did not qualify as a "child." The fact that the statute terminates death benefits to any natural-born child after reaching the age of 18 years, indicates that the legislature is defining a "child" as a beneficiary intended to limit this definition of "child" to minor children or children under the age of 18 years. In determining death benefits, the law is concerned with "dependants" only, when there is no wife surviving or minor children surviving. These are the only two classes of beneficiaries that are compensated without establishing their dependency through need. ORS 656.002(10) states that to compensate a dependent, there must be an absence of children under the age of 18 years. Any child who is under the age of 18 years would automatically be a beneficiary, and therefore the legislature defined "dependent" as those who are not under the age of 18 years. It is only when the child exceeds the age of 18, that he must show he is an invalid. If a beneficiary could be any natural-born child, regardless of age, there would be no reason why the legislature included in the definition of "dependent" a requirement that no child under the age of 18 years be living. If it were to be determined that the claimant were qualified as a "child" under the definition of a "beneficiary" in ORS 656.002(2), the door would be open to any and all natural-born children of deceased workmen, who are over the age of 18, regardless of age. As to whether the claimant is a "dependent," it appears that the claimant does not qualify for benefits under ORS 656.002 (10), because it will be noted that "invalid child over the age of 18 years" is in the same class as "father, mother, grandfather," et al., who do not take, if there is a widow surviving. Much ado is made of ORS 656.204(8), which states in part: "...if a child is an invalid at the time he becomes 18 years of age, the payment to him shall continue, while he remains an invalid, ..." The Hearing Officer and the majority of the Board, Mr. Callahan dissenting, hold that this means that payments must have begun (prior to age 18) for them to be continued. Accordingly the denial of benefits was affirmed. Mr. Callahan's dissent points out that there is no requirement in ORS 656.204(8) that payments of compensation must have begun prior to reaching age 18 in order that they may continue.

WCB #67-498 January 25, 1968

Carl A. Printz, Deceased.
H.L. Pattie, Hearing Officer.
Donald R. Wilson, Beneficiaries' Atty.
Roger Warren, Defense Atty.
Request for review by Department.

Decedent apparently died of a heart attack while working for the Commission of Public Docks. Two days after his death the State Compensation Department received a "Workman's Report of Occupational Injury or Disease" (WCB Form 801B). This form was prepared by the employer without knowledge or authority of the decedent's widow. This was on September 14, 1966. After making an investigation, the Department uttered an "order" on November 2, 1966, which would normally constitute a Notice of Denial. The original was mailed to the employer. The Department records indicate that the surviving spouse was sent a copy, but she does not remember it, if one was sent. The widow's lawyer prepared a "Claim for Compensation--Fatality," dated March 7, 1967, and the Department mailed a notice of denial in the usual form on March 15, 1967. A request for hearing was received April 20, 1967, and it is pursuant to this request, that this hearing has occurred. It is, of course the position of the Department, that the request for a hearing was not timely, in that it should have come within the statutory period from November 2, 1966, and not from March 15, 1967. The Hearing Officer found that the form 801 was not a claim, in that it failed to meet the standards of ORS 656.002(5), since the form did not say on its face that it was a claim form, nor did it include any request for compensation. Secondly, it was not authorized by the claimant, as she knew nothing of it, but rather a mere compliance with ORS 656.262 (3). The Hearing Officer further found that the November 2, 1966, order was ineffective in that the original was sent to the employer, and the widow was sent a copy, if one at all. ORS 656.262(6) states that the contributing employer should get a copy, implying that the widow should get the original. Further the records is silent as to whether the notice of appeal which appears on the document in evidence and most probably on the original Notice, in fact appeared on the copy allegedly sent to the widow. Accordingly the Hearing Officer found that the request for a hearing was in order and ordered the matter set for a hearing on the merits. On review the WCB reversed. The Board notes that ORS 656.262 makes it clear that the responsibility for processing claims is upon the employer or the State Compensation Department, and they are expected to act on notice or knowledge. Penalties and attorneys fees have often been assessed against employers with knowledge who failed to institute compensation within 14 days or deny claims within 60 days, even though no written request for compensation was ever filed. Another problem is that the claim upon which the claimant seeks to rely beyond the six-month deadline of ORS 656.208(5) and ORS 656.319(1)(3). Further, if the written claim is to be relied on as "the" claim, the 30-day filing requirement of ORS 656.265 has not been met. The Board concluded that the law contemplates employers and insurers should act without waiting for "written requests," and that such action will not be "void." It was proper for the State Compensation Department on November 2, 1966, to advise the widow that no compensation was due, and that she should request a Board review within 60 days, if she disagreed. The subsequent claim and second order did not revive any rights already lost.

WCB #67-477 January 25, 1968

Charles E. Sattefield, Claimant.
H. L. Pattie, Hearing Officer.
Phil H. Ringle, Jr., Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by Department.

This is an appeal from a notice of denial for a back injury. It was the position of the Department that there was no injury, and that the claim was not filed in a timely manner. Claimant was a job trainee from the Public Welfare Commission and had a history of back injuries and a criminal record, mostly for paper hanging. Claimant was discharged from his employment shortly after the date of the alleged injury, because of his employer's (a tire dealer) inability to obtain a required bond. The claimant alleges he suffered a pain in his back on or about January 3, 1967, while lifting a tire. The claimant's first written notice to the employer was not executed until February 24, 1967. The claimant had had two other employers in the meantime. Only a visit to a doctor on January 8, 1967, a Sunday, with low back complaints gives any plausibility to the claim, and admittedly the severity of the claimant's symptoms requiring the need of a doctor arose that Sunday afternoon. The claimant's employment had been terminated on January 6th. The employer claims prejudice in that, because of the late filing of the claim (more than 30 days), he was unable to find anyone in the plant who remembered what was going on in the plant at the time in question. The Hearing Officer ruled that the burden of proof of showing prejudice was on the employer and suggested too, for a showing of prejudice, it would require affirmative evidence. Here, no witness was produced by the employer who proved that there was a witness to the accident who remembered events favorable to the employer for the thirty-day period and had forgotten these events by the fiftieth day, when this claim was filed. Accordingly, the Hearing Officer ordered the claim accepted and awarded a $500 attorney fee. On review the WCB by majority reversed, Mr. Callahan dissenting, and ruled that the burden of showing prejudice where a claim is filed beyond the 30-day period is not upon the employer, but rather it is upon the claimant to show no prejudice. The Board also indicates very grave doubts as to the credibility of the claimant, and added "that even if the claimant had an episode of pain while working January 3, 1967, it did not constitute a compensable injury." Mr. Callahan dissenting, agrees that the Hearing Officer improperly placed the burden of proof upon the employer and the SCD, but concludes that the record is such that he believes the accidental injury occurred as claimed, and that the claimant justified his late notice to the employer.

WCB #67-815 January 25, 1968

Joe R. McDaniel, Claimant.
John F. Baker, Hearing Officer.
Donald F. Dunn, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for review by Claimant.

Claimant is a 44 year-old laborer who alleges that continuing problems have resulted from an injury to the back, while pulling lumber on the planer chain on June 2, 1966. The claimant's initial injury appears to have been rather minimal. The injury was more in the nature of a muscle reaction to unaccustomed labor. There have been intermittent periods of employment inconsistent with long-term disability. The initial determination was made on August 26, 1966, which allowed no permanent partial disability. Subsequent to this the carrier paid some medical bills, which has the effect of reopening the claim. Finally the carrier sent a letter of disclaimer as to further medical bills. This hearing was apparently pursuant to the disclaimer. The Hearing Officer found that the claimant had fully recovered from the compensable injury, and any problems that he had now, must be from some other cause. The claim was dismissed. The WCB affirmed, but noted that the claim should have been resubmitted for another determination pursuant to ORS 656.268, since the employer had recognized further liability by reopening the claim. Here, however, since there has been a hearing on the merits, the issue is dead.

WCB #67-243 January 26, 1968

Paul H. Lauber, Claimant.
H.L. Pattie, Hearing Officer.
Herbert B. Galton, Claimant's Atty.
Richard S. Borst, Defense Atty.
Request for review by Claimant.

Appeal from a Notice of Denial of compensation on an inguinal hernia. The issues go to the merits of whether there was a compensable injury, and also whether claim proceedings are barred by failure of the claimant to give notice to the employer as required by ORS 656.265. Claimant testified to a severe pain while working on his personal beach cottage, and then subsequently "thought back" and recalled a prior pain while emptying a trash barrel in the middle of July 1966. On October 5, 1966, he prepared a written claim to an off-the-job insurance carrier which was countersigned by an employer's agent. This claim was rejected because it said that the accident occurred while "lifting a barrel of scrap metal." A Form 801 occupational claim was executed November 11, 1966. The Hearing Officer found that the claimant had not sustained the burden of proving a compensable injury, and further he had failed to show lack of prejudice to his employer for the delayed reporting of the accident. The WCB affirms and further suggests that the criteria set up in ORS 656.220 was not met, in that there had been no operation, despite a recommended surgical repair. Also, one further comment was made as to an error which the Hearing Officer corrected in his final order. Payment of temporary total disability

was ordered paid except upon facts and law justifying the payment. The interim order was clearly beyon the power and authority of the Hearing Officer. ORS 656. 313 would not be applied by the Board under such circumstances, if money had been in fact paid pursuant to a void order.

WCB #917 January 29, 1968

Robin A. Mott, Claimant.
John F. Baker, Hearing Officer.
Richard P. Noble, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for review by Claimant.

Claimant suffered a neck injury from the vibration of operating a D-9 Cat, while ripping rock. He underwent 18 days of traction, and the doctors declared him cured; the determination awarded no permanent partial disability. He attempted to return to catskinning, but it caused a reoccurrence of cervical and thoracic symptoms. He then tried working as a diesel mechanic, which he found too heavy. He finally found a job operating a yarder, which didn't bother him. The medical evidence revealed a degenerative disc disease at the C-5,6 and 7 levels, which were aggravated by the injury. There was also nerve root irritation at the C5-6 level, which bothered the right arm. The Hearing Officer awarded 15% loss of an arm by separation. WCB affirmed.

WCB #67-754 January 31, 1968

Arthur Schanno, Claimant.
George W. Rode, Hearing Officer.
Maurice V. Engelgau, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for review by claimant.

Appeal from a determination of 15% loss of function of the left leg. Claimant suffered a severe laceration of the leg, when it was caught in a sprocket. He has a vertical scar in the calf area 7 or 8 inches long. Claimant stated he has suffered no impairment of motion in the knee joint. He does have considerable weakness in the leg. The injury has considerably impaired his stamina and endurance. He can climb steps, if he is not carrying any weight. He does not have the strength to lift a weight. Claimant does not lose time from his regular employment as a dryer tender, but must refuse overtime. The Hearing Officer increased the award to disability equal to 25% loss of function of the left leg. WCB affirmed.

WCB #67-725 January 31, 196

Ilene Thomas, Claimant.
H. L. Seifert, Hearing Officer.
C. S. Emmons, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for review by Claimant.

Claimant suffered a lumbo-sacral sprain in a fall in a cannery. Appeal from a determination allowing payment for medical services, but denying permanent partial disability. It appears that the claimant did not respond to the treatments and still suffers from some back pain. However, it appears that the claimant is still able to work without demonstrable decrease in her work capacities. There was substantial evidence at the hearing, including expert medical opinion, that the claimant had received adequate treatment, and that continuing problems the claimant might be experiencing were due to poor posture and functional complaints. Permanent disability denied. WCB affirmed.

WCB #67-420 January 31, 1968

George Ayres, Claimant.
Harold M. Gross, Hearing Officer.
Donald Richardson, Claimant's Atty.
James Blevins, Defense Atty.
Request for review by Claimant.

Appeal from a determination of no permanent partial disability. Claimant fell some three stories to the concrete sidewalk, when the swing-stage scaffold on which he was painting came loose. He was treated for a fracture of the 9th rib, contusion of the pelvis, sprain of the right ankle, and sprain of the right wrist. The fall was broken somewhat, because it was the far end of the scaffold which came loose, so that it "was an exciting slide, rather than a fall, and the claimant did not even become an in-patient in a hospital." Claimant claims a pain in the back and a pain in a previously broken ankle. There is no objective medical evidence to support these contentions. Claimant also professes dislike for working on scaffolds. The Hearing Officer found that the proof of the latter was insufficient. Hence, the question of compensability of traumatic neurosis is unanswered. The Hearing Officer found no permanent disability, and WCB affirmed.

WCB #67-283 January 31, 1968

Ernestine Withers, Claimant.
Harold M. Gross, Hearing Officer.
William A. Hedges, Claimant's Atty.
John E. Jaqua, Defense Atty.
Request for review by Claimant.

Claim for compensation for a condition of tenosynovitis in her right elbow, also called "bowling elbow" or "tennis elbow." Claimant had worked for Georgia-Pacific since 1963, but worked as a Raiman dryer feeder for three weeks in

July 1966, the alleged time of the accident. She had bowled several games a night several times a week since 1959. She first sought medical attention for her elbow in September 1966, saying that she had hurt her elbow bowling. She filed a work-connected claim on February 23, 1967. No issue was made of the eight-months delay in filing. Claim for disability was denied on the merits and WCB affirmed.

WCB #67-412 January 31, 1968

Victor W. Hoppus, Claimant.
John F. Baker, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for review by Claimant.

Appeal from determination of 15% loss of arm by separation for unscheduled back difficulty. Claimant slipped on a rock and fell, suffering a lower back injury which required a laminectomy at the L4-L5 and the L5-S1 levels. Straight leg raising at about 75 to 80 degrees caused pain and pulling in the low back on both sides. Claimant has difficulty in doing manual labor connected with his truck driving job. He is unable to help in loading or unloading or to change tires. He has changed jobs, so he doesn't have to do these things, but is still driving truck. His back aches constantly while driving, and he cannot bowl as well as he used to. The Hearing Officer awarded such additional compensation as to be equal to 25% loss of an arm by separation for unscheduled disability. WCB affirmed.

WCB #67-984 February 1, 1968

J. B. Capps, Claimant.
H. L. Pattie, Hearing Officer.
Carlton D. Warren, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Claimant.

Appeal from a determination of unscheduled disability equal to 5% loss of an arm by separation. Claimant suffered a minor back injury. Complicating factors included a long history of lower back injuries and an automobile accident. He had a ruptured disc in 1964, and had a disc removed and a spinal fusion in 1965, for which he was getting VA benefits to the extent of 10 or 15% partial disability. The straight leg raising test showed inconsistent results. Claimant was living on welfare and VA benefits. There appears to be a history of a functional problem, which in turn produces an inconsistent pattern of complaints of disability. The Hearing Officer ruled that the award of 5% loss of an arm by separation was more than adequate, but felt that there was some disability, and that 5% was a minimum award. WCB affirmed.

WCB #67-837 February 2, 1968

Alfred T. Lawson, Claimant.
Mercedes F. Deiz, Hearing Officer.
Clifford B. Olsen, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by Claimant.

This case presents the two-fold issue of whether the claimant was an employee, and if so, whether he was acting in the scope of his employment. Claimant had worked as a manager of an apartment house. Four days prior to his injury, he had been relieved of his managerial capacity, but permitted to remain and do ministerial functions, such as cleaning floor until a new manager was found. No reduction was made in his pay. The claimant stopped vacuuming the floor and went to the apartment of one of the tenants to discuss with him his purchase of some wine for one of the "winos" in the apartment. It seems as if one of the projects undertaken by the claimant and his wife, when he was manager, was to get rid of the "winos." In this apartment the claimant got into some sort of a scuffle and got poked by a cane in the face. The Hearing Officer concluded that going to a private apartment and getting into a brawl was clearly outside of the scope of employment. The WCB reversed. If any interest was being served, it was that of the employer. It may have been poor judgement, and it may even have been in violation of the letter of demotion from manager. Does poor judgement or violation of instructions bar a claim for injury, where the workman is pursuing his employer's interest? The Board concludes that it does not.

WCB #67-1028 February 7, 1968

John H. Beagle, Claimant.
Page Pferdner, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Thomas Cavanaugh, Defense Atty.
Request for review by Claimant.

Appeal from determination allowing 15% loss of an arm by separation for unscheduled disability, and 30% loss of use of the left forearm. Claimant has been a truck driver for Wilhelm Trucking for 26 years. The claimant fell from the top of a load, fracturing his left wrist and his second lumbar vertebrae. Claimant had worked some as a flagman for wide loads since this time, but the Bureau of Labor testified that the claimant was substantially unemployable due to his advanced age (62) and his impairment. Thus we are faced with a 62 year-old man with an eighth grade education and little experience other than that of a truck driver, with some medical impairment and the desire to retire. The claimant considers himself permanently and totally disabled, and this is substantially true, although his disability stems more from age and mental attitude than from his medical impairment . I find the claimant has permanent partial disability equal to 50% loss of an arm by separation for his unscheduled disability, together with 30% loss of use of his left forearm. The WCB remanded, because two medical reports mentioned in the opinion below, were not part of the certified record.

WCB #67-737 February 7, 1968

Eva Goldberg, Claimant.
Mercedes F. Deiz, Hearing Officer.
Gerald R. Hayes, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for review by Claimant.

Claimant was a creative window dresser for the Clothes Horse, Inc. She wrenched her back in a ladder accident while dressing a window. Dr. Logan diagnosed a "lumbosacral strain with suspected herniated intervetebral disc at the lumbosacral level with left sciatic nerve root iriitation." Claimant has been able to return to work, but not as a window dresser. She is in charge of the gift shop and wine cellar. This is lighter work and permits some sitting, but she does not get artistic satisfaction from it. The claimant cannot bend or lift on a sustained basis, if she is required to stand all day or becomes tired, pain develops in her back and leg, and claimant has to be extra careful in her movements. On an appeal from a determination of 5% disability, the Hearing Officer increased the award to equal permanent partial disability of 15% loss of an arm by separation. On review the claimant urged the Board to apply a de novo review, but the Board ruled that it would affirm where the decision of the Hearing Officer is supported by substantial competent evidence. The claimant also urged that liberal construction be made in favor of the workman as to the facts as well as to the law. The Board didn't accept that either, but observed that in practice, many questions of mixed law and fact do result in interpretations in favor of the workman under the liberal interpretation rule. The Hearing Officer affirmed.

WCB #67-621 February 7, 1968

Monroe Long, Claimant.
H. L. Seifert, Hearing Officer.
C. S. Emmons, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.
Request for review by Claimant.

Appeal from a notice of denial. Claimant was treated for a contusion of the hand and left temple, cervical pain and limitation of motion and memory lapse. Claimant alleges that he received those injuries when he was assaulted by an unknown person, while locking up the front door of a Salem drygoods store, where he worked as janitor. He did not report this to his supervisor until a subsequent time, when the store's manager inquired as to the source of his contusions. An examination of the door immediately thereafter revealed no blood, although the claimant's wife testified that the claimant had a blood soaked shirt. There was quite credible evidence, that claimant had been in a rather violent battle with another person at the local cannery over a mutual female friend. Claimant admits the cannery incident, but denies that he suffered any injury despite vivid descriptions of the incident by witnesses. The Hearing Officer found claimant's testimony less than credible and affirmed the denial of the claim. WCB affirmed.

WCB #67-370 February 7, 1968

Betty Jo Williamson, Claimant.
Harold M. Gross, Hearing Officer.
Dan R. Dimick, Claimant's Atty.
Eldon F. Caley, Defense Atty.
Request for review by Claimant.

Claimant slipped and fell while working as a waitress in July 1966. She suffered a back injury, for which she was treated conservatively. Treatment has been to no great avail, and the claimant still suffers from every kind of a back symptom in the book. She has not worked since the injury with a minor exception, and there is evidence that she is not able to do normal housework. The closing was on February 19, 1967. The determination awarded 5% loss of an arm by separation for unscheduled disability. She has continued to see the doctor since the closing, and it is the treating doctor's opinion that she is not medically stationary. The Hearing Officer found that the treatments that she was receiving were pallative and not curative and affirmed the denial of subsequent medical bills. The award for permanent partial disability was increased to 15%. On review, further evidence was tendered to the Board, which was met with a motion to strike. The Board allowed the motion, but remanded for further hearing and evidence, as it was the opinion of the Board that the issue was not sufficiently or completely developed. The Board was concerned about the unusual delay in processing this claim.

WCB #67-167 February 8, 1968

James W. Tooms, Claimant.
George W. Rode, Hearing Officer.
Tyler E. Marshall, Claimant's Atty.
Scott Kelley, Defense Atty.
Request for review by claimant.

Claimant had been a truck driver for some 28 years. He suffered a back injury while lifting and appeals a determination award of 10% loss of an arm by separation for unscheduled disability for aggravation of a preexisting condition. Claimant suffers from being overweight and lack of motivation. There was a complete absence of objective findings to substantiate claimant's subjective complaints. He is unable to pass the ICC physical, so as to qualify as a truck driver. He doesn't want to do any work which would pay less than a truck driver. The examining doctors found "reason to believe that he may be conciously exaggerating his symptoms." Claimant can barely walk, when he knows he is being observed, but otherwise walks very well. The physical tests for motion show inconsistent results. Claimant had substantial preexisting arthritis. The Hearing Officer affirmed the determination, and the WCB affirmed.

WCB #926 February 14, 1968

L. M. Elkins, Claimant.
Harold M. Gross, Hearing Officer.
Robert M. Christ, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.
Request for review by Claimant.

Claimant had a noncompensable back injury on January 1, 1963. The symptoms from this had cleared by the time that he suffered a compensable back injury from a fall on August 28, 1964. This claim had been closed by the SIAC, but was reopened on June 15, 1966 by the SCD for further medical treatment. The claim was again closed on December 1, 1966, with an additional award to permanent partial disability of 25% loss function of an arm for a total of 50% loss function of an arm for unscheduled disability. Apparently a laminectomy was performed. It is from this closing that the claimant appeals. Claimant has had separate surgical repairs on the dorsal spine and lumbar spine. The award of 25% loss of function for the dorsal spine is not contested, except that the SCD thinks it was too high. The controversy is over the lumbar spine award. Although the claimant can still perform his job, many of his activities have been limited. The Hearing Officer increased the lumbar award to 35% loss of function of an arm, for a total permanent partial disability award of 60%. The WCB affirmed, noting that this was an admittedly serious injury, and the award so indicated. The claimant also has spina bifida occulta in the sacral area, but this was considered irrelevant.

WCB #67-870 February 15, 1968

Charlie Parker, Claimant.
John F. Baker, Hearing Officer.
Marvin S. Nepom, Claimant's Atty.
Esdon Wetzel, Defense Atty.
Request for review by Claimant.

Appeal from award of 50% loss function of an arm for scheduled disability. Claimant is a 59 year-old dishwasher who sustained injury to his left shoulder when he slipped and fell on a wet floor. The diagnosis was a contusion of the left shoulder. Subsequent examination revealed that there was swelling in the left arm and shoulder, and the left bicipetal tendon was torn from its origin at the superior glenoid notch. Arthrography (air injection of the joint and X-rays) was performed, which showed a ruptured musculo-tendinous cuff. An arthoplasty was surgically performed, but was apparently a failure. Claimant was unable to raise the arm at the shoulder. He could flex it forward about 15 degrees, abduction was lacking. There was a long, well-healed, non-tender scar. The acromion precess had been removed. The deltoid appeared to contract to a minimal extent, although it was extremely weak, but apparently not paralyzed. When the doctor placed the arm in abduction, claimant was unable to hold it there. This is wasting and deformity of the shoulder muscles. However, the grip is normal, wrist and elbow motion is not impaired. Some shoulder motion remains, backward and a little forward. The claimant is able to touch his left hand to his face without extreme bending of the neck. Claimant has not

attempted to look for work. The Hearing Officer affirmed the determination of 50% loss function. On review the claimant urged 100% loss function, but the Board said this would be against the evidence, as there was still use in the arm. The Board did, however, modify the award to permanent partial disability of 90% loss function of an arm.

WCB #67-850 February 15, 1968

Linda Bogard, Claimant.
Page Pferdner, Hearing Officer.
Dan O'Leary, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for review by claimant.

Claimant, age 25, was a frail woman who slipped and fell, spraining her right hand and wrist. This is an appeal from a determination of 5% disability of the forearm. The Vocational Rehabilitation Center tried to train her as an office worker, but she found that typing and operation of an adding machine caused her hand to swell and become painful. She tried a part-time job answering telephone and ringing a cash register, but the latter was too heavy for her. She has trouble doing housework as well. She had a history of two right wrist sprains, but the most recent was nine years old. Dr. Shilm found tenderness at the proximal end of the metacarpals of the index and middle fingers of her right hand with no other objective symptoms. Dr. Berg found sensitivity over the transverse carpal ligament on the dorsum, weakness of grip and pain on forced flexion of her right wrist. The Hearing Officer observed that the loss of grip was not considered at closing and increased the award to 15% loss of use of the right forearm. WCB affirmed, noting that the claimant also suffers from some swelling of the uninjured wrist, which contributes to the difficulty in determining the extent of disability.

WCB #67-531 February 16, 1968

Dean N. Doud, Claimant.

The review in this case had been ordered dismissed on January 23, 1968, for want of proper service on the State Compensation Department. On request for reconsideration the Board set aside the dismissal and reinstated the review and directed briefs to be filed on the merits. Though not cited by either party, the Board has taken special congnizance of Harp v. SCD, 84 Adv. Sh. 831. Though the posture of the proceedings differ, the discussion by the Court of whether "jurisdiction" was lost, has caused the Board to reexamine the matter of jurisdiction in this instance. Here the SCD received actual notice from the Board of request for review within the time allotted by law for the [illegible]. The Board will continue to construe procedural

WCB #67-1061 February 16, 1968

Carl Perry, Claimant.
Page Pferdner, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Gerald C. Knapp, Defense Atty.

Appeal from a determination of 25% loss of an arm by separation for unscheduled disability due to aggravation of a preexisting back condition for which claimant had been previously awarded 20% loss of function of an arm. Claimant has less than a seventh grade education and has had no experience other than that of a manual laborer and truck driver. He has been the latter for the last eighteen years and has been making more than $500 per month. He cannot lift anything now. Vocational Rehabilitation trained him in radio and television repair, but he presently doesn't have a job. He is 47. The Hearing Officer ordered the award increase to 45% loss of an arm by separation for unscheduled disability due to aggravation of a pre-existing condition. On review the claimant wanted total disability. Claimant also had a prior award of 15% loss of use of a forearm. WCB observed that the claimant had been able to work with his cousin as a radio repairman for a short while before the latter left the state. This is indicative that the claimant is able to regularly perform suitable work. Hearing Officer affirmed by the WCB.

WCB #67-609 February 16, 1968

Jesse J. Mayes, Claimant.
Harold M. Gross, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Earl Preston, Defense Atty.
Request for review by Claimant.

Appeal from a denial of May 2, 1967, of an additional award for aggravtion of a 1963 injury. Prior to 1963, claimant had been generally in good health and had a good work record save a spinal fusion in 1939, and a crushed leg in 1945. Claimant suffered a blow to his stomach with a sledgehammer on August 3, 1963, while lying flat on his back changing a screen on a rock crusher, and three days later he slipped and fell on a catwalk. He suffered pain in his legs, back, hips, tail-end, and right wrist. He has not worked since. This accident apparently caused an alteration in a previously asymptomatic abdominal aortic aneurysm. Surgery and subsequent medical treatment was necessary, and the SIAC paid the claim. On March 9, 1965, a hernia was removed for which the SIAC paid. The claim was closed by the SIAC on June 18, 1965, with an award of 50% loss of function of an arm for unscheduled disability and 10% loss of function of the right forearm for permanent partial disability to that area. The claim was reopened for a neurological examination on March 2, 1966, and it is the closing without award on May 2, 1967, from which the claimant is now appealing. It seems apparent that the claimant's condition has become progressively worse. At the closing time in 1965, the treating physician considered the claimant able to perform "light work." In a report of February 24, 1967, the treating physician reported, "I believe him to be no longer employable

in any capacity within his area of skills or experience." In summary, the worsening of the condition can be described in terms of increased numbness, greater difficulty walking, greater tendency to fall, greater frequency of pain, less ability to tolerate driving, and less ability to stand, sit or lift. The question is not whether the claimant's condition has worsened, but whether the conditions caused by the accidental have worsened. Much of the claimant's progressive problem is attributable to an arterial insufficiency. It is possible to medically duplicate the claimant's symptom by clinically restricting the flow of blood to his legs. This arterial insufficiency preexisted the accidental injury, and it appears that the State Compensation Department accepted responsiblity for the surgical procedures of questionable, causal relation to the accident which benefitted, rather than aggravated, the underlying problem. The problem is complicated by the fact that the claimant has been off the labor market for three years before this claim for aggravation arose, as he has been drawing total disability from Social Security since 1964. The claimant wanted total disability. The Hearing Officer was of the opinion that permanent total disability required that the compensable injury be the exclusive precipitating cause. Here, "it would appear that the accidental injury of August 6, 1963, and those factors secondary to it, are not the exclusive condition permanently incapacitating the workman from regularly performing any work, but simply one of the contributing causes resulting in his disability to this degree." The Hearing Officer was of the further opinion that the evidence provided no basis for determining the extent of the contribution. There must be evidence to support the conclusion of the finder of fact, not speculation, surmise or conjecture: Robertson v. SIAC, 114 Or 394; Stuhr v. Barkwill, 215 Or 285; Anderson v. Sturhm, 209 Or 190; Lemons v. Holland, 205 Or 163; Wintersteen v. Semler, 197 Or 601. Where, as in the present case, the evidence discloses two or more possible inferences as to the cause of the claimant's disability, for only one of which the defendant is responsible, the claimant has the burden of proving which applies, and liability does not attach unless the evidence discloses that the cause for which the defendant is responsible is the more probable: Crevse v. Munroe, 224 Or 174; Marshall v. Bartel, 227 Or 364; Eitel v. Times, Inc., 221 Or 585; Ritter v. Swils, 206 Or 410; Simpson v. Hellman, 163 Or 357. Accordingly the Hearing Officer dismissed the claim, finding that the claimant has failed to prove a compensable aggravation. On review the claimant makes much of the Hearing Officer having stated the injury must be the "exclusive precipitating factor" to make the claim for increased compensation valid. The Board feels this is a poor choice of words, and bases its opinion on whether the injury was a "substantial precipitating factor." The majority of the Board concludes that the claimant has not suffered an aggravation of conditions produced by the accidental injury. Mr. Callahan dissents. He believes the medical evidence by its preponderance establishes that the compensable injury is a substantial contributing cause. "This workman should have had an award of permanent total disability, when the claim was first closed." Mr. Callahan continues, "The Hearing Officer should be reversed and the workman granted an award of permanent total disability." The majority, however, affirms the order of the Hearing Officer, denying the claim for aggravation.

WCB #67-963 February 20, 1968

H. A. McCarty, Claimant.
H. L. Seifert, Hearing Officer.
Richard P. Noble, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Claimant.

Appeal from a determination of permanent partial disability equal to 15% loss of use of the right arm. Claimant was a 62 year-old carpenter who hurt his arm while carrying a piece of plywood. He was first treated for a ruptured right biceps tendon, and then operated on for a traumatic rupture of the distal biceps tendon. Psychological evaluation revealed a general positive attitude, but the arm tires very quickly, and apparently the claimant will not be able to return to work as a carpenter. Dr. Logan found a limitation of pronation of approximately 20 degrees on the right, tenderness over the radiohumeral joint in the lower scar and insertion of the biceps tendon, and subjective complaints. The Hearing Officer ordered the compensation award increased to permanent partial disability equal to 35% loss of use of the right arm. Attorney fees were allowed to the extent of 25% of the increased compensation, not to exceed $350.00. On review the WCB expressed disapproval of the claimant's absence at the Hearing, and affirmed the Hearing Officer's decision with the exception that the dollar limitation on the attorney fees was stricken.

WCB #67-656 February 20, 1968

Janice Marie Hough, Claimant.
Harold M. Gross, Hearing Officer.
Robert L. Ackerman, Claimant's Atty.
John Jaqua, Defense Atty.
Request for review by Claimant.

Claimant is a 26 year-old panel patcher who suffered a back injury arising out of a slip and fall on an oil slick. This is an appeal from a determination of permanent partial disability equal to 5% loss of an arm by separation for unscheduled disability. The subjective complaints consisted of a shock-type pain in her right leg which is periodic, a fairly constant pain in her low back, and difficulty bending. She had no history of prior back problems. The diagnosis during the period of temporary total disability spoke of suspected herniated disc, etc., but the final examinations no objective findings, save an osteoma (bone tumor) in the ilium area, which was not considered to be a result of accident. Dr. Stainsby concludes that "I can find no evidence of nerve root dysfunction or any neurological abnormality at the present." The Hearing Officer dismissed the claim for additional disability and the WCB affirmed. The WCB observes that it is not bound to accord full weight or make an award of disability commensurate with all subjective complaints.

WCB #67-1122 February 21, 1968

Robert D. McGilvra, Claimant.
H. L. Pattie, Hearing Officer.
Garry Kahn, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for review by Claimant.

Appeal from a determination granting claimant "an award for permanent partial disability equal to 15% loss of an arm by separation for unscheduled disability due to aggravation of a pre-history (sic) condition." Claimant sustained a sprain in the thoracic region of his back while lifting 100-pound sacks on February 17, 1967. He had preexisting degenerative arthritis in that area. He had also suffered an earlier accident in November of 1966, which had developed pain between his shoulder blades. For this he had obtained no medical services, but had reported the pain. The claimant had had a laminectomy and a fusion to the lumbar spine in 1962. The aggravation claim is based on the aggravation of the November 1966 sprain. No limitation of motion was found, but it is apparent that the claimant must be restricted to light work to avoid subsequent injury. The Hearing Officer dismissed the claim for additional compensation, and WCB affirmed.

WCB #67-329 February 21, 1968

Raymond Trimble, Claimant.
Page Pferdner, Hearing Officer.
Alan R. Jack, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for review by Department.

Appeal from a notice of denial of claim for low back injuries. Claimant alleges a back injury while pulling on the green chain, and that the pain did not show up until the afternoon following his last day of work thereby explaining his failure to report or complain immediately of his condition. Claimant has a long history of prior back difficulties, all of which occurred in California. The X-ray diagnosis revealed "degenerative arthritis lumbar spine associated with scoliosis and schmorling of the vertebral bodies." Here there was no unusual occurrence to which the injury can be attributed, but the same is not necessary under Olson v. SIAC, 222 Or 407. The Hearing Officer summarized the back condition as follows: "A review of all the evidence reveals that the claimant has a 'glass back', easily injured by any demand made upon it. He could be descibed as an accident looking for a place to happen." Since the claimant had not done any work anywhere else, it was concluded that pulling on the green chain was the source of his difficulties. The claim was ordered accepted. WCB affirmed. The Hearing Officer taxed $350 attorney fees, and the WCB an additional $200 against the department.

WCB #67-1103 March 4, 1968

Vincent S. DeVaul, Claimant.
Page Pferdner, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for review by Claimant.

Appeal from a determination of 15% loss of use of the right middle finger and 20% loss of use of the right ring finger. Claimant, 47, is a machinist and has been for 25 years. The distal phalanges of the second and third fingers of his right hand were crushed. Shortly after he returned to work, a bone fragment erupted through the tip of his ring finger. Claimant suffered a minimal loss of the bony tuft of his ring finger, complete loss of sensation on the tip of his ring finger, complete loss of sensation on the tip and radial aspect of the distal phalange of his middle finger, and the nails of the injured fingers are now deformed. He is also unable to fully extend the distal phalange finger. There is evidence that the loss of sensation creates substantial problems for him in his occupation as a machinist. Relying on Kajundzich v. SIAC, 164 Or 510, the Hearing Officer rejected consideration of unusual occupational difficulties. "The statute applies to all workmen alike." However, the Hearing Officer did award additional compensation, so that the total award would be 25% loss of use of the right middle finger, 25% loss of use of the right ring finger, and 10% loss of use of his right thumb for opposition. On review the claimant urged that the reliance on the dicta in Kajundzich v. SIAC was improper, but the Board didn't see fit to cease adhering to the principle. The WCB raised the question as to the propriety of the award of 10% loss of the thumb in a case where both the thumb and the index finger were uninjured, but chose not to disturb it. The WCB affirmed.

WCB #67-349 March 8, 1968

Nancy Allen, Claimant.
George W. Rode, Hearing Officer.
Maurice Engelgau, Claimant's Atty.
John Jaqua, Defense Atty.
Request for review by Employer.

Appeal from a notice of denial. The claimant was employed by Georgia-Pacific feeding veneer into a gluing machine, and alleges a shoulder injury occurred as a result of pulling the veneer and then shoving it into the machine. The first report to the employer was on February 28, 1967. The alleged date of injury was January 30, 1967. Claimant had worked the entire month of February. Claimant stated, "I worked with this pain until I could stand it no longer, thinking I would get used to it and quit hurting." Defendant attempted to impeach the claimant by the introduction of another medical report on an unrelated injury, but admission of the report was refused. There is some question raised as to the actual date of injury, as the treating doctor does not describe any specific incident of a sudden onset of pain, but rather indicates that the conditon may have been caused by the motion of loading the gluing machine, and

the muscle strain involved. The Hearing Officer found that a sufficient explanation for the late reporting of the claim had been made and ordered the claim accepted. On review the Board concluded, "that taking all of the record from its four corners, it cannot be said that there is insufficient evidence to conclude that a compensable injury occurred as alleged. WCB affirmed.

WCB #67-91 March 8, 1968

Lawrence E. Andrews, Claimant.
Harold M. Gross, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Department.

Appeal from a closing order finding claimant's condition medically stationary and awarding permanent partial disability. Claimant's conditon was eventually found to be not medically stationary. Claimant is a 50 year-old welder, who was initially injured on November 15, 1962, when a 96-pound piece of iron fell about ten feet, striking him first on the helmet and then on his ankle, fracturing the latter. As a result of this the claimant suffered a series of problems including ulnar neuritis of the left arm, compression strain to the cervical and thoracic spine, and a complex fracture of the left ankle, which has eventually resulted in its fusion. The claimant also suffered several other problems which required medical attention, but from which there is no permanent partial disability. There is residual disability to the claimant's arm, ankle, and spine. In addition to these problems, the claimant, as a secondary result of the traumatic injury, suffered an aggravation to a preexistant condition of muscle fatigue. It is this latter condition which the Hearing Officer found in need of further treatment. Apparently the claimant suffers from muscle tension which causes fatigue of the muscles, which in turn causes further muscle spasm or tension. The problem can be treated by some sort of therapy. The evidence is that if the claimant receives no therapy, he will rapidly deteriorate and become permanently totally disabled. If he receives treatment, but keeps working full-time, his condition will probably gradually get worse. If the claimant works half-time and receives treatment, the doctor believes there is a 90% chance that the claimant will show a gradual improvement until he can do the work of a machinist without causing any trouble. There was evidence that the treatment was not only pallative but also curative. On this basis the Hearing Officer found that the claimant should be awarded temporary partial disability of 50%.
On review the problem centered around the computation of temporary partial disability. The briefs of the parties discuss ORS 656.212 and attempt to distinguish between earning power and wages. The Board concludes that though the terms are not synonymous, actual performance of work and wages received are proper items of evidence for consideration of the issue of loss of earning power. The Board notes this in this case for the three months prior to the hearing, the claimant was unable to work 9, 6, and 5 days respectively. This not only reflects an improving situation but is in direct conflict with a finding that the claimant can only work half-time. Inasmuch as the whole

theory of compensation with respect to a temporary condition is that the condition will improve, any order setting a fixed percentage with respect to a non-permanent condition must necessarily be conjectural and speculative. In abscence of further evidence and in order to give employers and insurer some semblance of a yardstick from which their varying liability may be determined, the Board policy is and will be to authorize employers and carriers to apply actual work and actual wages to determine the formula applicable to temporary partial disability compensation. The WCB accordingly modified the order directing the Department to pay temporary partial disability based upon the proportionate loss of wages attributable to the injury. The Hearing Officer had also attempted to maintain jurisdiction of the permanent partial disability award, but the WCB found that the award was premature so that the appropriate procedure would be for the Department to again submit the matter for determination, when the claimant's condition became medically stationary.

WCB #67-1088 March 8, 1968

Francis Wayne Edmonds, Claimant.
J. David Kryger, Hearing Officer.
Herbert P. Galton, Claimant's Atty.
James Larson, Defense Atty.
Request for review by Claimant.

Appeal from a determination of 30% loss of function of the left arm for a left shoulder injury of April 27, 1966. The claimant was 59 years old and had worked as a janitor most of his life, save 10 years when he had driven a truck. The diagnosis was a fracture of the left humerus. Surgery was performed and the fracture was found to be badly comminuted and further, there was "not enough bone remaining in the upper fragment to afford fixation." Dr. Logan's examination revealed a "post-fracture proximal end of the left humerus with resultant avascular necrosis of the left humeral head and chronic dislocation of the left shoulder joint." The reported ranges of motion are as follows: Internal rotation restricted by 60% of normal, limitation of 45% of normal in elevation of the left shoulder, loss of abduction of the left shoulder of 50 degrees. The doctor also elicited a loud audible popping in the shoulder on forward elevation of the left arm with pain. The deltoid muscle is weak by comparison to the right as is the triceps. The supraspinatus, the intraspinatus and the terres minor are markedly weakened on the left. The pectoralis major is present on the left, but weakened compared to the right. The claimant has about one-half the strength in his left hand as he does in the right hand. The X-rays indicated a "complete loss of the proximal end of the humerus from an anatomic standpoint." There was evidence that this injury would have a substantial effect on the claimant's employability. However, an award for a scheduled disability is one which is limited as defined in the statute and the amount of compensation granted by the statue is exclusive, regardless of the effect of the injury on employability: Chebot v. SIAC, 152 Or 255; Kajundzich v. SIAC, 164 Or 510; Ben Scoggins, WCB #67-92. Further the Hearing Officer found that the claimant was not entitled to any unscheduled disability. The arm radical includes the elbow joint, the shoulder joint and and the intervening structures. The humerus is one of the intervening structures.

(See C. J. Tourville, WCB #67-301, and Earl L. Mattson, WCB #67-803). The Hearing Officer then awarded scheduled permanent partial disability equal to 65% loss of function of an arm. On review the claimant wanted either total disability or an award of unscehduled disability. The WCB affirmed the Hearing Officer.

WCB #67-633 March 12, 1968

Dale Richardson, Claimant.
John F. Baker, Hearing Officer.
Tyler E. Marshall, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Claimant.

Appeal from a notice of denial. Claimant alleges injury to his back while employed as a laborer on April 11, 1967. Claimant began work for the employer at noon April 10th, and terminated work at noon April 12, 1967, thus working two full days. He had a previous back history, which consisted of a fusion in February, 1965, and a refusion in November, 1965, for which the claimant received 50% disability. The question here is whether the injury, if any, is compensable. The claimant was doing cleanup work with a fellow employee, when his back "popped." Claimant alleges immediate reports of this to the fellow employee, and soon thereafter to the supervisor. No one remembering these reports was located. Claimant did not know the names of those to whom he reported, except that the fellow employee he called "Jim." The employer testified that of the forty to fifty employees he could remember, none by the name of "Jim"; was unable to locate same. Actual notice to the employer was mailed April 19, 1967. There is evidence that the claimant told his employer that "he was stiff all over from the work," when he discontinued his employ. The Hearing Officer concluded that the discrepancies of the claimant's case were too many and affirmed the denial of the claim. The majority of the WCB reversed, holding that "the alleged discrepancies upon which the Hearing Officer relied to deny the claim are not deemed pertinent to the issue and have no bearing upon whether a disability was produced by the work." The SCD was ordered to pay attorney fees of $700.00. Mr. Cady dissented on the grounds that the issue was essentially one of fact, and the Hearing Officer should not be reversed, because there was substantial competent evidence to support his conclusion.

WCB #67-934 March 12, 1968

John H. Hill, Claimant.
George W. Rode, Hearing Officer.
E. B. Sahlstrom, Claimant's Atty.
Earl Preston, Defense Atty.
Request for review by Claimant.

Claimant was a 60 year-old timber sorter with a back injury. The case reached the Hearings Division on the issues of temporary total disability and permanent partial disability. The case had not been processed through the Closing and Evaluation Division. It was found that no temporary disability was due, and it

was stipulated that the matter would be referred to the Closing and Evaluation Division for a determination on the permanent partial disability. The Claimant appealed. The Board concludes that the Hearing Officer could either have proceeded to resolve the issues or remand the matter for the full administrative process contemplated by the statute. In either event, no error would exist where the procedure was taken upon agreement of the parties. The WCB affirmed, expressing frustration as to why the appeal was taken.

WCB #67-376 March 12, 1968

Marcellus R. Brudana, Claimant.
Page Pferdner, Hearing Officer.
Charles Paulson, Claimant's Atty.
Richard F. Porter, Defense Atty.
Request for review by Claimant.

Claimant suffered a compensable back injury in a fall from a stepladder on February 23, 1966. The issue is temporary disability and permanent partial disability. Claimant was initially overpaid for temporary disability, because his claim form indicated that he was married and had three children. His testimony at the hearing indicated that he had been living with a woman not his wife and had one illegitimate child which was born after the period in question. The claimant had a felony conviction in 1957, and entered the county jail for larceny on June 2, 1966. It was observed that the fact that the claimant was in jail does not of itself cause a workman to forfeit workmen's compensation benefits. The purpose of both the criminal statutes and the Workmen's Compensation statutes is to rehabilitate, and there is no reason why one part of the rehabilitation process should stop merely because the other is taking its course. On December 23, 1966, a retroactive determination was issued which adjusted the rate of temporary disability to that reflecting the proper family status and authorized retroactive cessation of temporary disability payments as of May 26, 1966. There was no medical authorization for the finding that the claimant was medically stationary. The Hearing Officer affirmed the finding that the claimant was medically stationary as of May 26, 1966. The WCB adopted medical reports of August 7, 1967, which indicated that the claimant had become medically stationary as of August 1, 1967, and accordingly ordered payment of temporary total disability from May 26, 1966, to April 30, 1967, and temporary partial disability to the extent of 50% for May, June and July of 1967. The Hearing Officer also awarded no permanent partial disability, he being of the opinion that since no physical defects were recorded by the claimant when he entered Rocky Butte, and his present physical complaints originated about October 1966, while he was in Rocky Butte; there was no reason to believe they were causally connected to the February injury. The Hearing Officer relied very heavily on the fact that the claimant had a substantial criminal record, an illicit spouse, an illegitimate child, and and the inaccurate claim form to indicate that the claimant's testimony was not worthy of belief. The WCB reversed denial of permanent partial disability, observing that there was no basis for the assumption that something happened in Rocky Butte, and that the continuing symptoms are consistent with the original injury. Accordingly an award was made for unscheduled back disability equal to the loss by separation of 15% of an arm.

WCB #67-217 March 12, 1968

James A. Anderson, Claimant.
George W. Rode, Hearing Officer.
E. G. Sahlstrom, Claimant's Atty.
John McCulloch, Defense Atty.
Request for review by Claimant.

Claimant suffered a neck, shoulder and head injury after being hit on the head by a falling snag. He was working as a timber bucker. The claimant appears to be a man of very limited capabilities, and an attempt to retrain him for janitorial work apparently was not successful. A determination was made of 50% loss of function of an arm for unscheduled disability. Claimant's present complaints include limitations of sight and hearing, continuous pain in his neck, shoulder and arms, especially his left arm, headaches and inability to do any heavy lifting. The claimant is also of the opinion that the blow to the head impaired his memory. The Hearing Officer found that the complaints were either exaggerated or subjective and not supported by the extensive medical findings. However, Dr. Myers did find a chronic cervical strain syndrome of mild to moderate severity, although he indicated that the claimant could return to light work. Apparently on this basis the award of permanent partial disability was increased to the equivalent of 60% loss function of an arm. On review the Board protested the lack of a brief or argument on the claimant's behalf. The WCB reviewed the record and affirmed the Hearing Officer.

WCB #67-499 March 18, 1968

Harriet Shlim, Claimant.
H. L. Pattie, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for review by Claimant.

Claimant is a 21 year-old college girl who suffered a neck and shoulder injury in a vehicle overturn. This is an appeal from an award of 5% of an arm by separation for unscheduled disability. Claimant suffers constant pain, which is especially bothersome when she studies, drives, or bends over. She has had to give up tennis and similar athletic activities, because of the neck and shoulder pain. In reliance on Wilson v. SIAC, 189 Or 114, it was held that pain itself was not compensable, and here it appeared that the disabling effects of it were minimal. However, the Hearing Officer ordered the permanent partial disability increased to a total of 10% loss of an arm by separation for unscheduled disability to the neck and right shoulder. WCB affirmed.

WCB #871 March 18, 1968

O. L. Reames, Claimant.
Page Pferdner, Hearing Officer.
Herbert B. Galton, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for review by Claimant.

Claimant suffered a small laceration and a concussion, when he was struck in the forehead by a springloaded current collector on a crane trolley. He was employed as a construction electrician. Subsequently he went to work as a Third Assistant Engineer in the merchant marine. The determination allowed no permanent partial disability. The claimant alleges hearing loss, visual loss, partial loss of use of the right arm and unscheduled disabilities for dizziness and headaches. The claimant has suffered two other compensable injuries since the accident at issue, and his own testimony indicates that some of the claimed disability, such as the arm symptoms, were noted for the first time after one of the succeeding accidents. As to the visual loss, an ophthalmologist reported the claimant's uncorrected vision in each eye was 20/30 and the corrected vision is 20/20. ORS 656.214 (2) (h) & (i) authorize permanent partial disability award for loss of vision "measured with maximum correction." So measured, the claimant has no loss of vision. As to the hearing loss, the defendant's doctor rated the hearing loss at 15%, and the claimant's examination indicated 25%. There was also evidence that the claimant had fired an average of 20 rounds from a large caliber rifle each year for the past several years. Claimant testified that he did not have any prior hearing problem, but the Hearing Officer stated, "I do not believe him." There was no other evidence as to the claimant's hearing ability prior to the accident. The Hearing Officer gave substantial stress to an article which was <u>not</u> part of the evidence entitled, "The Hearing Loss of Malingerer." From this he concluded, "The method of audiometry is not objective and without the cooperation of the listener; no meaningful information can be garnered from the tests." Whereupon the Hearing Officer found that any hearing loss the claimant might have was not the result of this injury. The Hearing Officer discounted the claimed extent of the severe headaches, dizziness, nausea and blurred vision, and awarded a permanent partial disability equal to 15% loss of an arm by separation for unscheduled disability. He also concluded that the arm and hand injuries, if any, were from another accident. On review the WCB affirmed the 15% finding on the post concussion syndrome, observing that if the claimant had more disability than that, he would not be employable in the merchant marine. As to the hearing problem, the Board criticizes the use of text material not properly a part of the record. "Counsel for claimant complained of this and proceeded to present to the Board on review other medical texts not in use at the hearing. Even on Hearing, the Board concludes that such texts should only be used in conjunction with expert witnesses who, by their testimony, support the conclusion of the text (<u>ALR 3rd Vol. 17, Pg 993 et seq.</u>)"
The majority of the Board then went ahead and took judicial notice of the fact that "any test dependent upon the response of the patient is subject to interpretation." The majority thereupon affirmed the Hearing Officer. Mr. Callahan dissenting, concludes that an award should be made for the hearing loss and also for permanent injury to the ulnar nerve affecting the right forearm.

WCB #67-1179 March 18, 1968

Jay Glenn Krewson, Claimant.
Page Pferdner, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for review by claimant.

Appeal from a determination of no permanent partial disability. Claimant suffered a lumbosacral strain while pulling heavy timbers on the green chain. A plaster body cast was applied on two occasions and X-ray studies revealed a spina bifida occulta, but a myelogram was negative. One doctor considered claimant's subjective symptoms to be functional. The Hearing Officer observed that the claimant had been divorced and had remarried during the injury period, and that he had been a medical corpsman while he was in the National Guard. The Hearing Officer further stated that he considered these bits of evidence significant, and concluded the claimant's complaints were either psychogenic or simulated. No permanent partial disability was allowed. The WCB affirmed. It was also observed that in 1959, the claimant had sustained a back injury, when the car in which he was riding struck a bridge abutment while traveling around 135 M.P.H. He had recovered from this in about a week.

WCB #67-584 March 18, 1968

James L. Holben, Claimant.
H. L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Wayne A. Williamson, Defense Atty.
Request for review by Claimant.

Claimant was a 69 year-old night watchman. He struck his head against an overhead beam. There is evidence that he was unconscious for about 15 minutes after the accident. He was subsequently treated for concussion and strain, and sprain of the back. The determination allowed disability equal to 10% loss of an arm by separation. Neither the Hearing Officer nor the WCB increased the award. Claimant had no history of any physical infirmities, but now must work at lighter jobs than before. Nonetheless, he is holding a full-time job as a janitor in a restaurant. He must rest after mopping for 30 minutes, however. He cannot cut wood, paint, lift or carry with his right arm, as it is weak. His problem seems to be cervical strain in the C-2 to C4 area, complicated by degenerative joint disease, which was apparently aggravated by the injury. The Hearing Officer ruled, "While an existing predisposition to an infirmity does not furnish grounds for denying compensation, when accidental injury substantially causes the disability, where the injury was due to the normal progress, development, or manifestations of an existing infirmity, unaffected by the employment as a proximate contributing cause, it cannot be regarded as having arisen out of the employment." See 58 Am. Jur. Workmen's Compensation Law, Sec 247. Here, it was felt that the award fully recognized claimant's pain and weakness and the disability as it affected his job. On review the Board was favorably impressed by the industry and motivation of the workman, but sustained the Hearing Officer under the substantial evidence rule.

WCB #67-982 March 18, 1968

Ellen L. Berry, Claimant.
H. L. Seifert, Hearing Officer.
Gary G. Jones, Claimant's Atty.
Stanley E. Sharp, Defense Atty.
Request for review by Claimant.

The claimant, a 62 year-old waitress, fell, fracturing her right wrist. The determination allowed 15% loss of function of the forearm. The bone of contention is whether the claimant sustained additional unscheduled disabilities. Claimant had received a previous award of 20% loss of function of an arm for unscheduled disability arising out of a fall on her tailbone and head in October 1964. The present complaints in summary consist of the inability to wear a girdle, dizzy spells, inability to sleep on her back, weakness in her right arm, inability to sit on a hard surface without a cushion, numbness in the back of the right leg when sitting on a hard surface, difficulty with lifting and bending, pain in the right thumb when lifting, and pain in the back of the head and neck. It is observed that these are substantially the same complaints on which the award for the 1964 injury was based. No unscheduled disability was allowed. WCB affirmed.

WCB #67-1302 March 18, 1968

Emma Jeanne Bergh, Claimant.
H. L. Seifert, Hearing Officer.
Bruce W. Williams, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for review by Claimant.

Claimant, a 29 year-old restaurant worker, fell on May 17, 1967. She was hospitalized under a diagnosis of lumbosacral strain and cervical strain. She was released to full duty on May 31, 1967, by the doctor under whose care she had been treated in the hospital. On June 20, 1967, claimant returned to work at a different job. She continued to receive treatment until August 22, 1967, when the then currently treating physician pronounced that her condition had become stationary, and that an apparently complete recovery had occurred. The claimant is not now working and is taking palliative treatment for back complaints in the form of chiropractic treatment. No permanent partial disability was found. WCB affirmed.

WCB #67-1141 March 18, 1968

Barbara J. Barnett, Claimant.
H. L. Seifert, Hearing Officer.
Jason Lee, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.
Request for review by Claimant.

Claimant suffered a lower back injury in a fall. She was treated for acute back strain and was prescribed a back brace. X-rays of the lumbar spine showed normal alignment and no evidence of fracture, dislocation or other osseous abnormalities. Claimant was 27 years old; five feet, six inches tall and weighed 216 pounds. Objective findings were minimal to nil. The Hearing Officer concluded that the subjective symptoms (pain in stooping, lifting and pushing) were inconsistent with the objective findings and that the continued overweight condition of the claimant was causing the continued problems. On review the claimant asserts there has been a callous disregard of the medical testimony and of the claimant's testimony. There is no place for a callous administration of the claims of injured workmen, nor is there any place for the unwarranted charges of callous treatment: Brazeale v. SIAC, 190 Or 565. Denial of permanent partial disability was affirmed.

WCB #423 March 25, 1968

Edwin Stricker, Claimant.
H. L. Pattie, Hearing Officer.
Milton O. Brown, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for review by Claimant.

Claimant is an unskilled laborer who suffered fractures of two of the metatarsal bones of his left foot. The injury took place on March 10, 1966, and the determination allowed temporary total disability to May 16, 1966, but no permanent partial disability. There were apparently medical bills subsequent to this date. The Hearing Officer ordered these bills paid, but sustained the finding that the claimant was medically stationary as of May 16, 1966. A majority of the Board concurred. Mr. Callahan dissenting, wanted a reexamination of the question of whether the claimant was medically stationary, as the nature of these subsequent medical treatments was not available at the Hearing. As to the question of permanent partial disability on the basis of the most recent report by Dr. Cohen, an award of 20% loss function of the left foot was ordered by the Hearing Officer. The evidence was that the claimant walked with a limp of his left foot, and that it required effort to walk on the ball or toes of his left foot. There was some atrophy of the left calf, but not the foot itself. There was a very minimal amount of restriction of motion in the left foot, and no loss of strength except for the inability to walk on the ball of the foot. Claimant still has pain. While permanency cannot be proved beyond the shadow of a doubt, the fact that the limp and pain still persist 18 months after the injury is convincing evidence that the disability is permanent. WCB affirmed this award of permanent partial disability.

WCB #67-443 March 25, 1968

Frances Schrier, Claimant.
John F. Baker, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for review by Claimant.

Claimant suffered an injury to her right arm in a fall April 14, 1966, while working as a cook. The determination allowed no permanent partial disability from which the claimant appeals. Claimant suffers from pain and loss of strength which makes it difficult to do the lifting necessary for her to carry on as a cook. She is right-handed. The medical evidence reveals a minor flattening of the posterior portion of the deltoid. There was an almost normal range of motion with, as most, a 5% limitation of abduction. Claimant could not put her right arm over the left side of her face as far as she could put the left arm over the right side of her face. Backward extension, internal rotation and forward abduction were each limited about 5 degrees. The right arm was elevated more slowly than the left, with complaint of some pain. At the time of injury, claimant had sustained a fracture of the greater tuberosity at the upper end of the right humerus. This had healed solidly and without deformity. Accordingly an award was allowed equal to 10% loss of use of the right arm. WCB affirmed.

WCB #67-780 March 25, 1968

Cheryl Hayward, Claimant.
H. L. Pattie, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Roger Warren, Defense Atty.
Request for review by Claimant.

Claimant suffered a contusion of her wrist and hand on September 6, 1966. Conservative treatment was not successful and surgical exploration was recommended on May 12, 1967. There was no evidence that the claimant was medically stationary at the time. The claimant was willing, but the claimant's obstetrician recommended postponement until after the birth of a child which was expected in September. Temporary total disability payments were not made subsequent to May 12, 1967, although there was evidence that the claimant would have worked until August 15, 1967, had it not been for the wrist problem. The Workmen's Compensation Board authorized suspension of temporary total disability payments on June 21, 1967. Despite a claim for penalties for the unpaid temporary total disability between May 12 and June 21, the employer offered no evidence whatsoever to show any reasonable explanation for failure to pay compensation as designated. It was therefore concluded that the delay and refusal to pay was unreasonable and a 25% penalty was assessed as provided by ORS 656.262. Attorneys' fees were not allowed, pursuant to ORS 656.382, because the tender and refusal of surgery was considered such as to make the resistance of payment not unreasonable. The Hearing Officer further ordered payment of temporary total disability to August 15th. On appeal the sole question was whether the

temporary disability payments should have continued beyond August 15th. The WCB held that the pregnancy was a subsequent intervening event solely within the control of the claimant. "When the obstetrician and the claimant approve the recommended surgery, it will be performed, a further period of temporary total disability will be reinstated, and in the end result the employer or its insurer will have paid the same benefits had the pregnancy not intervened. Otherwise the claimant would in effect be paid for time loss associated solely with her prenancy."

WCB #67-85 March 26, 1968

Irven S. Boorman, Claimant.
J. David Kryger, Hearing Officer.
Robert L. Ackerman, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for review by SCD.

Claimant is a 51 year-old lumber mill worker. He was struck in the face by a piece of roller chain, and as a result has his right eye enucleated and suffered impairment of vision in his left eye. The determination awarded 100% loss of vision of the right eye and 63% loss of vision of the left eye for a binocular vision loss of 72%. On the matter of temporary disability, the claimant objects to the retroactive termination thereof; and the non-payment thereof during Vocational Rehabilitation. The Hearing Officer denied additional temporary disability on both counts. ORS 656.268(2) is not to be interpreted as prohibiting cessation of payments prior to the date of the determination. As to the second count, the "medically stationary" of ORS 656.268(1) is limited to medical treatment alone and not rehabilitative processes: Forest C. Lamm, Claimant, WCB #67-197. As to permanent disability the claimant was seeking permanent total disability. The Hearing Officer distinguished the case from Chebot v. SIAC, 106 Or 660, 212 P 792(1923) and and allowed same. Claimant has a ninth grade education and is experienced in all descriptions of sawmill and logging work. He also has experience as a hydraulic miner and as a truck driver. He is precluded by his poor eyesight from doing any of these things. He is also experienced at picking beans, but his near vision is such that he cannot see the beans. He has lost color vision and can read for a few minutes at slow speed with a magnifying glass. He can observe television from a distance of three feet. He cannot work in his garden without assistance to indicate where the row is. With these facts and the medical report which indicated that the claimant has lost 88.8% of the vision of his left eye, the Hearing Officer concluded that the "useful vision" referred to in Chebot, supra, meant "industrial usefulness," and as such, there was no "useful vision." Accordingly, total disability was allowed.
On review the WCB reversed, holding that Chebot precluded an award of total disability. The Board referred to a report of the Discharge Committee of the Workmen's Compensation Board which stated that the claimant was "not legally or industrially blind or about to become blind." The Board continued:

> One problem encountered on review is the interpretation by the Hearing Officer of a medical report indicating the claimant had suffered a visual loss of 88.8% in the remaining eye. The Hearing Officer relied solely upon the figure of 11.2% visual efficiency in Dr. McCallum's report as indicative of the remaining vision.

Utilizing Dr. McCallum's report, the "Guides to the Evaluation of Permanent Impairment of the Visual System" and the statutory reliance upon corrected vision with reference to Snellen, the Board notes that there are factors of visual acuity, near vision, distance vision and visual fields which enter a proper determination.

Starting with Dr. McCallum's finding that the remaining eye has a visual acuity of 20/60. This factor alone would be rated as a 35% loss of vision. However, Dr. McCallum also reports a loss of near vision labeled a Jaeger 7, which reflects a 60% loss of near vision (Table 1, Page 6, 1958 issue A.M.A. Visual Guides). The A.M.A. Guides provide tables for combining factors such as distance loss and near loss and these produce a combined factor of 48% loss in the remaining eye. However, the further factor must be applied of loss of visual field, which in this case appears to be a 57% impairment. The final computation with respect to this eye, then combines the 48% loss with the 57% field loss, and this gives a combined value for the remaining eye of 78% impairment. It is this impairment that serves as the basis for calculation of the award.

When one takes the various combined factors set forth above and applies the statutory formula set forth in ORS 656.214(i) for binocular visual loss with loss 100% of one eye and 78% of the other, the binocular visual loss approximates 85% combined binocular visual loss.

Accordingly the WCB set aside the permanent total disability award and entered an award based upon 85% combined binocular visual loss.

WCB #67-552 March 26, 1968

Betty Lee Hergenrader, Claimant.
Page Pferdner, Hearing Officer.
David Greenberg, Claimant's Atty.
Wayne A. Williamson, Defense Atty.
Request for review by Claimant.

Appeal from a Notice of Denial. Claimant contends she has hypertrophic arthritis in her fingers as a result of folding about 1,500 shirts per day for a period of four years. She alleged the arthritis was the result of her fingers making contact with the shirt-folding machine several times per shirt. No claim was made by the claimant prior to April 1967. She had terminated her employment in September of 1966, giving remarriage as the reason. Further an insurance carrier (SIAC) not a party to this claim, had covered the employer prior to January 1, 1966. The Hearing Officer viewed the shirt-folding machine and found as a fact that the claimant did not "bang" her fingers on the machine, but that there was a light stroking contact. The written medical reports based on the hypothetical assumption that "she bangs her fingers on the table each time," were neither strong nor consistent in indicating that even "banging" could cause the stiff fingers. Accordingly the Hearing Officer found that the claimant had not sustained a compensable injury. The WCB sustained this finding and added that there was no timely notice as required by ORS 656.265, nor was there established a good cause or any cause for failure of timely notice.

WCB #67-1078 March 27, 1968

Anna A. McCarthy, Claimant.
H. L. Pattie, Hearing Officer.
Charles R. Paulson, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Claimant.

Claimant, a 60 year-old nurse's aide, sustained a back injury. The determination allowed unscheduled disability equal to the loss by separation of 15% of an arm and 5% loss of use of the left leg. The medical reports show a small amount of loss of motion on bending to touch the toes, none on the straight-leg-raising test other than some pain in the left leg and some atrophy of the left leg. Subjective complaints were numerous and included various aches and pains in the back and legs, also difficulty in sleeping. Three registered nurses and fellow employees testified that the claimant was a chronic complainer. The Hearing Officer concluded that the burden of proving additional disability had not been met. WCB affirmed.

WCB #67-491 March 28, 1968

Melitta Schaefer, Claimant.
Page Pferdner, Hearing Officer.
Herbert B. Galton, Claimant's Atty.
William H. Mitchell, Defense Atty.
Request for review by Claimant.

Claimant, 50 years old, sprained her right ankle while working as a maid for Emanuel Hospital. The diagnosis was right ankle sprain with hematoma. She did not respond well to treatment which consisted of physiotherapy, anodynes, local injections, and support stockings. Claimant complains of pain and swelling. The objective medical findings consisted of "minimal swelling about the right external malleolus, and perhaps some local tenderness." The Hearing Officer concluded that the pain and swelling was either psychogenic or was grossly exaggerated. He found some residual soreness and awarded permanent partial disability equal to 10% loss of use of the right foot. WCB affirmed, holding that the medical report evaluating the disability as 25%, was not controlling under the 1965 act.

WCB #67-1337 March 28, 1968

Vigo Birkhans, Claimant.
Page Pferdner, Hearing Officer.
Allen T. Murphy, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for review by Claimant.

This claim was initially denied and was remanded for acceptance in WCB #67-579 dated August 18, 1967. Pursuant to this order of acceptance, a determination was issued, awarding scheduled disability of 15% loss of use of the left arm. The medical evidence indicated a moderate limitation of motion in the cervical area, weakness of the left triceps, and some hypalgesia over the posterior

medial surface of the upper arm and into the forearm. The problems have previously been held to be the accidental result of a strain which aggravated a preexisting condition in the disc space at the C6, C7 level of the cervical spine. The Hearing Officer made an additional award for unscheduled disability equal to the loss by separation of 5% of an arm for cervical-neck symptoms. The claimant's major objection on review is that the rating for unscheduled disability should have been larger. "(W)ere it not for the C-6, C-7 defect in the spine...no award could have been made for the arm proper. It is the defect in the unscheduled area, which manifests itself in the arm to make the award measurable by its effect on the arm. This does not make the single defect compensable on a double basis. If there is a clearly separable disability, a separate award may be made, but in evaluating whether the claimant has been adequately compensated, it is not possible to conclude, as the claimant urges, that he has only been awarded 5% loss by separation of an arm for a cervical defect. This defect was not caused by the accident and is only compensable to the degree it was aggravated." Accordingly, WCB affirmed.

WCB #67-797 March 28, 1968

Margaret Aikman, Claimant.
H. L. Seifert, Hearing Officer.
Gary G. Jones, Claimant's Atty.
Stanley E. Sharp, Defense Atty.
Request for review by Claimant.

Claimant, while working as a waitress, slipped and fell, hitting her upper arm on a rack. She lost no time from work. A week later she visited a doctor with complaints of tenderness in the right lumbar area. A month later the complaints extended to pain and muscle spasm in the neck and upper back, radiating into both shoulders, arms and hands. There were also complaints that her eyes don't seem to focus like they should, ringing in her ears, feeling of "knots" in her neck and various other symptoms including a complaint that two of her fingers reacted slowly. Subsequent to the injury, she commmenced working as a typist for the State. The determination allowed medical treatment, but no permanent partial disability. The Hearing Officer affirmed this, as did the WCB.

WCB #67-640 April 3, 1968

Lorenzo D. Mackey, Claimant.
Harold M. Gross, Hearing Officer.
Thomas J. Reeder, Claimant's Atty.
William E. Duhaime, Defense Atty.
Request for review by Claimant.

Appeal from notice of denial. Claimant alleges an unwitnessed back injury, which was not reported until 26 days subsequent thereto. Claimant had a history of low back injuries over the last several years. Claimant had filed claims before and knew the proper procedure. Claimant had also claimed benefits for a nonindustrial incident while getting out of bed the night before.

Most of the symptoms complained of did not appear until several months after the alleged accident. The Hearing Officer found that under the circumstances, medical evidence would be necessary to establish a medical-causal relationship. Further he found a "credibility gap" in the claimant's testimony. Accordingly the claim was denied, and WCB affirmed.

WCB #67-712 April 3, 1968

Sandra Seidel, Claimant.
Page Pferdner, Hearing Officer.
James F. McCaffrey, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for review by SCD.

Appeal from a notice of denial. Claimant alleges a compensable injury, when she fell on ice in the course of employment. One foot doubled under the claimant in the fall, producing a straddling type impact upon the crotch area by the foot and shoe. The claimant consulted a doctor thereafter, who found the urethra, its meatus and the vagina inflamed. The condition was diagnosed as hemorrhagic cystitis. The claimant had had an attack of cystitis three years previous. The SCD denied the claim for the stated reason that the condition requiring treatment was not the result of the activity described. The Hearing Officer found that the claimant did suffer a compensable injury. The medical evidence indicated that this type of trauma usually occurred as a result of riding a boy's bicycle. WCB affirmed. The Hearing Officer allowed $450.00 attorneys' fees, and the WCB an additional $200.00 pursuant to ORS.386.

WCB #67-925 April 3, 1968

Emil A. Kociemba, Claimant.
Page Pferdner, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding permanent partial disability equal to 40% loss of an arm by separation for unscheduled disability. Claimant is 53, and suffered a myocardial infarction on April 5, 1966, which was found compensable (WCB #527). As to the extent of disability, the medical evidence was various. Dr. Leavitt considered the claimant permanently totally disabled. One medical report reflected that the claimant has infrequent angina with no arrhythmia and no premature beats. Dr. McGreevey characterized the claimant's heart as "within the upper limits of normal. His heart is slightly enlarged, and he experiences some elevation of blood pressure after exercise. He has no edema, neck pain, orthopnea paroxysmal nocturnal dyspnea or palpitations of his heart." Dr. Ottinger states, "He can walk up and down a flight of stairs without any particular difficulty and can walk for prolonged lengths of time without any distress, although walking rapidly up the hill or running, gives him dyspnea." The AMA Guide to the Evaluation of Permanent

Impairment of the Cardiovascular System provides five classes of impairment. In regard to Class 2, the Guide states, "A patient belongs in Class 2 when (a) organic heart disease exists, but without resulting symptoms at rest; (b) walking freely on the level, climbing at least one flight of stairs, and the performance of the usual activities of daily living do not produce symptoms; (c) prolonged exertion, emotional stress, hurrying, hill-climbing, recreation or similar activities produce symptoms; and (d) signs of congestive heart failure are not present." The range of impairment of persons in Class 2 is rated at 20 to 40% by the AMA. Claimant has attended vocational rehabilitation and studied blueprint, shop math and welding. He stated, he had experienced chest pains six or seven times while training as a machine operator and paces himself in learning to weld to prevent attacks of angina. He has been required to resort to nitroglycerine on two occasions at welding school. Whereupon the Hearing Officer concluded that the claimant has a permanent partial disability equal to 55% loss of an arm by separation for unscheduled disability. WCB affirmed.

WCB #67-401 April 11, 1968

Dorthy W. Jones, Claimant.
John F. Baker, Hearing Officer.
Harry F. Elliott, Claimant's Atty.
Carlotta Sorenson, Defense Atty.
Request for review by Claimant.

This 50 year-old claimant sustained an injury to her back on February 15, 1965, while scooping up chicken heads with a shovel. The claim was closed in February 1966, with an award for unscheduled permanent partial disability equal to 25% loss of an arm. This is a claim for aggravation filed on June 29, 1967. Same was denied August 22, 1967. This is an appeal therefrom. The claim is for either additional temporary disability and treatment or additional permanent disability. Dr. Kaufman treated the claimant in April 1967, for "severe right sciatic neuritis as a result of lumbar vertebral instability and/or herniated lumbar intervertebral disc." Dr. Abele examined the claimant on August 8, 1967. This examination revealed forward bending with the fingers to within 5 inches of the floor. Backward bending and forward bending caused considerable pain. Side bending caused some pain, worse on the right, in the lumbo-sacral area. Rotary movements did not hurt. The left knee straightening test did not cause pain; right knee straightening and double knee straightening caused pull-in in the right leg. Left straight-leg-raising did not hurt; right straight-leg-raising was made easily to 90 degrees at which point the claimant complained of pulling. Pulling also was complained of on double straight-leg-raising. Right cross leg test produced an exclamation of pain. Pinwheel testing suggested a diminution on the outside of the right calf and foot. Dr. Raaf who had seen the claimant prior to the 1965 closing, stated, "Her complaints at the present time are about as before." Claimant did not want a myelogram or operation, and same was not clearly indicated by the medical evidence. No other medical treatment was suggested. The Hearing Officer found that "The medical evidence is devoid of objective findings to support a claim of disability greater than that for which the claimant has been awarded." The denial of the aggravation claim was affirmed. WCB also affirmed.

WCB #67-1126 & 67-1127 April 11, 1968

Warren Miller, Claimant.
Page Pferdner, Hearing Officer.
Gerald R. Hayes, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for review by Claimant.

This is a combined case arising out of two separate injuries, both of which involved the same employer and the State Compensation Department. The first accident of May 12, 1966, resulted in falling about 16 feet and injuring the neck and shoulder area of his upper back. On November 2, 1966, he re-injured the area in a sudden movement to avoid a swinging log. He was employed as a rigger. Claimant is now taking vocational training as a salesman. The determinations allowed for the first injury, unscheduled disability to the shoulder-neck area equal to loss by separation of 10% of an arm; and for the second injury, a 15% loss of use of the right arm. Claimant now suffers from constant dull pain. If he endeavors to use his right arm or shoulder or turns his head, and if he endeavors to work, he gets a sharp, stabbing pain in his neck and shoulder area. Because of the non-use of the arm he has a marked loss of strength in the entire right arm, including the hand with atrophy of the entire trapezius and deltoid muscles on the right. The Hearing Officer concluded that all the present symptoms were the result from functional overlay and not the accident. Increased compensation denied. WCB affirmed.

WCB #67-1105 April 12, 1968

John M. Cox, Claimant.
George W. Rode, Hearing Officer.
Ernest Lundeen, Claimant's Atty.
Albert Ferris, Defense Atty.
Request for review by Claimant.

This claim was denied by St. Paul Insurance Companies on the grounds that the claimant was an independent contractor. Claimant had fallen from the roof of a house which he was framing. The factual situation in this case is similar to that of the Janzck case, WCB #67-380. The procedural problem was resolved by the statements of the claimant's attorney in his request for Hearing: "...when a hearing is set, that it will be Mr. Cox's duty to carry the burden in that he is a workman and not an independent employee under this part of the Statute." Claimant is an experienced carpenter who had always previously worked as an ordinary employee. He obtained this job by answering a classified ad for a two-man framing team with an acquaintance. The Hall Home Building Co. operated as follows: they obtained a buyer, secured real property, and then let out subcontracts for the varous stages of construction, which in general were foundation, framing, plumbing, electrical. The company maintained two employees, one as a finish carpenter and the other as a clean-up man. In this case the claimant and his partner agreed to frame the house for the sum of $400.00. Claimant furnished the tools. There was no supervision or control over the hours or the time that the job was to be done, except that the company wanted it done quickly. The work was to be done according to plans and

specifications and in such a manner so as to satisfy minimum FHA standards. There were no other instructions. The classified ad from which the carpenters were hired, contained the word "payday," which was considered significant but not controlling, as its presence was explained to some extent. The Hearing Officer concluded that the carpenter-claimant was an independent contractor. On review the WCB affirmed, commenting, "The Workmen's Compensation Board is aware of the decision such as Bowser v. SIAC, 182 Or 42....These decisions, combined with the repeal of ORS 656.124, do not make it legally impossible for a person to render labor only on an independent contractor basis....The Board does recognize the peril of workmen contracting away rights by becoming independent contractors. The Board concludes that it is still possible for situations such as those in Landberg v. SIAC, 107 Or 498, and Vient v. SIAC, 123 Or 334 to result in independent contractor status."

WCB #67-594 April 12, 1968

Kay Makela, Claimant.
Mercedes F. Deiz, Hearing Officer.
Nich Chaivoe, Claimant's Atty.
Richard Bemis, Kemper Insurance Atty.
Request for review by Employer.

This is an appeal from a payment of no compensation pursuant to ORS 656.325. Claimant who had a history of varicose veins, suffered an injury, when a table fell and struck her legs. Her doctor treated her for bruising, swelling and tenderness over the right shin. A subsequent report found "bruises and contusions to the right tibia, with rupture of vein and hemotoma had improved --still slight tenderness over tibia." Defendant insurance carrier provided two doctor's appointments for examination of the claimant, but claimant attended neither. The Hearing Officer found that they were not "reasonably convenient" as required by ORS 656.325 (1). Defendant insurance carrier did not accept or deny the claim pursuant to ORS 656.262 (5) within 60 days, or at any time. Further, it was not established that the delay or refusal to pay temporary total disability benefits was not reasonable. "The Hearing Officer finds that because payment of both compensation and acceptance of the claim were unreasonably delayed and resisted, the claimant is entitled to an additional amount of 25% of the amount due for failure to pay compensation, and an additional amount of 25% of the amount due for failure to accept the claim within the 60-day statutory period, plus a reasonable attorneys' fee, and that $350.00 is a reasonable amount to award therefore." The WCB affirmed, holding as to the alleged failure of cooperation, that "ORS 656.325(1) does permit an employer to suspend compensation..., but that requires Workmen's Compensation Board approval, which had not been obtained in this instance." The WCB continued, "A substantial part of the argument on review involves an issue of whether two violations of the employer's duty can bring a double penalty. The law recites a 25% penalty, but does not specify whether one period of compensation may be the basis for multiple penalties. If so, there may be no mathematical limit. The brief, claimant's counsel submitted, indicates the compensation involved could not have exceeded $85.00. Whether the penalty of $42.50 should have been limited to $21.25 is almost a de minimis issue. Without resolving the issue as a matter of basic precedent, the Board concludes, the employer failed to comply with rather basic procedural requirements of the law, and that the request for Board review approaches the frivolous."

WCB #67-1441 April 12, 1968

Wesley Eckert, Claimant.
H. L. Pattie, Hearing Officer.
Donald Atchison, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by Claimant.

Appeal from determination awarding permanent partial disability equal to 15% loss of an arm by separation for unscheduled back disability. Prior to the injury the claimant worked as a common laborer. Now he works as a bookkeeper at similar pay. The case is complicated by the fact that the claimant was treated for both prior and subsequent nonindustrial muscle spasms to the back. Claimant is under medical direction to avoid all heavy lifting. He has been required to give up bowling, water skiing and golf. The Hearing Officer found that the closing of all occupations to the claimant which involve heavy lifting indicate some loss of a capacity to earn, even though Vocational Rehabilitation has made new opportunities available to him at similar pay. This coupled with the physical impairment lead the Hearing Officer to conclude an award of 20% loss of an arm by separation. WCB affirmed.

WCB #67-799 April 12, 1968

Joe B. Johnson, Claimant.
Harold M. Gross, Hearing Officer.
Thomas J. Reeder, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for review by Claimant.

Claimant alleges a twist to the low back as a result of a fall. This is an appeal from a notice of denial. One doctor diagnosed a protruded lumbosacral disc with S-1 nerve root compression on the right. Another doctor diagnosed right sacroiliac subluxation with acute muscle spasm and secondary sciatica. Both doctors noted spina bifida occulta, but concluded that they could not be the sole source of the problem. The problem of causation depends entirely on the claimant's credibility, as he was working alone at the time. The injury is alleged to have taken place in the first hour and a half in the first day of the claimant's employment. The Hearing Officer regards this as a suspicious circumstance. The claimant was working as a dry wall taper, and there was some conflict as to exactly what the claimant was doing when the alleged injury occurred. Also the claimant testified that he stumbled over a loose board on the floor. There was evidence that dry-wall installers never permit boards to be loose on the floor. Most suspicious to the Hearing Officer is that the accident allegedly happened in the morning, and that the claimant finished out the day, and apparently made no attempt to identify what it was that he stepped on. Accordingly the Hearing Officer disbelieved the entire story of the claimant. The WCB reversed, commenting that "There is no presumption that an injury is subject to suspicion, if it happens on the first hours of the day of employment. Statistics might reveal that the uncertainties of a new job increase the chances of injury. The Hearing Officer also placed a great weight on the claimant's failure to make an effort to further identify

the object causing the slip. Even the matter of the claimant's manner of walking was thrown in to raise a conjecture about possible prior injury." "The Board, in reviewing the record, does not agree that the situations and circumstances cited by the Hearing Officer make the claim unbelieveable." Attorneys' fees in the amount of $500.00 were allowed.

WCB #67-904 April 12, 1968

Roy A. Smith, Claimant.
Page Pferdner, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Walter H. Sweek, Defense Atty.
Request for review by claimant, with request for cross review by Transport Indemnity Co.

Claimant, a truck driver, strained his back while attempting to pick up the tongue of a thousand-pound dolly. Dr. Geist diagnosed his injury as "Probable strain R foot or traction injury to sensory nerves R. Foot." The determination allowed no permanent partial disability from which the claimant appeals. Presently no objective symptoms appear except tenderness. At the hearing the claimant testified his foot still bothers him when he is walking and carrying things and pressure on the tarsal-metatarsal joint of the first toe causes pain. This requires that he be careful when walking, carrying, and using a hand truck. He no longer jumps off the tailgate of the truck, as his foot and ankle seem to sprain very easily. The Hearing Officer found that the claimant has permanent partial disability of 15% loss of use of his right foot. WCB affirmed.

WCB #67-1132 April 12, 1968

Jack Arnold Walton, Claimant.
J. David Kryger, Hearing Officer.
George Des Brisay, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.
Request for review by Claimant.

Appeal from award of no permanent partial disability for injury to low back while lifting a garbage can. Claimant had sustained a previous back injury in 1962, for which he was awarded 75% loss of function of an arm for unscheduled disability. The complaint then was low back pain and radiating pain to the left leg. There were no objective findings with this award, and the final diagnosis was "chronic lumbosacral strain." The 1967 injury in question, resulted in similar symptoms. Dr. Anderson found severe tenderness and spasm in the lower back muscles. A myelogram was performed which was negative. The diagnosis was "...an acute sprain of the muscles and ligaments of the lower back." Vocational Rehabilitation reported that the claimant was malingering. Other medical reports indicated "large functional overlay," "Chronic lumbar and sciatic pain secondary to disc degeneration at the L-3, L-4 level," and "Psychoneurosis." The medical evidence indicated that claimant was medically

The Hearing Officer found that the claimant is now unable to engage in any heavy work which involves heavy lifting, and that this is additional disability equal to 15% loss by separation of an arm for unscheduled disability to the back. On review the WCB affirmed, commenting at length on the claimant's "malingering," and finally stated that the award "may be generous under the circumstances."

WCB #67-835 April 12, 1968

Melvin C. Nelson, Claimant.
H. L. Seifert, Hearing Officer.
James J. Kennedy, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Claimant.

Appeal from determination awarding disability equal to 55% loss of function of the left great toe. Claimant was injured when his toe was run over by a forklift truck. Claimant complains of pain in his left arch. X-rays reveal that the claimant had a chip fracture of the left great toe in the distal phalanx. According to Dr. Patton, all the injuries were in the toe, and there were none in the foot. There was also limitation of flexion of the toe. The Hearing Officer concluded that the evidence was insufficient to establish a disability to the foot, and affirmed the determination. WCB also affirmed, commenting that "The award, if expressed in terms of a foot, approximates 10% of a foot, and it would be immaterial whether the award is expressed in toe or foot, unless the disability in the foot as a whole exceeds 10% of the foot."

WCB #67-753 April 18, 1968

Perry Bentley, Claimant.
Harold M. Gross, Hearing Officer.
William Deatherage, Claimant's Atty.
Lyle Velure, Defense Atty.
Request for review by Claimant.

Appeal from notice of denial. Claimant is a 65 year-old painter's helper who alleges a back injury. The issues revolve around whether there was a compensable injury, and whether the claim is barred by reason of failure to notify the employer pursuant to ORS 656.265, until eight months after the alleged injury and two months after employment was terminated. The medical evidence established that the claimant suffered from advanced degenerative arthritis. Neither examining physician was prepared to express the opinion that claimant's symptoms, as a matter of reasonable medical probability, were caused by any accidental injury of many months in the past. The Hearing Officer found no good cause for the great delay in reporting the accident, and further found that the evidence was insufficient to establish an accidental injury. On review the WCB added that the delay was prejudicial to the employer and affirmed a denial of the claim.

WCB #67-160 April 18, 1968

Rondal L. Harper, Claimant.
Harold M. Gross, Hearing Officer.
Bernard P. Kelley, Claimant's Atty.
Patrick Ford, Defense Atty.
Request for review by Employer.

Claimant, a 31 year-old millworker, suffered a compressing type injury when a heavy table device came down on his back and compressed him close to the floor with one leg stretched out behind and one knee underneath him. He felt bruised pretty badly at the time and was bothered in the low back area, although he finished out the shift. Claimant had suffered a prior back injury in 1962, for which he had received 30% loss of an arm for unscheduled disability. Objective findings are minimal, but Dr. Luce found a narrowing of the lumbo-sacral joint space, indicating a degenerated disc at L5-S1, which he believes was traumatically aggravated. Dr. Bolton found "essentially normal lumbar spine." Subjective complaints include left leg problems which did not preexist the injury in question. There is evidence that the claimant cannot now lift anything more than 25 pounds, and that he must now work at a lighter occupation. The determination allowed no permanent partial disability. The Hearing Officer ordered an award equal to 10% loss function of the left leg and 5% loss of an arm by separation of unscheduled disability to the low back. On review the claimant did not file a cross-request, but did file a brief within the 30 days seeking an additional award. WCB commented, "Proper procedure requires a request for review within 30 days of the Hearing Officer's order. Despite the failure of the claimant to request review, the Board assumes it has the authority to make whatever decision on extent of disability is justified by the record, regardless of which party request review." Then WCB affirmed.

WCB #67-1024 April 18, 1968

Elizabeth M. Leding, Claimant.
George W. Rode, Hearing Officer.
Nicholas D. Zafiratos, Claimant's Atty.
James Larson, Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding 30% loss of an arm for unscheduled disability. Claimant, 50, slipped on a wet floor landing on her back and hip and snapping her neck. It was her first day of employment. X-ray reports indicated moderately severe degenerative disc disease involving the lumbo-sacral joint. The condition was apparently asymptomatic prior to the accident. There was evidence that the claimant exaggerated her symptoms and disabilities. The doctor found a significant advancement of degenerative changes in the claimant's back over a five-month period following her injury. Claimant's pain is such as to consitute a limitation upon her employability. Accordingly, the Hearing Officer found permanent partial disability equal to 55% loss of an arm for unscheduled disability. WCB affirmed, commenting that the award expresses a disability which would seriously disable most workmen.

WCB #67-1257 April 18, 1968

Bobby Gene Philibert, Claimant.
J. David Kryger, Hearing Officer.
E. D. Sahlstrom, Claimant's Atty.
Wayne Williamson, Defense Atty.
Request for review by Claimant.

Appeal from determination awarding 10% loss of an arm by separation for unscheduled disability due to aggravation of a preexisting low back condition. Claimant, 33, sustained two previous lumbar and cervical spine injuries in 1959, and 1964. The accident in question occurred when the claimant was struck in the left upper quadrant of the abdomen by a 2 x 2 board from a rip saw. The 1964 injury had caused two compression fractures to the lumbar vertebrae. The present diagnosis was a lumbar strain. The Claimant suffers much pain and cannot lift anything over 50 pounds. Vocational Rehabilitation trained the claimant as a welder, but he has been unable to find employment as such. The Hearing Officer relied on Wayne McCaulley, WCB #588, and Forrest G. Lamm, WCB #67-197 for authority to deny temporary total disability payments after the claimant was medically stationary but during Vocational Rehabilitation. The Hearing Officer also refused to award medical expenses incurred after the claim closure for the purpose of litigation and not for treatment. The medical evidence did not establish that a substantial amount of the claimant's disability was a result of the claim in question. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #67-916 April 18, 1968

Louis E. Osler, Claimant.
Page Pferdner, Hearing Officer.
Donald Atchison, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for review by Claimant.

Appeal from determination awarding permanent partial disability equal to 20% loss of an arm by separation for unscheduled disability and 5% loss function of the right leg. The claim had been previously denied but ordered accepted at WCB #67-20. Claimant had sustained a herniated disc, which was surgically treated by a laminectomy. Claimant has returned to the same job as before, and movies taken of the claimant while at work do not reflect any limitation of motion. There were subjective complaints of stiffness. The Hearing Officer affirmed the determination, as did the WCB.

WCB #67-788 April 18, 1968

Laurence G. Moberg, Claimant.
George W. Rode, Hearing Officer.
Nicholas D. Zafiratos, Claimant's Atty.
James Larson, Defense Atty.
Request for review by Claimant.

Appeal from notice of denial. Claimant was exposed to sulfur dioxide gas. Subsequently the claimant suffered chest pains and shortness of breath. He was 57, and had no history of heart trouble. Claimant alleges his primary exposure to the gas was about three days prior to the first serious symptoms. Dr. Parcher's diagnosis was myocardial-ischemia without infarction pattern, as established by the electrocardiograms. This is essentially a decreased flow of blood in the heart with no damage to the arteries. The problem was the causal relationship of the gas to the symptoms. Of three doctors, one didn't know, another wasn't sure and a third thought not. Denial of claim affirmed, and WCB affirmed.

WCB #67-104 April 24, 1968

Edith Marie Lytle, Claimant.
John F. Baker, Hearing Officer.
Nick Chaivoe, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for review by SCD.

Appeal from notice of denial. Claimant alleges injury, when her employer attempted to swat a fly on her back during her lunch hour. Claimant experienced immediate pain and fainted ten minutes later. Claimant, 36, was employed as a nurse's aid. Claimant did not work the rest of the day and was admitted to the hospital 11 days later with repeated vomiting after a fainting spell. After sedation and intravenous fluids the claimant felt better, but complained of back pain. Claimant had had back injuries before. Dr. French had treated the claimant for many years and was of the opinion the fainting episode was due to vomiting, digestive upset, unrelated to her other conditions. The Hearing Officer found that the slap on the back was a compensable injury, and that the half day's time loss was sufficient to meet the definition of a compensable injury in ORS 656.002(6). The Hearing Officer ordered the claim accepted and allowed $400.00 attorneys' fees. On review the SCD protested with vigor. There was no medical bill presented, and it is the position of the SCD that a claim need not be accepted, that appears to involve no compensation. WCB commented that the claimant is obligated to make her claim within 30 days or risk being completely barred, likewise the claimant was obligated to appeal from the denial or lose her rights. Further the Hearing Officer did not rule on the extent and duration of the disability, if any. But rather ruled that a claim <u>may</u> be established, even though it in fact has not been established since a half day's time loss is not compensable, and there is no medical bill. WCB affirmed and assessed $200.00 additional attorney's fees.

WCB #67-873 April 24, 1968

Ray P. Zirschkey, Claimant.
H. L. Seifert, Hearing Officer.
Richard E. Kingsley, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Reqest for review by Claimant.

Appeal from a determination awarding 10% loss of an arm for back difficulties. Claimant twisted his back while getting out of a truck. Subjective complaints consisted of low back pain radiating into the buttocks. Medical evidence indicated lumbosacral sprain aggravated by poor posture and obesity. Various forms of traction were of no help. A myelogram was suggested but never performed. It was not clearly indicated. Claimant has worked only as a part-time preacher since the accident and considers himself disabled. The doctors indicated that the claimant could not return to heavy lifting jobs. The Hearing Officer affirmed the determination, as did the WCB.

WCB #67-302 April 24, 1968

Kenneth W. Franklin, Claimant.
J. David Kryger, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
John R. McCulloch, Defense Atty.
Request for review by claimant.

Claimant suffered a shoulder injury in a fall. The determination allowed permanent partial disability of 30% loss of function of the left arm. Claimant appeals. The initial diagnosis was "Rotator cuff tear." Due to recurrent dislocations, surgical intervention was necessary. A magnusom operation was performed. Claimant has a history of serious back disability, which has in the past required a laminectomy and a diskectomy. Claimant has also had prior fractures of both wrists which had residual disability. But as to the shoulder injury in question, the medical report reveals that the range of motion on the left external rotation is zero; internal rotation same as right at about 45 degrees. Forward flexion, 90 degrees. Abduction a bare 60 degrees with difficulty. Strength of the arms is approximately equal with the exception of the abduction function of the left arm. The grip is fairly strong bilaterally. Claimant is unable to work in his former occupation as a carpenter, because of his shoulder and prior disabilities. The Hearing Officer ruled that "...scheduled disability...is defined in the statute and...is exclusive regardless of the effect of the injury on employability." Chebot v. SIAC, 106 Or 66; Kajundzich v. SIAC, 164 Or 510; Ben Scoggins, WCB #67-92; William N. Adams, WCB #67-500.
The Hearing Officer affirmed the determination, but the WCB remanded for the taking of further medical reports from the examining doctor and the treating doctor.

WCB #68-67 April 26, 1968

Jerry G. Myers, Claimant.
Request for review by Claimant.

Claimant, without advising his counsel, applied for and received an advance payment on a disability award. He now seeks to subject this award to a hearing. This was a lump sum payment of $1,500.00. "The Board's positon will be that, when a request for hearing is otherwise timely, but a claimant has mistakenly obtained an advance payment, the Board will entertain a hearing, if the claimant restores his right to hearing by repayment of the lump sum, and thus replacing himself and the employer or insurer in a position to have the matter heard."

WCB #67-766 April 26, 1968

Dean C. Monroe, Claimant.
Page Pferdner, Hearing Officer.
Howard R. Lonergan, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by claimant.

Appeal from determination allowing no permanent disability. Claimant was injured in a truck accident. Some ten days later, back injury symptoms commenced to be complained of, and the claimant alleges that the pain is so severe that he is unable to even help with the dishes. The medical evidence indicates that eventually a spinal fusion may be indicated, but is not presently recommended. The medical reports had little in the way of objective findings. There was strong evidence that the claimant had serious psychological problems. His background is one which best goes undiscussed. Motivation seemed to be limited to that of obtaining a large disability award. The Hearing Officer allowed 5% loss of an arm for unsheduled disability. WCB affirmed.

WCB #67-129 April 26, 1968

Donald J. Holycross, Claimant.
Harold M. Gross, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for review by Claimant.

Appeal from determination awarding 15% loss of function of the left forearm, 20% loss of function of the left foot and 10% loss of an arm by separation for unscheduled disability. Claimant suffered multiple injuries, when he was thrown from an overturned dump truck. Claimant suffered a fractured nevicular of the left wrist, a fracture of the os calcis of the left foot, a head concussion and some compression of the lumbar spine. Claimant has restricted motion, limited sensitivity and will always have to wear an arch support for his left foot. The wrist suffers from limited motion and weakness. These awards were affirmed. As to the unscheduled areas, claimant suffers from a post-concussion syndrome which causes dizziness and a compression sprain of the low back. The Hearing Officer found this to be equal to 25% loss function of an arm. The WCB amended the order to be 25% loss by separation of an arm, and otherwise affirmed.

WCB #67-963 April 26, 1968

Conrad F. Baigert, Claimant.
Mercedes F. Deiz, Hearing Officer.
Edwin A. York, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by claimant.

Appeal from a determination allowing permanent partial disability equal to 10% loss of an arm by separation for unscheduled disability and 10% loss function of the right arm. Claimant, a chef of 50-years experience slipped and fell, first on his buttocks and then on his elbow. The initial examination disclosed cervical, dorsal and lumbar strain with advanced degenerative changes. The claimant made no recovery, and the doctors ran out of suggestions for further treatment. Claimant is receiving some present treatment for back symptoms, which is apparently palliative only. Objectively the claimant has at least a 25% limitation of the neck in all quadrants, a rather severe limitation of the motion in his back, and a 45 degree lack of normal flexion of his right shoulder. Claimant further demonstrates symptoms which arise unconsciously, but which cause pain, limitation and suffering and are quite true for him, nevertheless. Claimant was found to be not totally disabled, because he was qualified to be gainfully employed as an executive chef, which is a job which requires little physical effort. The Hearing Officer concluded that the disability of the claimant's arm was equal to 20% loss function of an arm, and that the cervical, dorsal and lumbar spine problems were equal to 35% loss of an arm for unscheduled difficulties. The majority of the WCB affirmed, Mr. Callahan dissenting strongly. He concluded that the claimant should have been granted total disability. "This man was able to work steadily prior to his last injury. At the time of the hearing, more than a year later, he had not worked since the injury. He described the work a chef would be expected to do. It is not realistic to believe he could find a job within his physical capabilities."

WCB #67-1046 April 30, 1968

Gladys M. Wunder, Claimant.
Mercedes F. Deiz, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Roger Warren, Defense Atty.
Request for review by Claimant.

Appeal from a partial denial. Claimant, a 65 year-old woman janitor, bumped her face against a cabinet sustaining a "severe contusion and large hematoma-- left zygomatic area. Following above injury, patient developed signs and symptoms of small cerebral thrombosis." The claim was accepted, but on March 22, 1967, the Department denied responsibility for claimant's cerebral vascular accident or disease and for the treatment and disability resulting therefrom. This letter included a notice of appeal rights. A Board determination dated May 26, 1967, awarded compensation for temporary total disability, but none for permanent disability. Claimant requested a hearing on August 24, 1967. The defense raised the jurisdictional issue. The Hearing Officer relied

on Lough v. SIAC, 104 Or 313(1922); Allen v. SIAC, 140 Or 449; Rosell v. SIAC, 164 Or 173; and Boatwright v. SIAC, 82 Ad. Sh. 975; for authority to conclude that there was no jurisdiction to proceed to consider the merits of the claim regarding claimant's cerebral vascular accident. Whereupon the merits of the facial injury were considered and no permanent partial disability found. The majority of the WCB affirmed. Mr. Callahan dissenting, argued that "consideration must be given to the relationship of the cerebral vascular accident to the injury for which the claim was filed."

WCB #67-1444 April 30, 1968

Carl E. Prodzinski, Claimant.
H. L. Pattie, Hearing Officer.
Bernard Jolles, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by Claimant.

Appeal from determination allowing no permanent partial disability. Claimant sustained back injury while unloading a truck in May 1967. The claim was closed June 29th. It was reopened on July 19th, and again closed on November 13th. Temporary disability was paid until October 23rd, when the treating physician reported that the claimant was "ready to admit that he has recovered, but he is not motivated to go back to work." The nature of the medical treatment was not reported. The medical diagnosis reported a lumbosacral sprain, but reported no disability. The only evidence of disability is evidence that claimant was in pain after shoveling snow in January 1968, for 15 minutes. The defendant contends that anyone who has rested his back for six months would sustain pain after 15 minutes of strain or exertion. Claim denied; WCB affirmed.

WCB #67-1016 April 30, 1968

Ira C. Lewis, Claimant.
Page Pferdner, Hearing Officer.
Donald S. Richardson, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for review by Claimant.

Appeal from July 18, 1967, determination allowing temporary disability but allowing no permanent disability. Claimant was a construction laborer. While working on a sewer project, he was buried up to his armpits by cement, water and mud, causing burns to his hands, arm, legs, and hips. He was first treated as an outpatient and eventually hospitalized for five days. The medical evidence found no permanent partial disability, except it was recommended that claimant avoid working around concrete "for perhaps years." Claimant has a number of discolored areas on his right hand, both wrists, and on his right leg between his knee and his ankle. These areas are slightly tender sometimes. It is clear claimant has no physical impairment. The sole question is whether or not his inability to work around concrete constitutes a permanent partial disability. There was evidence that some premium paying jobs were around concrete. There was evidence that more work would be available, if the claimant

could work around concrete. There was no evidence that the claimant has had any difficulty in finding employment. "Unscheduled disability related to the capability of engaging in general employment and is not predicated on an injured workman's inability to occasionally obtain the highest possible price for his services." Accordingly no permanent disability was allowed by the Hearing Officer. WCB affirmed.

WCB #67-967 April 30, 1968

Patricia E. Husted, Claimant.
Duane R. Ertsgaard, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.

Claimant suffered a lower back strain while lifting a patient at Fairview. The determination allowed unscheduled disability equal to the loss by separation of 10% of an arm. Subjective complaints included pain and difficulty doing housework. Medical evidence indicated a chronic lumbosacral strain aggravated by obesity. There was no evidence of a herniated disc. The determination was affirmed by the Hearing Officer. On review an attempt was made to introduce additional medical evidence. The Board ruled that this is not permitted under the 1965 Act. WCB affirmed.

WCB #67-1064 April 30, 1968

William J. Haney, Claimant.
J. David Kryger, Hearing Officer.
C. S. Emmons, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Claimant.

Claimant, 62, sustained a rupture musculotendinous cuff of his right shoulder in attempting to prevent a partially filled oil drum from falling off a truck. Claimant is unable to raise his right arm over his head, complains of constant pain of the shoulder and occasional numbness in the arm, hands and fingers. This is an appeal from a determination awarding 15% loss of use of the right arm. Claimant had sustained a ruptured biceps tendon in 1962, to his right arm which fully recovered in 1964, at which time a permanent partial disability award lapsed. Medical opinion was divided on the advisability of surgery and chances of success. Claimant refused it on the grounds that it would not be beneficial and that other patients had told him that it might make it worsen his condition. A defense of unreasonable refusal of medical treatment was attempted, but the Hearing Officer rejected it, concluding that the refusal was not unreasonable. Defendant's doctor states, "He does have limitation of motion, or at any rate, the last several degrees of motion in all directions are executed with some apparent discomfort." Claimant's doctor established that abduction is limited to 90 degrees. Claimant also alleges pain in the neck area, which results in shoulder and arm disability. Accordingly, the Hearing Officer increased the award to 25% of an arm. Claimant also suffered a 50% loss of grip of the right hand, but this was not considered in the award because of medical evidence, that it was not related to the shoulder injury.

On review the majority of the WCB affirmed, commenting, "The claimant argues in effect that, since the disabilities for which he received the prior award had disappeared, they cannot be taken into consideration, since there can be no 'combined effect.' ORS 656.222 in additon to using the words 'combined effect,' also relates to the 'past receipt of moneys for such disabilities.' To carry the claimant's logic to the most illogical consequences, the claimant's arm may be the basis of unlimited awards, simply by asserting that the prior awards were erroneous to the extent, they were made for nonpermanent injuries." Mr. Callahan, dissenting, concludes that the injury in this claim merits an award of 35% loss of function of an arm.

WCB #67-986 May 2, 1968

Larry L. Burling, Claimant.
Page Pferdner, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding 10% loss of an arm for unscheduled injuries. Claimant, 27, acquired a pain in the low back while working. During the period of treatment, he was involved in an auto collision, which apparently was not too serious. Claimant also had congenital back problems, including at least a well-defined spina bifida occulta at S-1. Claimant will not be able to return to heavy work and is currently being trained as a draftsman. The Hearing Officer increased the award to 15% loss of an arm by separation for unscheduled disability. WCB affirmed.

WCB #67-1299 May 2, 1968

William R. Bricker, Claimant.
J. David Kryger, Hearing Officer.
Nathan J. Ail, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by Claimant.

Appeal from determination awarding 20% loss of function of the left foot. Claimant fell about 8 feet onto a barge, while working as a common laborer. The first diagnosis was a chipped fracture of the ankle, but a subsequent diagnosis indicated an osteochondritis dessecans, which was not symptomatic prior to the injury; but, due to the injury, a fragment was displaced within the ankle joint. It was surgically removed. A medical examination revealed a lack of 10 degrees dorsiflexion, a lack of 15 degrees plantar flexion, a lack of 20 degrees eversion, and a lack of 10 degrees inversion. Also tenderness was found at the L-4, L-5 region, but with good motion and minimal muscle tightness. Claimant has a normal ankle save the loss of motion. He is able to engage in all prior occupations except climbing on steep roofs. The Hearing Officer affirmed the determination as to the ankle. Compensation was also denied on the back claim, as there was no medical testimony as to the medical-causal relationship of the back complaints to the ankle, and it was not obvious: Orr v. SIAC, 217 Or 249. On review the majority, Mr. Redman dissenting, increased the award to 30% loss function of a foot. Mr. Redman would have affirmed the Hearing Officer.

WCB #67-704 May 2, 1968

Joseph M. Sahli, Claimant.
Page Pferdner, Hearing Officer.
Raymond Rask, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant, 23, suffered a non-industrial fracture of the second metacarpal of his left hand in September 1966. He returned to work on December 6, 1966, and on December 7, he slipped and fell, reinjuring his left hand. On December 8, 1966, he filed a claim for the left hand injury, but not mentioning any low back injury. He did not inform the first examining doctor of any back problems. On December 28, 1966, claimant consulted Dr. Rask about back trouble. Dr. Rask's report indicated that the back trouble is the result of the September injury. September hospital records show "Bruise over left gr. Trochanteric area." Thus the only evidence of back injury as a result of the December fall is the claimant's. The Hearing Officer concluded that there was no compensable back injury, and further that surgery performed on the hand was not necessitated by the compensable fall. WCB affirmed, commenting, "Much of claimant's brief on review treats the claim as though it had been denied in its entirety and proceeds on the theory, that if a party testifies to an unwitnessed occurrence, a burden shifts to the other party to disprove that occurrence. The Board does not accept this proposition as an established part of our jurisprudence."

WCB #67-1044 May 3, 1968

Henry E. McClendon, Claimant.
Page Pferdner, Hearing Officer.
Herbert B. Galton, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for review by Claimant.

Appeal from determination allowing no permanent partial disability. Claimant, 63, was struck in the forehead with a falling piece of corrugated sheet metal. The diagnosis was a laceration of center forehead and cervical myositis--post traumatic. Although the laceration healed adequately, the claimant continued to complain of a stiff neck with some pain, and dizziness with some blurring of vision. Treatment has only slightly reduced the symptoms. Dr. Nudelman discovered "questionable tenderness of both trapezius muscles--decreased sensory perception to pain in the left fourth and fifth fingers, extending from the wrist distally involving both the flexor and extensor surfaces--(and) the bicep, tricep, and brachial radialis reflexes were absent bilaterally." Other doctors found no objective symptoms. There is evidence that the claimant suffers from arthritis and degenerative disc disease in his cervical spine. The Hearing Officer concluded that most of the claimant's problems were preexisting and related to the arthritis and degenerative discs. He considered that some of the problem may be the result of a previously asymptomatic condition, which became symptomatic. Accordingly, he ordered an award equal to 5% loss of an arm by separation for unscheduled disability. WCB affirmed, commenting that it was not convinced that any disability occurred, and that "an award limited to 5% is merely an invitation to extend the dispute."

WCB #67-987 May 3, 1968

Richard L. Lunsford, Claimant.
H. L. Pattie, Hearing Officer.
Edwin A. York, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by Claimant.

Claimant, an ambulance driver, suffered a whiplash, when the ambulance was "rear-ended." This is an appeal from an award of no permanent partial disability. The latest medical report concluded with the statement that, "When last seen, he seemed to be making satisfactory recovery. The prognosis is good for eventual full recovery. No objective neurological findings were found on any examination." There were various subjective complaints. The Hearing Officer held that medical evidence was not necessary to establish a compensable injury, but that this case failed for want of evidence indicating that the pain and subjective complaints were permanent. WCB affirmed, commenting, "It would appear that at the time of hearing the claimant was still complaining of some mild residual complaints and occasional symptoms. There is some dispute over the necessity of medical reports to prove permanence of injury. Regardless of past Court decisions, it should be kept in mind that the 1965 Act intended to place a higher emphasis upon medical testimony, since almost the whole process of ORS 656.268 is based upon submission of medical reports. The Board recognizes, however, that in a given case, a permanent disability may well be made without medical substantiation. Such an award should certainly be based upon evidence which not only confirms a present disability, but a likelihood from the evidence that it is permanent. The evidence in this case is certainly far from compelling any acceptance of the claimant's theory of permanence." No permanent disability allowed.

WCB #67-932 May 8, 1968

Clifford L. Timm, Claimant.
Page Pferdner, Hearing Officer.
Tyler E. Marshall, Claimant's Atty.
John Foss, Defense Atty.
Request for review by Claimant.

Appeal from a determination allowing permanent partial disability equal to 10% loss function of the right arm. Claimant dropped a 2 by 4 he was holding in his left hand on his right wrist. Dr. Pasquesi's examination, which is correlated with the American Medical Association's Guide to the Permanent Impairment of the Extremities and Back, reflects medical impairment of 2% of his right forearm. The Hearing Officer concluded that the subjective complaints were mostly psychogenic and affirmed the determination. WCB affirmed.

WCB #67-1017 May 6, 1968

Calvin Miller, Claimant.
Mercedes F. Deiz, Hearing Officer.
Donald S. Richardson, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by Claimant.

Appeal from determination allowing permanent partial disability equal to 10% loss of an arm by separation for unscheduled disability. Claimant has a prior history of back strain. The origin of the injury to the claimant, who is 43 years old and a body and fender man, is obscure. Dr. Kimberley's comment was "I think this man has a degree of low back discomfort and probably some left sciatica, which is on an organic basis, but over and above this, he certainly grossly exaggerates his complaints and is full of functional difficulties..." There was a claim for an additional period of temporary total disability, as it was terminated by determination prior to the release for work by the treating doctor. The Hearing Officer found that the fact that the claimant had not been released by his own doctor did not prevent a determination, in reliance on an examining doctor's findings, from ordering temporary total disability stopped. As to the permanent partial disability, the Hearing Officer pointed to many inconsistencies in the claimant's statements to various doctors and to subjective observations and found a lack of credibility. Accordingly the determination was affirmed. WCB affirmed, commenting, "The briefs on review also argue the Board's role in review. The Board, noting the current Supreme Court Decision of Coday v. Willamette Tug & Barge Co., 86 Ad. Sh. 751, has reviewed the entire record de novo. One must assume that the Board and Court could accept or disregard the observations of the Hearing Officer with respect to the demeanor of witnesses and the reliance of the Hearing Officer upon the testimony."

WCB #67-543 May 8, 1968

Richard J. Edgar, Claimant.
H. L. Seifert, Hearing Officer.
Owen E. McAdams, Jr., Defense Atty.
Request for review by Claimant.

Appeal from denial of claim. Claimant, a resident of the State Penitentiary, suffered a laceration of his hand and wrist, when he atempted to close a window. At the time the claimant was a compulsory pupil at the Prison School. Claimant was attending the school full-time and over his protest. He was receiving no compensation for going to school. The Question is whether the claimant sustained a compensable injury under ORS 655.510(1). The Hearing Officer concluded that the claimant was not engaged in an "authorized employment." WCB affirmed.

WCB #67-1348 May 9, 1968

Troy Etzel Cheek, Claimant.
H. L. Pattie, Hearing Officer.
Keith Burns, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for review by Argonaut Insurance Co.

Claimant suffered a back injury on October 13, 1966. The claim was eventually accepted and temporary total disability was paid through January 27, 1967. On February 1, 1967, claimant became a resident of the Oregon State Penitentiary and remained there until October 1968. A determination was requested March 16, which reported the claimant to be "off labor market as of 2/1/67." The carrier's doctor examined June 8th, and reported the claimant was medically stationary. The treating physician examined on August 22 and prescribed continued treatment. The treating physician again prescribed continued treatment after a November 17 examination. On December 27, 1967, a determination was issued by the Workmen's Compensation Board, which allowed temporary total disability to February 1, 1967, and allowed no permanent partial disability award. The Hearing Officer found as a fact that the claimant was not medically stationary as of the date of the hearing in January 1968. The Hearing Officer found that there was no statutory authorization to terminate temporary disability payments merely because the claimant was incarcerated in the penitentiary. Accordingly an order was entered to pay temporary total disability payments up to date forthwith. The Hearing Officer allowed no penalties in view of the fact that the determination had been requested on March 16, 1967, and no direct instruction to pay compensation was made. He found no unreasonable action on the part of the carrier. Attorneys' fees were ordered payable out of the claimant's compensation by the Hearing Officer. On review "The Board simply concludes that it was unreasonable for the insurance carrier to set itself up as a judge and jury to add to the claimant's punishment for a crime the withholding of compensation due by law as a windfall to the insurance carrier."

> The Workmen's Compensation Board notes with regret that part of its own operations fell into error in the handling of this matter in that on December 27, 1967, a determination was issued to the effect that temporary total disability was payable only to February 1, 1967. In light of the evidence available then, the Board can neither explain nor condone this error, but neither can the Board deem this to be a ratification of the improper termination and cessation of compensation.
>
> The Compensation due between February 1 and December 27, 1967, was withheld without authority of law and was clearly an unreasonable resistance to payment of compensation. The Board, therefore, pursuant to ORS 656.262(8), orders the employer and its carrier to pay the further sum of 25% of the compensation due from February 1 to December 27, 1967, for unreasonable delay and refusal to pay compensation during that period. The Board further finds that pursuant to ORS 656.382, the actions of the employer constituted an unreasonable resistance to payment of compensation, and that attorney fees should be paid by the employer in addition to, rather than deducted from, the claimant's compensation.

Whereupon the attorneys' fees for services to date were fixed at $750.00.

WCB #67-1365 May 9, 1968

Edward Thomas Mayes, Claimant.
H. L. Pattie, Hearing Officer.
Charles Paulson, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for review by Claimant.

Appeal from notice of denial. Claimant, 56, was a ready-mix driver. The Hearing Officer affirmed the denial. The case involves the issue of whether the claimant's myocardia infarction was a compensable injury. The claimant has several episodes of chest pain in the latter part of June and early July 1967. These episodes may have been produced by a conditon known as tracheitis and a pneumonia infection. The infarction was diagnosed July 15, 1967, and Dr. Fisher, the treating doctor, concluded that the long hours of work on the preceding days were related to the precipitation of the coronary occulusion. Dr. Fisher is a general practitioner. A specialist in internal medicine and cardiology, Dr. Semler, testified at length and convincingly under strong cross examination, after hearing the evidence in the case, concluded that the coronary occlusion suffered by the claimant was not related to the work effort. Dr. Semler is of the school which believes that normal work and exercise don't cause heart attacks. Here the testimony of the claimant was that he was hauling ready-mix, just as he had been for 21 years.

The majority of the Board, noting the recent decision of Coday v. Willamette Tug & Barge Co., 86 AD.Sh. 751, feels the more compelling evidence with respect to possible causality was contributed by Dr. Semler with a specialized training in the particular field of medicine involved, serving as an instructor in cardiology at the University of Oregon Medical School. The record does not reveal the entire basis of the report of Dr. Fisher. He does appear to have been under the impression the working hours were longer than those established at the Hearing. He was not present at the hearing and the report indicated that he believed the claimant had worked 14 hours the day of the heart attack, whereas the evidence only established about 11 hours of work. A first report of "may" was increased to "probable," but the background and depth of these reports from Dr. Fisher certainly could not approach the testimony of Dr. Semler who sat through the hearing and testified on the evidence there adduced.

Mr. Callahan, dissenting, concludes the claim should be accepted. He comments in part: "The treating physician relates the problem to the work. The claimant may not have been working as many hours as Dr. Fisher assumed and was working at his usual occupation; however, three days of nearly 11 hours each, following return to work from a period of illness is not ordinary work. Dr. Semler, called by the defense as an expert witness, is recognized as an eminent authority, and no attempt is made to minimize his qualifications. Dr. Semler testified that there was no causal connection of the claimant's condition to his work as truck driver. Yet, he testified that unusual exertion could be responsible for heart problems. The doctor apparently disregarded three days of nearly 11 hours each, and the claimant's recent illness. Certainly this was a case of unusual activity."

WCB #67-842 May 10, 1968

Levi Larson, Claimant.
Mercedes F. Deiz, Hearing Officer.
Herbert B. Galton, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by SCD.

This case is collateral to Larson v. SCD, 87 Ad. Sh. 197. Claimant had sustained compensable injuries in 1963, and elected to make the claim under the new procedures of the 1965 Act. The Hearing Officer ordered increased compensation on April 13, 1967. The Department appealed without success at the WCB level and the Circuit Court level. At the time of this hearing the matter was still pending before the Supreme Court. The final disposition of the original matter is to be found in the above cited case. The problem here is that the Department refused to make payments pending appeal in alleged violation of ORS 656.313(1). The position of the Department is that the election of remedies provisions of the 1965 Act do not carry with it the penalties and attorneys' fees provisions. It is concluded that the election to act under the new law carries with it all the new rights, and to impose penalties is not retroactive legislation in this case. The Department was most disturbed, because if the additional compensation and attorney's fees were paid, it appears that ORS 656.313(2) would preclude their recovery. The Hearing Officer held, nonetheless, that the "shall" of ORS 656.313(1) is mandatory. It provides "Filing by an employer or the department of a request for review or court appeal shall not stay payment of compensation to a claimant." The Hearing Officer again ordered that the payments be made and assessed penalties of 25% pursuant to ORS 656.262(8) for the unreasonable refusal to pay, and further ordered $350.00 attorneys' fees paid for unreasonable resistance pursuant to ORS 656.382(1). WCB affirmed and assessed an additonal $200.00 attorneys' fees.

WCB #67-668 May 13, 1968

Robert G. Jordan, Claimant.
H. L. Pattie, Hearing Officer.
Robert A. Bennett, Claimant's Atty.
James W. Durham, Defense Atty.
Request for review by claimant.

Appeal from notice of denial. Claimant stepped off a curb and sprained his ankle while returning from a 15-minute coffee break. There was an employee lunchroom available during the day, but the claimant was working graveyard and at that time only vending machine coffee was available. There was a coffee house available three blocks away to which the night workmen customarily went. It was while returning from there that the claimant was hurt. The Hearing Officer affirmed the denial. On review the majority of the Board applied the rule of Montgomery v. SIAC, 224 Or 380, 356 P2d 524 (1960, and concluded:

1. Mr. Jordan could not be said to be doing something for his employer. He could have obtained coffee on the work premises.
2. When the accident occurred, no control was being exercised by the employer over Mr. Jordan. Nor did the employer have control over the place of the mishap. The only element of control was the requirement that he return to employment by a set time, not yet reached.
3. The injury did not derive from an exposure greater than that presented to the general public.

Accordingly, the majority affirmed the Hearing Officer. Mr. Callahan, dissenting, argued that the coffee break is an integral part of the day's work, and acceptable coffee is part of that, and further that the machine-made coffee available on the premises was considered by many to be unacceptable. And if the injury with which we are concerned, had occurred in the building when the workman was going to or from the cafeteria operated by the telephone company, there would be no question about the compensability. If the cafeteria had been in operation and fresh brewed coffee available, it is doubtful that the employees would have left the building.

WCB #67-1190 May 14, 1968

James Roberts, Jr., Claimant.
J. David Kryger, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for review by Claimant.

Appeal from determination allowing no permanent partial disability. Claimant was struck on the head, shoulder and ankle by a falling pipe. Claimant alleges pain from any sort of physical activity. The objective findings were slight. Dr. Cooper indicated, "The most outstanding abnormality about this man is that upon shrugging his left shoulder in various directions, that there is a loud, audible and palpable crepitation, which he localizes as being in his dorsal spine, but which to me seems to be associated with the structures over or near the vertebral border of the left scapula. He states that this heavy crepitation contributes to his pain." Claimant was hit on the right shoulder by the pipe. The Hearing Officer was disinclined to believe the multitude of subjective complaints of the claimant, because he was not willing to admit that he had resided in the State Pen for a few years until impeached on cross-examination. The Hearing Officer ordered an award equal to 5% loss function (sic) of an arm for unscheduled disability relating to the crepitation. On review the Board was greatly influenced by Dr. Kimberley, who last diagnosed the claimant's condition as involving a chronic cervical radiculitis, a chronic dorsal radiculitis, a chronic lumbosacral sprain and a left shoulder-arm syndrome. "Even the need to seek lighter or more moderate work is indicative of far more than the 5% allowed." "The Board concludes,..., that claimant's permanent disability is equal to the loss of use of 10% of the left arm, and that the unscheduled disabilities are equal to the loss by separation of 20% of an arm."

WCB #67-886 May 14, 1968

Roger Truax, Claimant.
John F. Baker, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for review by Claimant.

Claimant alleges aggravation of a 1963 injury, which occurred when he stepped into a bucket of hot roofing tar. Claimant alleges he is in need of additional medical care and treatment and is entitled to attorney fees for unreasonable resistance. Claimant suffered second and third degree burns as a result of the injury. One portion of the burned area near the medial malleolus was chronically ulcerated and would not heal. A 1964 skin graft did not take. A ligation and vein stripping operation was performed in 1965, and the claimant has been allowed awards of permanent partial disability equal to 55% loss function. Following the vein stripping accident, there was improvement and some healing, but the area remained tender. In 1967, the ulcer reoccurred and the treating physician seeks authorization for further surgery from the Department. There was some medical evidence to cast doubt on the medical-causal relationship of the present need for surgery and the compensable accident. The Hearing Officer found that the matter should be remanded to the Department for care and treatment of the ulcer, but further found that the Department's responsibility was not clear enough to impose attorneys' fees. Review was withdrawn by motion of the claimant.

WCB #67-1087 May 14, 1968

Alvin L. Craig, Claimant.
George W. Rode, Hearing Officer.
Charles T. Smith, Claimant's Atty.
Albert H. Ferris, Defense Atty.
Request for review by Claimant.

Appeal from a determination allowing 25% loss of an arm for unscheduled back difficulties. Claimant has had a very spotty employment record. After the injury he attempted bar tending, but was not able to handle the beer kegs. He was offered Vocational Rehabilitation, but lacked the motivation to make any attempt to contact the local Rehabilitation personnel. Dr. Baker's conclusions were, "This man's subjective complaints are somewhat worse than they were at the time of his last previous evaluation in May of 1967. However, the objective findings are somewhat improved." This was indicated on the October 23, 1967 examination report. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #67-1501 May 14, 1968

William Jenkins, Claimant.
Robert Ackerman, Claimant's Atty.
Scott M. Kelley Defense Atty.
Request for review by Claimant.

Appeal from a determination of 60% loss use of right leg. Claimant, a logger, suffered a crushed leg, when it was caught between a cat blade and a log. The diagnosis was a comminuted compound fracture of the right femur with contusion of the femoral artery. Also a substantial portion of the quadriceps mechanism, the hamstrings and the common peroneal nerve were severed. Surgical attempts to repair the drop foot condition which resulted from the severed peroneal nerve were unseuccessful. Claimant must wear a brace, but he can walk for at least two blocks unassisted. His knee is weak. Four inches below the knee joint, the claimant has a loss of sensation which extends to the ankle. Claimant has a loss of 50 degrees flexion in the knee. The ankle has substantial loss of motion. Inversion is completely diminished; eversion, dorsiflexion and plantar flexion are each limited to one inch. Claimant is unable to perform any of his past occupations which include logger, mill worker, dairy farmer, construction work, saw sharpener. The Hearing Officer ordered the award increased so as to equal 75% loss os use of the right leg. A request for review was withdrawn.

WCB #67-701 May 14, 1968

Emmett D. Campbell, Claimant.
H. L. Seifert, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Hugh K. Cole, Defense Atty.
Request for review by Georgia-Pacific.

Appeal from a determination allowing no permanent partial disability. Claimant was injured, when one wheel of the jitney he was operating, dropped into a hole. The jitney did not overturn, and the trauma was limited to the jolting action caused by the sudden stop. Claimant was treated the following day for lower dorsal and lumbar back pain. Claimant was referred to Dr. Hickman for psychological evaluation. He found basic personality trait disturbance and evidence of psychotic symptoms of a schizophrenic nature. Dr. Hickman also found claimant to be compensation conscious. The Hearing Officer concluded that the evidence indicated that the claimant is suffering from some physical disability as a result of the accident, and its effects on his psychological distress of long standing. An order was entered by the Hearing Officer of 15% loss function of an arm for unscheduled disability to the back. On review the WCB reversed. The majority finding, "The claimant is a large individual, though not described as obese, despite a reported weight of approximately 250 pounds. His family history does reflect tragedies and frustrations which understandably could be transformed to physical complaints. It is at this point that doctors, in making physical examinations, find it impossible to relate physical complaints to the traumatic injury. Physical injuries affect groups of muscles and nerves

which, if truly injured give a uniform response. When patterns of pain unaccountably shift from place to place and from time to time, the doctors can conclude that there is in fact no physical disability." Whereupon the majority conclude that there is no evidence upon which an evaluation could be made of permanent disability. Mr. Callahan would have affirmed the Hearing Officer.

WCB #67-1509 May 15, 1968

Burlin O. Westfall, Claimant.
Glen H. Tilley, Subjectivity thereof.
Richard Kropp, Claimant's Atty.

Appeal from a determination by the Compliance Division. Defendant employer and his father, a lily bulb and truck farmer in Marion County. In 1964, the defendant purchased and built certain fumigation equipment for use in raising the mint, strawberries and bulbs because this type of service was not available in the area at the time. Defendant did not provide compensation coverage for the farm workers. Since the expensive fumigation equipment could not be kept continuously busy on the defendant's farms, he hired out on a "custom work" basis to other farmers. Most of his work was done within 10 miles of defendant's farm. Defendant had an assumed business name, which was listed in the phone book and under which he advertised. Defendant had a building, which served as a headquarters for the fumigation operations. No regular personnel were kept there. The income was segregated on his income tax returns, but no separate return was filed. On a year around basis, defendant's income is about equally split between the fumigation business and the farm work. Claimant suffered a broken heel in a fall, while handling a barrel of fumigant in the "Headquarters building." The Compliance Division found that the defendant was not a subject employer. The Hearing Officer found that ORS 656.023 placed the burden on the defendant employer to prove he was not a subject employer, and that in this case the defendant, who appeared without counsel, had not proven this. He further found that the fumigation business was too extensive to be incidental to farming within the contemplation of ORS 656.090, and therefore defendant was a subject employer, and the claimant was working in the subject occupation. On review the WCB remanded, commenting, "The Board notes from the face of the order, that the employer appeared without counsel, that the Hearing Officer erroneously shifted the burden of proof from the claimant to the employer, that no consideration appears to have been given to the long-standing administrative construction with respect to farmers performing custom farming, and that a strained construction has been placed upon what constitutes farming and work incidental to farming." "(T)he matter is referred to the Hearing Officer for further evidence, if need be, on the long-standing administrative construction of the activities included within the farming exemption, to conduct the further proceedings with the burden of proof upon the claimant, and for reconsideration of the merits of the decision upon such further record as may be made."

WCB #67-1278 May 21, 1968

Marion Lee Winburn, Claimant.
J. David Kryger, Hearing Officer.
C. H. Seagraves, Jr., Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for review by Claimant.

Appeal from temporary total disability computed on the basis on three working days. The issue is the computation of temporary total disability which in turn revolves around whether claimant was a permanent or temporary employee. Claimant suffered a compound comminuted fracture of the right ankle approximately 45 minutes after his employment had begun with an itinerate carnival. It was the usual procedure for this employer to hire numerous employees in connection with setting up the carnival, and then keep a lesser number on as permanent employees to operate the equipment. Claimant was hired at the beginning of the setting-up stage and testifies that he was hired to be a permanent employee. The employer testified that he didn't put on permanent employees until he had first seen them work as temporary employees. Also permanent employees were normally required to fill out a W-2 form, and the claimant had not done so. The Hearing Officer and the WCB both concluded that the claimant was a temporary employee.

WCB #67-949 May 23, 1968

Charles L. Griffith
Page Pferdner, Hearing Officer.
Dan O'Leary, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for review by claimant.

Appeal from a determination allowing 30% loss of use of left arm. Claimant injured his shoulder while getting out of a crane. The first diagnosis was "capsularitis and bursitis in left shoulder - rotation of upper dorsal vertebra." The Defense doctor found a severe contracture of the left shoulder, resulting from a partial tear of the rotator cuff. The Hearing Officer found that the claimant was entitled to an award for unscheduled disability, since claimant had atrophy of the left infraspinatus and supraspinatus scapular musculature. Accordingly, he reduced the arm award to permanent partial disability of 25% loss of use of the left arm and added 5% loss of an arm by separation for unscheduled disability. On review, the WCB reweighed the evidence and modified the order to restore the determination for loss of use of the left arm to 30% of the arm and affirmed the 5% award for unscheduled disability.

WCB #67-1424 May 23, 1968

Robert Haak, Claimant.
Page Pferdner, Hearing Officer.
Don Willner, Claimant's Atty.
Frederic A. Yerke, Jr., Reynolds Metals Co.
James F. Larson, SCD Atty.
Request for review by Claimant.

Appeal from determination allowing some temporary total disability and no permanent partial disability. Claimant, a long-time employee, was exposed to excessive chlorine gas on January 2, and May 8, 1967. Claimant has a history of asthma, dating back to 1962. The first question pertains to the duration of the temporary total disability as pursuant to the claimant's union contract. Claimant was entitled to a 10-week paid vacation, which had long been scheduled to begin on May 21, 1967. Claimant did not become medically stationary until after the vacation had begun and claims temporary total disability during this time. The Hearing Officer found that to allow such would be double compensation, and that the claimant was not entitled to receive temporary total disability, while he was also receiving vacation pay. As to the extent of the disability, the Hearing Officer found, "The cause of the claimant's underlying physiological problem has not been determined, and there is no evidence the claimant's employment precipitated or caused his bronchial asthma. There is evidence his asthma was exascerbated by exposure to chlorine in January and May 1967. Mr. R. W. Done is of the opinion 'This man has a chronic asthmatic condition and he would have a more severe reaction from an exposure to an irritant like chlorine than a normal person. However, this would produce a temporary and not a permanent reaction.'" The Hearing Officer also found that there was no evidence that the claimant's condition was any worse than it was in 1962. Accordingly he awarded no permanent partial disability. Notice of the right to request a review by the Workmen's Compensation Board was appended to the opinion by the Hearing Officer. The claimant followed the procedure for establishing a Medical Board of Review. There was no finding, whether the claim was based upon an accidental injury or occupational disease, but the transcript revealed references to the claim being an occupational disease claim by counsel for both sides. The department, however, met the claimant's attempt to get the claim before the Medical Board with a motion to dismiss. WCB concluded that the parties were not bound by the faulty appeal notice and referred the matter to the Medical Board of Review.

WCB #67-1271 May 23, 1968

Gerald B. Berglund, Claimant.
Page Pferdner, Hearing Officer.
Burl L. Green, Claimant's Atty.
James P. Cronan, Defense Atty.
Request for review by Claimant.

Appeal from a determination allowing 5% for unscheduled disability. Claimant during the course of a two-year employment as a construction laborer suffered four back accidents from jumping and falling and similar things. He is not now able to do vigorous physical sports and is employed as a timekeeper making about half what he did as a construction worker. The Hearing Officer ordered compensation increased, so as to equal 25% loss of an arm by separation for unscheduled disability. WCB affirmed.

WCB #67-1312 May 24, 1968

Fannie Morgan Rose, Claimant.
J. David Kryger, Hearing Officer.
Peter L. Barnhisel, Claimant's Atty.
Arden E. Shenker, Defense Atty.
Request for review by claimant.

Subsequent to an ankle fracture, which was admittedly compensable, claimant developed symptoms of vascular insufficiency for which defendant disclaims responsibility. This is an appeal from this denial. The vascular insufficiency developed in both legs, only one ankle was broken. Dr. Rawls, a general practitioner and treating physician, provided a report indicating that the injury to the right ankle caused the claimant to become incapacitated and exacerbated her arterial insufficiency. The defendant provided two doctors, at least one of which appeared at the hearing. One expressed no opinion as to the causal relationship, but the other testified that the arteriosclerotic condition was in no way related to the accidental injury. He was a specialist in vascular surgery. The Hearing Officer found that, although the claimant had made a prima facie case, the defendant had overcome this. Accordingly the denial was affirmed. WCB affirmed.

WCB #67-1296 May 24, 1968

Arthur Dement, Claimant.
Page Pferdner, Hearing Officer.
Tyler E. Marshall, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for review by Claimant.

Appeal from a determination allowing permanent partial disability of 15% loss function of left arm and 15% loss of an arm by separation for unscheduled disabilities. Claimant, a 33-year-old roofer, fell in a ladder accident. The diagnosis was "fractured pelvis, probable herniated disc, fractured ribs,

pneumonia." Claimant recovered fairly well, and a medical examination revealed claimant had about 15 degrees loss of rotation of the neck to the right and 25 degrees loss of rotation on the left with pain on extreme flexion, and also abduction of the left arm beyond 90 degrees seems somewhat uncomforable, and the same is true of forward flexion. The Hearing Officer awarded 10% loss of an arm for disability in the cervical region and 5% loss of an arm for disability in the lumbar region; together with shceduled permanent partial disability of 25% loss of use of left arm. WCB affirmed.

WCB #67-1067 May 24, 1968

Willard A. Brown, Claimant.
Harold M. Gross, Hearing Officer.
Bernard P. Kelly, Claimant's Atty.
Lyle Velure, Defense Atty.
Request for review by claimant.

Appeal from a determination allowing 15% loss of use of left arm. Claimant was injured when his arm was crushed between the rolls of a glue spreader in a plywood mill. The arm was pulled in all the way up to the axilla (arm pit). Claimant has been able to return to his former employment as a core layer, but he favors his left arm considerably. Dr. Kanzler found claimant lacking 15 degrees from complete extension at the proximal joint level with the wrist in full dorsiflexion. He did not recommend further surgery. Dr. Bolton found "loss of function of the middle finger including damage to the musculotendinous unit and also a minor disability to the left arm for the crush injury with continuing but minor symptoms about the elbow." Several fellow employee's indicated claimant had a considerable loss of dexterity. The foreman said he couldn't see any difference. The Hearing Officer ordered the award increased so as to be 25% loss of function of the left arm. WCB affirmed.

WCB #838 May 27, 1968

Norman O. Washburn, Claimant.
George W. Rode, Hearing Officer.
Fred Eason, Claimant's Atty.
John McCulloch, Jr. Defense Atty.
Request for review by Claimant.

Appeal from a determination allowing 20% loss of an arm for unscheduled disability. Claimant had a previous injury in 1961, which was settled for 40% loss of use of an arm for unscheduled back injuries and 15% loss of use of right arm. Claimant, 52, sustained the present injury to his back while attempting to open a stuck school bus window. Evidence of considerable functional problems and lack of motivation was reported in both medical reports and apparent at the hearing. Subjective complaints included aches and pains in the arms and legs and a limitation on the walking ability. The Hearing Officer affirmed the determination and the WCB affirmed commenting, "The claimant appears anxious to avoid any posture of work capability. This is obvious in discussions of the trailer court of which he is half owner. The claimant will not even admit to collecting rent for the trailer spaces, though this is certainly not outside of his work capabilities."

WCB #67-705 May 27, 1968

Tobe Trent, Claimant.
Mercedes F. Deiz, Hearing Officer.
Edwin A. York, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by SCD.

Appeal from a determination allowing 40% loss function of the right foot. Claimant, age 77, has worked full-time as a landscaper and gardner since his retirement as a construction worker. The power mower he was operating upset, and his right foot was deeply lacerated, when it was caught in the rotary blades. There was a deep gouge out of the heel bone and numerous other foot bones were fractured or partially cut away. Dr. Patton reported a 7-inch scar on the inside of the foot, which is soft and pigmented, very limited motion of the ankle and the great toe, and swelling in the ankle and limited motion in the foot. Claimant's knee bothers him at times, he has pain in the shin bone, and the right leg gets numb when he works standing on his feet. There is a serious circulatory problem in the foot. He is able to mow a lawn now and then, but is not able to do heavy manual labor. There was medical evidence that the claimant would be doing well just to take care of himself. The Hearing Officer found that the claimant was totally disabled. The WCB reversed in reliance on Jones v. SCD, 86 Ad. Sh. 847, which held that a right arm injury combined with advanced age, lack of education and limited training would not qualify for permanent total disability. Permanent partial disability equal to 65% loss function of a leg was ordered.

WCB #67-1189 May 27, 1968

Vern L. Sommers, Claimant.
H. L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding permanent partial disability equal to 15% loss of an arm by separation for unscheduled disability. Claimant, age 63, fell off a ramp while loading a freight car. X-rays of the cervical spine revealed a minimal scoliosis to the left. Degenerative changes of osteo-arthritis were seen in the mid-cervical spine, especially at C-4, C-5 level on the left. The thoracic spine seemed to be within normal limits as concerns disc spacing and structural changes except for the scoliosis. While hospitalized a right inguinal hernia was discovered and repaired. Claimant had a prior neck injury in 1942, for which he had been awarded 20% loss function of an arm. There was evidence that the claimant had been capable of heavy work prior to the injury in question. Now claimant suffers pain in the neck and shoulders, radiating into his arms. His work activities appear to be limited to those that would be commensurate with those of a night watchman. Dr. Tasi thought that the claimant could not return to any weight bearing occupation. The Hearing Officer increased the award so as to equal 30% loss of an arm by separation of unsche-duled disability. The claimant's position on review was that he was permanently

totally disabled. WCB observed that the claimant was the longtime owner of a 350 acre farm and his remaining physical abilities did not preclude claimant from regularly performing useful and gainful work in connection with the farm. However, the award was increased to 60% loss of an arm by separation for unscheduled injuries.

WCB #67-1065 May 27, 1968

Lawrence Snead, Claimant.
Harold M. Gross, Hearing Officer.
Donald Atchison, Claimant's Atty.
James P. Cronin, Jr., Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding 25% loss of an arm by separation for unscheduled disability. Claimant, a 61-year-old whistle punk, stepped in a hole and twisted his back while carrying 30 pounds of whistle wire through the woods. The sprain was superimposed upon a preexisting compression fracture and a preexisting condition of osteoarthritis at D-6. Dr. Shlim attributes claimant's present inability to work to his peptic ulcer condition, rather than his back injury, and indicates he does not feel the Department is responsible for the peptic ulceration. Two doctors indicated that the claimant was totally disabled. The employer offered some light work to the claimant, but the claimant didn't think he could do it. The claimant was awarded permanent partial disability equal to 40% loss of an arm by separation. On review the claimant argued that the ulcer should be compensable, but it was found that the medical evidence did not show connection and the laymen's speculation didn't either. Whereupon the WCB affirmed.

WCB #67-1475 May 27, 1968

Fred Kufner, Jr., Claimant.
Page Pferdner, Hearing Officer.
Donald E. Kettleberg, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for review by SCD.

Appeal from a determination allowing 15% loss of an arm by separation for unscheduled disability. Claimant suffered a back injury while attempting to catch a falling sewer pipe connector on October 18, 1966. The initial diagnosis was "acute post traumatic lumbar myositis." A myelogram on October 27, 1966, revealed he had a "herniated L-3 disc on the left." Partial laminectomies at the L-3, L-4 level were followed by excision of the nucleus pulposus of L-3. He was discharged from the hospital five days after the surgery, and at that time was "ambulant with ease and arises from bed, as if he had had no surgery." Dr. Ho, the operating surgeon, stated claimant was then virtually asymptomatic, and he anticipated a normal level of function in about three months. Claimant suffered variously described back injuries in a car accident in March 1967. Examination in May found that "some permanent, partial disability is present, but is relatively minimal in degree." The 15% determination was affirmed. The Hearing Officer also observed that the claim was not accepted nor compensation

paid until 38 days after the accident. The delay was found to be the result of a delayed report by the employer to the Department. It was found that the failure to report within 5 days was unreasonable delay and penalties were attached, and it was further found that the failure to report beyond 30 days was unreasonable resistance and attorney's fees were allowed. On review the Department complained of a lack of opportunity to defend on the issues of penalties and attorney's fees. The accident was unwitnessed, and the only evidence in the record of the report of the accident to the employer by the claimant was that the claimant "went to the boss and told him, I had to go to the doctor because my back was just hurting too bad." WCB found that this was insufficient notice of injury to base penalties and attorney's fees upon.

WCB #68-289 May 27, 1968

James P. Lewis, Claimant.
H. L. Seifert, Hearing Officer.

Appeal from a notice of denial, dated December 14, 1968. The Hearing Officer dismissed the request for hearing, because it was not filed until February 16, 1968, which is more than 60 days. WCB affirmed, noting that the fact that claimant had addressed a letter to the claims division of the State Compensation Department which was received by that agency on February 8, 1968. In reliance on In Re Wagner's Estate, 182 Or 340, the Board held that this letter was of no effect, since it was returned to the claimant and not forwarded to the Board.

WCB #67-749 May 27, 1968

Ruth P. Bray, Claimant.
George W. Rode, Hearing Officer.
Fred P. Eason, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for review by Claimant.

Appeal from an award of no permanent partial disability. Claimant, a clerk, suffered a back strain in attempting to prevent a pile of rugs from falling. The medical evidence of two doctors indicated no permanent partial disability. It was also found that whatever symptoms, claimant was still experiencing, were not related to the injury, as the claimant had a disturbed home life. Claimant alleges pain in the back, neck, and shoulders, but the Hearing Officer awarded no permanent disability, and the WCB affirmed.

WCB #67-531 May 27, 1968

Dean N. Doud, Claimant.
Request for review by Claimant.

This pertains to an alleged accidental injury arising out of the breathing of welding fumes in February 1967. The claim was denied in March 1967, as not being a compensable occupational disease. The Hearing Officer found nothing compensable. The Board made several references to procedural defects, but ruled on the merits that there was insufficient evidence to prove an accidental injury.

WCB #67-1222 May 17, 1968

Viola Carr, Claimant.
J. David Kryger, Hearing Officer.
Martin P. Gallagher, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for review by SCD.

Appeal from a notice of denial. Claimant, age 52, was employed as a fry cook. There was evidence that there were vents and hoods over the deep fat fryer and grill in compliance with the State Board of Health Regulations, and there was evidence that the claimant complained about grease fumes in the air. An air conditioner was available for use, but the other employees would not permit it to be operated, because it messed up their hair. Claimant had had difficulty breathing during working hours for some time, and approximately one week before she terminated employment, the claimant had an episode of inability to breathe and was helped outside by fellow employees in an attempt to get her fresh air. Accompanying the onset of difficulty in breathing is chestal pain which extends through her back below her rib cage. Dr. Finck diagnosed bronchial asthma, and indicated that it was work connected. He advised termination of work to see if it would clear up. It did. Dr. Cudmore was of the opinion that the claimant "developed a pulmonary degeneration and sensitivity to grease used in cooking." The defendant's doctor suggested other causes for the breathing problems. The Hearing Officer ordered the claim accepted and assessed $350.00 attorney's fees. The Department appealed for a ruling as to whether the respiratory condition in question was an accidental injury or an occupational disease. The Hearing Officer failed to rule on this. "The Board finds that on March 13, 1967, Mrs. Carr suffered a sudden inability to breathe caused by inhalation of grease fumes and concludes that this constituted a compensable accidental injury as distinguished from an occupational disease." $200.00 additional attorney's fees were taxed.

WCB #67-1120 May 29, 1968

Donald L. Staley, Claimant.

Claimant suffered a compensable injury to his feet. An effort was made by able counsel representing the insurer and the Hearing Officer to resolve, through a settlement, the problems which may arise in the future concerning aggravation and future medical treatment. Under this settlement, Mr. Staley received an amount which appears fair, but he states an attempted release of future rights. The law does not allow such a settlement. The only matter amenable to stipulated disposal of a workman's claim is a bona fide dispute concerning compensability. (ORS 656.236, 656.289(4).) No such issue was presented here. Further, the Hearing Officer had no jurisdiction over this claim at the time the settlement order was executed. There is at least one other important defect in the way this case has been handled. There has been no determination. The "Stipulation of Compromise and Final Settlement," signed by the Hearing Officer on March 21, 1968, is not approve, and it is declared to be null and void and of no force and effect.

WCB #67-924 May 29, 1968

James Arthur Cumpston, Claimant.
Page Pferdner, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
James F. Larson, Defense Atty.
Request for review by Claimant.

Appeal from a determination allowing 25% loss of opposition of the left thumb, 50% loss of function of left index finger, 50% of left middle finger, 50% of left ring finger, and 50% of left little finger. Claimant was injured when his hand was caught in a wringer. All the skin was forcefully pulled from the fingers of the claimant's hand and the distal portion of the palm. The entire distal phalange of each of the fingers was also pulled off. A series of ten operations were conducted in which skin grafts were made from the claimant's chest, abdomen, and thighs. The alleged fingers appeared to the Hearing Officer to look more like four short fat sausages. The appendages were nailless, stubby, discolored, a purplish brown, and lacked the creases and shape which would distinguish them as fingers. There was extensive scarring of the donor areas of the claimant's body. There is also a loss of strength in the arm and a lack of sensation in the hand except for a dull pain. The thumb is normal except for the loss of opposition due to the lack of a last joint in each of the fingers. The Hearing Officer ordered an award of 85% loss of function for each of the left hand fingers and a 60% loss of opposition of left thumb, and 30% loss function of an arm for unscheduled disability.
On review the Board commented, "The record reflects what to the Board is an obvious defect in attempting to evaluate separate digits when basically all of them are involved. A simpler process appears to be to evaluate what useful function is left in the forearm. It appears to the Board that this workman has approximately a 10% remaining function of the forearm and an appropriate award is therefore 90% loss of function of the left forearm."

"The Hearing Officer, in recognizing the restrictions imposed by chest and abdominal graft sites, made what appears to be an appropriate award of 30% loss function of an arm. However, both thighs are also involved and these are additional scheduled areas.
"Whether the Hearing Officer intended to include the leg disabilities in the 30% award is not clear. The Board, noting the sensitiveness of the skin and occasional cramping of muscles, concludes the claimant has suffered a loss of use of 5% of the left leg and 10% of the right leg," and accordingly so awards.

WCB #67-1165 May 29, 1968

Floyd G. Chaffee, Claimant.
Harold M. Gross, Hearing Officer.
William Babcock, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant, 58, was struck in the back and left shoulder by a limb on rolling log. Claimant alleges permanent total disability. Claimant is six feet three and weighs upwards of 260 pounds. Dr. Dalros initially diagnosed a myofascial strain superimposed upon hypertrophic degenerative arthritis of the lower dorsal spine with excessive spur formation between D9-D10 and D10-D11. Subsequently, Dr. Dalros indicated that the claimant had "a partial paralysis of the muscles deriving their enervation from C7 and C8." Dr. Brooke initially diagnosed a mild compression fracture of D-8, but finds no significant disability resulting from the accident. Dr. Cottrell explains that, although there are no positive objective findings to support claimant's complaints, this is the type of injury which can produce many subjective symptoms with little objective evidence, including pain in the upper extremities as some of the muscles which attach the upper extremities to the trunk attach to the spine in this area. Dr. Hickman considered the claimant to be "honest and genuine." The Hearing Officer concludes "the negative objective physical findings and his failure to attempt to find work do not permit the conclusion that he is totally disabled." An award was entered equal to 15% loss of function of an arm for unscheduled disability to the dorsal spine. The WCB amended the Order, changing it to loss by separation and otherwise affirmed.

WCB #67-953 June 3, 1968

Raymond D. Wood, Claimant.
John F. Baker, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for review by Claimant.

Appeal from a notice of denial. Claimant, a high school student, alleges a back injury while loading sacks of grass seed into a car. No immediate report was made either to a fellow employee or to the employer. This was on July 1st. Claimant testified that his back became very stiff and sore over the next few

days. Claimant was entered in a track meet on July 4th, but on cross-examination denied that he could or did participate. The records of the track meet indicated claimant had taken four official jumps in the Hop, Skip, and Jump event and had cleared the opening height in the high jump event and had later made three unsuccessful attempts to clear the bar at a higher level. On July 7th, Dr. Reid diagnosed a "compression of the body of T-9 on the right side; mid-thoracic strain." Dr. Andersen reviewed, apparently the same X-rays, and concluded they showed no evidence of bone pathology in the dorsal area, and that there was no evidence of fractures. He concluded there was a minor amount of strain of the muscles and ligaments of the dorsal spine. The Hearing Officer concluded that the claimant may have had the sort of general aching and soreness which appears after repeated heavy lifting by one not so accustomed. Denial affirmed. WCB affirmed.

WCB #67-944 June 6, 1968

Marlin Morgan, Claimant.
Harold M. Gross, Hearing Officer.
Benton Flaxel, Claimant's Atty.
James Cronin, Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding permanent partial disability equal to 25% loss of an arm by separation for unscheduled disability, and 20% loss of function of the right foot. Claimant, who survived a Korean War hand grenade incident which removed his right forearm below the elbow, his right eye, and scattered shrapnel through his body, to become a high-climber, was injured when his climbing spurs gave way when he was 170 to 180 feet above the ground. The highlead strap, which he was carrying, exerted a violent downward jerk. The diagnosis was a crushed disc at the L5-S1 Level. A laminectomy and L5 to sacral fusion was performed on November 10, 1966. Claimant was again climbing by April 1967. Claimant minimizes his symptoms, but it appears he is somewhat clumsy and weak in the right foot. His leg cramps on a regular basis. His ability to lift is impaired, and he has difficulty walking over rough surfaces. The Hearing Officer ordered the award increased so as to equal 40% loss of an arm by separation for unscheduled disability and 20% loss of function of the right leg. WCB affirmed.

WCB #67-1513 June 6, 1968

Richard L. Kreier, Claimant.
H. L. Pattie, Hearing Officer.
Garry Kahn, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for review by Claimant.

Appeal from a determination allowing 15% loss of an arm by separation for unscheduled disability. Claimant, a long-time Teamster, sustained a back injury when he stepped off a tailgate while carrying heavy furniture. Objective findings were slim, but the doctors did advise that claimant should avoid heavy lifting, as it would cause re-injury. Claimant must wear a corset and suffers from substantial pain. He is able to mow a lawn with a hand mower. The Hearing Officer awarded 25% loss of an arm for unscheduled difficulties.

WCB #67-628 June 6, 1968

Mildred L. Wershey, Claimant.
Page Pferdner, Hearing Officer.
Alan T. Murphy, Jr., Claimant's Atty.
James F. Larson, Defense Atty.
Rejection by the SCD.

Appeal from a determination of 75% loss function of an arm. This is an occupational disease claim. Claimant, age 53, was employed as a meat wrapper, when her right shoulder became painful due to chronic subdeltoid bursitis. Dr. Noall testified, he used every kind of conservative treatment he is aware of, for almost two years, and in spite of his best efforts, claimant's right arm is now seriously impaired. Treatment included hospitalization, a cast, aspiration of fluid, ultrasonic sound, exercise, physical therapy, antibiotics, rest, and manipulation. Claimant now has demineralization of the greater tuberosity of the humerus, the articular surfaces of the scapula, and the distal end of the clavical. She has weakness and atrophy of the muscles of her right arm and of the scapular rotation muscles, and complete obliteration and disintegration of the bursa which have been replaced by scar tissue. The Hearing Officer refused to allow permanent total disability, but concluded, claimant has permanent total disability equal to 90% loss function of her right arm, and additionally 25% loss function of an arm for unscheduled disability. The Department rejected, and a Medical Board of Review was constituted consisting of Drs. Davis, Cohen, and Noall. The re-examination by the members of the Board found:

> Examination is confined to the right upper extremity. There is some obvious atrophy of the right deltoid muscle. The patient complains of pain in the right shoulder on active and on passive abduction and rotation of the shoulder. She actively abducts the arm to a position of 40 degrees of abduction beyond which she cannot actively raise the arm. It can be further passively abducted to a position of 90 degrees, but the patient complains severly of pain as this is done. There is occasional palpable crepitus as passive abduction is carried beyond the active range. There is marked limitation of internal and external rotation amounting to approximately neutral position of external rotation. There is accompanied with this severe complaint of pain in the shoulder.(sic) The aptient has good use of the elbow, forearm and hand. The right biceps measures 14 and 1/2 inches; the left biceps at the same level, 14 3/4. Both forearms measured at the same level measure 10 1/2 inches in circumference. The grip on the right is weaker than on the left, but she still has what would be described as a good grip. There is no demonstrable disturbance in sensation in the lateral aspect of the arm, and there is normal sensation in the forearm and hand.
>
> New X-rays of the shoulder and of the neck were made on this occasion. X-rays of the neck are negative. X-rays of the shoulder show some demineralization of the proximal end of the humerus and some roughening of the greater trochanter area of the humerus with a small defect in the bone in this location. The shoulder joint itself shows fairly normal contour with some osteoporosis of these surrounding bone structures.
>
> We estimate her permanent partial disability as equal to 100% loss function of the right arm at the shoulder.

WCB #68-287 June 6, 1968

Arthur P. Cobb, Claimant.
H. L. Seifert, Hearing Officer.

Appeal from a notice of denial mailed December 11, 1967. The Hearing Officer dismissed the request for hearing filed on February 16, 1968, because more than 60 days had elapsed since the mailing of the notice of denial. On review the claimant argued the postmark of February 9, 1968, entitled the claimant to a presumption of receipt the following day. WCB noted that the postmark relied on, was a metered mark, subject to the control of the sender. Further the back of the envelope reflected an official post office cancellation bearing a cancellation of February 15, 1968. Order of dismissal affirmed.

WCB #67-1336 June 6, 1968

Harold F. Crisler, Claimant.
Eugene K. Richardson, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for review by Claimant.

Appeal from an award of no permanent partial disability. Claimant, a 60-year-old construction laborer, injured his back while pulling lumber off a hoist. Claimant suffered an acute low back strain and has worn a low back brace since. An investigator observed the claimant pushing a wheelbarrow on his back porch. The evidence was that the claimant would never be able to return to heavy manual labor, but would be limited to light to possibly medium work. An award of 15% loss function of an arm for unscheduled disability was ordered. On review the Board ordered, based largely upon the medical evidence, additional temporary total disability for two months, and modified the permanent partial disability award to read 15% loss of an arm by separation.

WCB #67-989 June 6, 1968

Kenneth Rae Barnett, Claimant.
J. David Kryger, Hearing Officer.
James H. Nelson, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for review by Claimant.

Appeal from a notice of denial. Claimant alleges a shoulder injury while pulling veneer. The exact circumstances of the alleged injury are obscure, but it was alleged to have happened on June 7, 1967. Claimant had suffered a dislocated left shoulder in a nonindustrial automobile accident on March 23, 1967, which was prior to his employment with defendant employer. Dr. Corrigan's examination, which was conducted about a week after the alleged injury of June 7, 1967, indicated that the claimant had suffered a separation of his left acromioclavicular joint, and that upon X-ray, the calcification of that area indicated this separation had taken place some time prior to June 7, 1967. He also found

some atrophy of the deltoid muscle, which, in his opinion, was a result of nonuse of the arm rather than any traumatic injury. Two other medical opinions were not helpful to the claimant's position. Denial affirmed. WCB affirmed. On review claimant argued that claimant had no shoulder disability from the auto accident, because the pre-employment medical examination didn't catch it. The Board concluded that the pre-employment examination was rather cursory.

WCB #67-637 June 7, 1967

Charles N. Adams, Claimant.
Page Pferdner, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding temporary total disability to May 3, 1966, and temporary partial disability from May 3 to October 24, 1966, and further awarding permanent partial disability of 15% loss function of a forearm. Claimant, who was the utility man and acting fire chief for the Port of Portland, fell and fractured the left upper radius of his arm and suffered a contusion of the sternum, while running to answer a fire alarm. The Department had not paid the temporary partial disability. Claimant's employer had rearranged his work schedule on May 2, so claimant could work as a gateman, although his arm was still in a cast. As a utility man, claimant earned $3.64 per hour and as a gateman was paid $3.40 per hour. Between January 1, 1966, and April 8, 1966, claimant earned $3,018.65 or an average of $215.61 a week. Between May 2, 1966, and October 15, 1966, claimant earned $3,424, 96, or an average of $142.70 a week, or $72.91 per week less than he had been earning as a utility man. Defendant contended that these earnings were not materially lower and did not justify payment of temporary partial disability. It is assumed that the claimant was earning as much as he was capable of earning between January 1, 1966, and April 8, 1966, and his earnings of $215.61 per week constitute his "earning power" for that period of time. As to the "earning power" of a workman with his major arm in a full cast, "I again can only assume that his 'earning power' and his actual earnings are synonymous. Although claimant's hourly rate as a gateman was very little less than his rate as a utility man, as a utility man he regularly received overtime. He did not receive overtime as a gateman. I find claimant is entitled to temporary partial disability equal to 33% of his rate for temporary total disability, or $89.10 per month from May 3, 1966, to October 24, 1966." The Hearing Officer also increased the permanent partial disability to 20% loss of use of the right forearm. The defendant was ordered to pay 25% penalty on the unpaid temporary partial disability for unreasonable delay and $200.00 attorney's fees.

On review the majority modified the computation of temporary partial disability. Under long-standing administrative interpretation, Mr. Adams is entitled to payment from the employer of temporary partial disability payments during the period of May 2, 1966, to October 24, 1966. Those payments are calculated by applying the percentage difference.

$3.40 (wage rate after) divided by 3.64 (wage rate before) = .934

1.00 - .934 = .066

12.2727 (daily TTD rate prior to 11/14/66) x 5 (das. worked per wk.) x .066 = $4.10 per wk.

As a utility man, Mr. Adams often received overtime. The Hearing Officer included that overtime in making his calculations on the temporary partial disability payments. The majority of the Board believes that the overtime cannot be included in these computations, but that the same basic rate as is used for temporary total disability must be utilized. Otherwise the Hearing Officer was affirmed.

Mr. Callahan, dissenting, would affirm the Hearing Officer. His position is that overtime earnings are part of "earning power" in ORS 656.212.

WCB #67-1206 June 7, 1968

Arthur L. Schafroth, Claimant.
H. L. Seifert, Hearing Officer.
Harl H. Haas, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 10% loss of an arm for unscheduled disability. Claimant was injured when a wall panel fell striking him on the shoulder. Claimant suffered back pain at L-5 and a myelogram showed a persistent extrinsic pressure defect at the L-5 level on the left consistent with a herniated intervertebral disc. A lumbar laminectomy was performed at L-5. Recovery from the surgery appeared good. The incision healed well. Physical therapy and exercises were recommended on a continued basis until the muscles were strong enough to perevent recurrence of back pain. Claimant is now unable to do the chores on his farm, because of the pain in his back. He has changed employment to a lighter job. The Hearing Officer ordered the award increased to 20% loss of an arm by separation. WCB affirmed.

WCB #67-1264 June 12, 1968

James R. Lowell, Claimant.
George W. Rode, Hearing Officer.
Gary Kahn, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

Appeal from a determination equal to 10% loss of use of the right leg. Claimant sustained an injury to his right shin, when he was struck by a tree. The injury consisted of a minimally displaced fracture of the tibia and considerable soft tissue injury. Dr. Smith's report indicates probable chondromalacia of patellae and slight flexion contracture of the right knee,

post-traumatic with no disability from fractured tibia. Claimant is a logger and complains of difficulty getting around in the woods, especially hilly ground, due to knee instability. He is still working as a logger, however. The subjective complaints are essentially consistent with the objective findings. The award was increased so as to equal 20% loss of use of the right leg. WCB increased the award to 30% loss of use of the right leg.

WCB #67-1391 June 12, 1968

John C. Bell, Claimant.
Mercedes F. Deiz, Hearing Officer.
Richard Noble, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 25% loss of an arm by separation for unscheduled disabilities. Claimant, a pipe fitter of 30 years experience, was struck on the back by a piece of falling pipe. He attempted to return to work forthwith, performing light duties in employer's parts shed, but soon had to quit because of low back pain radiating into the legs. Eventually a myelogram was performed which revealed a herniated disc with a considerable amount of extruded material L-4-5 on the right. A laminectomy was performed. A follow-up examination reported: "The patient walks well, without a limp. He stands with good posture. Motion in flexion--he could bring his finger tips to the floor. Lateral bending--he could slide his finger tips below the knee joint to the right and to the left, and extend to about 20 degrees. There is minimal tenderness about the low back scar. Straight leg raising could be done to about 70 degrees, and then there was some discomfort, and he was very easily able to lift both legs off the table top. Reflexes are symmetrically(sic) and to pin prick there is no change of sensation noted." The doctor wrote that claimant was able to do light duties. A month later Dr. Smith examined and reported that claimant could "forward bend until his fingers are about four inches from the floor. Extension of the back is limited about 30%. The deep tendon reflexes are within normal limits in both lower extremities and the sensation to pin prick is symmetrical on both lower extremities. It appears to be generally decreased in both legs. Straight leg raising test elicited complaints of pain in the low back at 30 to 40 degrees bilaterally. Patrick's test for sacroiliac strain also brought on complaints of lumbosacral pain. There appeared to be some tenderness over the low back from L-4 to the sacrum. There was no muscle spasm noted." The X-ray revealed some degeneration of the disc with minimal arthritic spurring from L3 to L5, "and his prognosis would be somewhat guarded, since he is 60 years of age and shows some degeneration of the joints in the lower back." Claimant is not doing anything now except puttering around his 20 acre farm and receiving unemployment benefits from Washington. Claimant alleges total disability, but this is inconsistent with being ready, able and willing to work as indicated on the application for unemployment benefits. The Hearing Officer concluded that although he had a seriously weakened back, he was able to do light work. The award was ordered increased to 40% loss of an arm for unscheduled disability.

On review the Board protested the absence of briefs, as it has before, but concluded that the evidence supported an award for leg disability. The Board

assumed the Hearing Officer included these factors in the award. Whereupon the award of disability was modified to reduce the unscheduled award for back injuries from 40% loss by separation of an arm to 30% and by granting an award for loss of use of 10% of each leg.

WCB #67-1202 June 12, 1968

Roy C. Burns, Claimant.
Page Pferdner, Hearing Officer.
Ralf H. Erlandson, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

The Hearing Officer entered an order directing the claimant to make an election as to whether he wanted an ankle fusion or not. Fourteen days was allowed to make said election, and the claim was ordered reopened when the choice was made. On review the Board remanded, commenting: The Board is disturbed by the record. There is no medical evidence that the radical surgical intervention of a fusion was necessitated by the industrial injury or even that such surgical intervention was required at this time. Certainly any such decision should not be made upon the basis of a claimant's understanding of various conversations with doctors. The claimant admittedly had a long-standing disability of an ankle caused by a motorcycle accident in 1957. Care and treatment had been largely under the auspices of the Veterans Administration, and there is evidence to the effect that progression of disability from the motorcycle accident itself would someday call for a surgical fixation of the ankle joint by a process commonly termed a fusion. Pursuant to ORS 656.268, a determination was issued finding the claimant's condition stationary and evaluating the additional permanent disability to the ankle as equal to a loss of 10% of a foot. Whether major surgery is undertaken is a choice to be made by the claimant after advice from the attending physician and should not have entered into the Hearing Officer's consideration of the claim without a clear showing of both the necessity for the surgery and the relation of such necessity for surgery to the industrial injury at issue. Whereupon the matter was remanded to the Hearing Officer.

WCB #67-1317 June 12, 1968

Lawrence J. Hallin, Claimant.
H. L. Pattie, Hearing Officer.
Burton H. Bennett, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for Review by Claimant.

Issues consist of penalties, attorney's fees, and extent of temporary disability. Claimant, a waiter in a cafe, was assaulted by the cook and suffered a broken arm and various injuries. No written notice of the injury was made to the employer, but the employer's wife was present and the employer arrived within the hour. This was on September 26, 1967. The employer prepared and signed an accident report on October 9. A request for a hearing was signed

on October 20 and filed on October 23. On November 14 the claim was accepted and the first compensation check for $30.00 covering the period from October 1 to October 8 was mailed. On November 30 a temporary total disability check was mailed in the amount of $216.00 covering 36 working days between September 26 and November 22. On February 6 temporary total disability was paid for a period between November 22 and December 6 in the amount of $54.00. The Hearing Officer found that this was an unreasonable delay and assessed 25% penalties on the entire amount but refused attorney's fees ground on unreasonable resistance, he being of the opinion that this required some indication of ill-will or bad faith. Also temporary partial disability was allowed through January 3, 1968.

The review concerned the assessment of the attorney's fees under ORS 656.382. To so assess attorney's fees, there must be an unreasonable resistance to the payment of the compensation. The Hearing Officer distinguished between unreasonable delay in payment of compensation and an unreasonable resistance. The Board agrees that the terms are not synonymous and will look upon the facts of each case to determine whether in a given instance the delay in payment is tantamount to a resistance. For the purpose of the decision the Board cannot confine itself to whether the State Compensation Department was culpable. If fault lies at the door of the employer, the State Compensation Department may recover the fees from the employer. In the instant case the workman's arm was broken in an assault by a fellow workman. The employer's wife was present and the employer himself knew of the injury within an hour. Despite this state of affairs, the first payment of compensation for this injury was November 14, 1967, six weeks after the accident and this first payment was for only five days lost time from work. As a matter of record, the request for a hearing on the matter of a delay in compensation was filed October 23, 1967, and it was not until three weeks thereafter that the nominal partial payment of accrued compensation was made.

The State Compensation Department is concerned that employers and carriers will be subjected to onerous "penalties" over minimal injuries for delays associated with the carriers' bona fide attempt to ascertain liabilities. Concern for such situations should not be the basis for delays associated with a broken arm which by most accepted standards may reasonably be deemed to be the cause for failure to return to work for a period of time. Whereupon the WCB found the delay in payment by the State Compensation Department in light of the knowledge of the facts by the employer to constitute an unreasonable resistance to payment of compensation, and the order was entered for the Department to pay $600.00 attorneys' fees.

WCB #67-1194 June 17, 1968

Leo W. Hogson, Claimant.
Request for Review by Claimant.

A notice of denial was issued July 27, 1967, which included the notice of a right to a hearing if requested within 60 days by a signed letter addressed to the Workmen's Compensation Board. No address was provided to which to send the letter. On September 22, 1967, a letter from the claimant was received by the State Compensation Department as follows:

> Reference is made to the Notice of Denial of my personal injury claim dated July 27, 1967.
>
> I object to the denial of my claim and respectfully request a hearing thereon by the Workmen's Compensation Board. My mailing address is 20 Shield Street, Milton-Freewater, Oregon 97862 and I have retained the law firm of Isaminger & Hanzen, P. O. Box 985, Pendleton, Oregon to represent me with reference to this claim.

The Board has previously held that the request for hearing was not accomplished until delivered to and received by the Workmen's Compensation Board. The Board observed that ORS 656.262(6) placed the responsibility for notifying the workman of his hearing rights upon issuer of a notice of denial. Whereas the misaddressed letters have been sent before, it is the conclusion of the Board that the notice of appeal rights was insufficient, therefore the Board reverses its previous holdings and remands the case for a hearing on the merits.

WCB #68-286 June 17, 1968

Lloyd E. Fitzhugh, Claimant.
Request for Review by Claimant.

Claimant received a compensable back injury August 17, 1966. The injury did not cause any loss of time from work and on October 27, 1966, by book entry only, the Workmen's Compensation Board noted the claim as closed. No formal determination was prepared pursuant to ORS 656.268, and accordingly no notice of the book entry of closure or determination was issued or mailed to the parties. In view of administrative expense, about 80% of the claims are handled in this manner, as they don't require any payment for disability. Hearings are available on claims which have not been presented for determination. In this case the claimant inquired as to his rights and on June 8, 1967, a formal determination was issued. This determination advised the claimant that he had one year from the date thereof within which to request a hearing. Over eight months thereafter on February 16, 1968, the claimant requested the Hearing. This was within one year of the only determination mailed to the claimant on June 8, 1967, and was therefore timely within ORS 656.319 (2) (b). If the Board on June 8 had simply advised the claimant that he had one year from the date of the last medical provided in September of 1966, the order of the Hearing Officer could be sustained. Whereupon the Board remanded for a hearing upon the merits.

WCB #504 June 17, 1968

Robert O. Olson, Claimant.
John F. Baker, Hearing Officer.
Fred P. Eason, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability for a November 1965 back injury. Claimant was a pole climber for the telephone company. Claimant is now doing little pole work. He has a history of substantial back trouble and received a previous award of 25% loss of function of an arm for a 1962 injury. Claimant had a device in his home for applying traction when his back bothered him. The medical reports estimated the disability to claimant's back to be equal to 25% loss of function of an arm. Accordingly the claimant was allowed no additonal permanent disability. WCB affirmed.

WCB # 67-1609 June 18, 1968

John H. Hill, Claimant.
George W. Rode, Hearing Officer.
David Vinson, Claimant's Atty.
Earl Preston, Defense Atty.

Appeal from a determination allowing 15% loss of an arm for unscheduled disability. Claimant, age 60, sustained a compensable back injury. Claimant has worked steadily since the injury, but states that his work involves handling kiln dried lumber which is considerably lighter than the usual greenchain work. Claimant considers himself unable to return to the heavier work. Claimant's back becomes stiff and sore after working. Mr. Molter's opinion indicates: "In my opinion there is a small to moderate degree of permanent partial disability remaining." The Hearing Officer affirmed the determination. WCB affirmed, commenting that "No brief has been submitted on behalf of the claimant and upon review of the record, it is obvious that it would be difficult to frame a brief to support an increase in the award."

WCB #1313 June 18, 1968

Dee Baker, Claimant.
Mercedes F. Deiz, Hearing Officer.
Ralf Erlandson, Claimant's Atty.
Roger Warren, Defense Atty.
Request for review by Department.

Appeal from a notice of denial. Claimant a 21-year-old mother with no previous history of ill health, became violently ill at work. There was evidence that one of the burners in the kitchen of the barbecue pit in which she worked was defective and released gas fumes. The kitchen smelled strongly of natural gas. Her symptoms were general abdominal cramps, weakness, dizziness, headaches, upper mid-chest ache, and mild dyspnea. The initial diagnosis was overexposure to natural gas fumes. Claimant alleges no disability

but merely a nominal time loss and some medical expenses. The treating doctor backed away from his initial diagnosis, and the defendant's doctor states that natural gas is non-toxic, and the illness could not be causally connected. The Hearing Officer ordered the claim accepted and assessed 25% penalties, because the claim was neither accepted nor rejected within 60 days, and further ordered the payment of $400.00 attorney's fees by the defendant. The WCB affirmed, commenting: "The Board does not believe that the circumstances are such that medical evidence must be relied upon to prove that the disabling symptoms, or some of them, were related to her physical reaction to breathing the fumes." $200.00 additional attorney's fees were allowed.

WCB #67-1405 June 20, 1968

Donald Roy Hutchison, Claimant.
Page Pferdner, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer with
Cross Request by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant was injured when caught between a wall and a falling stack of lumber. The diagnosis was "cervical myofascial strain; contusions right calf, left flank, left shoulder, and head." Claimant is suffering continued low back pain radiating into the leg or legs. He has been taking palliative treatment from Dr. Riley for this, consisting of hot, moist packs and proprietary analgesics. These medicals were held not compensable: Tooley v. SIAC, 239 Or 466. As to this issue the WCB affirmed, holding that ORS 656.245 of the 1965 Act, did not change the rule. As to the extent of permanent partial disability, it appears that the claimant was earning $2.07 per hour when injured. Subsequent to the injury he has worked variously at $2.87 per hour, $3.84 per hour and presently is working as a construction laborer at $3.00 per hour. The Hearing Officer found that the claimant had a permanent partial disability equal to 5% loss of an arm for unscheduled disability. On review the employer argued that there was no reduction in the claimant's earning capacity as demonstrated by the claimant's earnings. The Board responded, "In the recent case of Jones v. SCD, 86 Adv. Sh. 847 (May 1968), the Supreme Court reaffirmed the proposition enunciated in Kajundzich v. SIAC, 164 Or 510, to the effect that it is the physical loss and not the earning loss of the particular workman which is compensated under the Oregon statute. It is normally the employer who seeks the application of this principle to avoid heavy awards of disability. The employer should not seek to avoid this principle when the workman, despite some disability, is able to equal or increase his earnings." Whereupon the WCB affirmed and assessed $200.00 attorney's fees against the employer.

WCB #67-588 June 20, 1968

Sharon L. Dalton, Claimant.
H. L. Seifert, Hearing Officer.
Richard P. Kropp, Claimant's Atty.
James P.Cronan, Defense Atty.
Request for Review by SCD.

Appeal from a notice of denial. Claimant, a 29-year-old food processing worker, was required to move heavy racks of food into the freezing room. Claimant suffered bilateral inguinal hernias. It was her doctor's opinion that the work exacerbated the right hernia, causing it to become symptomatic, and that the work caused the left hernia. This opinion was contained in a medical report, and the doctor was not personally present. The Department objects to the admission of the medical report in the absence of the the presence of the doctor for the cross-examination. The Department was advised that the doctor making the report consented to be cross-examined, but the Department refused to underwrite any expense associated with obtaining any cross-examination of the doctor. The Hearing Officer admitted the evidence and ordered the claim accepted.

A pertinent section of the code is ORS 656.310(2) as follows:

> The contents of medical, surgical and hospital reports presented by claimants for compensation shall constitute prima facie evidence as to the matter contained therein; so, also, shall such reports presented by the department or direct responsibility employers, provided that the doctor rendering medical and surgical reports consents to subject himself to cross-examination.

In adopting rules of procedure, the Workmen's Compensation Board, as part of WCB Order No. 5-1966, adopted rule 5.05 D which, after setting forth ORS 656.310(2) above, reads as follows:

> The Workmen's Compensation Board believes that ORS 656.310(2) is intended to strongly encourage the use of written medical reports and limit the need for personal appearances by doctors. The costs of securing expert medical witnesses should be borne in mind and every effort made to keep from calling doctors as witnesses. Since this will not always be possible, the following rule will be applied.
>
> Reports from claimant's doctor will be accepted as prima facie evidence unless defendant, in desiring to explore that written evidence, subpoenas claimant's doctor for cross-examination.
>
> Reports from defendant's doctor will also be accepted as prima facie evidence providing defendant is willing to produce the doctor for cross-examination, whose report is in evidence.

It is the position of the Department that the rule 5.05 D is an illegal rule, contrary to the statute and beyond the authority of the Board to adopt, and that the order of the Hearing Officer cannot be sustained in absence of the doctor being produced by the claimant for cross-examination in addition to the doctor consenting to such examination. Much of the Department brief is directed to the cost burden being shifted to the employer or its insurer of paying

the cost of expert witnesses. The Board assumes that under the statute the doctor could be subpoenaed as an ordinary witness, and the State Compensation Department would not be required to bargain over an expert witness fee for an adverse witness. The Department could have taken depositions, submitted interrogatories or simply subpoenaed the witness. The WCB concludes that the Workmen's Compensation Law is not required to treat employers and workmen with absolute equality. The proposition is so well settled as not to require citation that the law is construed liberally in favor of the workman. Whereupon the WCB found the Rule 5.05 D was a legal and proper rule and affirmed the Hearing Officer, and assessed attorney's fees in the amount of $200.00

WCB #67-1166 June 20, 1968

Clarence R. Zwahlen, Claimant.
H. L. Seifert, Hearing Officer.
Hayes P. Lavis, Claimant's Atty.
James F. Larson, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 5% loss function of a foot. Claimant was injured when a log he was bucking fell across his legs. Claimant sustained a posterior astragular fracture and a cast was put on. Dr. O'Donovan's findings were contusions and abrasions on the anterior surfaces of both legs and ankles. Claimant has some swelling of the left knee, but a full range of motion of the ankle joint and knee joint. A special boot was recommended to give claimant extra support to his ankle. Claimant is still able to work as a logger. The Department was ordered to pay for the special boot and the determination was affirmed. On review the Board remanded for a finding as to the knee disability if any. The claimant had sought to introduce new evidence concerning an alleged calcium deposit in a knee, allegedly related to the injury and not diagnosed at the time of hearing.

WCB #67-1592 June 21, 1968

Einar Johnson, Claimant.
Page Pferdner, Hearing Officer.
Ralph C. Barker, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding permanent partial disability of 5% loss of an arm by separation for unscheduled disability. Claimant, age 44, is a Pontiac salesman who was involved in an automobile accident. Dr. Rask diagnosed his injury as "ruptured musculotendinous cuff, cervical sprain." His arm was immobilized for a few weeks and claimant received injection into his shoulder for an additional week. He also received physical therapy for two or three weeks, but the therapy became so painful, he discontinued it. Claimant suffers diminished strength in the left arm and in the grip. He can't play golf or bowl. The neurological report of Dr. Druickshank reveals that claimant had a skiing accident at age 14, and since then has had some shortening of the sternocleidomastoid muscles on the left side of his neck which limits extension

of the neck. In his comments, he states, "These films reveal a severe degeneration of the disc at C4-C5 interspace. With such narrowing of the nerve foramina, it is reasonable to expect that any slight trauma to this man's cervical spine would produce headache, cervical spasm, and possible nerve root damage....This gentleman has cervical spondylosis of C4-C5 interspace which is far advanced and in all probabilities is responsbile for his present complaints. ...Because of the narrowing of the foramina and the encroachment upon the nerve root--any trauma to the cervical region would aggravate the condition and probably result in symptoms such as he has." Dr. Bachhuber's report states, "Objectively there are no neurologic changes and minimal restriction in the range of cervical motion. Muscular development of shoulder is good and there is no indication of significant lesion of the rotator cuff. The shoulder and left upper extremity complaints are felt to be related to the degenerative disease of the cervical spine, rather than pathology of the shoulder. There is a very minimal permanent impairment of the cervical spine resulting from the automobile accident of January 26, 1966." Whereupon the Hearing Officer affirmed the determination. WCB affirmed.

WCB #67-1474 June 21, 1968

Robert L. Brown, Claimant.
Page Pferdner, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by SCD.

Appeal from a notice of denial. Claimant alleges pain and numbness in his right arm and hand. He further alleges the tingling sensation in his hand and arm began while he was straining to ladle steel. The Department categorized the claim as an occupational disease claim, but the claimant elected to have it tried as an accidental injury. Dr. Lloyd diagnosed the condition as "neuritis," and related the condition to the injury. Dr. Smith suggested a "Right median nerve entrapment syndrome at the carpal tunnel." The claimant lost no time from work. The claim was ordered accepted. Claimant had requested penalties because there had been neither acceptance nor denial within 60 days, but the Hearing Officer observed that penalties are calculated as a percentage of temporary disability not paid, and here, since there was no time loss, there was nothing to which to attach penalties. On review the position of the department is that the medical substantiation is insufficient. The Board concluded that the uncontradicted statement of the claimant as to when the symptoms began, plus the medical report of the treating doctor which describes the condition requiring treatment as the result of the injury, is sufficient to establish a prima facie case. The employer or insurer should not wager against the outcome by seeking a remand on review to inquire into matters that could easily have been inquired into at or before the Hearing. Whereupon the WCB affirmed and assessed $200.00 attorney's fees.

WCB #67-1466 June 21, 1968

Harry J. Rand, Claimant.
Richard Kropp, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 30% loss of an arm by separation for unscheduled disabilities. Claimant injured his low back March 28, 1967, when carrying a sack of seed and a second sack fell on his feet. Dr. Van Olst diagnosed an accute lumbosacral sprain as did Dr. Mack. There are no objective physical findings, and Dr. Van Olst concluded that the claimant would be restricted from sustained heavy lifting. Claimant alleges inability to pick up objects off the floor without squatting, but the defendant's investigator observed the claimant engaged in carpentry and fence building around his house and testified that the claimant without an apparent difficulty was able to bend over and hold the fence wire with one hand and nail it with the other. Claimant also had had a 1958 auto accident in which he injured his back, requiring him to wear a back brace for two years. Determination affirmed. WCB affirmed.

WCB #67-463 June 25, 1968

Allen Hargis, Claimant.
Harold M. Gross, Hearing Officer.
John H. Horn, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant, age 18, suffered a right hand injury in a plywood press. At the time his hand was visibly injured, scratched, bruised, swollen and red in color. He was X-rayed, given an injection and an ace bandage and taken home. After the initial treatment, neither doctor indicated that there would be any permanent partial disability. He was released for work two weeks later and has worked various places since then, including pulling on the green chain. Claimant was also treated the day after the injury for a stomachache. The doctor knows of no connection between this and the injury to the hand, and the stomach doctor wasn't told of the accidental injury at the time, but the claimant contends that the stomachache was a result of the injection that he was given the day before, which the claimant alleged to have been demerol to which he is allergic. This allergy was in his medical history, and the medical records indicated that the claimant was given an injection of Varidase. Hence claimant is not entitled to collect for his stomachache. As to permanent disability, claimant has some pain and swelling of the hand. There is some apparent loss of the metacarpal arch of the hand and all claimant's fingers lack about ½ centimeter of touching the distal flexion crease, but there are no abnormalities of the thumb. There is also weakness and clumbsiness. Accordingly the Hearing Officer awarded 15% loss function to each of the four fingers of the right hand. On review claimant urged that this is a "hand" injury which is unscheduled and should be treated accordingly. This

interpretation would allow a larger award for a "hand" than for a loss of an arm completely. ORS 656.214(3) includes a direction that "the loss of any digit shall be rated as specified with or without the loss of the metacarpal bone and adjacent soft tissue." In effect, fingers are treated on a skeletal basis extending through the palm. It is not unscheduled when a bone in the palm or tissue adjacent to such a bone is injured. There is a legislative direction that these bones (metacarpal) and surrounding tissue are deemed part of the fingers. Whereupon WCB affirmed.

WCB #67-886 June 26, 1968

Roger Truax, Claimant.

On hearing this case was remanded for further medical care and treatment and request for review was withdrawn, and the matter dismissed by the WCB on May 14, 1968. The doctors are now protesting that they are receiving only 75% of their fees in keeping with the order of the Hearing Officer which directed that 25% of the cost of medical care and treatment including surgery be directed to the claimant's attorney. The doctors alleged that such an order penalizes the doctors, hospitals, ambulances, druggists, nurses, and surgical assistants. Whereupon the Board ordered that the medical bills should be paid in full, and that claimant's attorney should be entitled to compensation equivilant to 25% of the additional compensation including medical services in an amount not to exceed $500.00, but that the attorney would have to look directly to the claimant for this.

WCB #67-1354 June 26, 1968

Edwin Kershaw, Claimant.
J. David Kryger, Hearing Officer.
Carlotta Sorensen, Defense Atty.
A Request for Review by Beneficiaries.

Appeal from a determination allowing 20% loss function of the right arm. Claimant, a 57-year-old personnel officer at the State Penitentiary, slipped on the running board of a truck and fell, dislocating and fracturing his right elbow. Claimant has difficulty shaking down the inmates. There is some loss of grip. The most recent medical examination revealed no limitation of motion. Claimant is able to continue at his former occupation. The Hearing Officer affirmed the determination. Prior to the review the claimant died. The Board reviewed the record, since the widow is entitled to receive the balance of any compensation which should properly have been awarded her husband in this case. The Board finds the disability to be 35% loss function of the arm.

WCB #67-1005 July 3, 1968

Michael Spencer Wing, Claimant.
H. L. Pattie, Hearing Officer.
Edwin A. York, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for Review by Claimant.

Appeal from a determination of no permanent partial disability as a result of suffering a blackout and receving a blow to the right side of the head. The claimant, prior to the incident at issue had a history of spontaneous convulsions for a period of some five years, possibly related to a motor scooter accident at age 13. The Department accepted responsiblity for the immediate medical care associated with treatment following the blow upon the head. If the injury was due solely to a preexisting traumatic epilepsy, there would normally be some question concerning any liability of the employer. The workman was working about some wooden pallets and the Hearing Officer concluded the claimant struck his head on one of these while evading a forklift truck. At issue also was some of the hospitalization and diagnostic work associated with determining the cause of the claimant's problems and ascertaining the proper treatment. The Hearing Officer concluded that despite the fact that some of the diagnosis of treatment might have been associated with an underlying non-related illness, the diagnosis and treatment of the head injury received in the fall was so inextricably interwoven, that it would be impossible to delete any of the charges as being caused solely by the preexisting disease. It was concluded that an aggravation of the preexisting epileptic condition had not been proven. There was no indication of direct impairment arising out of the blow to the head. Accordingly no permanent partial disability was allowed. WCB generally affirmed, but modifications of the award of attorney's fees placed a $500.00 limit thereon and specified that that part of them payable, based upon the increased allowances of medical services, be paid directly by the claimant, so that the medical bills would be paid in full.

WCB #67-1332 July 3, 1968

Jack W. Walker, Claimant.
George W. Rode, Hearing Officer.
A. J. Morris, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding permanent partial disability equal to 20% loss function of left foot. Claimant is a timber faller who fractured his ankle. He has been able to continue in the same occupation since the accident but complains that the ankle is stiff in the morning, and he has greater difficulty in getting around on the rough ground. It also gets cold easily. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #67-769 July 3, 1968

Yvonne Wrightsman, Claimant.
David Vinson, Claimant's Atty.
Earl Preston, Defense Atty.
Request for review by SCD.

Appeal from a notice of denial. Claimant, a night-club musician, became involved in a fight with the barmaid. A glass was smashed against claimant's left cheek, and she lost the sight of her left eye as a result thereof. The question of whether an employee or independent contractor was resolved in favor of the employee status. Claimant was one of a duo signed under a written contract to perform at $250.00 per week. No payroll deductions were made for Social Security or withholding taxes, and the duo furnished the drums. However, the employer closely supervised the musicians. He directed the type of dress, type of music he wanted, collected the tips, regulated the working hours and generally closely supervised the claimant. The evidence as to the origin of the problem was conflicting, but the Hearing Officer found that the mutual dislike between the parties arose out of on the job disagreeableness. He further found that the claimant was the aggressor. The Hearing Officer ordered the claim accepted and assessed $950.00 attorney's fees.

On review the Board finds no evidence in the record that the personal dispute had any origin or implementation outside of the working hours or working associations. There is substantial authority from other states dealing with injuries from assaults. There are decisions denying benefits on the basis that the injured workman was the aggressor, and therefore invited injuries. The problem with such decisions is that essentially they rest upon doctrines of contributory negligence, which have no place in consideration of workmen's compensation claims. There appears to be only one compensation assault case of record in Oregon. In Atkinson v. Fairview, 190 Or 1, a workman was not permitted to recover against the employer of another workman under provision exempting employers from liability to workmen of other employers, where the employers of both were engaged in a common enterprise. In other words, the workman's sole remedy was workmen's compensation. The Board feels that the principles set forth in Stark v. SIAC, 103 Or 20, apply. Here, there was a friendly scuffle over a compressed air hose which resulted in the death of one workman. The Court concluded that it was to be expected that a certain amount of horseplay would arise out of employment situations and compensated the widow. It would appear that it should be immaterial whether the employment associations generated frivolity or animosity. The law only requires that the injury arise out of and in the course of employment. The facts here meet those tests. Order of acceptance affirmed with $200.00 additional attorney's fees allowed.

WCB #67-848 July 3, 1968

John T. Rawls, Claimant.
George W. Rode, Hearing Officer.
Charles Seagraves, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for review by SCD.

Claimant requested a hearing pertaining to the correctness of a Department order suspending permanent total disability payments. In 1959, the claimant, a school teacher, suffered numerous injuries including the loss of a leg at the hip, while employed during the summer on a heavy construction job. In 1961, after claimant had resumed teaching, the SIAC awarded claimant permanent total disability. Prior the injury the claimant had also been the coach and principal. In the spring of 1967, the Department "investigated" the claimant and made the big discovery that the claimant was teaching school, a fact that the Department and its predecessor had known since at least 1961. Then the Department issued an order suspending permanent total disability payments "while the claimant continues gainful employment." The issue is whether the Department has the jurisdiction to enter such an order. The Hearing Officer concluded, relying on Jessie Forte, WCB #67-159, that the Department had no jurisdiction to issue such an order and accordingly assessed 25% penalties and assessed $1,050.00 attorney's fees payable by the Department.

On review the Board noted that the issue here was not whether total disability payments should be stopped to one who is gainfully employed and does not meet the criteria of "automatic" total disability, but rather whether the Department had the authority to do this. In replacement of the former State Industrial Accident Commission with the Workmen's Compensation Board and the State Compensation Department, there was a distribution of powers and duties. OL 1965, Ch 285, Sec 43 (2) provides:

> The powers, duties and functions performed by the State Industrial Accident Commission under such law shall be performed by the manager of the department except that the board shall exercise all powers, duties and function imposed on the commission under ORS 656.278 with respect to claims arising from such injuries.

ORS 656.278 (1) reads as follows:

> The power and jurisdiction of the board shall be continuing, and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified.

A further specific reference to this section is found in ORS 656.726 (4) relating to Board powers and no reference is made to the State Compensation Department relating to taking action upon such claims. It appears to the Board that the State Compensation Department, regardless of the merits of its position, acted without procedural authority in suspending compensation, and that such compensation could only be suspended by the Workmen's Compensation Board pursuant to ORS 656.278. The Board assumes that it could convert the present proceedings to an own motion consideration or utilize the record, as may be otherwise supplemented, as the basis for an own motion consideration upon application for such action. With respect to this review, the issue is

basically whether the State Compensation Department had authority to unilaterally suspend payments without approval of the Board. The Board concurs with the Hearing Officer in finding that the Department does not.

If the suspension of compensation is invalid, the Board sees no reason why the provision of ORS 656.262(8) should not be invoked. This is not a matter of increased compensation being applied by a retroactive application of the law. It is a prospective application dependent solely upon the actions of the Department following the law becoming effective. This being so, the application of attorney's fees chargeable to the Department is also proper. Whereupon the Board affirmed the Hearing Officer in all respects and assessed an additional $200.00 attorney's fees.

WCB #67-1440 July 3, 1968

Herbert J. Bryant, Claimant.
George W. Rode, Hearing Officer.
Donald Wilson, Claimant's Atty.
Daryll Klein, Defense Atty.
Appeal by Employer
Cross appeal by Claimant.

Appeal from a determination awarding permanent partial disability equal to 5% loss of an arm by separation for unscheduled disability. Claimant, age 54, and a cement finisher, sustained a compensable back injury when he fell while carrying a sack of cement. Dr. Ho's diagnosis reads: "Interspinous ligament strain at lumbosacral level. Spondylarthrosis lumbar spine. Osteoporosis." His prognosis was "Further recession of symptoms anticipated to a significant degree within the next two weeks. Because of degenerative changes and a long history of heavy work, however, the patient may be near a level of overtaxing his low back structure because of occupational requirements." Claimant has been able to continue his work as a cement finisher, but avoids the aspects of it which are particularly taxing on the back. Much objection is made of the defendant's investigative technique which consisted of a female investigator inviting claimant over to give an estimate of a foundation job while the co-investigator made films. The Hearing Officer increased the award to 15% loss of an arm for unscheduled disability. WCB affirmed, commenting that the decrease in ability to lift heavy objects or run certain machines warrants the award of 15%. Claimant's counsel was awarded $200.00 attorney's fees.

WCB #67-1072 July 3, 1968

Lowine Casey, Claimant.
Harold M. Gross, Hearing Officer.
Randolph Slocum, Claimant's Atty.
Eldon F. Caley, Defense Atty.
Request for Review by Employer

Appeal from a notice of denial. Claimant was working graveyard shift as a putty patcher in a plywood plant, when a fellow employee fell injuring herself. Claimant alleges a dorsal back injury while helping the injured fellow employee

to the hospital. Fellow employees recall claimant's back complaints upon her return from the hospital, but apparently no Form 801 was filled-out for three weeks. There was evidence of a preexisting kidney infection. The medical evidence revealed no objective symptoms, but the claimant's doctor indicated that this was the type of injury which could exist without objective symptoms. The Hearing Officer ordered the claim accepted and awarded penalties on temporary disability payments overdue prior to the denial of the claim and allowed attorneys' fees. WCB affirmed.

WCB #67-181 July 3, 1968

Joe Waibel, Claimant.
H. L. Seifert, Hearing Officer.
Wesley A. Franklin, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Beneficiaries.

Appeal from a determination awarding temporary total disability to August 10, 1966. The issues are compensability of temporary total disability and medical care from August 10, 1966, until claimant's death. The compensability of claimant's death is being tried in a subsequent proceeding. On August 4, 1966 claimant was hit in the chest by a timber which knocked him backward against a log. He was hospitalized with a diagnosis of concussion and cervical strain. Claimant returned to work on August 10th and worked sporadically until February. He was a man who never complained or would say why he did not come to work, but he always called in. He had mentioned, however, that his back had been hurting him. Claimant had a history of Hodgkin's disease dating back to 1960. At the time of the injury, claimant was taking medicine four times a day for it. There was evidence that the claimant had a tumor in his thoracic back which caused spastic paraplegia about March 1967. It is conceded that there is a compensable injury, if the blow to the chest caused an aggravation of this preexisting condition. The medical evidence generally indicated that a trauma could aggravate a tumor but not in this case. According to Dr. Seaman, a trauma may aggravate a tumor where there is a cutting, squeezing or dismemberment of a tumor, and while a blow to the cervical area could aggravate or disseminate the cancerous process, it did not in this case, because the tumor lay inside the bony canal, which would have to collapse to affect the tumor. He found no evidence in this case that the blow collapsed the bone or squeezed the tissue or caused a sudden hemorrage. Accordingly the Hearing Officer found that the compensable trauma did not affect the normal progress and development of the existing infirmity. WCB affirmed.

WCB #67-877 July 3, 1968

Albert J. Sheppard, Claimant.
Mercedes F. Deiz, Hearing Officer.
Robert A. Bennett, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer.

Claimant suffered a left inguinal hernia in the course of his employment. The determination allowed temporary total disability up to January 16, 1967, when claimant was released to return to work. Claimant suffered continued pain in the scrotum and visited the University of Oregon Medical School surgery clinic on April 24, 1967. The doctor there felt the pain was neurologic in origin, secondary to a trapped ilio inguinal nerve. An injection of Xylocaine into the tender area immediately relieved the pain. The pain persisted and commencing June 23rd the injections were given weekly. The problem was apparently cured by September 12th, at which date the claimant was again medically stationary. Claimant wants payment for medical expenses and temporary total disability from January 16 to September 12. ORS 656.220 limits the compensation for a hernia, but Plowman v. SIAC, 144 Or 138 and Tucker v. SIAC, 216 Or 74, authorize compensation for complications arising therefrom. Whereupon the Hearing Officer found that the claimant was entitled to compensation for temporary total disability from January 16 to September 12, 1967, less time worked, for the attendant disabling post-surgical complications, and further directed that the medical expenses be paid.

On review the Board commented: The record reflects that the claimant was released as able to work by the treating doctor as of January 16, 1967. The record also reflects that no further medical treatment was sought until April 24, 1967. There is even good evidence from the doctor's examination of April 24th, that the claimant at that date was not totally disabled. It was further observed that the claimant represented to the Department of Employment that he was able to work during part of the period for which he was awarded temporary total disability. This is not controlling, but coupled with the fact of an employment layoff at the regular place of employment, further doubt is raised as to the cause of his not working. Accordingly the order was modified to indicate that the claimant was able to work from January 16, 1967, to April 24, 1967.

WCB #67-969 July 3, 1968

Gilbert Levesque, Claimant.
J. David Kryger, Hearing Officer.
Edwin A. York, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

Appeal from a denial of a claim. Defendant at the Hearing moved for a dismissal on the grounds that the claimant did not give adequate notice as required under ORS 656.265. Defendant also denied the claim on the grounds that (1) there is insufficient evidence that said workman sustained accidental personal injury within the meaning of the provisions of the Oregon Workmen's

Compensation Law, and (2) the condition requiring treatment is not the result of the activities described. Claimant alleges a back injury when he attempted to lift a heavy piece of metal on May 8, 1967. There was no written notice to the employer until June 16, 1967. Claimant was not able to get out of bed the following day and didn't report for work. Claimant picked up his pay check the following Friday without mentioning the injury or filling out a claim form. Claimant had a history of prior back injuries. Claimant provided no explanation as to why the notice of the injury was late. ORS 656.265(4)(a) further states that the 30-day notice requirement may be dispensed with, if the "Department has not been prejudiced by failure to receive the notice." At the conclusion of the claimant's case, the defendant moved for an order of dismissal on the grounds that the claimant had not sustained his burden of proof in showing that in fact this prejudice did not exist. In support of this motion the defendant cited Charles E. Satterfield, WCB #67-477, wherein the Board on appeal stated, "The Board concludes that the Hearing Officer was in error in placing the burden on the State Compensation Department to show cause why the claim should not be allowed." In effect the Board placed the burden of showing lack of prejudice upon the claimant. The statute itself does not place the burden upon either party, but merely states that, if the Department has not been prejudiced, the claim should be allowed. Therefore the Hearing Officer is compelled to accept legal precedence in the interpretation of this statute. Further the claimant has introduced no evidence of "good cause," as in ORS 656.265 (4)(c). There was a diagnosis of "an acute herniated intervertebral disc," and on the merits the Hearing Officer concluded claimant had made a prima facie case, but dismissed the claim for want of sufficient notice.

WCB #67-1040 July 3, 1968

Willie B. Fretwell, Claimant.
H. L. Seifert, Hearing Officer.
Rodney W. Miller, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding loss of 20% of the vision of the right eye and unscheduled disabilities in the cervical area equal to the loss by separation of 5% of an arm. Claimant, a bartender, sustained neck and face injuries, when he was struck by a customer. The first complaints were of headaches, accompanied by dizziness and fading and discolored vision of the right eye. Medical evidence found a very mild sprain of the neck. In April Dr. Rowell diagnosed naturally occurring farsightedness and hyperopic astigmatism. A subsequent examination indicated that the condition had been satisfactorily corrected by glasses. Dr. Rowell concluded that the loss of acuity due to optic nerve injury on the right reduces to an impairment of visual function in the right eye of 18% in centaral visual acuity. There was no impairment of field of the right eye. Dr. Stenerodden thought that claimant had suffered the loss of central visual efficiency of the right eye at 5%. The Hearing Officer concluded that it is recognized that certain types of ocular disturbances are not included in medical computations, and these may result in disabilities, the value of which cannot be accurately measured by any scientific methods. Among these are disturbances of accommodation of color vision and other like disturbances, and for such disabilities

additional compensation may be allowed: Sam Finley, WCB #67-148 (Dec. 22, 1967). Here, however, the determination was ordered affirmed.

On review the WCB affirmed. "Though there has been no cross-appeal by the State Compensation Department, it does appear that in the measurement of visual loss, the claimant's award is liberal in light of the evidence. Visual losses are measured by highly specialized methods and the evidence in this case is such that the Board could in this de novo review, reduce the award. However, in giving a liberal interpretation to the law, the award granting a visual loss above the technical finding of actual corrected loss for other factors of vision impairment is being affirmed."

WCB #67-1143 July 8, 1968

Clarence A. Hooper, Claimant.
Harold M. Gross, Hearing Officer.
Request for Review by Employer.

This case raises the question, whether a carrier can unilaterally deprive a claimant of a hearing and deprive the Hearing Officer of jurisdiction, by unilaterally accepting a claim which was previously denied, after a Request for Hearing has been filed, and after the running of the 60-day period during which the claim is to be denied or accepted. The question here is whether the claimant's attorney is entitled to payment of his fees. The hearing Officer assessed $350.00 against the carrier. On review the Board commented: ORS 656.386 provides that the employer shall pay the fee where a claim has been denied and the claimant prevails at a hearing on review or on appeal. The claim was denied by the insurer of the employer for failure of the workman to file a written notice of claim within 30 days. It would appear that the insurer capitulated on the issue of denial of the claim when taking stock of this factor of employer's knowledge just prior to the hearing. Apparently there had been no prior inquiry as to the employer's knowledge. The section of the law awarding attorney's fees is a special section which would normally be strictly construed. The Board concludes that without explanation, it would be difficult to conclude other than that the claim was accepted as a result of the hearing. Whereupon WCB affirmed and assessed $200.00 additional attorney's fees.

WCB #67-1654 July 8, 1968

Peter A. DeRosier, Claimant.
H. L. Pattie, Hearing Officer.
Wes Franklin, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

A first determination, issued June 1, 1966, found that the claimant suffered no permanent partial disability and was entitled to temporary total disability only to April 12, 1966. The claim was subsequently reopened by the Department and a further determination on March 30, 1967, found the claimant to be entitled to temporary total disability from May 24, 1966, to March 14, 1967 (less time worked), and that there was an unscheduled permanent back injury

comparable to the loss by separation of 5% of an arm. The hearing is upon the latter determination. Claimant, an unskilled laborer, strained his back while lifting a scaffold. An October 1966 examination indicated a complete recovery, but in February 1967, some stiffness was found in the back. There are subjective complaints of pain in the back. The Hearing Officer concluded that some pain upon exertion after two years of idleness would be expected, and affirmed the determination. WCB affirmed.

WCB #67-1493 July 11, 1968

Kenneth E. Wagner, Claimant.
H. L. Pattie, Hearing Officer.
Garry Kahn, Claimant's Atty.
Robert P. Jones, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding temporary total disability to November 14, 1967, less time worked, and permanent partial disability equal to 35% loss of an arm by separation for unscheduled disability. Claimant suffered a skull laceration and a neck injury which eventually required a cervical laminectomy, when a work tower toppled over on him while he was welding. The Hearing Officer made a modification of the temporary disability, but the determination was reinstated by the Board. Claimant commenced working less than a month after the laminectomy, which was performed in August 1966. He worked fairly steadily until June 10, 1967, when the job at which he was working expired because the employer's son preempted it. Claimant was working elsewhere than for the employer by whom he was employed when injured. Claimant has not worked since June 10, 1967. There is evidence that the claimant's work was less than the best, and the reason that he changed jobs was to seek welding which did not require heavy lifting. Defendants' motion pictures showed claimant carrying a tire and wheel, and operating a chain hoist. The Hearing Officer ordered the award increased so as to equal 45% loss of an arm by separation. WCB affirmed.

WCB #68-107 July 16, 1968

Daniel Oremus, Claimant.
H. L. Seifert, Hearing Officer.
Daryll E. Klein, Claimant's Atty.
Scott M. Kelley, Wholesale Dealer's Atty.
Wayne A. Williamson and Robert E. Joseph, Jr. for
Oregonian Publishing Co., through Liberty Mut. Ins. Co.
Request for Review by Claimant.

Appeal from a notice of denial. The Hearing Officer concluded in a well-documented ten pages, that the claimant-newspaperboy was an independent contractor. The Board reversed, and their opinion appears below substantially in its entirety.

Daniel Oremus, when 10 years-of-age, executed what is identified in the record as a "wholesale dealer-junior dealer agreement" along with a Mr. Albert Leibrand. The agreement appears on record as claimant's exhibit 5. The agreement

relates to the purchase and distribution of papers published by the Oregonian Publishing Co. On February 4, 1967, after Daniel had terminated purchase and distribution of papers, but before he had completed collecting from the newspaper subscribers, he had called Mr. Leibrand with regard to the route book required for making collections. Mr. Leibrand was en route to contacting Daniel, and as Mr. Leibran approached the place they were to meet, Daniel ran into the street and was struck by an oncoming auto. So far as the record reflects, Dan has never recovered consciousness. At least at the time of hearing on February 29, 1968, Daniel remained in a coma.

The issues before the Board are

1. Was one Daniel Oremus a workman in the employment of either or both the Oregonian Publishing Co. and Mr. Albert Leibrand; and
2. If so, whether Daniel Oremus was injured in the course of employment; and
3. If so, whether a claim can legally be pursued on behalf of Daniel Oremus by Anne Oremus, the mother of Daniel.

ISSUE ONE

Was Daniel Oremus a workman in the employment of either the Oregonian Publishing Co. or Albert Leibrand?

The Board is amazed in its research that the parties herein, the Hearing Officer and the decisions of the various Courts appear unconcerned with the implications of imputing to a 10-year-old boy sufficient knowledge to be aware of the significance of many terms used in the "Junior Dealer Agreement." Certainly the words, "independent contractor" through which the defendants seek to avoid liability were beyond the comprehension of this 10-year-old.

Let us assume, however, that this boy was knowledgeable beyond his years in matters which have troubled able legal scholars, and the issue is simply whether this young man bought papers to be resold. If this is a sale-purchase contract, where is the stated consideration? Paragraph 3(d) refers to "their established wholesale prices." It is immediately apparent that all of the terms of the contractual arrangement are not encompassed within the written contract. The Board is not even satisfied that this question was ever answered except that Mr. Leibrand, at page 50, Tr., concluded that the "established wholesale price" would be whatever Mr. Leibrand chose to set as the price.

This Board proceeds further with this decision on the basis that the contract executed by Daniel Oremus is of interest and some value, but that the legal liabilities of the parties are not to be resolved within that document or by legal conclusions subscribed by a 10-year-old minor.

Stripped of legal niceties, young Daniel Oremus engaged his services to deliver papers within a fixed territory upon a route of established customers with a requirement of prompt delivery within a prescribed time after being supplied with the exact number of papers required to supply the subscribers from the list owned by the publishing co. and Mr. Leibrand. For this he was to retain certain "suggested" sums per month, if he was able to successfully collect, ans subject to being "fined" if a customer complained.

The Board will not attempt to analyze or distinguish all of the citations of authority of record or even conjecture on what might have happended had Daniel established variable subscription rates in his territory.

The opinion of the Hearing Officer fails to cite a single "newsboy" decision from any jurisdiction involving a claim for workmen's compensation where the boy was held to be an independent contractor. The nearly 50 pages of briefs of the two alleged employers cite only a California case where the compensation law excluded from coverage persons involved in resale of personal property. The Board is, of course, cognizant of decision against early day newsboys who hawked their wares from street corners.

The error of the employer's legal position in this case is best exemplified by its explanation of the Mississippi decision in Laurel Daily Leader v. James, 87 So2d 706. At page 9, lines 24-24, of the answering legal memorandum of the Oregonian, appears the statement:

> The opinion makes it quite clear that the Mississippi Court is interpreting the legislative intent and was not paying due respect to common law principles.

It is too well-settled to require citation that "Common law principles" do not control in determination of workmen's compensation. Employer's Counsel notes that Mississippi proceeded to legislate newsboys "out". The Board notes that the Supreme Court of New Jersey in In De Monaco v. Renton, 113, A2d 782, held a similar statue unconstitutional as a deprivation of equal rights.

Most of the citations and discussions in the briefs of the employers are directed to factual situations which would only apply, if Mr. Leibrand had been injured and was pursuing a claim against the Oregonian. It is not necessary to this case to decide whether Mr. Leibrand was also an employee of the Oregonian. Decisions holding persons in Mr. Leibrand's circumstances to be independent contractors are not authority for exclusion of this minor newsboy from compensation.

In a case not cited of record, the Supreme Court of Nevada allowed compensation to a similar newsboy in Nevada Industrial Commission v. Bibb, 374 P2d 531, 535. The court pointed out that decisions such as Batt v. San Diego Sun Publishing Co., 60 P2d 216, involve liability of an alleged employer to a third person and that the doctrine of respondeat superior in such cases is narrower than the rationale of Workmen's Compensation.

The briefs and opinion on review cite Larson on Workmen's Compensation and Buchner v. Berben Evening Record, 81 NJS 121, 195 A2d 22. The true significance of this decision and of Mr. Larson's able test(sic) has been overlooked.

There is a test applied to cases such as this, that appears nowhere in the record before the Board. That text is commonly referred to as "the relative nature of the work" test. The New Jersey Court in the Buchner case said:

> The test contains these ingredients: The character of the claimant's work or business--how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden,--and its relation to the employer's business; that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent,

and whether the duration is sufficient to amount to the hiring of continuous services as distinguished from contracting for the completion of a particular job.

Applying such test to the facts of this case, we find that the work of the petitioner was manual labor requiring no great skill, training or experience. The work he performed was intimately bound up with respondent's business--the distribution of its newspapers to people who had made subscriptions directly to the newspaper itself.

1A Larson 45.10 discussed the relative nature of the work test as follows:

(quotation omitted)

At page 714, par 45.23, Larson made what appeared to be a fiat for the case before the Board when he concludes:

"Those who deliver papers on fixed routes are quite clearly employees."

For other authority not of record the Board has noted: Hann v. Times Dispatch (Vir),184 SE 183; Havens v. Natchez Times, 238 Miss 121, 117 So2d 706; Scorpion v. American Republican Inc. (Conn), 37 A2d 802; Wilson v. Times Printing Co. (Wash), 290 P. 691; Salt Lake Tribune Pub. Co. v. Industrial Commission of Utah, 102 P2d 307.

With all the feathers removed, if young Mr. Oremus was an independent contractor, the law of Oregon is such that an adult with $30,000 invested in a log truck and hauling logs from point A to point B is a workman, but a 10-year-old minor with $30 invested in a bicycle and transporting newspapers from point A to point B is an independent contractor. The Board cannot accept this conclusion and therefore finds that Daniel Oreumus was at least a workman with respect to Albert Leibrand. Whether Daniel was also a workman of the Oregonian Publishing Co. is not necessary to be now decided since the claim is compensable if either of these subject and qualified employers is found to be the employer.

ISSUE TWO

The Board now proceeds to whether Daniel Oremus was injured in the course of employment.

It is true that Daniel had ceased to deliver papers. It is undisputed, however, that Daniel had not as yet collected from the subscribers; that the book which served as the basis for collections had not been forwarded to Daniel in accordance with the usual custom; that shortly before the accident, Daniel had called Mr. Leibrand and Mr. Leibrand was enroute to contact Daniel and at least deliver the book. There is testimony from which the Board concludes that Mr. Leibrand was to participate to some extent in directing Daniel in the collecting process, but thisis not necessary to the decision. Though Mr. Leibrand's car was stopped mid-street adjacent to where Daniel was standing, the employers would have the Board speculate that Daniel was chasing a ball into the street. The Board concludes simply that Daniel was where he was, because of the appointment with Mr. Leibrand, and that the accident was thus in the course of employment.

ISSUE THREE

The third issue is whether Anne Oremus, the mother of Daniel, may properly pursue a claim on behalf of her minor son, while he remains in a coma. ORS 656.132 declares a minor to be sui juris. ORS 656.319(1) (d) provides for hearings as follows:

> If the workman was rendered mentally incapable of seeking compensation because of accidental injury, six months after removal of such mental incapacity if his parents, guardians, employer, physician or other person have not requested a hearing on his behalf.....

Further, ORS 656.002(5) defines a claim as a written request for compensation from a subject workman or someone on his behalf.

(Whereupon the Board ordered Albert Leibrand to pay the compensation provided by law for the injuries received and in addition pay claimant's counsel $1,500.00 attorney's fees.)

WCB #67-205 July 24, 1968

Lawrence B. Hays, Claimant.
Harold M. Gross, Hearing Officer.
Robert E. Jones, Claimant's Atty.
John Jaqua, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowed 15% loss function of a leg. Claimant, age 56 and a cat skinner, fell off his cat and broke his leg. Claimant's initial injury was diagnosed as a fracture of the tibia into the knee joint. There is no contention of permanent total disability, although claimant has not worked. Dr. Holbert's closing report indicates some laxity of the anterior cruciate ligament and some movement of the articular margin of the proximal tibia against the femur. This is the sight of the fracture. Dr. Holber also diagnosed post traumatic arthritis and indicates that there is a five-degree restriction of left knee motion. The Hearing Officer increased the award to 25% loss function of a leg and WCB affirmed.

WCB #67-1545 July 24, 1968

Herman L. Shum, Claimant.
Mercedes F. Deiz, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Scott Kelley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 50% loss of an arm for unscheduled disability. Claimant, a truck driver, was directing the unloading of some heavy timbers from the top of his truck, when one fell hitting him on the head. He was treated for severe cervical-dorsal strain and scalp lacerations. The X-rays at the time revealed no fracture. Claimant stated he was in great pain, with the most marked pain being felt in his left arm. After five days he was

transferred to a Portland hospital--he was initially in Puyallup, Washington--and treated additionally for a brain concussion and a fracture of the odontoid process of the second cervical vertebra, with posterior displacement. Dr. Groth surgically affixed skull tongs for cervical traction on a rotating bed, and claimant was discharged as improved about six weeks after the accident, wearing a heavy plaster Minerva Jacket. Four days later claimant was readmitted, as the fracture had become re-displaced while casting. It was re-casted, and there was a fusion operation performed on C-1, C-2, and C-3. Claimant now has some diminished sensation in the fingers of the left hand and arm and tenderness in the cervical area. The fusion is solid, and there is limitation of motion in the neck. Claimant cannot work as a truck driver, but can work as a dispatcher. Claimant also suffers disability pain and loss of grip in the left arm. Accordingly the Hearing Officer made an award of 20% loss function of the left arm. WCB affirmed.

WCB #67-1385 July 24, 1968

Frank Butler, Claimant.
H. L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding 50% loss function of the left middle finger, 50% loss function of the left ring finger, and 65% loss function of the left little finger. Claimant injured his left hand in a concrete block-making machine. He sustained a two-inch "L" shaped laceration of the middle finger, a one-inch laceration on the ring finger and a one-fourth inch laceration on the palm. At present his middle, ring and little fingers on his left hand are crooked at approximately 90 degree angles. He can touch his thumb and all his fingers on his left hand. When he uses his left hand, his fingers swell at the knuckle joints on the inside at the palm. He has experienced a knot in the center of his palm which becomes very sore. He has a minimum type grip with his left hand, because he cannot extend his fingers. One doctor thought that surgery would be worthwhile, as it might permit extension to 45 degrees. Claimant did not believe that the surgery would be successful. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #67-968 July 24, 1968

Henry A. Jeffers, Claimant.
George W. Rode, Hearing Officer.
W. A. Franklin, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer.

Appeal from a determination awarding no permanent partial disability. Claimant, a choker setter, was struck by a flying piece of wood. He sustained a cerebral concussion and a sprain of the cervical spine. Claimant's job pattern includes frequent job changes interspersed with periods of unemployment. There is evidence that the claimant has had to quit a falling and bucking job, because of his back problem. Dr. McHolick indicated "Recovered to the best of my knowledge." Dr. Bryson indicated involvement with the lumbar back, as well as the cervical

back. The Hearing Officer awarded 15% loss of an arm by separation for unscheduled disability. On review the Board commented, "The Board recognizes that the evidence is not strong with regard to the relation of the low back symptoms. However, the Hearing Officer, with the benefit of personal observation of the claimant, concluded that there were residual disabilities, and the Board, reviewing de novo, concludes that there is sufficient evidence to support the award." Therefore the award was affirmed, and the claimant's counsel awarded an attorney's fee of $200.00 payable by the employer.

WCB #67-845 July 24, 1968

Bill R. Lemons, Claimant.
H. L. Seifert, Hearing Officer.
Richard D. Kropp, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a denial for certain injuries. Claimant sustained a back injury on September 23, 1966, which was accepted. Claimant had a long history of back problems dating back to 1959. On May 23, 1967, claimant was going down the steps in front of a clinical laboratory after a blood test order by his family physician, when he fell about half of the last flight of steps. Claiman did not slip or trip and did not know what happened. He was hospitalized and a laminectomy was required on the low back. It is for these injuries that the Department denies liability. The Hearing Officer was unable to find the causal connection between the May fall and the compensable injury of the previous September. The denial was affirmed. WCB affirmed.

WCB #68-9 July 24, 1968

Leo Lang, Claimant.
Page Pferdner, Hearing Officer.
Donald S. Richardson, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss of use of the left leg, with question of whether a 1965 Washington award of "10% loss of function of left leg at or above the knee joint" should be deducted under provision of ORS 656.222. Claimant, age 56, is a structural iron worker. He was knocked down causing a "fracture left intertrochanteric." The fracture was reduced with a Neufeld nail and stainless steel screws. Claimant is not able to climb about on the structural steel or is he able to climb ladders. He is still employed as an iron worker. The Hearing Officer found that the claimant now had a 10% loss of use of the left leg, and in apparent reliance on Nesselrode v. SCD, 85 A. Sh. 797, concluded that the prior award should be deducted. The Board held otherwise, commenting, "If the Oregon injury had occurred to the same area of the claimant's leg and the disability to that area of the leg was no greater after the Oregon injury, there would be a basis for acceptance of the Hearing Officer's conclusion, that the claimant is not entitled to award for the Oregon Accident." "In this instance, however, the Oregon injury fractured a different bone and affects a different area of the leg. There is no question

but that the claimant suffered a new and independent permanent disability differing from whatever disability he suffered before the accident at issue." Therefore the Board concluded that the prior award in Washington should not be deducted, and the majority concluded that the 10% determination was a proper one. Mr. Callahan would have increased the award to 20% loss function of the leg.

WCB #67-1615 July 24, 1968

David Paul Foster, Claimant.
Page Pferdner, Hearing Officer.
William E. Gross, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant, age 21, sustained a low back injury while lifting a spring or a brake drum. Eleven months after the injury, Dr. Borman found tenderness of the left lumbosacral region. However, the only limitation of motion is flexion which was restricted 10 degrees. His extension is 5 degrees better than normal, and right and left lateral flexion are each 10 degrees better than normal. Rotation is normal. He observed obesity and evidence of underlying mild gouty arthritis, which was not caused by the accident. In his opinion, "The effects of the lumbosacral strain would likely be prolonged by the presence of the extreme overweight and potential gouty arthritis." The Hearing Officer ordered the payment of an additional medical bill, but otherwise affirmed the determination of no permanent partial disability. WCB affirmed, commenting, "It also appears that claimant's symptoms are minimal and largely subjective, and that any physical limitations are those imposed by his excess weight."

WCB #67-1560 July 24, 1968

Edward Mosley, Claimant.
George W. Rode, Hearing Officer.
David Vinson, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. A large plank fell on claimant's left foot, fracturing the necks of the second and third metatarsals. The medical evidence gave no indication of permanent disability, but one doctor recommended temporary use of an arch support. Claimant alleged his foot would swell after four or five hours, if he wore shoes without an arch support. He also alleged that he could not walk on the ball of his foot. Determination affirmed. WCB affirmed.

WCB #68-32 July 24, 1968

James R. Freeman, Claimant.
Page Pferdner, Hearing Officer.
James B. Griswold, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination granting claimant "a permanent partial disability award equal to (sic) 10% loss use of right leg and 10% loss use of left leg." Claimant sustained "first and second degree burns both hands, both thighs down to patella, both legs (from groin to knee), first degree burns abdomen." The latest medical report indicated, "The patient has extensive scarring of the thighs bilaterally. The scars are soft and pliable, but consist primarily of loss of pigmentation. The skin is really well-healed, and there is no evidence of any breakdown. I find no evidence of burns of his abdomen. I find nothing wrong with his hands. There is a heavy callous. It is dirth. It appears that he is using his hands effectively." Claimant testified to impaired circulation of his legs which makes them ache in cold weather. He also indicated loss of strength of the legs, and a difficulty in kneeling. The Hearing Officer found, "The quantity of jobs within these restrictions are probably less than half of those formerly available. I find that the claimant has permanent partial disability of 25% loss of use of his right leg and 15% loss of use of his left leg." WCB affirmed.

WCB #67-529 July 26, 1968

Stanley P. King, Claimant.
H. L. Pattie, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Claimant sustained a back injury October 17, 1966, while lifting a plank. A report was made, and the claim was accepted, and medical bills were paid. Claimant suffered an additional back injury, when he jumped off a cat on October 28, 1966. This was reported to the foreman, but the claimant and the foreman decided that no additional claim need be filed as the claimant already had a claim in. The carrier apparently didn't in fact learn of this injury until shortly before the hearing. About November 5th the construction job on which the claimant was working shut down for the winter, and claimant went on unemployment. It was not until work resumed in February 1967, that the back difficulties interrupted his work. The claim form that was filed for the October 17 injury was stamped "Closed January 27, 1967, Workmen's Comp. Board." There has been no determination. The Hearing Officer remanded the matter to the carrier for medical care and treatment, and time loss as might be required as a result of the accidental injuries of October 17 and October 28, 1966. The Hearing Officer allowed no penalties or attorney's fees. On review the WCB allowed a $500.00 attorney's fee, commenting, "The obligation of processing claims is a first responsibility of a direct responsibility employer. The insurer of such an employer must be charged with the knowledge possessed by the employer and share with the employer any burden cast for improper delays or denials of claims....(T)he Board concludes that the employer and its insurer

did not fulfill their responsibilities to the workman...and that the delays in extending compensation including medical care constitute in effect a denial and an unreasonable delay as a basis for imposition of the attorney fee upon the employer in keeping with ORS 656.382 and 656.384."

WCB #67-1514 July 26, 1968

Signe F. Lautenschalger, Claimant.
Mercedes F. Deiz, Hearing Officer.
Herbert B. Galton, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant, a 60-year-old janitor, suffered a laceration on the wrist and on the lateral aspect of the forearm, when a venetian blind fell on it. Claimant complains of numbness and pain of the right thumb. The treating doctor found equal strength in both hands, no tenderness at the scar sites, and some questionable atrophy of the interosseus muscle, between the first and second metacarpal, and little change in sensation. Dr. Mason indicated claimant "has had a nerve contusion which will gradually recede, and I think she will become asymptomatic from this in the future." On reexamination two months later Dr. Mason wrote: "I do not feel that the patient has any significant nerve injury to the radial nerve, and I do not think that any surgical exploration should be considered. There is no reason why this patient should not be able to return to work at this time." The Hearing Officer affirmed the determination. WCB affirmed also.

WCB #67-597 July 29, 1968

Jay K. Langsdorf, Claimant.
John F. Baker, Hearing Officer.
John H. Holmes, Claimant's Atty.
Walter H. Sweek, Defense Atty.
Request for Review by Employer.

Appeal pertaining to the extent of temporary disability to which claimant is entitled. Claimant suffered a back and ankle injury when his forklift fell off a dock on June 27, 1966. On February 28, 1967, the claimant's treating doctor advised the insurer of the employer that the claimant could return to light work. The employer then offered the claimant a full-time office job commencing March 20, 1967, which the claimant refused to accept. Apparently the claimant was going to college. The carrier ceased temporary total disability payments as of March 21st. The Hearing Officer assessed penalties and attorney's fees for the period between March 21st and April 7th. This was reversed on review--the Board commenting, "So far as the record is concerned the carrier is authorized by the Compliance Division of the Workmen's Compensation Board by letter of April 7, 1967, that it would be proper to base compensation starting March 22, 1967, on the basis of temporary partial disability. This letter appears as defendant's exhibit K. The Hearing Officer concluded that there was an improper delay in compensation in "stopping" compensation on March 21, 1967. In the first place, compensation could not be said to be stopped until another payment was due and unpaid. This would be

two weeks from the March 21st payment and would only be a couple of days short of the April 7th date. The Board finds a most unusual situation to exist in this case in that the Board records contain a letter of March 24, 1967, addressed to the Transport Indemnity Company, copy of which is attached to this order. (Letter states: "...Board concurs with your discontinuance of payments to claimant for temporary total disability as of March 21, 1967." Ed.) As an official part of the Board's records, the Board takes judicial notice of this letter. The Board is not advised with regard to the failure of the party to produce this letter and assumes that the failure of the April 7th letter to note the prior letter of March 24th may have mistakenly led counsel to conclude that the April 7th letter was the only such authorization issued by the Board." Accordingly the Board set aside the Hearing Officer order to pay increased compensation, penalties and attorney's fees on the period between March 21st and April 7th. The authority given by the compliance division to pay temporary partial disability from March 22, 1967, was sustained.

WCB #67-971 July 30, 1968

Harry M. Davis, Claimant.
Leo R. Probst, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by SCD.

Appeal from a notice of denial. Claimant, a diabetic, was welding on October 26, 1966, when sparks or slag fell on the medial aspect of his right calf and right foot in the area proximal to the big toe. A portion of the coverall leg and overall leg were burned away. A small area of the long underwear leg was scorched and sticking to the skin. The leather of the shoe was not burned away but had been burned until "hard." Claimant immediately informed the foreman. No written report was then made, as minor burns were quite common in the welding business. Anyway, the "hotfoot" caused a blister on the big toe which did not heal properly and eventually became infected, requiring extensive treatment in the hospital in January. The Hearing Officer found that the delay in making the written report (until February) was reasonable under the circumstances as the complications and problems could not be anticipated from a minor burn. The claim was ordered accepted and $500.00 attorney's fees assessed. WCB affirmed and assessed $200.00 additional attorney's fees.

WCB #67-1043 July 30, 1968

Melvin Chetney, Claimant.

The Circuit Court of Multnomah County has previously held that a denial of an occupational disease claim was a nullity and remanded the claim for further proceedings. The employer then sought to stay further proceedings based upon the pendency of an appeal to the Supreme Court. The Hearing Officer denied the request. "(T)he Board finds no authority to assume jurisdiction to stay proceedings order by the Circuit Court," and "therefore respectfully denies the request for review."

WCB #67-1344 July 30, 1968

John C. Parsons, Claimant.
Berkeley Lent, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for review by Claimant.

Appeal from a determination awarding 20% loss of an arm for unscheduled disability. On February 21, 1966, claimant, a 58-year-old cat skinner, injured his back when he jumped off the cat to avoid a falling tree. He was hospitalized for an impacted fracture of D-12. Subsequently, it was discovered he had developed a right inguinal hernia; surgery was not indicated, however. Dr. Furst found symptoms of prostratism. Except for a neck injury in 1956, claimant had had no prior injuries and had been in good health. He has been a steady worker. Claimant now suffers from some pain and weakness and cannot cut brush or split wood. He is able to work as a cat skinner with periodic pains. The Hearing Officer affirmed the determination. WCB affirmed, commenting, "The weight of evidence bears out a conclusion that the groin complaints were related to a prostate problem not caused or exacerbated by the accident."

WCB #67-1366 August 1, 1968

Timothy L. Hinrichs, Claimant.
George W. Rode, Hearing Officer.
A. Morris, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 20% loss of use of right leg. Claimant appeals from this determination alleging it to be inadequate. The employer counter-appealed from the determination, alleging it to be excessive. Claiman had suffered a nonindustrial knee injury in 1965, which required surgical removal of the medial meniscus and a pes anserina transplant with removal of a posterior tag of cartilage. The industrial injury occurred in February of 1967, and now claimant will not be able to work on the green chain or to do other work which requires a lot of standing. The medical evidence indicates that the 1965 injury was a tearing type injury, and that the 1967 injury was a twisting type injury. Dr. Rockey expressed the opinion that even if the 1967 injury had not occurred, the right knee would have deteriorated to the point of which a further operation would have been necessary. The industrial injury in effect hastened a process that would have occurred without further incident. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #67-938 August 1, 1968

Carl Olson, Claimant.
Herbert B. Galton, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 60% loss of an arm for unscheduled disability. Claimant, a 61-year-old truck driver and warehouseman, twisted his back, getting off a hyster. Claimant suffered a herniated disc, and a laminectomy was performed at the L4-L5 level. Claimant continued to have complaints of low back pain radiating into the left leg. Dr. Campbell reported, "It is my belief that this patient has a persistent irritability of the lumbosacral spine due to instability in the region where the protruded intervertebral disc was previously removed. In addition, this patient shows findings indicative of damage to the fourth lumbar nerve on the left with some persisting irritability of this nerve." The claimant has had an occasional muscle spasm in the left leg. Claimant alleges total disability. The record indicates that the claimant intended to retire at age 62, when he was injured. He applied and received both union and social security benefits. Claimant has not sought reemployment, but rather plans to move to a beach cottage at Devil's Lake. More specifically as to the leg, there are objective findings of weakness of the left extensor hallicis longus muscle and of the left quadriceps muscle and neurological deficits of diminished ankle reflex and anesthesia of the left leg. Dr. Carlson states, "The most disabling feature of his problem is the instability of the left leg, the fact that he cannot bear weight on it normally without the danger of it giving way." The Hearing Officer ordered an award of 25% loss function of the left leg in addition to the determination award. WCB affirmed, commenting, "no effort appears to have been directed toward reemployment. All the effort has been directed toward the accumulation of various benefit programs."

WCB #67-772 August 2, 1968

Virgil R. Johnson, Claimant.
Mercedes F. Deiz, Hearing Officer.
Garry Kahn, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Department.

Appeal from a determination awarding no permanent partial disability. Claimant fell backwards onto an I-beam, when a scaffold collapsed on March 24, 1966. Claimant had 12 hours of time loss the week of the injury, but worked full-time the following three weeks. Claimant was hospitalized for ten days in early May with back complaints. An intern suggested a herniated disc. Dr. Spady wrote on May 5th: "This patient appears to have chronic degenerative disc disease at the L-5, L-1 level with some associated degenerative arthritis in the facet of joints. In addition, he has apparently sustained a rather severe strain of the legamentous structures in the lumbosacral and sacral-iliac regions. There is no evidence of active nerve root pressure at this time. I would recommend that the patient be continued on conservative treatment." Claimant had a history of back injuries. Claimant was released from the hospital on May 13, and the determination ended temporary total disability on

May 16th. Claimant applied for unemployment during the summer after a layoff. November 26, 1966, claimant's car assaulted a power pole, and the claimant suffered extensive injuries, when he was thrown from the car. He was in the hospital for 12 days and was treated for a fractured clavicle, multiple lacerations and abrasions of his head, lip and left elbow, left ankle sprain and an acute lumbo-sacral sprain. X-rays of the lumbar spine taken on hospital admittance revealed slight straightening of the usual lordotic lumbar curve, minimal osteo-arthritic changes and no compression deformity. Claimant was readmitted to the hospital on April 28, 1967, with back problems. A myelogram showed protrusion of intervertebral disc at the L-5, S-1 level, and on May 5, 1967, a laminectomy and excision of th disc was performed. Claimant now has residual disability. The Hearing Officer found that the need for the back surgery arose out of the compensable accident of March 1966, and ordered the department to pay for the medical expenses connected therewith, and further found that the claimant was entitled to permanent partial disability equal to 25% loss of an arm for unscheduled disability. The WCB found the Hearing Officer's conclusions inconsistent with the facts and reversed the award in its entirety, concluding that the hospitalization was not related to the industrial injury.

WCB #67-1262 August 6, 1968

Etta D. Sager, Claimant.
Mercedes F. Deiz, Hearing Officer
Herbert B. Galton, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Employer.

Appeal from a determination dated May 18, 1967, awarding temporary total disability to May 28, 1966. Claimant, a 63-year-old sales lady, fell while attempting to avoid stepping on a child. She was hospitalized briefly for back complaints. X-rays indicated osteoporosis but little else. The fall occurred on May 5, 1966. Her treating doctor released her for work on May 23, 1966, and claimant attempted to return. She worked three half-days and was sent home apparently because of her disability. On June 12, 1966, a check for $107.20 was sent to claimant by the carrier covering time loss from May 6 through May 27, 1966. Claimant complained of back pain to her doctor, but was given no treatment. During the Summer of 1966, claimant's condition got progressively worse. The carrier was notified of this by letter on October 19, 1966. At the carrier's request the claimant was examined on April 12, 1967. He reported: "I am unable to make any diagnosis of sequellae of injury. This lady has some osteoporosis, and there is some settling as manifested by kyphosis, etc. I am unable to ascribe any permanent partial disability to the injury in question." Claimant was eventually treated by Dr. Thompson on September 20, 1967. Dr. Thompson found limitations in back motions, tenderness in the dorsal and lumbar spine, positive leg-raising tests, and decrease to pinprick sensation of the left leg. The X-rays revealed marked osteoporosis of the entire spine, a mild compression fracture in the mid-thoracic area, some disc protrusion and narrowing at L-5-S1 interspace. Dr. Thompson prescribed a dorsal-lumbar support and medications for the osteoporosis. Dr. Thompson connected the symptoms with the fall. The Hearing Officer found that the claimant was not medically stationary as of May 28, 1966, and that the claimant is in need of further medical care and treatment. The Hearing Officer assessed 15% penalties on the amount of compensation due for the period covering May 28, 1966, through November 29, 1967; 25% penalties for late

payment of the temporary total disability due for the period of May 6, 1966 through May 27, 1966; and further awarded attorney's fees of $650.00. The WCB affirmed, but cited different reasons than the Hearing Officer.

> The first factor is the undue delay in submitting the obvious issues for determination or hearing. Another is the testimony of claimant's husband who thought that employer's permission was required before the claimant could see another medical specialist. (Tr. Page 54, Line 18-25) The obligation of the employer or its insurer is to properly advise a claimant of his rights. By withholding the requested permission and failing to advise that such permission was not required, the adjuster for the carrier perpetuated a problem which might at that time have been quickly resolved. The other facet is the refusal of the employer to reemploy the claimant, when she was "released" by the treating doctor. The Board does not charge the employer with extrasensory perception to see behind the treating doctor's report. The employer and its insurer are charged with responsibility for continuing responsibility when reemployment is refused upon a basis of disability, but compensation and medical care are discontinued.
>
> The Board further concludes that the evidence warranted the award of continuing temporary total disability. It is not now necessary to decide the ultimate degree of responsibility for the osteoporosis. Certainly the preexisting or subsequent natural development of such conditions are not the responsibility of the employer. The exacerbation and treatment associated with exacerbation by industrial injury are the proper basis for compensation.

$200.00 additional attorney's fees were allowed.

WCB #68-27 August 7, 1968

Wilma Hansen, Claimant.
J. David Kryger, Hearing Officer.
Leonard Girard, Claimant's Atty.
Clayton Hess, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. The issue is AOE/COE. Claimant, a 54-year-old clerical substitute, was on October 26, 1967, in the employ of Atkinson School, a member of Portland School District #1. On said day at approximately 3:15 P.M. the claimant requested and obtained permission ot leave school to keep a doctor's appointment. She proceeded out the front entrance of the school, turning left at the public sidewalk. She proceeded to the end of the block, which is the intersection of Division and S. E. 57th Street, where there is situated a traffic and pedestrian control light. At this particular time of day numerous children were also leaving the building, and a group of these children were walking slowly and approaching the same intersection and traffic light. The claimant, seeing the light was about to change against her, and walking in a normal adult pace, realized that she would have to cut across that area between the sidewalk and street, commonly referred to as the parking strip, in order to make the light. The claimant stepped off the sidewalk onto the parking

strip, slipped and fell, injuring her right arm. The claimant was wearing flat-heeled shoes and does not know what caused her to fall, other than by inference as her coat was muddy subsequent to the fall.

The Hearing Officer, in seven pages of opinion which included a discussion of the rules in Philpott v. SIAC, 234 Or 37, concluded that the denial should be affirmed.

The WCB, after quoting Larson Workmen's Compensation, Vol. 1, para. 15.12 and 15.15, concluded:

"If this claimant had been injured by some special hazard of the premises or if she had been injured by the special hazard posed by the traffic in crossing the street, she would have brought herself within the special class of cases involved in extension of the premises.

"The authorities make it clear, for instance, that if one is approaching the employer's plant by the only public access which crosses a railroad track that an injury by a train collision is compensable. If the injury is along this route and caused by no special hazard, such as the train, it is not compensable.

"In extending the premises, so to speak, the extension is not as broad as if the same injury had occurred on the premises proper of the employer.

"The claimant in this case has no explanation of the cause of her fall other than the inference drawn from a muddy coat. She was not going to an employer operated parking facility. Her course of travel was within her control and not necessitated by the employment. Her route across the parking strip was not necessitated by the congestion of pupils. She chose the route because she thought it was the quickest way to catch that particular green traffic light. The employment had no more relationship than if the claimant suffered an automobile injury a mile away in her haste to get to the doctor.

"For the reasons stated, the Order of the Hearing Officer is affirmed."

WCB #67-1576 August 8, 1968

George W. Richards, Claimant.
Page Pferdner, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
Walter H. Sweek, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss of use of right leg. Claimant, age 50 and a heavy-duty mechanic, tore the medial meniscus of his right knee while installing a radiator in a truck. The current diagnosis is "chronic osteoarthrities of the knee, right, with recurrent effusion." In amplification Dr. Cottrell states, "I believe that he will continue to have an aggravated osteoarthrities which will be permanent. This condition will require occasional injections into the knee joint indefinitely--perhaps for the rest of his life. The condition cannot be considered completely curable, but is not due entirely to the accident which he had, but the arthrities was quiescent and giving him no great amount of trouble prior to the accident. The knee should be tolerable for continuing his work with an occasional injection into it." The Hearing Officer increased the award to 25% loss use of a leg.

"Upon review, the claimant seeks a further increase. It appears that the claimant's argument is based more upon his lack of education and training for a particular employment than upon the measurement of the physical disability. The fact that one or more employers are hesitant to employ a workman with a disability of 25% of a leg will not justify increasing the award beyond the measurement of physical disability." Accordingly WCB affirmed.

WCB #67-677 August 8, 1968

Clifford S. Bean, Claimant.
Mercedes F. Deiz, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Department.

Appeal from a notice of denial. Claimant, age 63, rented a room in a skid-row hotel on East Burnside as a paying guest and paid the rent for one week ending November 24, 1966. About November 22, 1966, the claimant explained that he was unemployed, and therefore arrangements were made for him to janitor work in exchange for subsequent room rent. Claimant was also hired to work two nights a week on the front desk as a part-time clerk at $4.00 for a 12-hour shift. Claimant stated he additionally painted rooms of the hotel on the basis of $5.00 for 10 hours' work; that he lived at the hotel about three weeks until "I got my hand hurt." Claimant was hospitalized for three weeks beginning on December 8th for an infected hand. Claimant alleges the source of infection was a small cut or scratch which he received while handling a garbage can on December 6th. He testified that he immediately went to the desk and asked for a bandaid to put on it, but none was available, so he returned to his duties. It is admitted by the hotel manager that the claimant worked five or six days as a janitor, but it is insisted that the claimant was terminated on November 26th, and that thereafter the claimant lived in the hotel without paying and with no attempts being made to eject him. The Hearing Officer consulted the calendar and decided that it was impossible for the claimant to have worked as a desk clerk for two days, as a janitor for five or six days, and paint one and a half hotel rooms, and be terminated on November 26th. Accordingly, the Hearing Officer found the credible version of the story was the claimant's and ordered the claim accepted; that notice was timely, because there was actual notice, so the written report was excused; and that the claimant was entitled to statutory penalties and attorney's fees. WCB affirmed.

WCB #68-532 August 8, 1968

John J. Sain, Claimant.
Request for Review by Claimant.

Review of a Hearing Officer order of dismissal. The request for hearing was filed on March 28, 1968, more than 60 days after a denial of the claim by the Fireman's Fund, as the carrier for the employer Maaco Corporation, on January 17, 1968. The question was whether an employer may delegate to the private carrier the legal right to accept or deny claims. The claimant's position, which is fortified by a Circuit Court decision in another case, is simply that

the insurance company denial is a nullity, since it was not made by the employer proper, but instead was made by an insurance company. It is quite clear by statute that the State Compensation Department is delegated authority to make decisions affecting their insured. The employers insuring with private carriers are designated Direct Responsiblity Employers, and by ORS 656. 262(1), 656.401, and 656.405, a greater degree of direct responsibility is cast upon this class of employers. However, the Board by its administration has permitted such privately insured employers to delegate responsibility for claims acceptance, denial and payment to their insurers with the reservation that the employer remains primarily liable and is subject to penalties for any failure of the insurer to comply with the law. To prohibit this would cause a major disruption of the whole administrative process. (Ed. Note: The Circuit Court case referred to is not identified, but other materials have indicated that the issue is pending before the Supreme Court.) The Board affirmed the dismissal of the request for hearing as untimely filed.

WCB #67-1027 August 9, 1968

Raymond C. Loudenbeck, Claimant.
Mercedes F. Deiz, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 55% loss of use of left leg. Claimant, age 62, has been a powder monkey and rock driller most of his adult life. He suffered a broken leg in a rock slide. Claimant was treated for a fracture of the left medial malleolus of the tibia without displacement, a fracture of the lower third of the distal portion of the fibula, a fracture of the proximal portion involving the knee joint without displacement. Later the medial malleolus required surgical reduction with the application of a screw. About 14 months later the defendant's medical examiner found a marked limp, a 1½-inch atrophy of the left thigh, a 1-inch atrophy of the left calf, a lack of 15-degrees extension and a 5-degrees flexion of the knee, a 15-degree lack of dorsiflexion of the left ankle, a gross loss of muscle strength throughout the left lower extremity and a 10-degree increase of valgus deformity of the left knee. His opinion was that claimant's condition was medically stationary with extensive permanent partial disability resulting from weakness, loss of muscle mass, limitation of movement, and instability. It is conceded that claimant is unable to return to his previous occupation of powder monkey, despite his best efforts. He knows no other occupation. There was medical evidence that he probably could not be trained for any other occupation. Claimant alleges total disability. The Hearing Officer ordered payment of compensation of 90% loss use of a leg.

On review the claimant again sought total disability. The Board indicated that this would require the precedent established by the Supreme Court from Kajundzich v. SIAC, 164 Or 510(1940), to Jones v. SCD, 86 Ad.S. 847(1968), to be ignored. The Board then set aside the Hearing Officer award and reinstated the determination which allowed only 55% loss of use of a leg.

WCB #67-204 August 9, 1968

Earl J. Gregory, Claimant.
Dan O'Leary, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss of use of the left arm. Claimant suffered a shoulder injury when the truck he was driving overturned. He missed four days of work. Claimant had a 1944 award of 18% loss of function of the left leg for a pelvis injury caused by a falling log, and a 1962 award of 15% loss of function of an arm for unscheduled low back injury. Subsequent to the truck accident the claimant has had a prostate operation and a bladder operation. It is not alleged that these are compensable. Claimant is now totally disabled. The Hearing Officer concluded that the claimant's generally poor state of health was a result of his other problems and not the truck overturn, and accordingly affirmed. On review the claimant contended that there would have been an unscheduled award since the shoulder was involved. The Board stated, "Basically the loss of function suffered by this claimant was in the arm itself, though the shoulder closely associated with that arm is the source of the disability to the arm. It would be immaterial from a standpoint of compensation to call the disability 'unscheduled,' particularly where the primary function lost is in the scheduled area." WCB affirmed.

WCB #67-1361 August 16, 1968

Charles C. Risener, Claimant.
George W. Rode, Hearing Officer.
Paul Clayton, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant alleges exacerbation of a pre-existing lipoma (fatty benign skin tumor) when he struck a wrench with the palm of his hand to loosen a bolt. Notice of injury was delayed about three weeks, and then there was some confusion on the date of the injury. Apparently the treating doctor was not told of any alleged trauma. Dr. James reported, "Whether or not the protrusion I described resulted from the trauma is a matter of conjecture." The Hearing Officer affirmed the denial of the claim. The majority of the Board reversed and ordered the claim accepted, discounting the importance of the confused dates of injury and treatment, and concluding that the claimant did exacerbate the tumor as alleged, and that the resultant surgery was necessitated by this unforeseen result of striking the hand against the wrench. The majority assessed $500.00 attorney's fees. Mr. Redman, dissenting, questions if the trauma had occurred at all, and further questions the medical-causal relationship.

WCB #68-23 August 16, 1968

Roy L. Moultrie, Claimant.
H. L. Pattie, Hearing Officer.
Vincent G. Ierulli, Claimant's Atty.
Thomas A. Davis, Defense Atty.
Request for Review by Claimant.

Appeal from an award for permanent partial disability equal to 30% loss of use of the right leg. Claimant suffered a leg injury from the toe to the hip when run over by a mobile shop crane. The principal injury was to his knee. The most recent medical evidence reports 15 to 20 degrees less motion in the right knee than in the left. There is "lateral instability" as well as "anterior-posterior instability," and an almost complete loss of sensation over the area commonly called the knee cap. Claimant is presently doing shop work for the same employer at the crane operator's wage. Claimant is apprehensive about operating the crane, because his bad leg is the leg necessary to operate the brake on the crane. The claimant is able to walk, but must be very careful. The Hearing Officer ordered the award increased to 50% loss of function of the leg. WCB affirmed.

WCB #67-1180 August 16, 1968

Savola Fullerton, Claimant.
J. David Kryger, Hearing Officer.
Bert Joachims, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 25% loss of an arm for unscheduled disability. Claimant, a crusher operator, was struck on the head by a falling rock on June 22, 1964. He was 64-years-old at the time and is now 68. Claimant suffered a compound depressed skull fracture. Presently the claimant complains of a loss of memory plus dizziness, headaches and inability to extend the neck without resultant dizziness and pain. Claimant attempted to return to work in September 1964, but had to give up after 6 hours because the noise made him dizzy. Claimant also suffers from neck pains and hearing loss. Dr. Billings indicated that the neck difficulty was related to osteoarthritis which was not accident-connected, and further was of the opinion "that the lightheadedness was more probably due to a vascular-cardiac condition which may be secondary to chronic pulmonary disease." Dr. Patton suggests that the headaches are related to the claimant's nervous condition and observed that they were relieved by "Equinal." Claimant's wife does not believe he has sustained any loss of memory, and that it is the same as it was prior to the injury. The Hearing Officer affirmed the determination.

On review the majority affirmed, commenting: "The real issue is whether the claimant is now permanently and totally disabled as the result that injury being, in effect, the straw which broke the back of the claimant's ability to regularly perform useful work. The problem is not made easier by the fact that the claimant's non-industrial disabilities in 1964, with their natural progression, would probably have rendered the claimant totally disabled by 1968, in the absence of the industrial injury. The claimant suffered from

silicosis which had caused him to quit working as long ago as 1953, and produced shortness of breath upon exertion when he returned to work. Hearing had decreased through the years, and there is no medical basis to assume that any additional hearing loss was occasioned by this injury. Despite the fact that this claim involved a head injury, almost all of the symptoms of lightheadedness, dizziness, etc., preceded the accident and are accounted for largely on the basis of vascular cardiac problems complicated by chronic pulmonary disease. About the only symptoms which are not completely discounted are the headaches which the medical profession concedes may have been influenced by the trauma, though it appears the headaches are susceptible to treatment by routine drugs."

Mr. Callahan, dissenting, would allow total disability: "When the legislature added word 'including preexisting disabilities' to ORS 656.206(1), it is required that the preexisting disabilities be taken into consideration. It is not to be held that disability from the last injury be the sole cause of the workman's inability to perform work at a gainful and suitable occupation."

WCB #67-1579 August 16, 1968

Robert M. Fulton, Claimant.
Mercedes F. Deiz, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 30% loss of an arm by separation for unscheduled disability. Claimant, age 42, sustained a back injury when the scraper he was operating blew a tire and threw him about the cab. X-rays revealed a minimal fracture of L-2 and a narrowing of the disc space at L-5, S-1. Claimant suffered pain radiating into the left leg. As a result of a lumbar myelogram, Dr. Ho diagnosed lumbosacral instability with degenerative disc disease at L-5 and spondylarthrosis at the lumbosacral junction. Dr. Ho performed a spinal fusion which included two bone grafts which were removed from the ilium and placed in the lumbosacral disc space, and the complete excision of the nucleus pulposus along with 75% of the annulus fibrosis of the L-5 disc. Claimant made a fairly good recovery, but is limited from heavy work. He is taking Vocational Rehabilitation as a mechanic. He has substantial complaints of pain in the legs. The Hearing Officer increased the award to 40% loss of an arm by separation for unscheduled disability. WCB affirmed, commenting, "In terms of evaluating disability involving substantial subjective complaints and serious question concerning the extended effects of that injury, there appears to be no error in classifying the entire disability as unscheduled. Any separation of the award would require a like reduction in the existing unscheduled award."

WCB #67-947 August 16, 1968

Mary Phillips, Claimant.
Page Pferdner, Hearing Officer.
James B. Griswold, Claimant's Atty.
Richard C. Bemis, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, age 32, commenced employment with Nabisco as a cracker packer beginning July 10, 1967. Claimant alleges a back sprain while twisting. She immediately consulted the company nurse and saw the company doctor as soon as he was available. This was on July 21, 1967. It was then discovered that the claimant's application for employment and medical history had been falsified. It appeared that the claimant had been hospitalized in April 1967, with a back injury to which she had not admitted. The Hearing Officer affirmed the denial. WCB reversed and ordered the claim accepted, commenting, "If this claimant had not been thoroughly examined by a doctor of the employer's choice prior to employment and had then obtained employment with an 'accident' reported shortly thereafter, there would be no choice but to affirm the denial. The pattern of claimant's behavior would have left such doubt, that the claim would of necessity be denied. However, the record is clear that the claimant was not suffering from low back difficulty when examined, but had a recurrence of her back troubles following a period of employment. It is likely that the claimant's truthful recital of prior back trouble to the treating doctor excited the employer into a preemptory denial of the claim for failing to fully advise the employer. The Board does not sit in judgement to award to the pure and to punish sinners." The Board assessed 25% penalties and awarded attorney's fees.

TABLE OF CASES

SUBJECT INDEX

ADVANCE PAYMENT

Hearing may still be obtained by repayment to employer; J. G. Myers 112

AGGRAVATION

Back: Possible evidence of bowling not bar to claim; W. Martin 50
Back: Aggravation not proven; D. Jones 102
Degenerative changes: No award in anticipation thereof; L. Carr 28
Dismissal of review of present permanent disability award does not waive any rights for aggravation claims; H. Brown 31
Head blow did not aggravate preexisting epileptic condition; M. Wing 153
Injury must be substantial contributing factor; J. Mayes 82
Not only remedy where symptoms appear after closing; E. Stephens 39
Prior Washington award not deducted; L. Lang 167
Recurring ulcer in burn area; R. Truax 124
Request must comply with ORS 656.271; G. Delaney 53
Trauma did not aggravate Hodgkins disease; J. Waibel 157

AOE/COE--Arising Out Of and In the Course of Employment

Absence of compensation due not excuse for denial of claim; E. Lytle 110
Arthritis in fingers not caused by folding shirts; B. Hergenrader 98
Assault: Compensable; A. Lawson 77
Assault: Incredible explanation; M. Long 78
Assault in which aggressor employee injured compensable; Y. Wrightsman... 154
Assault while going home from doctor; W. Coleman 64
Audiogram taken only after injury not conclusive; O. Reames 92
Auto accident: Employee who drives without pay to a logging camp not in course of employment; A. Fullmer 31
Auto accident: Ride to and from site of employment; L. Freeman..... 5
Back: Full range of back complaints found not compensable; E. Berry..... 94
Back injury not from compensable fall; J. Sahli 117
Back injury without objective symptoms ordered accepted; L. Casey 156
Back pains appearing two months after injury are compensable; B. Philibert 10
Back problem result of normal aging; P. Bentley 107
Bowler's elbow: Not compensable; E. Withers 75
Bronchitis not from mild steel welding; D. Doud 69
Coincidence of increased back pain and possible increased working hours; not sufficient of itself to establish aggravation; S. Thompson 19
Compensable back injury not consistent with participation in track meet three days later; R. Wood 136
Concussion--relation of various symptoms not found; S. Fullerton 180
Credibility gap: Claimant's testimony impeached; J. Piatt 36
Credibility of claimant: False presumptions should not impeach; J. Johnson 105

Disability mostly result of other causes: J. Oreskovich 20
Discrepancies in claimant's case must be pertinent: D. Richardson 89
Dramatic onset of symptoms relevant: M. Desgrange 56
Dual purpose trip compensable: P. and G. Medford 46
Fall at doctor's not connected to previous back injury: B. Lemons 167
Falling off horse is intervening injury: J. Williamson 63
Forearm injury not related to concussion: O. Reames 92
Food poisoning on business trip: L. George 2
Glass back hurt again: R. Trimble 85
Grease fume inhalation accidental injury: V. Carr 134
Great delay in attributing injury to accident raises problem of causality: E. Mace 7
Heart attack claim ordered accepted: M. Bowles 45
Heart attack found not compensable: E. Mayes 121
Heart attack not caused by sulfur dioxide gas: L. Moberg 110
Heart attack symptoms began before work: R. Henrikson 58
Hemorrhagic cystitus from fall compensable: S. Seidel 101
Hernia after transfer to heavy lifting job: J. Borland 7
Hernia, failure of proof that compensable: P. Lauber 73
Hernia, double, in woman: S. Dalton 148
Incredible accident: L. Mackey 100
Incredible back injury: C. Egr 56
Incredible shoulder injury: M. Benjamin 54
Initial story attributing injury to prior job won't bar claimant from telling truth later: E. Green 51
Injury must be substantial contributing factor: J. Mayes 82
Intervening non-compensable injuries: K. Tackett 65
Jailhouse accident not to be assumed: M. Brudana 90
Laminectomy after intervening severe car accident: V. Johnson 173
Leukoplakia not occupational origin: T. Van Arsdale 68
Lunch hour death from choking on potato chip while sitting in company truck off the employer's premises: M. Luck 3
Medical causation is matter for medical evidence to establish: J. Sisson .. 18
Natural gas fumes may cause illness: D. Baker 146
Neck pain out of thumb amputation: G. Schenck 65
Neuritis from forearm injury: R. Brown 150
Newspaper boy hit by car: D. Oremus 161
Pre-employment physical established injury not preexisting: M. Philips.. 182
Return trip from coffee house three blocks away not compensable where stepped off curb and sprained ankle: R. Jordan 122
School employee fell on street corner on way to doctor: W. Hansen 175
Shoulder injury attributed to prior auto accident: K. Barnett 139
Skidrow hotel and part-time janitor: C. Bean..... 177
Sprained ankle injury may produce a back injury which would not manifest disabling pain for three months: C. Weakley 16
Time of accident found sufficiently definite: E. Kilgore 45
Trading services: T. Smith 122
Trauma not cause of internal injury: P. Lowe 23
Vascular insufficiency after ankle fracture: F. Rose 129
Welding fumes did not make accidental injury: D. Doud 134
Wrench blow to palm of hand exacerbated tumor: C. Risener 179

BURDEN OF PROOF

Claimant must prove employer's subjectivity: B. Westfall 126
Claimant must prove any award to which he is entitled beyond amount of determination: J. Byers 25
Claimant must prove case: C. Butcher 66
Claimant must justify late notice of injury: G. Levesque 158
Claimant must justify late notice of injury: C. Satterfield 72
Claimant's testimony of AOE/COE does not shift burden: J. Sahli 117
Injury must be substantial contributing factor: J. Mayes 82
Head injuries claim not proven: R. Turvey 55
Prima facie case for claimant: R. Brown 150

COSMETIC DEFECT

Burns, extent of compensation: R. Rhode 37
Impotency not compensable: H. Alexander 28
Loss of taste or smell not compensable: T. Ayers 30
Red nose not compensable: H. Sminia 10
Scars compensable where limit mechanical function and damage psychologically: R. Rhode 37

DOMESTIC RELATIONS

Common-law marriage not found: R. Reischel 35

DOUBLE EMPLOYERS

Fact that paid by one employer doesn't bar finding that general employee of another: L. Freeman 5
Trading services: T. Smith 66

DUAL PURPOSE TRIP

Bird hunting and cattle buying in Eastern Oregon: P. and G. Medford 46

ELECTION OF REMEDIES

New procedure obligates payment of benefits pending appeal, even though injury occurred under prior law: L. Larson 122

EMPLOYEE OR INDEPENDENT CONTRACTOR

Carpenter is independent contractor: J. Cox 103
Carpenter not subject workman under prior law: J. Bowman 29
Moonlighting steamfitter found employee: A. Wright 54
Newspaper boy employee of wholesale dealer: D. Oremus 161
Vacuum cleaner salesman is employee: Electra Enterprises, employer 49

EVIDENCE
See also Substantial Evidence Rule.

Audiogram does not prove hearing loss: O. Reames 92

Circumstantial evidence may be considered in establishing medical-causal relationship where medical evidence is confusing and conflicting: L. George 2
Criminal record casts doubt on claimant's veracity: M. Brudana 90
Department cannot force claimant to produce doctor for X-ray exam at claimant's expense: S. Dalton 148
Judicial notice taken of Official Board records: J. Langsdorf 170
Medical evidence found insufficient to establish permanent disability: W. Hayden 19
Medical evidence, necessity thereof: R. Lunsford 118
Medical evidence must be used to establish medical-causal relationship: B. Sisson 18
Medical evidence not necessary to relate illness to natural gas fumes: D. Baker 146
Medical-causal relationship exclusively medical question for expert opinion: M. Kelley 16
Medical evidence of anticipated degenerative changes may not be considered in present award: L. Carr 28
Use of texts not in evidence: O. Reames 92
Where medical testimony of no probative value, Hearing Officer should have claimant examined by more doctors: C. Dobson 15

FALLS

A fall of a doubtful or unknown cause may be compensable, if it occurred at a time and place soas to be a positional risk: S. Smith 6

HEARING OFFICER DECISION

Cross request required, if determination to be reduced: J. Byers 25
Failure to issue order within statutory time under ORS 656.289(1) does not make the order void: D. Bridge 33
Insufficiently developed: B. Williamson 79
Late issued order does not go to jurisdiction: B. Johnson 35
Permanent disability award inconsistent with order of curative surgery: J. Bonner 40
Record must reflect gainful and suitable employment available if permanent and total disability is denied: F. Simmons 41
Record must explain denial of award allowed on determination: F. Simmons. 41
Remanded for further medical reports: K. Franklin 111
Sufficient notice to parties if counsel notified: M. Benjamin 54
Unscheduled disabilities should be stated in terms of loss of arm by separation: E. Hodgson 42
Void Order, effect of: P. Lauber 73
Weight of evidence disregarded by Hearing Officer: E. Stephens 39

HEART ATTACK

Coronary thrombosis compensable: M. Bowles 45
Claim ordered accepted: R. Henrikson 58
Evaluation at 55% loss of arm by separation: E. Kociembra 101
Not compensable by majority vote: E. Mayes 121
Not caused by sulfur dioxide gas: L. Moberg 110

INTERVENING INJURY

Assault while going home from doctor: W. Coleman 64
Laminectomy result of intervening car accident: V. Johnson 173
Only makes evaluation more difficult: J. Williamson 63

JURISDICTION

See Request for Hearing Request for Review, Procedure

LIBERALLY CONSTRUED

Not applied to facts: E. Goldberg 78

MEDICAL REPORTS

Admissible even if undertaken to assume ultimate decision of extent of permanent disability: D. Bridge 33
Claimant's report prima facie: S. Dalton 148
Cooperation--effect of claimant's failure: K. Makela 104
Discourage conversion of physical findings into percentage awards: D. Cole 61
Insufficient if couched in terms of "could have": E. Kilgore 45
Interpretation of visual loss: I. Boorman 97
Necessity of showing permanence: R. Lunsford 118

MEDICAL SERVICES

Additional disability therefrom compensable: F. Koch 44
Claimant has right to refuse surgery, but such refusal must be considered in evaluation of disability: K. Seratt 1
Custom and usage dictate payment for reasonable transportation expenses incident to medical treatment: G. Shannon 18
If unnecessary surgery must pay compensation and bills anyway, but may proceed against doctor in malpractice: S. Elliott 9
Need of curative services indicate not medically stationary: L. Andrews.. 87
No further payment: J. McDaniel 73
Palliative treatment not compensable: D. Hutchison 147
Palliative treatment not compensable: T. Guy 35
Payment not to be reduced by attorney's lien: R. Truax 152
Refusal not unreasonable: W. Haney 115
Surgery postponed on account of pregnancy: C. Hayward 96
When proper: R. Burns 143

NOTICE OF INJURY

Abuse of discretion is extent of review under ORS 655.520(3): D. Bias .. 53
Claimant must justify late notice: C. Satterfield 72
Claimant must justify late notice: G. Levesque 158
Delay excusable where employer has actual knowledge but Department is prejudiced: J. Clem 56
Delay excused when late appearing complications from minor burn: H.Davis 171
Delay in reporting permissible if circumstances justify: S. Smith 6
Delay prejudicial: P. Lauber 73

Eight-month delay prejudicial: P. Bentley 107
Great delay in attributing injury to accident raises problem of causality: E. Mace 7
Month delay on shoulder strain explained: N. Allen 86
Notice not timely: T. Williams 42
Sixteen-day delay explained: F. Voigt 3

OCCUPATIONAL DISEASE

Asbestosis found 50% contributing factor to permanent and total disability: F. Moffet 13
Asthma condition and chlorine gas: R. Haak 128
Chronic subdeltoid bursitis evaluated at 100% loss function of arm: M. Wershey 138
Contact dermatitis of fry cook basis for award: E. Wasson 11
General hearing loss and tinnitus appearing after operation of noisy cat, compensable even though some prior symptoms of acoustic trauma: M. McBride 5
Leukoplakia not occupational origin: T. Van Arsdale 68
Lung condition caused by dust exposure compensable: E. Gray 27
Presence thereof should be reviewed by Medical Board and not WCB: J. Lescard 36
Pneumonitis claim denied relating to paint fumes: E. Shadduck 17

PENALTIES AND ATTORNEY'S FEES

Acceptance of claim on eve of hearing won't bar fees: C. Hooper 160
Allowed after denial reversed: D. Baker 146
Attorney's fees allowed after claimant prevailedin subjectivity hearing: Beaver Sports Properties, Inc., Employer 48
Board reversed award of penalties after taking judicial notice of record: J. Langsdorf 170
Claimant's Attorney gets $31.00: W. Swink 59
Confusion: G. Delaney 53
Continued payment of wages not unreasonable resistance: M. Walsh 1
Denial defective: J. Loper 34
Department may not unilaterally suspend SIAC award of total disability: J. Rawls 155
Disallowed on review for insufficient basis: F. Kufner 132
Double penalties not allowed under ORS 656.262(8): M. Desgrange 56
Double penalty award not reversed on review: K. Makela 104
Erroneous retroactive determination does not ratify otherwise unreasonable non-payment of temporary total disability: T. Cheek... 120
Falsified medical history and employment application unreasonable basis for denial of claim: M. Phillips 182
New procedure obligates payment of benefits pending appeal: L. Larson .. 122
Non-payment of temporary partial disability: C. Adams 140
None for late payment unless specifically plead which payment late: W. Benedict 38
None where payment stoppage subsequently sustained by determination: W. Benedict 38
Pair of injuries, one of which insurer is uninfomred, makes liability for attorney's fees: S. King 169

Penalties allowed on reversal of denial, although Hearing Officer had affirmed: M. Phillips 182
Penalty allowed for late time loss but no fee: W. Aarnio 2
Premature suspension of time loss where pregnancy: C. Hayward 96
Prevailing on legal issue not enough; compensation must be disallowed or reduced on review to avoid fee: S. Finley 55
Sight draft is not permissible form of payment: L. Antoine 62
Termination of time loss payments before records justify basis for penalties: E. Wasson 11
Various; allowed for great delay in getting determination, etc.: E. Sager 174
"Unreasonable resistance" to be determined on a case by case basis and distinguished from "unreasonable delay": L. Hallin 143
Withdrawal of request for review; claimant's attorney entitled to reasonable fees for work already done: G. Shannon 18

PERMANENT PARTIAL DISABILITY

(1) Arm & Shoulder
(2) Back - Lumbar and dorsal
(3) Fingers
(4) Foot
(5) Forearm
(6) Leg
(7) Neck and Head
(8) Unclassified

(1) ARM AND SHOULDER

Arm and leg burns, various: J. Woosley 11
Arm: Shoulder may be either scheduled or unscheduled; C. Tourville 47
Arm, shoulder and neck determination affirmed: W. Miller 103
Arm: No unscheduled though source of disability in shoulder; E. Gregory 179
Arm: 5% each for double fracture of scapula; J. White 48
Arm: 10% for weakness; H. Brown 31
Arm: 10% from fall and fracture; F. Schrier 96
Arm: 10% determination affirmed; C. Timm 118
Arm: 20% scheduled for shoulder; E. Matson 67
Arm: 25% for limited abduction; W. Haney 115
Arm: 25% where crushed; W. Brown 130
Arm, shoulder, cervical area, 30% scheduled, 5% unscheduled; C. Griffith. 127
Arm: 35% for ruptured distal biceps tendon; H. McCarty 84
Arm: 35% for broken elbow; E. Kershaw 152
Arm: 50% after shoulder surgery; R. Delamare 24
Arm: 65% scheduled to old man for shoulder; F. Edmonds 88
Arm: 75% for loss of strength to old carpenter; M. Funk 64
Arm: 90% for shoulder where hand and forearm OK; C. Parker 80
Arm: 100% loss function for chronic subdeltoid bursitis; M. Wershey ... 138

(2) BACK - Lumbar and Dorsal

Back: Credibility gap; J. Tooms 79
Back: WCB set aside Hearing Officer award; E. Campbell 125
Back: Disability not in excess of prior award; R. Olson 146
Back: None for subjective complaints; M. McGill 7
Back: None for pain and fatigue; E. Thompson 11
Back: None where poor work record and poor motivation; C. Fairchild ... 18
Back: None where medical evidence insufficient; W. Hayden 19
Back: None for some pain; I. Thomas 75
Back: None after fall three stories to sidewalk; G. Ayres 75
Back: None where claimant disbelieved; J. Krewson 93
Back: None after fall; E. Bergh 94
Back: None to obese woman; B.Barnett 95
Back: None for pain; C. Prodzinski 114
Back: None where subjective complaints without medical evidence; R.Bray. 133
Back: None where obese and gouty; D. Foster 168
Back: 5% for minimal dorsal injury; E. Richert 38
Back: 5% for minor injury; J. Capps 76
Back: 5% where no objective findings; J. Hough 84
Back and Leg: 5% and 10%; R. Harper 108
Back: 5% for minor injury to claim conscious; D. Monroe 112
Back: 5% determination affirmed for sprain; P. DeRosier 160
Back: 10% for chronic strain; C. Delamare 24
Back and Leg: 10% each for subjective complaints; G. Baker 32
Back: 10% for aggravation; B. Philibert 109
Back: 10% for sprain where obesity; R. Zirschkey 111
Back: 10% determination affirmed where obesity; P. Husted 115
Back, cervical and lumbar: 15%; C. Hewlett 57
Back: 15% to window dresser; E. Goldberg 78
Back, upper: 15% determination affirmed; R.McGilvra 85
Back: 15% determination affirmed; A. McCarthy 99
Back: 15% generous; J. Walton 106
Back: 15% where intervening problems and no heavy work; L. Burling 116
Back and arm: 15% and 25%; A. Dement 129
Back: 15% after surgery; F. Kufner 132
Back, dorsal: 15% to logger; F. Chaffee 136
Back: 15% where excluded from heavy work; H. Crisler 139
Back: 15% determination affirmed with comment on absence of brief; J. Hill 146
Back: 15% for inability to lift heavy objects; H. Bryant 156
Back: 15% award affirmed on "not strong" evidence; H. Jeffers 166
Back: 20% after compression fracture; T. Ayers 30
Back: 20% for pain; A. Belding 61
Back: 20% for limited lifting; W. Eckert 105
Back and Leg: 20% and 5% after laminectomy; L. Osler 109
Back and Shoulder: 20% and 10%; J. Roberts 123
Back: 20% determination affirmed; N. Washburn 130
Back: 20% after laminectomy at L-5; A. Schafroth 141
Back: 20% after compression fracture of D-12; J. Parsons 172
Back: 25% determination affirmed where large functional overlay; G. Huitt 15
Back: 25% where no heavy lifting; W. Benedict 38
Back: 25% for severe pain; L. Carlson 40

Back: 25% where cannot bend over and lift; W. Dunlap 52
Back: 25% for backache, etc.; V. Hoppus 76
Back, foot and forearm: 25%, 20%, and 15%; D. Holycross 112
Back: 25% determination affirmed; A. Craig 124
Back: 25% for multiple injuries and reduced income; G. Berglund 129
Back: 25% to furniture mover; R. Kreier 137
Back: 30% for disabling pain; N. Mullins 41
Back: 30% instead of total disability; W. Smith 52
Back: 30% for strain imposed on spondylolisthesis; A. Gonsalves 57
Back and Legs: 30% and 10% each after laminectomy; J. Bell 142
Back: 30% determination affirmed where claimant impeached; H. Rand 151
Back and Arm: 35% and 20% to 63-year-old chef; C. Baigert 113
Back: 40% to 65-year-old man; L. Thornbraugh 43
Back: 40% for sprain on preexisting compression fracture; L. Snead 132
Back and Leg: 40% and 20% for slip by high climber; M. Morgan 137
Back: 40% after fusion; R. Fulton 181
Back: 45% to truck driver now TV repairman; C. Perry 82
Back and forearm: 50% and 30% after fractures to old man; J. Beagle ... 77
Back: 55% from fall; E. Leding 108
Back: 60% for lumbar and dorsal spine; L. Elkins 80
Back and Leg: 60% and 25% after laminectomy; C. Olson 173

(3) FINGERS

Fingers: Various for punchpress to hand; W. James 14
Finger: Loss of grip computed in terms of thumb loss; B. Nelson 20
Finger: None for numbness, soreness, and loss of strength; C. Miller ... 21
Finger: Disability not extended to forearm; H. Alexander 28
Fingers: Various to machinist; V. DeVaul 86
Fingers: 15% loss to each of four; A. Hargis 151
Fingers: Various awards for lacerations; F. Butler 166

(4) FOOT

Foot: None for fracture; E. Mosley 168
Foot: 5% from logging accident; C. Zwahlen 149
Foot: 10% for sprain and contusion; E. Bradley 63
Foot: 10% for sprain; M. Schaefer 99
Foot: 10% for fracture; E. Stephens 39
Foot: 15% to longshoreman for pain after fracture; D. Cole 61
Foot: 15% loss use for back strain; R. Smith 106
Foot: 20% for fractured metatarsals and limp; E. Stricker 95
Foot: 20% determination affirmed for ankle fracture; J. Walker 153
Foot: 30% for lost motion; W. Bricker 116
Foot: 45% after ankle fracture to logger; R. Spencer 60
Foot: 50% for fracture; T. Ayers 30

(5) FOREARM

Forearm: Award must be based on injury at or above wrist joint;
W. Serles 50
Forearm: None for laceration; S. Lautenschlager 170
Forearm: 10% for sore wrist; V. Cochran 32

Forearm: 10% for fracture; T. Guy 35
Forearm: 15% for sprained wrist; L. Bogard 81
Forearm: 50% for chain saw cut to wrist; S. Dupuis 13
Forearm: 90% for degloved skin and distal phalanges; J. Cumpston 135

(6) LEG

Leg: Award restricted to schedule of benefits even though effect of injury is to render workman unemployable; B. Scoggins 12
Leg: 10% determination affirmed for fracture but prior Washington award not deducted; L. Lang 167
Leg: 20% for reinjured knee; T. Hinrichs 172
Legs: 25% and 15% for burns; J. Freeman 169
Leg: 25% for weakness; A. Schanno 74
Leg: 25% for knee fracture; L. Hays 165
Leg: 25% for knee injury; G. Richards 176
Leg: 30% for fracture and knee instability; J. Lowell 141
Leg: 50% for badly injured knee; R. Moultrie 180
Leg: 65% to old man with severe laceration; T. Trent 131
Leg: 75% where crushed by cat; W. Jenkins 125
Leg: 90% award reduced where claimant requested review; R. Loudenbeck . 178

(7) NECK AND HEAD

Cervical aggravation manifested primarily in arm: V. Birkhans 99
Concussion and skull fracture: Limited award because most symptoms were preexisting; S. Fullerton 180
Post concussion syndrome: 15%; O. Reames 92
Whiplash, permanent impairment not proven: R. Lunsford 118
Neck: 5% for blow to forehead; H. McClendon..... 117
Neck: 5% where large preexisting degenerative change; E. Johnson 149
Neck and Head: 10% to 69-year-old man; J. Holben 93
Neck and Shoulder: 10% for minimal injury; H. Shlim 91
Neck and Thoracic area: 15% to catskinner; R. Mott 74
Neck and Back: 15% where prior back awards; E. Hodgson 42
Neck: 45% after laminectomy; K. Wagner 161
Neck and Arm: 50% and 20% for broken neck; H. Shum 165
Neck: 60% for blow to head; J. Anderson 91
Neck: 60% to 63-year-old millworker; V. Sommers 131

(8) UNCLASSIFIED

Aches and pains: none for fall; M. Aikman 100
Bizzare claims without supporting medical testimony are not compensable: C. Rios 26
Burns: Various awards after severe burn; R. Rhode 37
Burns with residual tenderness insufficient: I. Lewis 114
Contact dermatitis basis for award to fry cook: E. Wasson 11
Curative surgery inconsistent with PPD: J. Bonner 40
Earning capacity explored, Kajundzich rule: D. Hutchison 147
Eyes: Photo sensitivity--25% combined binocular visual loss; S. Finley.. 55
Eyes: Visual losses may not be converted into unscheduled disabilities; R. Rhode 37
Eye: 20% determination affirmed; W. Fretwell 159

Eyes: Method of computation of visual loss; I. Boorman 97
Eyes: No loss where glasses correct; O. Reames 92
Heart attack evaluated at 55% loss arm: E. Kociembra 101
Impotency not compensable: H. Alexander 28
Intervening injury merely makes evaluation more difficult: S. Raney 27
Loss of hearing capacity is basis for compensation: S. Raney 27
Lung: 60% loss of vital capacity; E. Gray 27
Narcolepsy: Remand for further diagnosis; H. Cunningham 58
Pain, per se, is insufficient: M. Edington 9
Physical functions not former occupation measure: G. Kautz 25
Prior awards, did present injury result in additional disability: D. Bridge 33
Red nose not compensable; permanent disabilities must be those known to surgery: H. Sminia 10
Ribs: No award for contusion; E. Murray 67
Scars compensable where limit mechanical function and damage psychologically: R. Rhode 37
Skin Graft: Donor area compensable; J. Arthur Cumpston 135
Taste loss not compensable: T. Ayers 30
Toe: 55% determination affirmed; M. Nelson 107
Unscheduled disabilities should be stated in terms of equivalents to loss of an arm by separation and not to loss function: J. Coleman.. 33

PROCEDURE

Appeal from a stipulation of remand not called for: J. Hill 89
Attempted denial must meet requirements of ORS 656.262(6): J. Loper 34
Board indicated briefs desirable to clarify issues and position of parties: J. Bell 142
Denial by delegates of employer effective to start 60-day period running despite Circuit Court ruling to contrary: J. Sain 177
Employer may delegate responsibility for acceptance, denial, and payment to carrier: J. Sain 177
Faulty appeal notice does not prevent proper appeal: R. Haak 128
Form 801 is claim, even if widow doesnot know and thereby loses appeal rights: C. Printz 71
Request for hearing directed to Department may be excusable: L. Hogson . 144
Rule 5.05 D is legal and proper rule: S. Dalton 148
Stay in proceedings not available pending Supreme Court appeal: M. Chetney 171

REQUEST FOR HEARING

Postage meter impression dated prior to 60-day period insufficient for jurisdiction: A. Cobb 139
Request addressed to State Compensation Department gives no jurisdiction: J. Lewis 133
Request addressed to State Compensation Department held insufficient: R. Cooper 26
Request directed to State Compensation Department held sufficient, as previous occurrences indicative of inadequate notice of appeal rights: L. Hogson 144
Subsequent claim acceptance not bar to attorney's fees: C. Hooper 160
Time expired before widow knew claim filed: C. Printz 71

Where partial denial, time runs as to that denied from date of partial denial and not subsequent determination: G. Wunder 113
Where year has run may allow filing of aggravation claim: J. Peck 17
Year allowed for request even though determination is delayed until long after secret closure of claim: L. Fitzhugh 145

REQUEST FOR REVIEW

Claimant should seek if wants increased award: R. Harper 108
Failure to request within 30 days goes to jurisdiction: P. Lowe 23
Failure to request within 30 days goes to jurisdiction: P. and G. Med P. and G. Medford 46
Must be timely: Notice to counsel; notice to parties: M. Benjamin 54
Request may be withdrawn: B. Castricone 17
Service on SCD: Failure not jurisdictional; D. Doud 81
Service of SCD: Failure is jurisdictional; D. Doud 69
Stipulation of settlement may be disavowed: R. Schulz 59

SCOPE OF REVIEW

Board determination may not be reduced by Hearing Officer without cross-request by defense: J. Byers 25
Medical Board should determine presence of occupational disease: J. Lescard 36

SCOPE OF WORKMEN'S COMPENSATION ACT

Carpenter found not to be a subject workman under prior law: J.Bowman .. 29
Certain settlements of claims not permissible: D. Staley 135
Custom farming usually incidental to farming: B. Westfall 126
Department may not unilaterally suspend SIAC award of total disability: J. Rawls 155
Employee of farm labor contractor engaged in farming or work incidental thereto: T. Burk 8
Employee defined for purposes of "four employee rule": Beaver Spt. Prop. 48
Invalid child over 18 not beneficiary where widow survives: W. Leech ... 70
Prison inmate not covered while attending school: R. Edgar 119
Pellet mill found to be farming activity: Schmidt Bros. Farms 24

SUBSTANTIAL EVIDENCE RULE

De novo review rule adopted: C. Miller 119
Substantial evidence rule applied to affirm choice of medical theories: M. Bowles 45
Substantial evidence rule applied over claimant's protest: E. Goldberg.. 78

TEMPORARY DISABILITY

After treating physician's initial release, limitations: W. Benedict ... 38
Computation based on loss of wages: L. Andrews 87
Computation where partial temporary disability: C. Adams 140
Discharge from employment two months after injury sufficient basis for award: M. Walsh 1
Hernia complications extend carrier's liability: A. Sheppard 158

Jailed claimant does not suspend obligation to pay: T. Cheek 120
Jail residence not excuse to stop paying: M. Brudana 90
Lower back injury cases in which the claimant suffers from continuing problems, a myelogram should be effected prior to a declaration that medically stationary: J. Belanger 22
Medically stationary condition not found: H. Young 62
Medically stationary condition not found: W. Adams 60
Medically stationary condition not found: L. Andrews 87
None during Vocational Rehabilitation: F. Lamm 21
None during Vocational Rehabilitation: I. Boorman 97
None during Vocational Rehabilitation: B. Philibert 109
Part- vs. full-time employee: L. Antoine 62
Pregnancy--effect: C. Hayward 96
Retroactive determination permissible: I. Boorman 97
Seasonal worker: Too speculative; A. Belding 61
Temporary and not permanent employee: M. Winburn 127
Treating doctor's release did not stop: E. Sager 174
Termination prior to release or determination, when OK: W. Benedict 38
Unemployment compensation may not be used as setoff: W. Adams 60
Unemployment compensation may not be used as setoff: H. Young 62
Vacation with pay terminates: R. Haak 128

TOTAL AND PERMANENT DISABILITY

Additional disability from medical treatment compensable: F. Koch 44
Dissent would have allowed to old man: S. Fullerton 180
Elderly man's prior history no bar where previously employable: A.Wolverton 23
Failure to return to work not a prima facie test: A. Dewitt 43
Failure to return to work not conclusive as to inability: W. Smith 52
Functional overlay may be compensable: F. Koch 44
Functional element produced by serious injury and numerous associated surgical insults can be compensable factor in determining total disability: M. Tevepaugh 13
Hearing Officer award was overturned on review: T. Trent 131
Inability to return to former occupation insufficient: K. Seratt 1
Injury which will not yield to treatment plus inability of State of Oregon to find regular and suitable employment strong evidence of total disability: E. Storm 8
Mere belief that unemployable insufficient to establish same: C. Ellingson 15
Must show that old longshoreman cannot do more sedentary type of work before can qualify for total disability: J. Oreskovich 20
Not allowed for 60% vital capacity of lungs: E. Gray 27

TABLE OF CASES

ALPHABETICAL BY CLAIMANT

Claimant's Name	WCB Number	County to Which Appealed	Page
Aarnio, William	WCB #67-71		2
Adams, Charles N.	WCB #67-637	Multnomah	140
Adams, Willis	WCB #854		60
Aikman, Margaret	WCB #67-797		100
Alexander, Howard	WCB #67-550	Multnomah	28
Allen, Nancy	WCB #67-349		86
Anderson, James A.	WCB #67-217	Lane	91
Andrews, Lawrence E.	WCB #67-91	Wasco	87
Antoine, Leona	WCB #67-840	Multnomah	62
Ayers, Thomas H.	WCB #67-577		30
Ayres, George	WCB #67-420		75
Baker, Dee	WCB #1313	Multnomah	146
Baker, George	WCB #67-58		32
Baigert, Conrad F.	WCB #67-963	Multnomah	113
Barnett, Barbara J.	WCB #67-1141		95
Barnett, Kenneth Rae	WCB #67-989		139
Beagle, John H.	WCB #67-1028	Multnomah	77
Bean, Clifford S.	WCB #67-677		177
Beaver Sports Properties Inc.	WCB #857		48
Belanger, Jeanne E.	WCB #67-33		22
Belding, Aretta	WCB #67-614	Marion	61
Bell, John C.	WCB #67-1391	Multnomah	142
Benedict, William J.	WCB #67-294		38
Benjamin, Mac B.	WCB #67-632		54
Bentley, Perry	WCB #67-753		107
Bergh, Emma Jeanne	WCB #67-1302	Marion	94
Berglund, Gerald B.	WCB #67-1271	Multnomah	129
Berry, Ellen L.	WCB #67-982		94
Bias, Dewey B.	WCB #67-546		53
Birkhans, Vigo	WCB #67-1337	Multnomah	99
Bogard, Linda	WCB #67-850	Multnomah	81
Bonner, Joseph A.	WCB #685		40
Boorman, Irven S.	WCB #67-85	Lane	97
Borland, John L.	WCB #67-204		7
Bowles, Maynard B.	WCB #67-587	Linn	45
Bowman, John	WCB #67-422		29
Bradley, Estil	WCB #67-1168	Lane	63
Bray, Ruth P.	WCB #67-749	Coos	133
Bricker, William R.	WCB #67-1299		116
Bridge, Dale Eugene	WCB #315		33
Brown, Henry H.	WCB #67-538		31
Brown, Robert L.	WCB #67-1474		150
Brown, Willard A.	WCB #67-1067	Jackson	130
Brudana, Marcellus R.	WCB #67-376	Multnomah	90

Claimant's Name	WCB Number	County to Which Appealed	Page
Bryant, Herbert J.	WCB #67-1440	Multnomah	156
Burk, Thomas	WCB #892		8
Burling, Larry L.	WCB #67-986	Multnomah	116
Burns, Roy C.	WCB #67-1202		143
Butcher, Clifford	WCB #67-671	Multnomah	66
Butler, Frank	WCB #67-1385		166
Byers, John F.	WCB #67-175		25
Campbell, Emmett D.	WCB #67-701	Marion	125
Capps, J. B.	WCB #67-984		76
Carlson, Ludvick W.	WCB #67-397		40
Carr, Lester E.	WCB #933		28
Carr, Viola	WCB #67-1222		134
Casey, Lowine	WCB #67-1072		156
Castricone, Benjamin	WCB #67-549		17
Chaffee, Floyd G.	WCB #67-1165	Lane	136
Cheek, Troy Etzel	WCB #67-1348		120
Chetney, Melvin	WCB #67-1043		171
Clem, James Nathan	WCB #67-664		56
Cobb, Arthur P.	WCB #68-287		139
Cochran, Velma	WCB #67-462		32
Cole, Donald T.	WCB #67-876	Multnomah	61
Coleman, James F.	WCB #67-468		33
Coleman, W. B.	WCB #67-891		64
Cooper, Robert B.	WCB #67-50		26
Cox, John M.	WCB #67-1105	Lane	103
Craig, Alvin L.	WCB #67-1087		124
Crisler, Harold F.	WCB #67-1336		139
Cumpston, James Arthur	WCB #67-924	Multnomah	135
Cunningham, Hiram S.	WCB #705	Lane	58
Dalton, Sharon L.	WCB #67-588	Linn	148
Davis, Harry M.	WCB #67-971		171
Delamare, Cathy Bertha	WCB #863		24
Delamare, Robert T.	WCB #894		24
Delaney, Garland O.	WCB #708		53
Dement, Arthur	WCB #67-1296	Multnomah	129
DeRosier, Peter A.	WCB #67-1654		160
Desgrange, Michael J.	WCB #67-55	Multnomah	56
DeVaul, Vincent S.	WCB #67-1103	Multnomah	86
Dewitt, Albert	WCB #67-252		43
Dobson, Charles Raymond	WCB #67-39		15
Doud, Dean N.	WCB #67-531	Umatilla	69
Doud, Dean N.	WCB #67-531	Umatilla	81
Doud, Dean N.	WCB #67-531	Umatilla	134
Dunlap, William T.	WCB #67-655		52
Dupuis, Samuel N.	WCB #757		13
Eckert, Wesley	WCB #67-1441	Multnomah	105

Claimant's Name	WCB Number	County to Which Appealed	Page
Edgar, Richard J.	WCB #67-543		119
Edington, Mary J.	WCB #692	Multnomah	9
Edmonds, Francis Wayne	WCB #67-1088	Multnomah	88
Egr, Corinne Bernice	WCB #67-504	Lane	56
Electra Enterprises	WCB #67-440		49
Elkins, L. M.	WCB #926	Marion	80
Ellingson, Carl B.	WCB #67-219		15
Elliott, Sandra	WCB #811	Multnomah	9
Fairchild, Clayton D.	WCB #67-142		18
Finley, Sam	WCB #67-148	Multnomah	55
Fitzhugh, Lloyd E.	WCB #68-286	Multnomah	145
Foster, David Paul	WCB #67-1615		168
Franklin, Kenneth W.	WCB #67-302		111
Fretwell, Willie B.	WCB #67-1040	Marion	159
Freeman, James R.	WCB #68-32		169
Freeman, Loren B.	WCB #855	Klamath	5
Fullerton, Savola	WCB #67-1180	Clackamas	180
Fullmer, Anthony, Jr.	WCB #664	Coos	31
Fulton, Robert M.	WCB #67-1579		181
Funk, Marvin H.	WCB #67-471		64
George, Lawrence E.	WCB #599		2
Goldberg, Eva	WCB #67-737		78
Gonsalves, Alexander H.	WCB #67-351	Multnomah	57
Gray, Everett N.	WCB #67-435		27
Green, Eddie	WCB #67-121		51
Gregory, Earl J.	WCB #68-204		179
Griffith, Charles L.	WCB #67-949	Multnomah	127
Guy, Thomas	WCB #852	Multnomah	35
Haak, Robert	WCB #67-1424		128
Hallin, Lawrence J.	WCB #67-1317		143
Haney, William J.	WCB #67-1064	Multnomah	115
Hansen, Wilma	WCB #68-27		175
Hargis, Allen	WCB #67-463		151
Harper, Ronald	WCB #67-160		108
Hayden, William A.	WCB #533		19
Hays, Lawrence B.	WCB #67-205	Coos	165
Hayward, Cheryl	WCB #67-780	Multnomah	96
Henrikson, Robert	WCB #67-98	Douglas	58
Hergenrader, Betty Lee	WCB #67-552		98
Hewlett, Charles W.	WCB #67-711	Multnomah	57
Hill, John H.	WCB #67-934	Lane	89
Hill, John H.	WCB #67-1609	Lane	146
Hinrichs, Timothy L.	WCB #67-1366		172
Hodgson, Everett G.	WCB #67-69		42
Hogson, Leo W.	WCB #67-1194	Umatilla	144
Holben, James L.	WCB #67-584		93
Holycross, Donald J.	WCB #67-129		112

Claimant's Name	WCB Number	County to Which Appealed	Page
Hooper, Clarence A.	WCB #67-1143		160
Hoppus, Victor W.	WCB #67-412	Wasco	76
Hough, Janice Marie	WCB #67-656	Lane	84
Huitt, Glen E.	WCB #296		15
Husted, Patricia E.	WCB #67-967	Marion	115
Hutchison, Donald Roy	WCB #67-1405	Multnomah	147
James, Wilfred E.	WCB #67-48		14
Jeffers, Henry A.	WCB #67-968		166
Jenkins, William	WCB #67-1501		125
Johnson, Beno	WCB #799		35
Johnson, Einar	WCB #67-1592		149
Johnson, Joe B.	WCB #67-799		105
Johnson, Virgil R.	WCB #67-772	Multnomah	173
Jones, Dorothy W.	WCB #67-401		102
Jordan, Robert G.	WCB #67-668	Multnomah	122
Kautz, George	WCB #67-469		25
Kelley, Maurice E.	WCB #67-177	Lane	16
Kershaw, Edwin	WCB #67-1354		152
Kilgore, Eddie L.	WCB #67-284	Multnomah	45
King, Stanley P.	WCB #67-529		169
Koch, Fred	WCB #67-364	Umatilla	44
Kociembra, Emil A.	WCB #67-925	Multnomah	101
Kreier, Richard L.	WCB #67-1513	Multnomah	137
Krewson, Jay Glenn	WCB #67-1179	Clackamas	93
Kufner, Fred, Jr.	WCB #67-1475		132
Lamm, Forrest C.	WCB #67-197		21
Lang, Leo	WCB #68-9	Multnomah	167
Langsdorf, Jay K.	WCB #67-597	Multnomah	170
Larson, Levi	WCB #67-842	Multnomah	122
Lauber, Paul H.	WCB #67-243		73
Lautenschlager, Signe F.	WCB #67-1514		170
Lawson, Alfred T.	WCB #67-837	Multnomah	77
Leding, Elizabeth M.	WCB #67-1024		108
Leech, Willis E.	WCB #67-110	Coos	70
Lemons, Bill R.	WCB #67-845	Linn	167
Lescard, Joseph A.	WCB #433		36
Levesque, Gilbert	WCB #67-969	Multnomah	158
Lewis, Ira C.	WCB #67-1016	Multnomah	114
Lewis, James P.	WCB #68-289		133
Long, Monroe	WCB #67-621		78
Loper, James F.	WCB #67-207	Douglas	34
Loudenbeck, Raymond C.	WCB #67-1027	Benton	178
Lowe, Phillip E.	WCB #67-338		23
Lowell, James R.	WCB #67-1264		141

Claimant's Name	WCB Number	County to Which Appealed	Page
Luck, Maury Gene	WCB #67-3	Lane	3
Lunsford, Richard L.	WCB #67-987	Multnomah	118
Lytle, Edith Marie	WCB #67-104		110
Mace, Eugene R, Jr.	WCB #67-366	Multnomah	7
Mackey, Lorenzo D.	WCB #67-640		100
Makela, Kay	WCB #67-594	Multnomah	104
Martin, William D.	WCB #67-517		50
Matson, Earl L.	WCB #67-803	Multnomah	67
Mayes, Edward Thomas	WCB #67-1365	Multnomah	121
Mayes, Jesse J.	WCB #67-609	Lane	82
McBride, Ernie Manthe	WCB #864		5
McCarthy, Anna A.	WCB #67-1078		99
McCarty, H. A.	WCB #67-963	Multnomah	84
McClendon, Henry E.	WCB #67-1044	Multnomah	117
McDaniel, Joe R.	WCB #67-815	Hood River	73
McGill, Myrnaloy V.	WCB #123	Multnomah	7
McGilvra, Robert D.	WCB #67-1122	Multnomah	85
Medford, Page William	WCB #67-275		46
Medford, Gordon Dee	WCB #67-276		46
Miller, Calvin	WCB #67-1017		119
Miller, Calvin R.	WCB #67-221	Multnomah	21
Miller, Warren	WCB #67-1126 & WCB #67-1127		103
Moberg, Laurence G.	WCB #67-788		110
Moffet, Fred	WCB #606		13
Monroe, Dean C.	WCB #67-766		112
Morgan, Marlin	WCB #67-944		137
Mosley, Edward	WCB #67-1560		168
Mott, Robin A.	WCB #917		74
Moultrie, Roy L.	WCB #68-23	Multnomah	180
Mullins, Nita	WCB #67-190	Coos	41
Murray, Erwin A.	WCB #846		67
Myers, Jerry G.	WCB #68-67	Multnomah	112
Nelson, Bror E.	WCB #67-180		20
Nelson, Melvin C.	WCB #67-835	Multnomah	107
Olson, Carl	WCB #67-938		173
Olson, Robert O.	WCB #504	Coos	146
Oremus, Daniel	WCB #68-107	Multnomah	161
Oreskovich, Joe N.	WCB #67-63		20
Osler, Louis E.	WCB #67-916	Multnomah	109
Parker, Charlie	WCB #67-870	Multnomah	80
Parsons, John C.	WCB #67-1344		172
Peck, Joseph Lee	WCB #67-931		17
Perry, Carl	WCB #67-1061	Multnomah	82
Philibert, Bobby Gene	WCB #67-189		10
Philibert, Bobby Gene	WCB #67-1257	Lane	109
Phillips, Mary	WCB #67-947		182

Claimant's Name	WCB Number	County to Which Appealed	Page
Piatt, Janell L.	WCB #67-408		36
Printz, Carl A.	WCB #67-498	Multnomah	71
Prodzinski, Carl E.	WCB #67-1444	Multnomah	114
Rand, Harry J.	WCB #67-1466		151
Raney, Stanley H.	WCB #67-776		27
Rawls, John T.	WCB #67-848		155
Reames, O. L.	WCB #871	Multnomah	92
Reischel, Robert W.	WCB #67-57		35
Richards, George W.	WCB #67-1576	Multnomah	176
Richardson, Dale	WCB #67-633	Multnomah	89
Richert, Erwin L.	WCB #67-437		38
Rios, Carlos V.	WCB #67-432		26
Risener, Charles C.	WCB #67-1361	Lane	179
Roberts, James, Jr.	WCB #67-1190		123
Rhode, Robert M.	WCB #923		37
Rose, Fannie Morgan	WCB #67-1312		129
Sager, Etta D.	WCB #67-1262		174
Sahli, Joseph M.	WCB #67-704		117
Sain, John J.	WCB #68-532	Lincoln	177
Satterfield, Charles E.	WCB #67-477	Multnomah	72
Schaefer, Melitta	WCB #67-491	Multnomah	99
Schafroth, Arthur L.	WCB #67-1206	Lane	141
Schanno, Arthur	WCB #67-754	Coos	74
Schenck, Glenn	WCB #67-708	Clackamas	65
Schmidt Brothers Farms	WCB #224		24
Schrier, Frances	WCB #67-443	Hood River	96
Schulz, Ray	WCB #67-709	Lane	59
Scoggins, Ben	WCB #67-92	Lane	12
Seidel, Sandra	WCB #67-712	Multnomah	101
Seratt, Kelly L.	WCB #67-29	Lane	1
Serles, Wilbert O.	WCB #67-382	Linn	50
Shadduck, Evelyn L.	WCB #67-42		17
Shannon, Guy E.	WCB #748		18
Sheppard, Albert J.	WCB #67-877		158
Shlim, Harriet	WCB #67-499	Multnomah	91
Shum, Herman L.	WCB #67-1545	Multnomah	165
Simmons, Frank A.	WCB #67-287	Lane	41
Sisson, Billy Joe	WCB #67-405		18
Sminia, Henry	WCB #785		10
Smith, Roy A.	WCB #67-904	Multnomah	106
Smith, Sherman	WCB #67-45		6
Smith, Thomas L.	WCB #67-771	Multnomah	66
Smith, William Raymond	WCB #67-363	Coos	52
Snead, Lawrence	WCB #67-1065	Coos	132
Sommers, Vern L.	WCB #67-1189		131
Spencer, Roger A.	WCB #897		60

Claimant's Name	WCB Number	County to Which Appealed	Page
Staley, Donald L.	WCB #67-1120		135
Stephens, Edward F.	WCB #67-535		39
Storm, Evalena Mae	WCB #93		8
Stricker, Edwin	WCB #423	Multnomah	95
Swink, William Floyd	WCB #67-67	Coos	59
Tackett, Kathy	WCB #67-679		65
Tevepaugh, Marvin	WCB #790		13
Thomas, Ilene	WCB #67-725		75
Thompson, Elbert E.	WCB #67-505	Lane	11
Thompson, Sally Jane	WCB #779		19
Thornbraugh, Leonard E.	WCB #67-395	Linn	43
Timm, Clifford L.	WCB #67-932		118
Tooms, James W.	WCB #67-167	Multnomah	79
Tourville, C. J.	WCB #67-301		47
Trent, Tobe	WCB #67-705	Multnomah	131
Trimble, Raymond	WCB #67-329		85
Truax, Roger	WCB #67-886	Clatsop	124
Truax, Roger	WCB #67-886		152
Turvey, Roy B.	WCB #67-541	Marion	55
VanArsdale, Theodore P.	WCB #499		68
Voigt, Fred W.	WCB #67-119	Lane	3
Young, Herbert Dean	WCB #67-631E		62
Wagner, Kenneth E.	WCB #67-1493		161
Waibel, Joe	WCB #67-181	Yamhill	157
Walker, Jack W.	WCB #67-1332		153
Walsh, Margaret K.	WCB #689	Multnomah	1
Walton, Jack Arnold	WCB #67-1132	Marion	106
Washburn, Norman O.	WCB #838	Coos	130
Wasson, Ethel M.	WCB #67-315	Multnomah	11
Weakley, Claude E.	WCB #67-375		16
Wershey, Mildred L.	WCB #67-628		138
Westfall, Burlin O.	WCB #67-1509	Marion	126
White, John Virgil	WCB #67-372	Lane	48
Williams, Thomas H.	WCB #67-410	Clackamas	42
Williamson, Betty Jo	WCB #67-370		79
Williamson, Joe W.	WCB #67-200	Multnomah	63
Winburn, Marion Lee	WCB #67-1278	Josephine	127
Wing, Michael Spencer	WCB #67-1005	Multnomah	153
Withers, Ernestine	WCB #67-283	Coos	75
Wolverton, Albert R.	WCB #859		23
Wood, Raymond D.	WCB #67-953		136
Woosley, James D.	WCB #681		11
Wright, Alden	WCB #67-602		54
Wrightsman, Yvonne	WCB #67-769	Lane	154
Wunder, Gladys M.	WCB #67-1046	Multnomah	113
Zirschkey, Ray P.	WCB #67-873	Linn	111
Zwahlen, Clarence R.	WCB #67-1166		149