VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

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VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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PRICE FORTY DOLLARS

SAIF CLAIM NO. A932648 OCTOBER 5, 1976

KATHLEEN SCRAMSTAD, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On March 18, 1976 claimant requested the Board exercise its own motion jurisdiction, pursuant to ORS 656.278, and order the State Accident Insurance Fund to reopen her claim on the basis of an aggravation of the industrial injury she suffered on June 15, 1966.

Claimant, on January 19, 1976, had requested the Fund to voluntarily reopen this claim based upon the report from Dr. Crist; however, on February 4, 1976, the Fund denied claimant's request on the grounds it appeared she had sustained a new injury on November 3, 1975.

The Board found the evidence before it was not sufficient to determine whether claimant had suffered an aggravation of her 1962 injury or a new injury as a result of the incident which occurred on November 3, 1975. It referred the matter to the Hearings Division with instructions to hold a hearing and take additional evidence on the issue of aggravation or new injury. Upon conclusion of the hearing the Referee was to cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendations.

On June 23, 1976, the hearing was held before Referee Raymond S. Danner and, on September 24, 1976, Referee Danner submitted his advisory opinion to the Board together with an abstract of the proceedings before him.

The Board, having reviewed the transcript of the proceedings and given consideration to the advisory opinion rendered by Referee Danner accepts the recommendation and adopts as its own the findings contained in the advisory opinion which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim is remanded to the State Accident Insurance Fund for acceptance and for the payment of medical care and treatment and compensation, as provided by law, commencing December 30, 1975 and until claimant's claim is closed pursuant to ORS 656.278.

Claimant's attorney is awarded as a reasonable attorney fee for his services the sum of $800, payable by the State Accident Insurance Fund.

CLAIM NO. E 42CC 98720RG OCTOBER 5, 1976

ERNEST ALLEY, CLAIMANT
Rick McCormick, Claimant's Atty.
Lyle Velure, Defense Atty.
Own Motion Order

On December 11, 1975 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury suffered on February 4, 1969 while working for Oregon Construction Company, whose workmen's compensation coverage was furnished by Aetna Casualty and Surety Company. The claim was accepted and initially closed by Determination Order dated October 21, 1969. Claimant's aggravation rights have expired.

In August, 1972 claimant had suffered an injury while working for the State Highway Department, whose workmen's compensation coverage was furnished by the State Accident Insurance Fund.

The Board concluded that the evidence before it was not sufficient to make a determination upon the merits of claimant's request to reopen his 1969 claim and, on January 30, 1976, remanded the matter to the Hearings Division to hold a hearing and take evidence on the issue of whether claimant's present condition was an aggravation of his 1969 injury.

On February 10, 1976 claimant filed a claim for aggravation for his 1972 injury, it was denied by the Fund and claimant requested a hearing on this denial. The hearing on the propriety of the Fund's denial was combined with the hearing on the merits of claimant's request to reopen his 1969 claim and both issues were heard by Referee William J. Foster on July 2, 1976.

On September 15, 1976 Referee Foster entered an order which upheld the Fund's denial of claimant's claim for aggravation. On the same date Referee Foster, by interoffice memo, recommended to the Board, based upon the medical evidence and the testimony received at the hearing, that claimant's 1969 claim be reopened pursuant to the Board's own motion jurisdiction.

The Board, after carefully reviewing the abstract of record and giving full consideration to the findings and conclusions of the Referee as set forth in his Opinion and Order of September 15, 1976, accepts the recommendations of the Referee.

ORDER

Claimant's claim for an industrial injury suffered on February 4, 1969 is remanded to the employer, Oregon Construction Company, and its carrier, Aetna Casualty and Surety Company, to be accepted for payment of medical expenses and for the payment of compensation, as provided by law, commencing September 26, 1975 and until the claim is closed pursuant to ORS 656.278.

Claimant's counsel is awarded as a reasonable attorney fee the sum of $850, payable by the employer, Oregon Construction Company, and its carrier, Aetna Casualty and Surety Company.

WCB CASE NO. 75-2544 OCTOBER 5, 1976

ABRAHAM JONES, CLAIMANT
Dept. of Justice, Defense Atty.
Order of Dismissal

On August 20, 1976 Referee John D. McLeod entered an Opinion and Order in the above entitled matter. On September 21, 1976 the Board received a hand written request for review of the Referee's order which was enclosed in an envelope postmarked September 20, 1976.

Although the request for review by the claimant was mailed within the time provided in ORS 656.289(3), the claimant failed to mail to all of the other parties, copies of the request as required by ORS 656.295(2).

The Board concludes that the request for review must be dismissed as untimely.

IT IS SO ORDERED.

WCB CASE NO. 75-188 OCTOBER 5, 1976

SCANDRA KAHL, CLAIMANT
Allan Knappenberger, Claimant's Atty.
Own Motion Order

On September 29, 1976 claimant filed a motion requesting the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and rescind its order, dated March 29, 1976. This order allowed the employer and its carrier in the above entitled matter to take as a credit against the award made by the Referee's order entered on January 28, 1976 the amount of $1,273.41.

A Determination Order, mailed May 7, 1976, awarded claimant compensation for permanent partial disability to 96 degrees for 30% unscheduled right shoulder disability. This award amounted to $6,720.00. After a hearing on the adequacy of this order Referee James P. Leahy entered an order on January 28, 1976 which affirmed the Determination Order but awarded claimant compensation equal to 96 degrees for unscheduled left shoulder disability. The amount of this award also was $6,720.

The employer requested Board review on February 5, 1976. Thereafter claimant filed a motion requesting the Board to dismiss the request for review because on February 12, 1976 the carrier had sent two checks to claimant's attorney's office; one was made out to claimant for $5,040, the other was made out to claimant's attorney for $1,680. The two checks totalled $6,720, the amount of the award made by the Referee.

The Board in its order on claimant's motion stated that the carrier could apply the sum of $1,273.41 against the award made by the Referee; this sum was the amount still due claimant from the award made by the Determination Order.

On June 29, 1976 the Board issued its Order on Review which affirmed the Referee's order.

The Board, after due consideration, concludes that when it affirmed the Referee's order it affirmed the award of 96 degrees granted by the Referee for claimant's unscheduled left shoulder disability and also affirmed the award of 96 degrees for unscheduled right shoulder disability made by the Determination Order mailed May 7, 1976. Therefore, there is no basis for allowing an offset. Claimant is entitled both to the full amount awarded to her by the Determination Order, i.e., $6,720 for her right shoulder disability and to the same amount which was awarded to her for her left shoulder disability by the Referee's order.

The motion filed by the claimant on September 20, 1975 should be allowed.

ORDER

The order of the Workmen's Compensation Board entered on March 29, 1976 is hereby rescinded and the employer and its carrier in the above entitled matter are hereby directed to pay to claimant the sum of $1,273.41, said sum being the balance due claimant on the award made by the Determination Order mailed May 7, 1975.

WCB CASE NO. 76-1965 OCTOBER 5, 1976

EDWARD KEECH, CLAIMANT
James Lewelling, Claimant's Atty.
Roger Luedtke, Defense Atty.
Order

On September 29, 1976 claimant, through his attorney, filed a motion requesting the Board to dismiss its prior order which dismissed claimant's request for review. Attached to the motion was the affidavit of claimant's attorney.

The affidavit admits that through inadvertance claimant's attorney failed to serve the employer or the employer's attorney, therefore, the Board concludes that it acted correctly when it dismissed claimant's request for review as being untimely under the provisions of ORS 656.295(2).

ORDER

The motion to dismiss Board's order which had dismissed claimant's request for review in the above entitled matter is hereby denied.

SAIF CLAIM NO. NC 344816 OCTOBER 5, 1976

GLEN E. KUSKIE, CLAIMANT
J.W. McCracken, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On September 21, 1976 the Board received claimant's Supplemental Request for Review, specifically requesting the Board to consider the letter from Dr. Golden, dated August 11, 1976, a copy of which was attached to the supplemental request for review. The request states that the evidence was not available at the time of the hearing for the reason that the medical examination took place on August 11, 1976, 20 days after the hearing.

On September 24, 1976 the State Accident Insurance Fund responded, stating that it objected to the supplemental request for review on the grounds and for the reason that had claimant wanted Dr. Golden's report submitted in support of his claim for aggravation he should have arranged for the examination to be made prior to the hearing; that the report from Dr. Golden does not constitute newly discovered evidence.

The Board, after due consideration, concludes that the Supplemental Request for Review received by the Board on September 21, 1976 should be denied.

IT IS SO ORDERED.

He also argues, in light of the employer's actual notice in May and its failure to object until after claimant's brief on appeal was filed in September, that the employer should be estopped from raising a technical defense.

Claimant is correct in asserting that notice requirements are not to be strictly construed in workmen's compensation cases. Schnieder v. Emannuel Hospital, 75 OAS 956, 20 Or. App. 599 (1975).

Although it appears that the Oregon Court of Appeals prefers to ignore "technicalities" where no prejudice to the opposing party has occurred, the Court has recognized that there are limits on how far the Court should go in dispensing with literal compliance regarding notice requirements, Nollen v. SAIF, 75 OAS 3982, ____ Or. App. ____, (1975).

In the cases of Stroh v. SAIF, 261 Or. 117 (1972), Schnieder and Nollen, supra, the Court was faced with actual service, timely notice, situations. There, the lack or prejudice was determinative. Here we are faced with a constructive service, untimely notice situation. Only four days untimely if the employer's attorney received the Board's letter of acknowledgement on May 25, 1976; but many weeks untimely by the time a copy of the request was sent on September 21, 1976.

The Court in Nollen, explained that the necessary function of notice statutes is to inform the parties of the issues in sufficient time to prepare for an adjudication. Time limitations on the period to request review also serve another, perhaps more important function; that of providing finality to the Referee's Opinion and Order.

We are of the opinion that the opposing party should be entitled to assume, where the statute requires the making of a request within 30 days and also the giving of notice within that time, that lack of notice during the period signifies the finality of the Referee's Opinion and Order and that they may thereafter act without fear of continued litigation. It can be argued that to permit perfection of the review beyond the prescribed time only where no prejudice occurs, harms no one. It does however, leave the matter unconcluded for an indefinite period.

From the decisions to date, we are unsure of where the Court of Appeals intends to draw the line regarding compliance with notice requirements. The Court has relied upon the authority of the text writer, Professor Arthur Larson in this area. Nollen supra. Larson states "...the theme pervading much of the adjectival law of workmen's compensation is the necessity of striking a balance between relaxation of rules to prevent injustice and retention of rules to ensure orderly decision making and protection of fundamental rights." 3 Larson Workmen's Compensation 78.12.

We believe that, on balance, the necessity of maintaining orderly procedures for review and providing certainty for the parties, requires us to dismiss claimant's defective request for review without regard to whether the employer in this case was not specifically prejudiced and without regard to whether the doctrine of estoppel may be applied.

The Motion to Dismiss should be granted.

IT IS SO ORDERED.

WCB CASE NO. 75-4032 OCTOBER 6, 1976

DARREL CHASTAIN, CLAIMANT
Gordon Price, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of that portion of the Referee's order which granted claimant's counsel an attorney fee of $400, payable by the State Accident Insurance Fund.

Claimant suffered a compensable low back injury on July 18, 1974 which was closed as a non-disabling injury. Claimant missed no time from work but about a year later sought medical care for increased symptoms.

Dr. Imel wrote to the Fund on July 16, 1975 requesting the reopening of claimant's claim and, on July 22, 1975, the Fund responded, stating it had "fulfilled our responsibility in this file". On July 31, 1975 Dr. Imel again requested reopening of claimant's claim and again the Fund declined.

On February 9, 1976 claimant was examined by the Orthopaedic Consultants who found claimant medically stationary and without any loss of function due to his injury.

The Fund has agreed to pay the medical expenses incurred from Dr. Imel and the Orthopaedic Consultants.

The Referee found claimant had proven he is entitled to have the medical expenses paid; not pursuant to ORS 656.273 but pursuant to ORS 656.245. He concluded that due to the responses made to Dr. Imel's request for claim reopening by the Fund that it had, in effect, denied claimant's claim and the Referee awarded claimant's attorney an attorney fee of $400 payable by the Fund.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 17, 1976, is affirmed.

Claimant's counsel is awarded for his services in connection with Board review an attorney fee in the sum of $100 payable by the State Accident Insurance Fund.

WCB CASE NO. 75-4194 OCTOBER 6, 1976

DAVID HEATON, CLAIMANT
Robert Olson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order which granted claimant 160 degrees for 50% unscheduled back disability. Claimant contends he is entitled to 100% unscheduled back disability.

Claimant sustained a compensable back injury on November 20, 1973 diagnosed as a contusion, lower back strain. Dr. Eckhardt examined claimant a week after his accident and hospitalized him.

On May 15, 1974 claimant was examined by Dr. Gantenbein who diagnosed contusion lumbar spine, degenerative changes mild, conversion reaction severe.

A psychological evaluation was conducted on May 22, 1974 which indicated claimant has moderately severe anxiety tension reaction with some depression; the symptoms are superimposed on a basic personality trait disturbance with emotional immaturity and instability. Claimant's psychopathology is moderately related to claimant's accident from aggravation of a pre-existing condition.

On July 15, 1974 Dr. Eckhardt felt claimant could not return to work as a carpenter, work he has done since 1952.

A Determination Order issued on June 19, 1975 granted claimant 64 degrees for 20% unscheduled low back disability.

On August 29, 1975 Dr. Eckhardt said claimant has a chronic low back sprain with chronic mild fasciitis and mild to moderate low back instability. Claimant's prognosis is guarded.

On October 21, 1975 Dr. Eckhardt reported claimant could not only not return to his occupation as a carpenter but also he could not return to work as truck driver, the only other occupation in which claimant has ever engaged. Claimant could not handle any job which requires prolonged sitting or standing.

The Referee found claimant had sustained his burden of proving the award granted to him was inadequate. It is claimant's intention to get a GED and he professed interest in learning to be a building inspector.

The Referee concluded, based on claimant's inability to return to his regular work, his lack of education and adaptability, that he has lost 50% of his wage earning capacity and the Referee granted claimant an award of 160 degrees.

The Board, on de novo review, concludes claimant is not 100% disabled as there are occupations he can perform. It adopts the Referee's order.

ORDER

The order of the Referee, dated February 27, 1976 is affirmed.

WCB CASE NO. 75-3328 OCTOBER 6, 1976

SAMUEL GARDNER, CLAIMANT
Dennis Hachler, Claimant's Atty.
Roger Luedtke, Defense Atty.
Order On Review

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks Board review of the Referee's order which directed the employer to accept claimant's claim for aggravation and to pay compensation, as provided by law, until the claim is closed pursuant to ORS 656.268.

Claimant suffered a compensable injury to his low back on April 3, 1973. His claim was closed by a Determination Order mailed November 9, 1973 which awarded claimant 48 degrees for 15% unscheduled low back disability.

Claimant had suffered a back injury in 1971 and had been involved in two automobile accidents, one in 1971 and another in 1973, both of which resulted in injury to his low back and required hospitalization.

After the April 3, 1973 injury claimant was seen by Dr. Edmunson who diagnosed a lumbar strain. In response to a request from the employer, Dr. Vogt reported that claimant showed bilateral lumbar muscle spasms with a slight tilting to the right and tenderness in the lumbar spine and the right underlying lumbosacral region. He felt claimant had an unstable low back based upon the evidence of the recurrent back injuries referred to above and that because of this claimant was not physically qualified to continue in more strenuous types of work. Arrangements were made for claimant to consult with a counselor at the Vocational Rehabilitation Division.

On July 23, 1973 Dr. Robinson examined claimant; his diagnosis was consistent with those made by Dr. Edmunson and Dr. Vogt. Dr. Robinson also stated that sometime in the future further aggravation of claimant's back from which he would fail to recover might necessitate a lumbosacral fusion. Based upon these medical opinions the Determination Order of November 9, 1973 was issued.

Claimant followed the advice of the doctors and the counselor at the Vocational Rehabilitation Division and engaged in lighter work. He worked for a period of time for the Columbia Gorge Rehabilitation Center and was also employed in rehabilitation work in Hood River.

On November 6, 1974 claimant had finished work and had returned to his home; he was in a hurry and he had to pay some bills and he jumped from his porch, which is approximately 15 inches from the ground. He felt an immediate sharp pain which forced him to his knees. His back got progressively worse and he sought medical treatment from Dr. Edmunson who stated, unequivocally, that claimant had aggravated the 1973 injury when he jumped off the porch.

The Referee, based upon Dr. Edmunson's opinion and also Dr. Robinson's statement that a future aggravation was likely, found that the preponderance of the evidence favored the contention of claimant that he had suffered an aggravation of his 1973 job related accident when he jumped from the porch of his home on February 6, 1974.

The Referee further found that the record was sufficiently complex and that it would not be proper to impose penalties payable by the employer; however, he did award an attorney fee to claimant's attorney payable by the employer.

The majority of the Board, on de novo review, affirms the order of the Referee.

Although claimant has had problems with his low back since 1971 there is no evidence that he had suffered an independent intervening injury between April 3, 1973, when he sustained a compensable injury to his low back, and February 6, 1974, when he jumped a relatively small distance from his porch to the ground but, nevertheless, reinjured his back. The reinjury of claimant's back under such circumstances would indicate that this was an aggravation of a prior injury rather than a new injury. The severity of the pain suffered by claimant is out of proportion to the incident which brought it on.

ORDER

The order of the Referee, dated April 27, 1976, is affirmed.

Claimant's counsel is awarded, as a reasonable attorney fee for his services in connection with Board review, the sum of $400, payable by the employer.

DISSENT

Chairman M. Keith Wilson dissents as follows:

The majority of the Board affirms the order of the Referee and bases its decision on a finding that the preponderance of the evidence supports the claimant's contention that he has suffered an aggravation of the 1973 job related accident when he jumped from the porch of his home on February 6, 1974. The majority of the Board places weight on the proposition that there is no evidence that the claimant had suffered any independent injury between April 3, 1973, the date of the compensable low back injury and February 6, 1974, being the date of the claimed aggravation.

In my view this conclusion is untenable and I would reverse the finding of aggravation by the Referee.

The evidence establishes that claimant's back was seriously injured in 1971 and again in 1972 in other employment and automobile accidents. The compensable injury of April, 1973 was relatively minor, requiring only conservative treatment. The condition improved after the 1973 incident. I am confident that had the February, 1974 incident occurred in industrial surroundings, it would have been of sufficient severity to be considered a new injury. Drs. Harder, Zimmerman and Edmunson were unable and unwilling to ascribe the 1974 symptoms to the 1973 compensable injury. There is no question but that claimant had an unstable back, dating at least from 1970 and it is impossible for me to logically attribute claimant's back problems to the innocuous injury of 1973 and to disregard the far more severe injuries of 1971, 1972 and 1974.

For the reasons that the preponderance of lmedical evidence does not support claimant's contention of aggravation of the 1973 injury; because the pre-1973 injuries and the 1974 injury were more severe than the 1973 injury; because the 1974 incident constituted a new injury in my view and because any worsening of the claimant's condition after the 1974 incident must be attributed to an unstable back condition existing long before the rather minor trauma of 1973, I respectfully disagree with the Referee and the majority of the Board.

/s/ M. Keith Wilson, Chairman

SAIF CLAIM NO. HC 224743 OCTOBER 6, 1976

NORMAN L. HUX, CLAIMANT
Marvin Hollingsworth, Claimant's Atty.
Order Remanding for Hearing

On December 28, 1969 claimant suffered a compensable injury to his back. The claim was initially closed by a Determination Order mailed January 29, 1970 which awarded claimant compensation for temporary total disability only. Claimant's aggravation rights expired on January 28, 1975.

On September 7, 1976 the Board received a request from claimant, through his attorney, to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for payment of medical expenses and compensation as provided by law.

The request was not supported by any current medical information and claimant's attorney was advised that such information had to be submitted before the Board could consider the request to reopen the claim. On September 22, 1976 the Board was furnished a copy of Dr. Cohen's letter, dated April 9, 1976, stating he had examined claimant on April 8, 1976 and, as a result of his examination, felt that claimant's present condition was related to the back injury which he suffered on December 28, 1969.

The Fund was allowed 20 days after it received this medical information and claimant's request within which to file its response. On September 29, 1976 the Fund responded by denying any further responsibility for claimant's 1969 injury.

The Board concludes that the evidence presently before it is not sufficient for it to determine whether claimant's present condition is attributable to his industrial injury of December 28, 1969 and has worsened.

Therefore, the matter is remanded to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant's condition at the present has worsened and that the worsened condition is attributable to the industrial injury of December 28, 1969. Upon conclusion of the hearing the Referee shall cause to be prepared a transcript of the proceedings which he shall submit to the Board together with his recommendations.

WCB CASE NO. 76-2717 OCTOBER 6, 1976

MAURICE KOONCE, CLAIMANT
Donald Richardson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On September 27, 1976 the State Accident Insurance Fund filed a Motion and Conditional Request for Review in the above entitled matter, requesting the Board to set aside the Order of the Referee, George Rode, entered on September 16, 1976, or in the alternative, to review said order.

CLAIM NO. AB 52 OCTOBER 6, 1976

JOHN J. MICEK, CLAIMANT
Dell Alexander, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Proceeding Referred for Hearing

Claimant suffered a compensable injury on June 18, 1963; the claim was closed with an award of permanent total disability on October 23, 1968.

On August 3, 1976 the Board received a request from the State Accident Insurance Fund to exercise its own motion jurisdiction, pursuant to ORS 656.278, and cancel the claimant's award of permanent total disability. The Fund's request was based upon the findings and opinions submitted by Dr. Becker in a report, dated June 25, 1976.

On August 6, 1976 the Board wrote to claimant, stating that the Fund had requested his award be cancelled, forwarding a copy of the request and the medical report and advising claimant that he had 20 days within which to state his position with respect to the request.

On August 25, 1976 the claimant responded, stating that he was presently permanently incapacitated from regular performing any work at a gainful and suitable employment and that the Fund's request should be denied. On September 9, 1976 claimant furnished the Board a medical report from Dr. Regier who has been treating claimant for the past couple of years for his back condition.

On September 28, 1976 the Board received a reply from the Fund, accompanied by the affidavit of Mr. Elton Fishback.

It appears that the Board does not have sufficient evidence before it at this time to allow it to make a complete determination with respect to claimant's present condition. Therefore, the matter is referred to the Hearings Division with instructions to hold a hearing and take evidence on the state of claimant's present condition and its relationship, if any, to his industrial injury of 1963.

Upon conclusion of the hearing the Referee shall cause an abstract of the proceedings to be prepared and submitted to the Board together with his recommendation.

SAIF CLAIM NO. C 26000 OCTOBER 6, 1976

GLEN W. PAYNTER, CLAIMANT
Keith Skelton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On September 24, 1976 the Board received a request from claimant's attorney that the Board exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen claimant's claim for an industrial injury suffered on July 5, 1966. At the time of the injury, claimant was working for Lundy Brothers Lumber Company, whose workmen's compensation coverage was furnished by the State Accident Insurance Fund.

In support of his request, claimant submitted reports from Dr. Paluska, dated

September 1 and July 15, 1976. At the present time Dr. Paluska is treating claimant and has stated that it is within a medical probability that claimant's present back problem is due to the job injury which he sustained in 1966.

The State Accident Insurance Fund was furnished a copy of the request and Dr. Paluska's reports. It has made no response. On September 2, 1976 claimant's attorney had requested the Fund to voluntarily reopen claimant's claim; the Fund advised claimant's attorney that its letter of June 10, 1976 constituted a denial of claimant's request.

The Board, after considering the medical reports supplied by Dr. Paluska, which have not been rebutted by the Fund, concludes that inasmuch as claimant's aggravation rights have expired it should exercise its own motion jurisdiction and direct the Fund to accept claimant's claim as of July 15, 1976, the date Dr. Paluska recommended to the Fund that claimant's claim be reopened. It further concludes that claimant should be paid compensation, as provided by law, from that date until his claim is closed pursuant to ORS 656.278.

It is so ordered.

WCB CASE NO. 75-3039 OCTOBER 7, 1976

MARSHALL A. NELSON, CLAIMANT
Gary Marlette, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson, Moore and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order which found claimant to be permanently and totally disabled as of January 29, 1976, the date of his order. Claimant suffered a compensable injury on July 9, 1973 while lifting a heavy fuel hose overhead. The diagnosis was acute sciatic neuritis, secondary to lumbosacral strain. In September, 1973 claimant had a lumbar laminectomy. His claim was closed by Determination Order of April 17, 1974 whereby claimant received 48 degrees for 15% unscheduled low back disability and 15 degrees for 10% loss of the left leg and compensation for time loss from July 10, 1973 through March 22, 1974.

Claimant is functionally illiterate; he is 46 years old. Since his injury he has attempted, without success, to return to work for a friend in the construction business; and he also sought employment and registered with the employment office.

Because of continuing symptomatology, claimant was referred to Dr. German for an orthopedic evaluation in connection with his back and leg pain and to Dr. Griffith, a urologist, for a genito-urinary situation involving decrease in force of urinary stream and impotence. It was determined that this problem was causally related to the industrial injury and claimant submitted to a urethral dilitation for urethral stricture which improved both problems.

In January, 1975 a myelogram was performed which indicated no significant lesion and, after examinations by orthopedic physicians and neurologists, no surgical or medical cause for claimant's symptoms could be found. Claimant still complained of difficulty with

The majority of the Board, on de novo review, would affirm the Referee's order, primarily upon the report of Dr. German, dated July 7, 1975, wherein he states his impression is that claimant has severe physical disability with regard to his back and leg and he felt this would be a permanent condition, helped only to a mild degree with exercise program and an occupation which would necessitate very little lifting. The evidence indicates that the occupations suggested by Dr. German are not available to claimant.

Claimant has clearly shown his motivation to return to work, therefore, although the injury was not entirely incapacitating the fact that claimant, because of his lack of education, his age and limited skills and training, cannot be regularly employed in any well known branch of the labor market places him in the "odd-lot" category. The Fund did not offer any evidence to show there was available to claimant regular, suitable and gainful employment.

The Referee correctly assessed claimant's disability and the majority of the Board affirms the order.

ORDER

The order of the Referee, dated January 29, 1976 is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with this Board review, the sum of $400 payable by the State Accident Insurance Fund.

Board Member George A. Moore dissents as follows:

This reviewer is unable to find permanent total disability in the evidence and testimony of this claim.

The latest medical report before the Board's second determination, that of Dr. Mason of the Disability Prevention Division, indicates (1) chronic lumbosacral strain, mild residual; (2) clinically, no nerve root compression or herniated intervertebral disc lesion; (3) definite emotional overlay; (4) minimal disc degeneration at L4-5 and moderately severe disc degeneration at L5-S1; (5) no medical treatment appeared necessary.

Claimant is under 50 years of age and while his academic skills are deficient he has above average mechanical comprehensions and good manual dexterity.

Claimant has proved disinterested in psychological treatment and counseling. Claimant testified to his physical limitations which do not preclude his work return except to heavy work and his motivation is limited by his refusal to consider moving from the Baker environs where opportunities for modified work are scarce.

It is granted by the Fund that the disability assessment in the Determination Order of the Board's Evaluation Division is insufficient although the rating was made after a personal interview, therefore, this reviewer would modify the Referee's award of permanent total disability to 65% unscheduled low back disability and 10% loss of the left leg.

/s/ George A. Moore, Board Member

Claimant applied for unemployment. He has looked for work at a garage and a machine shop but has not filled out any applications.

The Referee found the record replete with observations of claimant's total lack of motivation made by the psychologist, the service coordinator and numerous doctors.

The Referee concluded that claimant's total lack of motivation and his stated desire to retire disqualified him from being classified as an "odd-lot" permanent total. However, claimant's physical condition together with his psychological problems have resulted in loss of wage earning capacity greater than that for which claimant has been compensated. He granted claimant an increase of 32 degrees for his 1972 injury and an increase of 32 degrees for his 1974 injury.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated March 5, 1976, is affirmed.

WCB CASE NO. 75-4628 OCTOBER 8, 1976

PATRICIA DIMMICK, CLAIMANT
Stephen Brown, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests Board review of the Referee's order which remanded claimant's claim to it for payment of compensation, as provided by law, and further ordered claimant be evaluated by a psychiatrist and provided psychiatric treatment if it is deemed necessary.

Claimant suffered a left hand injury on June 28, 1974 which was diagnosed by Dr. Rasmussen as tendonitis. Claimant's arm was casted and improvement was slow. On December 20, 1974 Dr. Baker, an orthopedist, examined claimant and found her major complaints were tension in her neck and headaches. It was his impression that claimant was greatly magnifying her complaints and if his conservative treatments did not ease her symptoms he recommended psychiatric consultation.

On February 7, 1975 Dr. Jones, a neurologist, examined claimant and diagnosed cervical strain and post-traumatic headaches.

On July 28, 1975 Dr. Pasquesi, an orthopedist, examined claimant and diagnosed a neck-shoulder-arm syndrome with chronic tendonitis or bursitis of the left shoulder and chronic radio-humeral bursitis of the left upper arm. He found some functional overlay and rated her cervical area at 10% of the whole man, her left upper extremity at 10% and the loss of muscle power in the left upper extremity at an additional 5%. Dr. Pasquesi felt her low back complaints were not related to her injury; he found claimant was medically stationary but not necessarily vocationally stable. He felt claimant could not return to her regular occupation of checker.

On October 15, 1975 a Determination Order granted claimant 15 degrees for 10% loss of her left hand.

A report of January 23, 1976 from Dr. Rasmussen indicates claimant's limitations are to her hand; wrist, arm and neck. Claimant's headaches, he felt, are caused by functional overlay due to anxiety of her left arm injury and he stated "she would not have these had she not had the accident." On February 4, 1976 Dr. Rasmussen found claimant medically stationary and recommended psychiatric counseling for her functional overlay.

The Referee found that the weight of the medical evidence establishes claimant's functional overlay is related to her industrial injury and claimant should have psychiatric counseling.

The Referee concluded that claimant's claim should not have been closed without a psychiatric evaluation as recommended by Dr. Rasmussen and he remanded claimant's claim to the employer to provide such psychiatric evaluation and for payment of compensation as provided by law, commencing on the date of his order and until her claim is closed pursuant to ORS 656.268, and to provide psychiatric counseling to claimant if deemed necessary.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated March 18, 1976, is affirmed.

WCB CASE NO. 75-5123 OCTOBER 8, 1976

WILBUR POST, CLAIMANT
Larry Bruun, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review of the Referee's order which awarded claimant 57.60 degrees for loss of binaural hearing.

Claimant filed an occupational disease claim on April 16, 1974 for bilateral ear infection which developed as a result of his exposure to wood dust and the use of ear plugs. The employer contended that claimant's bilateral ear infection did not arise out of and in the course of his employment and it denied responsibility therefor.

The claimant requested a hearing and, as a result of the hearing held on August 2, 1974, Referee Danner treated claimant's occupational disease claim as a claim for both ear infection and hearing loss. He found claimant's claim was timely filed and ordered the employer to accept claimant's claim for both the bilateral ear infection and the hearing loss. The Referee's order was affirmed by the Board which agreed that claimant had developed bilateral ear infection from wood dust and the use of ear plugs and that his hearing loss resulted from industrial noise exposure.

On October 28, 1975 a Determination Order was mailed which awarded claimant compensation for temporary total disability from April 16, 1974 to April 22, 1974 but awarded no compensation for permanent disability. The claimant again requested a hearing and at this hearing the employer contended that the Referee had no jurisdiction to determine the extent of claimant's permanent disability as it related to his loss of hearing inasmuch as no notice of claim had ever been filed alleging a loss of hearing due to industrial noise exposure, therefore, no claim was properly before the Referee; however, should the Referee find that he did have jurisdiction, the employer contended that there was no permanent partial disability.

The Referee found, based upon the testimony of claimant and his wife, that claimant had complained of chronic or recurrent bilateral ear infection accompanied by earaches and ear drainage for a substantial period of time. The medical evidence, basically the same as presented to Referee Danner, substantiates claimant's testimony that he does experience chronic and recurrent otitis, which is inflammation of the ear marked by pain, fever, abnormalities of hearing, deafness, tenitis and vertigo. The medical evidence also establishes that claimant has a bilateral high frequency neuro-sensory hearing loss.

The Referee concluded that he had jurisdiction to pass upon the extent of disability with respect to both the ear infection and the hearing loss. He found that claimant had failed to prove by a preponderance of the evidence that his chronic recurrent otitis condition caused or contributed to his high frequency neuro-sensory hearing loss or that his bilateral ear infection resulted in any permanent impairment. There was no medical opinion which established, by reasonable medical probability, that claimant's otitis condition, in fact, caused such hearing loss.

The Referee found that claimant had proved by a preponderance of the evidence that he was entitled to an award of compensation for his hearing loss sustained as a result of exposure to industrial noise. The Referee applied the statutory formula set forth in ORS 656.214 (f) (g) and, taking into consideration claimant's loss of word discrimination, concluded that claimant was entitled to an award of 30% of the binaural hearing which would be equal to 57.60 degrees.

The Board, on de novo review, affirms the award of the Referee. The employer in its brief accuses the Board of not adhering to its own rules; more specifically, OAR 5-1975, 65-010-6, which provides that the Evaluation Division, in making a determination, should remove the worker to a noise-free environment for at least two months prior to the testing. That the medical reports in the present case indicated that in one instance claimant had only been out of the noise environment for three hours, in another for only 8 hours and still another for 16 hours. The employer contends this is contrary to the Board rules, therefore, there is no real evidence of any permanent hearing loss because claimant's condition could not be considered stationary at the time of testing.

The Board feels that if, in fact, its own rules were not complied with it was because the employer requested a determination with the knowledge that, at the time of its request, claimant had not been removed to a noise-free environment for at least two months. The employer is trying to take advantage of its own mistakes. The employer was satisfied with the validity of the audiometer tests submitted to Evaluation and any procedural defects which may have been made by Evaluation were impliedly waived when the employer made its request for a Determination Order. A Determination Order can be initiated by the employer only when the worker's condition becomes medically stationary, therefore, the employer by its request implied that claimant's condition was medically stationary.

The Board notes, furthermore, that the employer never raised the issue of failure to remove claimant to a noise-free environment either prior to its request for a Determination Order by Evaluation or before the Referee at the hearing held on February 26, 1976.

ORDER

The order of the Referee, dated April 19, 1976, is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with Board review, the sum of $400 payable by the employer.

WCB CASE NO. 76-248 OCTOBER 8, 1976

PHILIP DIGIORGIO, CLAIMANT
John Klore, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests Board review of the Referee's order which affirmed the denial of claimant's claim for a tumor condition.

On March 28, 1975 a pallet jack ran over claimant's left foot. He received an additional injury on July 16, 1975 when he jumped from the tailgate of his truck and struck a pebble bruising the ball of his left foot. On July 11, 1975 because of the pain in his foot claimant saw Dr. Voy who referred him to Dr. Struckman. Claimant thought Dr. Struckman was unsatisfactory so didn't keep his second appointment. Thereafter, Dr. Voy referred claimant to Dr. Zimmerman who recommended a metatarsal bar which claimant said puts his foot to sleep so he discarded it.

In July, 1975 Dr. Voy found the tumor in claimant's leg and referred claimant to Dr. McAllister who, in December, 1975, removed a malignant liposarcoma from the calf of claimant's left leg.

On December 8, 1975 Dr. Voy stated that many cases of sarcomas are caused by trauma. On December 8, 1975 Dr. Struckman stated his opinion that "a malignant liposarcoma of his (claimant's) leg is not causally related in any way to his previous on-the-job injury." On December 12, 1975 Dr. Fletcher stated the liposarcoma was not causally related to the trauma to the foot.

The Referee found that the preponderance of the medical evidence established that there was no causal relationship of the tumor to the industrial injury of his foot. He concluded that the employer's denial was proper.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 5, 1976, is affirmed.

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WCB CASE NO. 75-3185 OCTOBER 12, 1976

GEORGIA A. KELLY, CLAIMANT
Harold Adams, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks review by the Board of the Referee's order which affirmed the Determination Order, mailed July 7, 1975, whereby claimant was granted compensation for temporary total disability and an award of 96 degrees for 30% unscheduled low back disability and 15 degrees for 10% loss of the right leg. Claimant contends she was not medically stationary on May 28, 1975 or, in the alternative, if she was medically stationary that the award granted by the Determination Order was inadequate to compensate her for her permanent disability.

Claimant suffered a compensable injury to her low back on November 1, 1973 when she slipped and fell while working as a "whistle punk". As a result of this fall, which occurred while claimant was working in steep terrain, claimant developed pain in the low back radiating into her right leg. The injury was diagnosed as a low back strain and claimant was hospitalized for conservative treatment. Claimant made some recovery and then her condition deteriorated and she was again hospitalized in February 1974 with the same complaint.

In June 1974 Dr. Teal, an orthopedic surgeon, performed a disc excision on the right at L5-L1 (claimant had an extra lumbar vertebra) level with right posterolateral and left posterior spinal fusion, same level. Claimant's progress was good and the fusion appeared to be solid. In February 1975 Dr. Teal placed claimant on a Williams flexion exercise program but claimant, after attempting to do some of the exercises, had acute discomfort and Dr. Teal took her off the program and the symptoms subsided.

Dr. Winkler, claimant's original treating physician, in a report dated February 11, 1976 indicated that claimant was still complaining of back pain aggravated by any type of excessive activity and that she continued to be unable to do any lifting, straining, pulling, etc. nor was she able to stand for any prolonged periods of time. He recommended that her work be limited and that she should not be exposed to extreme temperature. He stated that claimant could not return to her usual occupation, that she was too old to retrain and did not have an education which would qualify her for any other type of work. He suggested that she be given full disability and retired, although claimant at the time was only 55 years of age.

Dr. Teal had indicated as early as November 1974 that claimant walked with a reasonable degree of security, stood erect with no showing of gross discomfort and he felt the prognosis was reasonably good for providing claimant with a functional, reasonably painless lower back. He indicated later that claimant's permanent impairment was moderate and that further heavy lifting, bending or stooping could not be done by claimant in her present physical condition. Such restrictions would eliminate claimant from returning to her former occupations.

In 1965 claimant had suffered a severe industrial injury and her claim was originally closed on June 3, 1966 with an award equal to 25% loss function of arm for her unscheduled disability. As a result of claimant's request for a re-hearing and negotiations carried on after such request, claimant received an additional 15% giving a total award equal to 40%. In July 1967 claimant applied for increased compensation on account of aggravation which was denied. After a hearing, an order issued on January 15, 1968, awarded claimant an additional 17%. Therefore, at the time of the 1973 injury claimant had already received awards totaling 57% loss of an arm for her unscheduled disability.

The Referee concluded that claimant's condition was correctly determined to be medically stationary on May 28, 1975. Dr. Teal, who was then treating claimant, indicated that her back condition was medically stationary. He recommended no further curative treatment for her low back condition.

With respect to claimant's extent of permanent disability, the Referee found that although the evidence might appear to indicate that claimant is completely incapacitated from regularly performing any gainful and suitable occupation, she was not in such state of disability as a result of her November 1973 low back injury. The Referee distrusted some of claimant's statements regarding her inability to perform any activity, useful work, and also her complaints of such severe disability from the 1973 back injury. He also doubted claimant's motivation to return to work.

The Referee concluded, based primarily upon the opinions expressed by claimant's principal physician, Dr. Teal, an orthopedic specialist, that although claimant would have some restrictions on strenuous activity such as heavy lifting, bending or stooping, nevertheless, her condition was such that she should in time have a reasonably painless and continuing functioning back. Claimant was not permanently and totally disabled in that she was unable to work or do any kind of gainful activity, although she cannot return to her former occupations which include working as a waitress, processing turkeys, working as a whistle punk or helping her husband in his logging work. No aptitude test was conducted to determine what type of work claimant could do; the reason for not doing it apparently was based on claimant's own complaints that she did not have sufficient strength to take the test.

The Referee correctly interpreted the law which requires that claimant's condition be considered immediately before the injury and immediately after recovery from the effects of that injury to determine what disability would have resulted from the injury in question and he concluded that claimant could not be considered to have been disability-free prior to her low back injury despite her statements that she was very spry and able to engage in all those activities which she was doing before the 1973 injury. Claimant had obtained substantial awards for her 1966 injury which would imply that claimant at that time had suffered a severe injury. The Referee found it difficult to believe that claimant could have made such a miraculous recovery from a condition which had been found to have worsened between July 1966 and January 1968 and for which she was granted an additional award of 17% by November 1, 1973 when she injured her low back.

The Referee concluded that the claimant's loss of wage earning capacity resulting from her 1973 low back injury had been adequately compensated by the Determination Order mailed July 7, 1975 which granted her an award of 96 degrees for 30% unscheduled disability. He further concluded that the physical impairment of her right leg was no greater than the 10% awarded her by the same Determination Order. He affirmed the Determination Order of July 7, 1975.

The Board, on de novo review, affirms and adopts the order of the Referee.

With respect to claimant's contention that he now is in need of further medical treatment based upon medical advice received after the hearing, the claimant could have, based upon Dr. Sullivan's report of June 25, 1975, brought forth the issue at the hearing. He chose not to do so and he cannot now expect the Board to consider the issue on review. Claimant can, if he can prove the need for further medical treatment, apply for it, pursuant to ORS 656.245, or, if he can show a worsening of his condition, file a claim for aggravation pursuant to ORS 656.273.

ORDER

The order of the Referee, dated June 2, 1976, is affirmed.

WCB CASE NO. 74-2780 OCTOBER 12, 1976

MILDRED CULWELL, CLAIMANT
Millard Becker, Claimant's Atty.
Marshall Cheney, Defense Atty.
Request for Review by the Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks review by the Board of the Referee's order which granted claimant an award of permanent total disability effective November 1, 1975.

Claimant suffered a compensable injury to her back on June 26, 1968; approximately seven months later a laminectomy was performed by Dr. Geist, an orthopedic surgeon. Claimant's recovery was prolonged and in addition to Dr. Geist she was seen by Dr. Davis, a neurosurgeon, Dr. Cherry, an orthopedic surgeon, the Back Evaluation Clinic and also examined by Dr. Hickman, a clinical psychologist. Her claim was closed by a Determination Order, dated August 19, 1970, whereby claimant was awarded 48 degrees for 15% unscheduled low back disability. Claimant appealed and eventually a circuit court Judgment Order was entered in May, 1972 whereby claimant's award was increased to 120 degrees.

During the progress of the litigation claimant continued to complain of back pain; conservative treatment was first tried and claimant was hospitalized for 25 days. Later, Dr. Robinson recommended a fusion, the claim was reopened and claimant entered the hospital on April 26, 1972 and the fusion was performed. For a short period of time after the surgery claimant experienced some relief of pain and her claim was again closed by a Determination Order, dated August 2, 1973, which granted claimant no additional permanent partial disability. The closure was based upon the report from the Back Evaluation Clinic, dated June 12, 1973; Dr. Robinson expressed his concurring opinion.

At the time of the hearing claimant was 48 years old, she has a 10th grade education and started working at a soda fountain at the age of 15. She followed this type of work for approximately ten years. Claimant worked for a tax accountant for sufficient time to gain enough expertise to enable her to become self-employed in the tax accounting field for approximately three years. She worked as a medical secretary for a period of 14 years, working in Oklahoma City as a pathologist's secretary typing medical and autopsy reports. Claimant also has worked for private doctors. At the time she suffered her injury, claimant was working full time for a Portland doctor and part-time for Kaiser Hospital where she suffered her injury by falling on a stairway. Claimant does not take dictation and although she has self-educated herself in tax work and has acquired substantial knowledge of medical terminology and language she has not acquired a GED certificate.

The Referee found claimant to be a tense, moderately heavy person who appeared to be in immediate pain, shifting from time to time in the witness chair as she testified. He found her to be credible as a witness. Claimant has been hospitalized eight times, two times for back surgery. She testified that she is in continual pain in the low back on both sides into both hips with burning pain down both legs. She cannot tolerate prolonged sitting or standing, she walks with a limp. At the present time claimant and her husband live on a small houseboat which is furnished to them by virtue of the husband acting as a caretaker.

The Referee found that the extent of claimant's physical activity at the present time was walking out on the dock to show a particular moorage slip to a boater. She cannot tolerate driving any great distance and she does very little housework. Claimant testified that she moved out of a ten room home because she could not do the work.

The Referee found that claimant had received prolonged and extensive medical treatment from many specialists in the medical field. Dr. Cherry indicated in his report of February 3, 1972 that claimant's disability was severe; at the hearing he expressed the opinion that she was permanently and totally disabled. Dr. Dow, a neurologist, was of the same opinion, his diagnosis was of adhesive arachnoiditis. With respect to motivation or the lack of it, the Referee found because of claimant's overall condition that motivation was not a major issue to be determined.

The Referee concluded, based upon all of the medical reports, and particularly on the recent reports of Dr. Cherry and Dr. Dow, that the evidence preponderated in favor of claimant's contention that she was permanently and totally disabled. He found her to be so as of November 1, 1975, the day following a hearing.

The majority of the Board, on de novo review, would affirm the order of the Referee.

ORDER

The order of the Referee, dated April 23, 1976, is affirmed.

Board Member George A. Moore dissents as follows:

The great weight of medical opinion fails to establish justification for an award of permanent total disability. In June, 1973 the Back Evaluation Clinic stated that claimant's condition was stationary, that her degree of disability was mild and recommended that she return to her former occupation (Exhibit 54). Dr. Robinson concurred with the report of the Back Evaluation Clinic (Exhibit 56).

In August, 1973 claimant's vocational rehabilitation counselor stated that claimant was suffering from a post laminectomy syndrome, but

> "This, however, does not appear to preclude Mrs. Culwell from returning to her occupation as a medical secretary, as this is as sedentary an occupation as might be available" (Exhibit 57).

On April 21, 1975 claimant responded to a newspaper advertisement by Combined Insurance Company, seeking agents. Claimant met with a representative of the company on April 22, 1975 and discussed employment opportunities and benefits of the job. That same evening another meeting was arranged with claimant's wife being present. At this meeting salaries were discussed and the claimant was told of the necessity of taking a two week training program in Seattle.

At a third meeting the representative told claimant if he could be in Seattle on Sunday the job was his.

At this time claimant terminated his prior employment and proceeded to Seattle, the flight being paid for by the company. Claimant was required by the company to stay in a designated dormitory and attended classes 8 hours a day. The first week claimant's meals were paid for by the company, the second week he was given $6 or $7 to pay for his own meals.

On April 28, 1975 claimant had attended his first 8 hours of classes and he had studied until 2 a.m. Claimant retired and subsequently walked in his sleep through a second story window, falling to the pavement below. The parties stipulated that injuries did occur.

Subsequently, after completing the course, claimant returned to Coos Bay and after several attempts, passed the salesman examination for the State of Oregon. He ultimately received commissions from the company before he terminated his employment.

Claimant received no salary while going through the training course in Seattle other than his expenses being paid by the insurance company.

Prior to attending the training course claimant signed a training agreement which specifically stated it was a training agreement and not an employment agreement.

The first issue is whether claimant was an employee of Combined. The Referee found no Oregon cases specifically in point but relies on Larson, The Law of Workmen's Compensation , Sec. 47.43(a) which states, in essence, that the element of payment may not be in money but can be anything of value, and board and room, training etc. can be considered as equivalent to wages.

The Referee felt that the training program was to the company's benefit and the training course was a condition precedent to employment. He concluded that the training agreement was so worded as to relieve the employer of paying a salary or commission during the training period, but it did not remove it from liability as an employer and claimant was "hired" when he boarded the plane for Seattle.

The second issue is did claimant's accident arise out of and in the course of claimant's employment? The Referee found this a difficult issue. Larson states "...injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable."

The evidence indicates claimant had no choice while in Seattle but to stay at a designated building, in a designated room and had to eat on the same premises, this being the equivalent to the employer's own premises. The Referee concluded that claimant's accident arose out of and in the course of his employment, and he remanded the claim to the employer.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated April 5, 1976, is affirmed.

Claimant's counsel is granted as a reasonable attorney fee for his services in connection with Board review, the sum of $100, payable by the employer.

WCB CASE NO. 75-4903 OCTOBER 12, 1976

ALLEN HASH, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which awarded claimant 80 degrees for unscheduled low back disability.

Claimant suffered a compensable injury to his low back while operating a hydrohammer on February 27, 1975. It was diagnosed, initially, as a lumbar muscle sprain by Dr. Stark who treated claimant.

New symptoms developed with pain radiating from the back into the groin and claimant was hospitalized for five days in April in pelvic traction. His discharge diagnosis was a low back strain with possible herniated L3-4 resolved.

Later claimant was again hospitalized and a myelogram performed. Dr. Johnson performed a lumbar laminectomy with nerve root decompression and removal of herniated intervertebral disc L4-5. Claimant was discharged from the hospital on June 10, 1975. His recovery was uneventful and he returned to work on August 11, 1975.

On November 6, 1975 a Determination Order awarded claimant 64 degrees for 20% unscheduled low back disability. Claimant requested a hearing. On January 26, 1976 claimant was examined by Dr. Cherry who found residuals of low back strain superimposed on low back residuals and post disc surgery; he felt claimant's disability at that time was equal to 40% loss of function of the lower extremity or 60 degrees and that possibly claimant's condition would deteriorate in the future.

Claimant has a high school education but no other training or skills. He claims that he is constantly in pain, that he cannot touch his toes and that some times his wife has to help him put on his shoes. However, claimant has not missed a day from work since his return and he is able to do house and yard work, although it takes him a little longer to do it now than it did prior to his injury.

Films were taken of claimant doing certain things, however, they were of very little evidentary value.

The Referee found that claimant had suffered a greater loss of wage earning capacity than that which he had been awarded by the Determination Order and he

A Determination Order of October 11, 1973 granted claimant 96 degrees for 30% unscheduled neck and right shoulder disability and 48 degrees for 25% loss of the right arm.

On April 19, 1974 pursuant to a stipulation, claimant received an additional 16 degrees for her unscheduled disability and an additional 19.7 degrees for her right arm.

On January 23, 1975 Dr. Smith performed an anterior cervical discectomy and interbody fusion at C4-5 and C5-6.

Dr. Smith's report of October 23, 1975 stated that claimant's total physical problems, including her leg problems which are not related to her industrial injury, made her totally and permanently disabled with respect to gainful employment. With respect to her neck, shoulders and upper extremity she has moderate to moderately severe impairment.

A 2nd Determination Order of January 6, 1975 granted claimant 48 degrees for 15% unscheduled neck disability. Claimant now has a total of 50% unscheduled disability and 35% loss of the right arm.

Dr. Cherry, on February 5, 1976, found claimant has severe permanent disability and cannot do any job for which she has had experience or training and probably cannot be retrained.

On March 5, 1976 claimant had a psychiatric examination by Dr. Quan who found no significant psychological disorders but found claimant's physical dysfunction makes her a poor candidate to be hired for most occupations.

On March 29, 1976 Dr. Gripekoven examined claimant and rated her disability as moderate to severe in nature; he felt claimant could return to sedentary occupations.

The Referee found that the medical evidence indicated that, taking into consideration both claimant's upper body and lower body problems, she is without a doubt permanently and totally disabled. However, the upper body problems, according to the consensus of medical opinion, constitute a disability of moderate to severe. He found claimant did not lack motivation.

The Referee found that the medical evidence shows claimant has moderate to severe permanent impairment and that certain doctors have indicated there is little likelihood that claimant will be able to do any type of work in the future. Taking into account claimant's age, lack of education and lack of special skills in any other work but physical labor, he concluded that claimant falls within the "odd-lot" category and he granted claimant an award of permanent total disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 6, 1976, is affirmed.

Claimant's counsel is awarded, for his services in connection with Board review, an attorney fee in the sum of $400, payable by the employer.

WCB CASE NO. 76-721 OCTOBER 12, 1976

JOSEPHINE BADONI, CLAIMANT
Gary Case, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests Board review of the Referee's order which affirmed the State Accident Insurance Fund's denial of claimant's claim.

Claimant received a hip injury on August 3, 1975 while helping relatives move furniture. She was given hip injections by Dr. Campbell. On August 11, 1975 claimant was admitted to the hospital; the history taken by Dr. Campbell indicated that on August 3, 1975 claimant, after moving furniture, experienced severe pain in her low back into her right thigh. It was discovered claimant had a spasm in the periformis muscle. This spasm was not present when she was examined on August 3, 1975.

Dr. Campbell diagnosed nerve root irritation from a protruding intervertebral disc. Claimant made no mention of any accident at work. In September, 1975 a laminectomy was performed. Claimant's post-operative course at first was smooth, but became quite difficult with hysterical reaction which required medication.

On October 14, 1975 claimant was readmitted to the hospital for a body cast due to lumbosacral joint instability.

Claimant had off-the-job coverage by Standard Insurance Company which started paying claimant benefits. On the claim form claimant claimed a ruptured disc had occurred on August 10, 1975. Claimant testified at the hearing that it happened on August 3, 1975 when she was at home moving furniture but that this injury was aggravated at work by lifting ice cream trays.

Dr. Campbell completed the bottom portion of claimant's claim form indicating the injury was neither caused by nor aggravated by claimant's employment.

Claimant stated at the hearing that there were two eye witnesses to the incident at work on August 11; however, neither corroborated claimant's testimony.

The Referee found no evidence whatsoever that claimant sustained any injury at work or that her incident at work on August 11 aggravated the August 3 injury.

The Referee concluded that claimant had failed to sustain her burden of proof and he affirmed the Fund's denial.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated April 29, 1976, is affirmed.

WCB CASE NO. 75-3628 OCTOBER 12, 1976

ABEL ALBIAR, CLAIMANT
John W. Stewart, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Order on Motion

The employer has moved for an order dismissing claimant's request for review of a Referee's Opinion and Order on the grounds of lack of jurisdiction because the claimant failed to serve a copy of the request for review upon the employer in the manner required by ORS 656.289(3) and ORS 656.295(2).

It appears that the Referee mailed his Opinion and Order on April 21, 1976 and that claimant's attorney mailed a copy of the claimant's Request for Review to the Workmen's Compensation Board on May 19, 1976 but that no copy of that request was mailed to the employer until September 21, 1976.

Claimant argues that the timely mailing of the request for review to the Board alone prevented the Referee's order from becoming final by operation of law and invested the Board with jurisdiction to entertain the review.

He further argues that the employer was not prejudiced by his failure to send the employer a copy of the request for review at the time it was sent to the Workmen's Compensation Board since the employer in fact actually received notice of the request for review on or about May 25, 1976 by receipt of a copy of the Board's letter acknowledging the request for review.

He also argues, in light of the employer's actual notice in May and its failure to object until after claimant's brief on appeal was filed in September, that the employer should be estopped from raising a technical defense.

Claimant is correct in asserting that notice requirements are not to be strictly construed in workmen's compensation cases. Schnieder v. Emannuel Hospital, 75 OAS 956, 20 Or. App. 599 (1975).

Although it appears that the Oregon Court of Appeals prefers to ignore "technicalities" where no prejudice to the opposing party has occurred, the Court has recognized that there are limits on how far the Court should go in dispensing with literal compliance regarding notice requirements, Nollen v. SAIF, 75 OAS 3982, ____ Or. App. ____, (1975).

In the cases of Stroh v. SAIF, 261 Or. 117 (1972), Schnieder and Nollen, supra, the Court was faced with actual service, timely notice, situations. There, the lack of prejudice was determinative. Here we are faced with a constructive service, untimely notice situation. Only four days untimely if the employer's attorney received the Board's letter of acknowledgement on May 25, 1976; but many weeks untimely by the time a copy of the request was sent on September 21, 1976.

The Court in Nollen, explained that the necessary function of notice statutes is to inform the parties of the issues in sufficient time to prepare for an adjudication. Time limitations on the period to request review also serve another, perhaps more important function; that of providing finality to the Referee's Opinion and Order.

We are of the opinion that the opposing party should be entitled to assume, where the statute requires the making of a request within 30 days and also the giving of notice within that time, that lack of notice during the period signifies the finality of the Referee's Opinion and Order and that they may thereafter act without fear of continued litigation. It can be argued that to permit perfection of the review beyond the prescribed time only where no prejudice occurs, harms no one. It does however, leave the matter unconcluded for an indefinite period.

From the decisions to date, we are unsure of where the Court of Appeals intends to draw the line regarding compliance with notice requirements. The Court has relied upon the authority of the text writer, Professor Arthur Larson in this area. Nollen supra. Larson states "...the theme pervading much of the adjectival law of workmen's compensation is the necessity of striking a balance between relaxation of rules to prevent injustice and retention of rules to ensure orderly decision making and protection of fundamental rights." 3 Larson Workmen's Compensation 78.12.

We believe that, on balance, the necessity of maintaining orderly procedures for review and providing certainty for the parties, requires us to dismiss claimant's defective request for review without regard to whether the doctrine of estoppel may be applied.

The Motion to Dismiss should be granted.

It is so ordered.

WCB CASE NO. 75-3600 OCTOBER 13, 1976

RICHARD MAYNARD, CLAIMANT
Don Wilson, Claimant's Atty.
Marshall Cheney, Defense Atty.
Order of Dismissal

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

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 75-5521 OCTOBER 13, 1976

SHERYL BETTENCOURT, CLAIMANT
Thomas Mahoney, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore and Phillips.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of benefits, as provided by law, until the claim is closed pursuant to ORS 656.268.

Claimant is a key punch operator; she had been employed by A.D.P. from July, 1973 to August, 1974 when she was employed in the same capacity by the employer, Georgia Pacific, for whom she worked until September 15, 1975 when she was unable to tolerate her chronic back pain. Claimant had first noticed this pain when she was employed by A.D.P. and it again became noticeable in January, 1975 and thereafter developed rapidly into a chronic and disabling condition.

Claimant contends that the nature of her employment subjected her to tension by requiring her to sit over the machine which she operated and to employ a high degree of concentration for long periods of time. The employer contends that claimant's chronic back problems are not related to her employment; it contends that claimant has had a foot deformity from the time she was slightly over one year old; also, that she possibly had injured her back while playing baseball on July 27, 1975. It further contends that had claimant admitted to Dr. Morse, who first treated her, that she had been involved in an accident in the past year which resulted in a "little back ache."

After claimant was treated by Dr. Morse, a chiropractic physician, she submitted her doctor bills to the employer's health insurance policy carrier, Prudential Insurance Company, which refused to pay for chiropractic services.

On September 25, 1975 claimant filed a claim. It was denied by the employer on November 13, 1975, based upon a report from Dr. Specht which indicated that claimant's back pain could not be causally related to her employment.

Dr. Duff, one of claimant's treating physicians, diagnosed her condition as chronic muscle strain in the mid-dorsal area related to occupational posture; a mild scoliotic curvature was noted in the thoracic-lumbar area of the spine. Dr. Morse found muscle spasm in the same area. Dr. Bachhuber, after examining claimant, diagnosed a postural back ache with a probable psycho-physiological component. The history taken by Dr. Bachhuber was substantially as that taken by Dr. Duff, i.e., that symptoms initially manifested while claimant was sitting at work without any history of specific injury. Dr. Duff stated that the only satisfactory resolution of claimant's medical problems would be retraining for an occupation that did not require prolonged activity in one position; he was doubtful whether claimant could ever return to her former occupation as a key punch operator.

Dr. Specht stated he could find no organic pathology either in the thoracic or lumbar spine objectively demonstrable on physical examination or radiological examination. He was of the opinion that claimant's back pain was not related to her employment. When confronted with the other medical reports which stated claimant had a chronic strain, Dr. Specht testified that there was no such phenomena known to medical science as a chronic sprain or strain.

The Referee found that the consensus of the medical reports justified a finding that claimant probably had a chronic strain of the upper back. He found no evidence that the automobile accident in which claimant was involved had contributed in any way to her present condition nor was there any medical report indicating that the strain or injury that claimant might have sustained during the baseball game was a contributing factor. He found no medical report or evidence that the orthopedic deformity which claimant had had since her early years had contributed to her present back condition. The Referee concluded that claimant's back condition resulted from an occupational posture at her place of employment with the subject employer.

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SAIF CLAIM NO. KC 150252 OCTOBER 13, 1976

EMIL PFISTER, CLAIMANT
Gary Susak, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On September 24, 1976 the Board received claimant's petition to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen claimant's claim for an industrial injury suffered in 1968. The petition was accompanied by a report from Dr. German, dated July 13, 1976, based upon his examination of claimant on that date.

The State Accident Insurance Fund was furnished a copy of the petition and a copy of Dr. German's report. On October 1, 1976 the Fund responded stating claimant already has received awards totaling 100% of the maximum allowable by statute for unscheduled disability. The last award received by claimant was granted by an Opinion and Order dated August 27, 1974. The medical staff of the Fund expressed its opinion that claimant was currently having classical symptoms of degenerative osteoarthritis and that no definitive therapy was indicated, only palliative, according to Dr. German's report. The Fund stated it had fully discharged its responsibility with respect to any aggravating effects as a result of the 1968 injury.

The Board, after giving consideration to Dr. German's report and the report received from the Fund, concludes that claimant's petition for the reopening of his 1968 claim, pursuant to the Board's own motion jurisdiction granted by ORS 656.278 must be denied.

It is so ordered.

WCB CASE NO. 74-999 OCTOBER 14, 1976

DON L. WIDENER, CLAIMANT
Douglas Kaufman, Claimant's Atty.
Jack Mattison, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

The claimant seeks review by the Board of the Referee's order which upheld the employer's denial of claimant's claim for workmen's compensation benefits.

The issues before the Referee were whether claimant sustained a compensable injury on or about July 19, 1973 arising out of and in the course of his employment and, if so, was his claim for workmen's compensation benefits barred under ORS 656.265 for failure to give timely written notice of an injury to his employer.

Claimant was employed as a pondman, during part of the time he was also operating a pond splitter saw which he was required to maintain as well as operate. While doing some maintenance work on the saw claimant tripped on a cable and fell onto an electric motor, he landed on his back and hurt the lower part thereof.

Claimant did not report this incident to any supervisor and continued to work on his job, however, he did mention the accident to a co-employee who was working on the saw job with claimant. The co-employee stated that after the claimant mentioned the accident he noticed claimant was having problems of stiffness or soreness in his back. Claimant's testimony that he fell was also corroborated by another witness who said claimant had told her he had fallen but that he had not broken anything and he thought he could "tough it out."

Claimant continued to work for several months and in October, 1973 he reported to his employer that he was sick; he did not go back to work after the latter part of October at which time he still had not made any report of an on-the-job injury to his employer.

In November, 1973 claimant told his employer that he was seeing a doctor with some back and leg problems but did not mention that he had had an on-the-job injury. Claimant had sought medical treatment and was treated by Dr. Martindale, later referred to Dr. Kayser and then to Dr. Tanabe who, ultimately, performed surgery. Just prior to the surgery claimant filed a written notice of on-the-job injury with his employer (this was in late November or early December, 1973). The employer denied the claim on the ground that the medical evidence did not substantiate the claim for compensation and that also claimant had failed to give timely written notice of his injury.

The Referee found that claimant's testimony alone was not sufficient to establish the fact that he had suffered a compensable injury, however, claimant's testimony was corroborated on the basic facts of the accident and immediate distress by two separate witnesses. The Referee concluded that claimant had sustained an injury when he fell as he testified. He concluded that the medical opinions expressed by the physicians who had provided treatment to claimant indicated that the need for such medical treatment was attributable to the injury claimant advised them he had suffered in July, 1973. This was sufficient to establish the necessary causal relationship and that claimant had suffered a compensable injury.

With respect to the issue of whether claimant had given timely notice of the injury to the employer, the Referee found that claimant's claim would be barred under ORS 656.265(4) unless one of the three exceptions thereto was applicable. The Referee found that the employer did not have knowledge of the injury, and he had been prejudiced by the failure to receive the notice; that the employer had not begun payment of compensation, and that claimant had failed to show good cause for his failure to give notice within 30 days after the accident and, therefore, was not entitled to one year after the date of said accident within which to give notice.

The Referee concluded that the only reasons which claimant gave for his failure to provide the required service to his employer was that he though he could tough it out even though he was hurting, that he was in financial straits and needed to work and he was afraid that his employer would fire him if he found out about the injury (claimant had had an earlier injury and was fearful that the employer might believe claimant to be accident prone).

The Referee concluded that claimant's desire to cover up the situation or deceive his employer did not constitute good cause for failure to give notice of an injury which possibly could only have been minor as to his consequences.

The Referee concluded that claimant had failed to establish that he was entitled to workmen's compensation benefits even though he had sustained an accident arising out of and in the course of his employment.

The Board, on de novo review, affirms the order of the Referee.

ORDER

The order of the Referee, dated November 10, 1975, is affirmed.

WCB CASE NO. 75-5287 OCTOBER 14, 1976

BRUCE RENGO, CLAIMANT
Donald Diment, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests Board review of the Referee's order which granted claimant 64 degrees for 20% unscheduled low back disability. Claimant contends his loss of wage earning capacity is greater than that for which he was awarded.

Claimant suffered an industrial injury on October 8, 1974 which was denied. A Referee's order of August 13, 1975 remanded claimant's claim to the State Accident Insurance Fund for acceptance. A Determination Order of December 3, 1975 granted claimant 16 degrees for 5% unscheduled disability.

Claimant is a college graduate with a degree in economics; however, claimant and a friend from his church became partners in a painting business.

At the hearing several witnesses testified that claimant favored his back since the industrial injury and that he no longer engaged in heavy work activities.

The Referee found that claimant was suffering from chronic back sprain and was now precluded from a certain segment of the labor market such as, heavy labor. The Referee found the medical evidence doesn't indicate any great impairment to claimant's back, however, claimant cannot return to his regular occupation.

The Referee concluded, based on claimant's inability to return to his regular employment, that his loss of wage earning capacity was greater than that for which he was awarded by the Determination Order and increased the award to 64 degrees for 20% unscheduled disability.

The Board, on de novo review, adopts the Referee's order. It is the Board's position that claimant has sufficient education and training to aid him in finding an occupation suitable to his present physical condition but claimant has failed to do anything to help himself return to the labor market as a useful member thereof.

ORDER

The order of the Referee, dated April 30, 1976, is affirmed.

WCB CASE NO. 75-1617 OCTOBER 14, 1976

JERRY RANEL, CLAIMANT
Elton Lafky, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests Board review of the Referee's order which affirmed the Third Determination Order of January 8, 1975. The issues before the Board on review are the extent of permanent partial disability, premature claim closure, request for reopening of claimant's claim and claimant's entitlement to vocational rehabilitation.

Claimant injured his right knee on May 2, 1969. On November 12, 1969 Dr. Goodwin performed a right medial meniscectomy. On March 6, 1970 a Determination Order granted claimant an award of 15% partial loss of the right leg.

On December 1, 1972 claimant's claim was reopened and Dr. Jenkins performed a lateral meniscectomy. On May 30, 1973 a Second Determination Order granted claimant an additional 20%.

In September, 1973 Dr. Ingham examined claimant and on January 14, 1974 performed an arthrotomy. He found degenerative arthritis of the posterior medial compartment and significant chondromalcia of the patella.

Claimant thereafter saw Dr. McHolick who found claimant has full extension and 5 degrees loss of flexion of the right knee.

On January 8, 1975 a Third Determination Order granted claimant an additional 15%, making a total of 50% loss of the right leg.

The Referee found, based upon the medical reports, that claimant had been adequately compensated for the loss of physical function of his right leg by the Third Determination Order.

On the issue of non-payment of temporary total disability compensation from the Second Determination Order, the Referee found that the State Accident Insurance Fund had, in fact, paid more temporary total disability compensation to claimant than the Determination Order awarded and concluded claimant had received all payments due him.

On the issue of premature claim closure, the Referee found that claimant has not been recommended for nor has he utilized any curative treatment since January 8, 1975. He found no medical evidence that claimant was not medically stationary.

The Referee found no medical evidence that claimant's claim should be reopened and he denied such a request for reopening.

The Referee found that claimant would obtain no benefits through vocational rehabilitation nor did he believe that claimant was sufficiently interested, even if he were to enter an authorized program, to complete such a program.

The Board, on de novo review, affirms the Referee's order.

Dr. Mueller first indicated that he would not rule out any permanent impairment from claimant's 1974 injury and that claimant would develop some difficulty over prolonged period of time as a result of the compression fracture and he finally concluded, based upon all of his examinations of claimant, that claimant's present condition and complaints were due to both injuries. No further treatment was indicated.

Claimant has purchased a tavern and is performing the managerial functions and leaving the more strenuous work to other persons. The Referee found no evidence of the income claimant derived from the tavern. Claimant had testified that he was receiving approximately $580 net every two weeks while working at the mill, this salary was based upon a production basis and the reason claimant finally terminated was that, although he was still able to do the work, he was not able to produce as well as he had prior to his injury.

The Referee found that claimant was a credible witness and had shown excellent motivation by purchasing a business and seeking other less strenuous endeavors to produce an income. He found that claimant was no longer able to engage in athletic activities and that he was precluded from returning to any type of work which involved heavy lifting, bending and stooping and, therefore, has sustained an impairment of his earning capacity not based upon monetary computation but upon the fact that he is precluded from the heavy labor component of the labor market. He concluded that claimant has lost in excess of one-third of an industrial back and he granted claimant an award for his 1974 injury of 20% and increased the award for the 1975 injury from 10% to 15%.

The Board, on de novo review, finds that the medical evidence, especially the reports of Dr. Fisher and Dr. Mueller's report of March 24, 1976, indicate that the permanent impairment which claimant suffered as a result of his November 30, 1974 injury was minimal; the permanent disability which claimant has suffered is basically the result of his May 5, 1975 injury and/or a condition which pre-existed the November 30, 1974 injury. The Board concludes that the award of 20% for the November 30, 1974 injury was excessive and that claimant would be adequately compensated for his loss of earning capacity as a result of that injury by an award of 5%.

With respect to the award of 15% for the May 5, 1975 injury, the Board agrees that this adequately compensates claimant for the additional loss of wage earning capacity resulting from this injury.

The Board notes that the Referee neglected to award the claimant's attorney a fee based on the increased compensation which he awarded claimant and it will, therefore, make the award, as provided by ORS 656.386(2), in this order.

ORDER

The order of the Referee, dated March 10, 1976, is modified.

Claimant is awarded a total of 64 degrees of a maximum of 320 degrees for unscheduled low back disability; 16 degrees for his unscheduled low back disability resulting from the injury of November 30, 1974 and 48 degrees for his unscheduled low back disability resulting from his injury of May 5, 1975.

Claimant's attorney is allowed as a reasonable attorney fee a sum equal to 25% of the increases in compensation, to-wit: 16 degrees for the November 30, 1974 injury and 48 degrees for the May 5, 1975 injury, payable out of said increases as paid, not to exceed a total of $2,000.

The employer was successful in having a portion of the award made by the Referee reduced, therefore, claimant's attorney is not entitled to an attorney fee for his services in connection with this Board review.

WCB CASE NO. 75-4913 OCTOBER 14, 1976

BERT JONES, CLAIMANT
Stanley Sharp, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of the Referee's order which granted claimant an award of permanent total disability, effective the date of the order.

Claimant, whose past work experience was in sawmills, farming and carpentry, sustained a compensable low back injury on September 9, 1971. Claimant developed acute low back pain with radiation into his left hip and leg, he received conservative treatment including pelvic traction. On April 6, 1972 a Determination Order granted claimant 32 degrees for 10% unscheduled disability.

On April 19, 1974 claimant sought medical help from Dr. Smith for back and left leg pain. Dr. Smith found considerable mechanical instability and felt claimant's job was too heavy for a person with a condition like claimant's.

As a result of a previous injury claimant had had a spinal fusion at L4 to S1 in 1964. In August, 1974 claimant underwent another fusion at L3 to L4. Claimant has not worked since April, 1974.

On June 11, 1975 claimant was examined at the Disability Prevention Division which found "functional overlay is totally absent." A psychological evaluation on June 19, 1975 indicated moderately severe depressive reaction combined with moderately severe anxiety; claimant's moderately severe psychopathology is moderately related to the injury.

On July 29, 1975 the vocational rehabilitation coordinator at the Disability Prevention Division found claimant not eligible for rehabilitation because he was not likely to benefit from said services.

A Second Determination Order of August 26, 1975 granted claimant an additional 128 degrees for 40% unscheduled disability.

Claimant testified he is relatively comfortable if he doesn't do much and he wears his back brace practically all day. Claimant testified that even using a screwdriver causes pain in his shoulder.

Claimant, in February, 1976, was examined by a psychiatrist, Dr. Mighell, who stated that with claimant's psychiatric problems it probably was impossible for claimant to do any kind of work, "even so-called light work." Dr. Mighell found mental impairment and depression which affected claimant's ability to function at work. Dr. Mighell found claimant was not a malingerer. Claimant testified he has not sought employment because he feels he cannot do the work.

The Referee found claimant and his wife to be credible witnesses and he believed claimant's wife when she testified claimant is a totally different person, both physically and emotionally, today than he was prior to his injury.

The Referee concluded, based upon all of the evidence, that claimant came within the "odd-lot doctrine" and awarded him permanent total disability.

The Board, on de novo review, adopts the Referee's order primarily because the State Accident Insurance Fund failed to show any employment which claimant now would physically be able to perform.

ORDER

The order of the Referee, dated May 28, 1976, is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with Board review, the sum of $400 payable by the State Accident Insurance Fund.

WCB CASE NO. 75-1117 OCTOBER 15, 1976

PAUL BALEY, CLAIMANT
Rolf Olson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Claimant requests Board review of the Referee's order which granted claimant 160 degrees for 50% unscheduled disability. Claimant contends the incident of July 29, 1974 constituted a new injury. The State Accident Insurance Fund cross-requests Board review, contending the award of 160 degrees is excessive.

Claimant sustained a compensable back injury on June 8, 1971, diagnosed by Dr. Freeman as subluxation of lower lumbar spine with secondary functional disturbances.

On July 21, 1971 Dr. Melgard performed a lumbar laminectomy with removal of a protruded intervertebral disc at L4-5 right. In December, 1971 claimant returned to his regular employment as a plumber. A Determination Order of May 16, 1972 granted claimant 48 degrees for 15% unscheduled disability.

In July, 1974 claimant was working under a house in an awkward position when he experienced pain in his low back. The following week claimant experienced pain in both his right and left hips and right and left legs. Claimant was seen by Dr. Melgard who considered claimant's condition "an aggravation of his previous condition." The claim was reopened.

Claimant was seen at the Disability Prevention Division and their closing medical report rated claimant's disability as mild. Dr. Melgard concurred.

A Determination Order of November 29, 1974 granted claimant 16 degrees for 5% unscheduled disability.

Claimant testified that he now has limitation of motion with pain and discomfort in his low back, both hips and both legs. Because of claimant's limitations and discomfort he has changed jobs and is now a utility inspector, a job which pays substantially lower wages than the claimant had previously made as a journeyman plumber.

Claimant contends the July 29, 1974 incident was a new injury rather than an aggravation of his June 8, 1971 injury, therefore, when the Fund reopened his claim on the basis of aggravation it, in effect, was denying his claim for a new injury. He claims he is entitled to a re-computation of his time loss benefits, etc.

The Referee found that Dr. Melgard's finding of an aggravation was persuasive and that claimant had not proven by the evidence that he had sustained a new injury. Claimant's contention that the Fund's reopening constituted a de facto denial of his claim for a new injury, therefore, is not tenable nor is claimant entitled to a re-computation of his time loss and an award of attorney fees.

The Referee found that claimant is now medically stationary and he found further that claimant is now precluded from returning to his former occupation and has lost a substantial portion of his wage earning capacity. He granted claimant an award of 50% unscheduled disability.

The Board disagrees with the findings and conclusions of the Referee.

The Board finds that claimant's incident in July, 1974 was, in fact, a new injury, but finds no de facto denial thereof. In 1973 and 1974 claimant's back pain gradually dissipated to the point where claimant was able to do everything he had done prior to his injury. Also claimant's prior symptoms after his 1971 injury did not affect his legs or his hips which are now of primary concern to claimant.

The Board also finds, based on the medical reports and the evidence of claimant's loss of wage earning capacity, that claimant is entitled to a lesser award than that granted by the Referee. The Board grants claimant an award of 112 degrees for 35% unscheduled disability.

ORDER

The order of the Referee, dated October 30, 1975, is modified.

The claimant is awarded 112 degrees of a maximum 320 degrees for unscheduled disability. This is in lieu of the award made by the order of the Referee, which is in all other respects affirmed.

WCB CASE NO. 75-2800 OCTOBER 15, 1976

DONALD COLEMAN, CLAIMANT
S. David Eves, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order on Review

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which found claimant permanently and totally disabled as of the date of his order.

Claimant suffered a compensable injury to his back on May 28, 1974. The pain and discomfort worsened with the passage of time and on June 29, 1974 claimant was seen by Dr. Wigham, a chiropractic physician, who diagnosed a lumbar sprain and recommended chiropractic treatment. Claimant was released to return to regular work on July 1, 1974 and Dr. Wigham indicated there would be no residual permanent impairment. The claim was closed by Determination Order mailed August 5, 1974 granting claimant compensation for temporary total disability only.

After his claim was closed claimant was examined and/or treated by his family doctor, Dr. Fletchall and by Dr. Bruce. The former treated claimant by the use of cervical traction, a neck collar, medication and bed rest; however, no improvement was noted with respect to claimant's back condition.

On August 28, 1975 claimant was examined by Dr. Bruce who found extensive degenerative changes of the cervical and lower lumbar vertebra. Dr. Bruce noted that claimant had four lumbar vertebra and the fifth was sacralized. He felt that claimant was disabled from any further work on the basis of cervical and lumbar degenerative disease. He further believed that prospects for any rehabilitation of claimant enabling him to return to gainful employment were very slim.

Dr. Bruce expressed a medical opinion that claimant's injury of May 28, 1974 aggravated a pre-existing back condition which, in turn, was the reason for claimant's present inability to work. He recommended that claimant undergo surgery which would possibly give him relief from the neck complaints. At the time of the hearing, claimant had not undergone such surgery.

Claimant has an eighth grade education; he has no other formal education or training and his primary occupation has been in the lumber industry, primarily driving logging or lumber trucks. He has had some experience owning and operating dump trucks and has done some farming.

Claimant has had prior neck and back difficulties for at least ten years which were progressive and disabling and were attributable to his arthritic condition and to prior industrial injuries which involved at least four truck accidents for which claimant had made no claim. In spite of all this claimant had continued to work and he performed his job duties until December, 1974 when he terminated.

Claimant has not sought the services of the Division of Vocational Rehabilitation stating "I am too sick." He discussed the suggested surgery with his wife and decided to refuse it, stating he was not certain the surgery would give him relief, he was fearful of the consequences and Dr. Fletchall gave him some indication that the results of any surgery would be speculative.

The Referee found that sufficient causal relationship had been established between the May 28, 1974 accident and claimant's alleged back disability, based upon Dr. Bruce's medical opinion. He further found, considering claimant's age and educational level, that claimant's attitude toward vocational rehabilitation was realistic inasmuch as claimant probably was not a suitable prospect for retraining. With respect to claimant's refusal to submit to surgery the Referee found it was not unreasonable.

The Referee found that the fact that claimant was capable of performing some type of light work or of earning occasional wages did not preclude a finding of total disability and, based upon the evidence presented at the hearing, which included the credible testimony of claimant and his wife, and taking into consideration claimant's age, education, training and experience as well as his pre-existing neck disability which is progressive in nature, the Referee concluded claimant had established prima facie that he came within the "odd-lot" category. Claimant's injury of May 28, 1974 aggravated his pre-existing disabling back condition to such an extent that claimant experiences physical limitations in lifting, bending, stooping, prolonged sitting and standing and prolonged driving and all of these limitations would adversely affect claimant's primary occupation.

The Referee further concluded that these limitations when coupled with claimant's back condition and his pre-existing neck condition not only precluded claimant's return to his former occupation but also impaired his ability to obtain and hold jobs in the general industrial labor market on a regular and continuous basis with duties which required the above activities in which claimant is no longer allowed to engage. Although proof of motivation was not necessary in this case claimant nevertheless did establish a realistic level of motivation. He found no medical evidence to indicate claimant was malingering.

Having concluded claimant came within the "odd-lot" doctrine, the Referee concluded that the Fund had failed to meet its burden of showing that some sort of suitable work was regularly and continuously available to claimant. He found claimant to be permanently and totally disabled as of the date of his order, January 23, 1976.

The Board, on de novo review, finds that claimant was able to work after his industrial injury of May 28, 1974; in fact, he did not terminate until December, 1974. Claimant told Dr. Bruce that his back had not been good at any time in the past ten years. Although the injury of May 28, 1974 was to claimant's low back, claimant has exhibited generalized complaints which are indicative of the arthritic condition for which he has been treated for many years. The evidence is undisputed that claimant has had prior neck and back difficulties which have progressively worsened and which were disabling; these problems were attributable to claimant's arthritic condition and also to prior industrial injuries which claimant had made no claim.

The Referee found that claimant's age and lack of education precluded vocational retraining and rehabilitation, however, there is nothing in the record, to indicate that claimant could not be retrained to perform some type of light work. Claimant made no attempt at all to seek the services of the Division of Vocational Rehabilitation; his sole excuse was: "I am too sick." This is not substantiated by the medical evidence.

There is no evidence to indicate that the May 28, 1974 injury made any substantial change in claimant's condition. Claimant has been slowing down for years and more than six months after the injury claimant was forced to discontinue his work because of his general physical condition. He has made no effort to seek help which would either improve his attitude or his vocational prospective.

made on the first paycheck but not thereafter. In the latter phases of the project claimant hired other people to assist him; their pay was lumped in with claimant's and claimant would pay them from his check. At least two of these hired employees were sent to claimant by Bob Riemenschneider. Claimant could be terminated or he could quit any time. He had never been licensed as a contractor.

The Referee found this was a close case but concluded claimant was an employee rather than an independent contractor because there were more factors which established the former. The right to control and contract of hire tests are met here. He directed the employer to accept claimant's claim.

The Referee also concluded the carrier unreasonably delayed the processing of claimant's claim and he assessed 25% of the temporary total disability compensation due claimant as a penalty.

The Board, on de novo review, concurs with the conclusions of the Referee because of the recent ruling in Waibel. (Woody v. Waibel, ____ Or ____, opinion filed September 18, 1976).

ORDER

The order of the Referee, dated May 7, 1976, is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with Board review, the sum of $350 payable by the employer.

WCB CASE NO. 75-5520 OCTOBER 21, 1976

KEITH BJORKMAN, CLAIMANT
Burton Fallgren, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests Board review of the Referee's order which granted claimant 16 degrees for 5% unscheduled disability. Claimant contends this award is inadequate based on his loss of wage earning capacity.

The employer cross-appeals contending claimant is not entitled to any permanent partial disability as there was no loss of wage earning capacity.

Claimant has worked for the employer since August, 1973. In early 1974 claimant became a "pourer" which is strenuous work. About July 24, 1974 claimant experienced back pain and muscle swelling. Claimant finally sought help at Keiser Hospital.

On October 31, 1974 Dr. Stark diagnosed chronic back strain and ordered a lumbar corset and physiotherapy for claimant.

On March 11, 1975 claimant was examined by Dr. Sacamano who diagnosed low back pain of undetermined etiology and recommended psychological evaluation.

Claimant was examined by the Orthopaedic Consultants on October 15, 1975; they diagnosed lumbosacral sprain and functional overlay and it was their opinion that claimant's complaints outweighed the physical findings. They found claimant could return to his regular occupation and claimant's psychological problems were the reason claimant did not continue working. Total loss of function of claimant's back due to this injury was minimal.

A Determination Order of December 3, 1975 granted claimant temporary total disability compensation only.

The Referee, based on all of the medical evidence, found minimal disability and granted claimant an award of 16 degrees for 5% unscheduled disability.

The Board, on de novo review, disagrees with the conclusions of the Referee. The Board believes that claimant has not been adequately compensated for his loss of wage earning capacity. It finds that the evidence indicates his loss of earning capacity is greater than the medical reports show. Claimant's job opportunities are now limited. He is no longer as good an employment risk as he was before this injury.

The Board concludes claimant is entitled to an award in the amount of 48 degrees for 15% for his unscheduled disability.

The Board also recommends that claimant take advantage of psychological evaluation and counseling which has been recommended by all who have examined claimant. He can do this under the provisions of ORS 656.245.

ORDER

The order of the Referee, dated April 30, 1976, is modified.

Claimant is awarded 48 degrees of a maximum 320 degrees for his unscheduled disability. This is in lieu of the award made by the Referee's order, which in all other respects is affirmed.

Claimant's counsel is granted as a reasonable attorney fee for his services at Board review, a sum equal to 25% of the increased compensation payable out of said increased compensation, as paid, not to exceed the sum of $2,300.

WCB CASE NO. 76-356 OCTOBER 21, 1976

DENNIS K. EASTON, CLAIMANT
John Bogardus, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On September 28, 1976 the Board received an amended request for review from the claimant in the above entitled matter, whereby claimant withdrew his request for review of the issue of the extent of the award for permanent partial disability of his left leg, but requested review of the remaining two issues, namely:

(1) The Referee's finding that the claimant's back condition was not related to the compensable left leg injury;

(2) The Referee's finding that there was not sufficient evidence in the record to justify the award of penalties and attorney fees against the Fund for unreasonable delay in furnishing to the claimant medical reports in the Fund's possession.

Claimant also requested that a recent medical report from Dr. Balme, dated August 13, 1976, be made a part of the record, stating that this report was not available at the time of the hearing because claimant did not have the financial means to seek an independent medical examination at that time. Dr. Balme's report relates primarily to complaints of pain in the neck and right shoulder which claimant made to him when he examined claimant on August 13, 1976.

On September 29, 1976 the State Accident Insurance Fund advised the Board that it objected to the admission of Dr. Balme's report on the grounds that the issues of neck and right shoulder disability were not before the Referee at the hearing and, therefore, were not properly before the Board on review.

The Board, after due consideration, concludes that claimant's request that Dr. Balme's report of August 13, 1976 be received as part of the record before it on review is not relevant to the issues before it.

ORDER

The request to receive the report of Dr. Balme, dated August 13, 1976, offered by claimant as new evidence which was not available at the time of the hearing is hereby denied.

WCB CASE NO. 75-2677 OCTOBER 21, 1976

VESTER HAMS, CLAIMANT
Don Swink, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order which granted claimant an additional award of 35% for his unscheduled disability and temporary total disability compensation from March 27, 1975 through April 24, 1975. Claimant contends he is permanently and totally disabled.

On August 3, 1972 claimant sustained a compensable injury to his back when he fell from a tractor. Claimant's condition was diagnosed as spondylolisthesis, last lumbar sacrum first degree, and acute back strain.

Claimant was examined by Dr. Smith on October 16, 1972 who found claimant had a mechanically weak back in the lumbosacral area which was aggravated by claimant's injury. He started claimant on conservative treatment. On December 4, 1972 Dr. Smith found such treatment had improved claimant's condition and he released claimant to light work as of March 19, 1973.

On April 16, 1973 Dr. Smith reported claimant didn't want a spinal fusion and he agreed with claimant's refusal, stating claimant was ten years too old to consider a fusion.

WCB CASE NO. 75-5453 OCTOBER 22, 1976

FRED LUGVIEL, CLAIMANT
Phil Ringle, Jr., Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Referee's order which affirmed the State Accident Insurance Fund's denial of the responsibility for claimant's cervical and shoulder complaints as having no relationship to the injury for which claimant's claim was established.

Claimant sustained a compensable injury to his back and left leg on November 9, 1972. His principal treating physician was Dr. Hardiman, an orthopedic surgeon, who, on February 7, 1973, performed an arthrotomy on claimant's right knee.

Claimant's claim had been closed by a Determination Order mailed December 13, 1972 which awarded claimant compensation for temporary total disability only. Claimant continued to have back symptoms and underwent a myelogram, the eventual diagnosis for the low back problem was chronic strain, mild.

The claim was later reopened and closed by a Second Determination Order, mailed January 21, 1974, which awarded claimant time loss and 15% loss of the right leg equal to 22.5 degrees. After being treated by Dr. Hardiman for some time claimant commenced having pain in his neck; Dr. Hardiman was not sure whether this was related to the industrial accident but reported on June 12, 1974 that claimant was probably undergoing a normal degenerative change and experienced an injury that aggravated these symptoms.

Dr. Dennis, a neurosurgeon, examined claimant on March 26, 1974 and suspected a cervical spondylosis and a possible disc narrowing.

Claimant requested a hearing on the adequacy of the Second Determination Order. At that hearing he alleged that the scheduled award was inadequate and that he was entitled also to an award for unscheduled low back disability.

On September 17, 1974 Referee George Rode entered an order awarding claimant 48 degrees for unscheduled low back disability and increasing his award for right leg disability to 37.5 degrees; no specific mention of claimant's neck-shoulder-arm pain syndrome was made in this order. The Referee commented that claimant had undergone extensive vocational counseling and was presently undergoing vocational retraining as a horse trainer and riding instructor, a job which the vocational counselors had viewed with some misgiving as being beyond claimant's physical capabilities. The program was denied by the Board, but the Division of Vocational Rehabilitation, based upon its own medical consultants and evaluation of claimant, determined that claimant was physically capable of handling the suggested program.

The program referred to in the preceeding paragraph consisted of two phases. Claimant was sent to a school in Maryland and upon completion of phase one claimant was certified as an assistant horse master. Upon completion of phase two claimant would have been certified as a horse master. Claimant completed phase one only. While at the school claimant experienced pain and discomfort strapping horses with his left hand so he switched to his right hand and, in May, 1975, while leading a horse, it shied unexpectedly and jerked claimant's right hand and greatly increased claimant's symptoms which ultimately led to medical care for his neck, right shoulder and arm and to the denial by the Fund of any responsibility for the cervical and shoulder complaints.

The Referee found claimant had told several conflicting stories as to how the cause of his right arm and shoulder pain occurred. The Fund contends that claimant is barred by the doctrine of res judicata from now showing that his right shoulder and arm complaints are causally related to his compensable injury, in view of his failure to prove this at the previous hearing before Referee Rode. The Referee, in the present case, found that it would not be appropriate to bar claimant from proving such causal relationship under the doctrine of res judicata if claimant's condition, in fact, has changed since the time of the hearing, nor should he be barred to void a multiplicity of suits because it would have been impractical to have litigated the matter in question at the previous hearing if the condition was then basically asymptomatic and no partial denial had been made.

The Referee found that the evidence indicated, at most, some degenerative cervical conditions probably were aggravated by the original injury, but he concluded that claimant had failed to prove that his current right shoulder and arm complaint result from a compensable aggravation of his original injury. The Referee cited a previous ruling he had made; In the Compensation of Albert Wood, WCB Case No. 75-4795, wherein he relied strongly upon the concept of "quasi-course of employment" set forth in 1 Larson, Workmen's Compensation Law, Section 1311, but distinguished this case from Wood on the grounds that claimant had broken the chain of causation by intentional conduct which could be regarded as expressly or impliedly prohibited by the employer, i.e., claimant chose a vocational rehabilitation program which had been rejected by the Board and accepted with misgivings by the Division of Vocational Rehabilitation and the subsequent reinjury he suffered was predictable when the nature and extent of his physical impairment was taken into consideration.

The Referee affirmed the partial denial.

The Board, on de novo review, reiterates its position stated in its Order On Review entered In the Matter of the Compensation of Albert Wood, WCB Case No. 75-4795 with respect to the application of the "quasi-course of employment" concept in Oregon, but affirms the conclusion reached by the Referee on the basis that claimant's compensable injury suffered on November 9, 1972 was related to his low back and left leg and there is no evidence whatsoever to indicate that claimant suffered any injury at that time to his neck nor that subsequent injury to his neck was causally related thereto.

ORDER

The order of the Referee, dated June 11, 1976, is affirmed.

WCB CASE NO. 75-1521 OCTOBER 22, 1976
WCB CASE NO. 75-2528

In the Matter of the Compensation
of the Beneficiaries of
ELDON GAY, DECEASED
Dan O'Leary, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer, Riviera Motors, and its carrier, Employers Insurance of Wausau, request Board review of the Referee's order which remanded the claim to it for payment of benefits, as provided by law, and affirmed the State Accident Insurance Fund's denial of responsibility.

The decedent workman was 55 years old at the time of his death on January 10, 1975. He had been working at two full time jobs, i.e., an industrial arts teacher at a grade school from 8:30 a.m. to 3:30 p.m. and from 4:45 p.m. to 1:00 a.m. as a mechanic for Riviera Motors five days a week.

The school vice-principal was aware at one time that the decedent workman had a second job. As time progressed it became apparent that the students were not getting proper instruction and the decedent workman had been letting them out of school early so he could rest before going to his other job. On a few occasions the decedent workman had been found asleep in the teacher's lounge. The vice-principal had had a conversation with him to try to assist him to be a more proficient teacher. There was no evidence presented that the decedent workman's job had been in immediate jeopardy.

It is the contention of Riviera Motors that the deceased workman was under pressure at his teaching job, not only from the vice-principal but also from the students, which got on his nerves. This defendant felt that this emotional upset contributed and was responsible for the fatal heart attack.

The supervising principal testified that the deceased workman had seemed constantly tired for the past two years. He also testified that he had been poor at planning courses and his classroom was a place of pilferage and disorganization.

The Referee found the contention that emotional pressure at school was a contributing factor to the deceased's heart attack was not persuasive.

The illness which preceded the workman's death began on December 20, 1974 with symptoms of numbness in both arms, pain across the chest, nasal congestion and a cough. The deceased workman had worked at Riviera that night, he did not work the 21st, 22nd; on the 23rd he saw Dr. Eberdt who prescribed antihistamines. The deceased workman did not work on the 24th, or 25th, but returned to work on the 26th at Riviera.

On January 6, 1975 the deceased workman had returned to teaching school, he had been pale, tired and weak. When at home he had stayed in bed all of the time. He died on January 10, 1976.

At Riviera there was a bonus program which an employee could receive if he completed a job quicker than in flat rate time. The deceased workman had strived for these bonuses but had never received one.

On the night of the workman's death he was cleaning a fuel injection pressure sensor; while performing this task he collapsed. Efforts to revive him were unsuccessful. The left ventricle of the heart had ruptured and caused the death.

Dr. Griswold testified, after listening to the testimony and reviewing the evidence, that, in his opinion, the deceased workman had suffered a myocardial infarction 5 to 7 days prior to his death, and that if he had not worked at school on the day of his death it would not have necessarily have made any difference in the rupture at work that evening. The rupture is related to activity, but it could occur on any rise of blood pressure. Dr. Griswold felt the school work the deceased workman had done on the day of his death had nothing to do with the death. Dr. Griswold testified that any one of the acts the deceased workman had performed that night at Riviera could have precipitated the rupture.

The Referee found that the preponderance of the evidence supports a conclusion, based on the opinion of Dr. Griswold, that the activity in which the deceased workman was engaged at the time of his death was the cause of the death. He affirmed the Fund's denial of responsibility and remanded the claim to Employers Insurance of Wausau for payment of compensation benefits.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated February 24, 1976, is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with Board review, the sum of $300 payable by the Employers Insurance of Wausau.

SAIF CLAIM NO. WC 153199 OCTOBER 22, 1976

JAMES STEPHENS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right knee on October 28, 1968. A Determination Order of October 6, 1969 granted claimant time loss only. Claimant's aggravation rights have expired.

Claimant continued having knee problems and his claim was voluntarily reopened on October 1, 1975. In February, 1976 claimant underwent a medial meniscectomy of the right knee. Chondromalacia was present.

In Dr. Pasquesi's closing report of September 13, 1976 he found claimant had full range of motion in his right knee and normal lateral stability; although forceful abduction caused pain in the medial collateral ligament. Both of claimant's legs have quadriceps atrophy.

The State Accident Insurance Fund requested a determination on October 4, 1976. Evaluation recommended awarding claimant 22.5 degrees for 15% loss of the right leg and temporary total disability compensation from October 1, 1975 through September 10, 1976, less time worked.

ORDER

Claimant is hereby granted temporary total disability compensation from October 1, 1975 through September 10, 1976, less time worked; and 22.5 degrees for 15% loss of the right leg.

WCB CASE NO. 75-5392 OCTOBER 22, 1976

PATRICK KELLY, CLAIMANT
and In the Matter of the Complying Status of
GARY BURNETT, dba Forest Fibers Co.
Sidney Nicholson, Claimant's Atty.
George Woodrich, Employer's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

The State Accident Insurance Fund requests review by the Board of the Referee's order which found Gary Burnett, dba as Forest Fibers Company, a non-complying employer from July 1, 1975 through July 16, 1975, but that from July 17, 1975 through August 18, 1975 the State Accident Insurance Fund was estopped from denying coverage for this period to the employer. The order also held the State Accident Insurance Fund responsible for claimant's industrial injuries suffered on August 5 and August 18, 1975 and directed it to pay claimant's attorney $75 as a reasonable attorney fee.

There is no dispute in this case that claimant sustained the two industrial injuries while working for Forest Fibers Company.

The employer had been insured by the State Accident Insurance Fund for a number of years. On May 15, 1975 the Fund notified the employer that his policy had to be renewed as of July 1, 1975. He was again notified about the renewal on July 15, 1975. On July 1 the Fund still had not heard from the employer. On July 14, 1975 the Fund notified the employer that his policy had been cancelled for failure to renew.

In the meantime the employer had moved his place of business, from the Eugene area to Deadwood, a town on the coast. In the past his bookkeeper had taken care of the payroll premiums. He would notify the employer of the amounts due and the employer would make out a check for the total amount which the bookkeeper would submit to the Fund.

The employer testified that in June, 1975 he tried to get a payroll form from the Fund by telephone calls, but never received anything. On July 14, 1975 the employer figured his own payroll form and submitted it to the Fund, together with a check for his payroll payments for the month of June; he also notified the Fund he had moved to Deadwood.

On July 17, 1975 the Fund acknowledged receipt of the employer's payment for his June, 1975 payroll and informed him he had overpaid $18.61. On the statement of accounts sent to the employer was written: "This statement is for your information only, no payment is necessary. This credit may be used on future reports." This was sent even though the Fund had previously cancelled the employer's coverage.

The employer and his bookkeeper both testified they had never received the Fund's notices of renewal or cancellation.

The Referee found that the Fund had sent out the notice of renewal, as required by law, to the employer and also the notice of cancellation; he also believed the testimony of the employer and his bookkeeper that neither had ever received them.

The Referee's main concern was the statement of accounts sent by the Fund to the employer; he found no justifiable reason for the Fund to keep the employer's $18.61 overpayment after it had cancelled his coverage; also the statement that this was to be a credit towards future premiums was misleading and gave the employer the impression that he was covered at that time.

The Referee found that the Fund was estopped from denying coverage after the date of the statement of accounts, namely, July 17, 1975.

The Referee concluded, based upon all of the evidence, that although the employer was a non-complying employer from July 1, 1975 through July 16, 1975, commencing July 17, 1975 and through August 18, 1975 the Fund was responsible for coverage of claimant's employees.

Because of the conclusion, stated in the preceding paragraph the Referee found that claimant's two industrial injuries were the responsibility of the Fund. Furthermore, because of the issue of non-complying status of this case claimant was forced to seek legal counsel and, therefore, claimant's attorney was awarded $75 as a reasonable attorney fee to be paid by the Fund.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 18, 1976, is affirmed.

SAIF CLAIM NO. C 26000 OCTOBER 22, 1976

GLEN W. PAYNTER, CLAIMANT
Keith Skelton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Supplemental Own Motion Order
Awarding Attorney Fees

On October 6, 1976 the Board issued its Own Motion Order pursuant to ORS 656.278 and remanded the claimant's claim to the State Accident Insurance Fund to be accepted and for the payment of compensation as provided by law, commencing July 15, 1976 and until the claim is closed pursuant to ORS 656.278. The order failed to include an award of a reasonable attorney fee.

ORDER

Claimant's attorney shall be awarded a sum equal to 25% of any compensation which claimant shall receive as a result of the Own Motion Order of October 6, 1976 payable out of said compensation as paid, not to exceed $2,300.

CLAIM NO. B53-131107 OCTOBER 22, 1976

IDA WALKER, CLAIMANT
Own Motion Determination

Claimant injured her back on August 6, 1969. A Determination Order of November 10, 1970 granted her an award for 10% unscheduled disability. On August 3, 1972 a Second Determination Order granted her an additional award for 5% unscheduled low back disability.

Subsequently, the carrier voluntarily reopened claimant's claim for further medical treatment recommended by Dr. Berselli, which included hospital bed rest and traction. Claimant's aggravation rights have expired. On May 24, 1976 Dr. Berselli released claimant to return to work.

The carrier requested, on August 9, 1976, a closing evaluation, however, claimant could not be located.

Evaluation recommended claimant be granted compensation for temporary total disability from March 22, 1976 through May 23, 1976; due to claimant's unavailability for a closing examination claimant's present permanent partial disability cannot be rated.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 22, 1976 through May 23, 1976.

WCB CASE NO. 75-4361 OCTOBER 22, 1976

KATHERINE E. MCRAY, CLAIMANT
C.S. Emmons, Claimant's Atty.
Charles Holloway III, Defense Atty.
Order

On October 11, 1976 the Board received from Hartford Accident Indemnity Company a motion to dismiss Hartford as a party to the request for review made in the above entitled matter by Industrial Indemnity.

The facts relating to the initial request by Industrial Indemnity that the Board join Hartford as a party to the above proceedings at the hearing level are fully set forth in the Own Motion Order entered July 15, 1976 which denied the request.

The request for review by Industrial Indemnity on June 30, 1976 was acknowledged and Industrial Indemnity and claimant were advised of the schedule for filing of briefs and the briefs now have been received from both parties. At no time did the Board consider Hartford as a party to the proceedings on review. However, the appellant's brief refers to Hartford, therefore, for the purpose of clarification, the Board again will, by granting the motion made by Hartford, dismiss Hartford Accident Indemnity Company as a party to the proceedings before the Board at this time.

It is so ordered.

WCB CASE NO. 75-4853 OCTOBER 22, 1976

JENNINGS VOGUE, CLAIMANT
Sidney Galton, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which remanded claimant's claim to the employer to reopen for further medical care and treatment and for additional temporary total disability compensation, commencing January 9, 1976 until closure is authorized. Also claimant was referred to the Disability Prevention Division for a determination of his employability. The Referee awarded an attorney fee to claimant's counsel equal to 25% of the temporary total disability compensation and 25% of any future award of permanent partial disability.

Claimant contends that the Referee should have rated his extent of permanent partial disability and awarded compensation for permanent total disability, or if the reopening of the claim was correct, that the attorney fees should be payable by the employer and penalties assessed for its unreasonable resistance and delay in reopening claimant's claim.

Claimant has been a truck or bus driver for thirty years. He has had several injuries to his low back while working for this employer, and has an arthritic spine and degenerative disc disease. On January 13, 1975 claimant suffered an industrial injury to his low back diagnosed as acute lumbosacral strain with degenerative disc disease. Claimant's treating physician was Dr. Post.

On October 18, 1975 Dr. Post found claimant medically stationary; he felt claimant could not return to his regular occupation but might be employable in sedentary light employment.

On November 10, 1975 a Determination Order awarded claimant 115.2 degrees for 60% unscheduled disability; corrected on November 19, 1975 to 192 degrees for 60% unscheduled disability.

A chart note of Dr. Post's, dated January 6, 1976, indicated claimant had lifted something while at the beach and had suffered recurrent pain and spasm. The employer's carrier wrote to Dr. Post inquiring if the lifting episode at the beach was an intervening accident. Dr. Post's reply of February 13, 1976 was received by the carrier on February 23, 1976. He stated that the lifting episode caused exacerbation of claimant's condition. Dr. Post went on to say: "I also feel that the fact that such a minimal stress could precipitate such major symptoms is an index of how significant Mr. Vogue's underlying back problem is and how strong his predisposition is to re-injury with minor stress."

The employer contends that it was Dr. Post's letter of February 13, 1975 that alerted it of claimant's need for reopening which, at the hearing, it agreed to do.

The claimant contends that the chart note of Dr. Post, dated January 9, 1976, gave the employer adequate notice of a request for reopening.

The Referee found claimant lacked motivation to return to work, however, claimant has constant pain exacerbated by daily activities. Claimant is so disabled he couldn't obtain employment within his capabilities, based on his age, education and experience without assistance.

Claimant had been referred at the Disability Prevention Division to a service coordinator for job placement. The Disability Prevention Division concluded it was not feasible to put claimant in a vocational rehabilitation program. The service coordinator ceased aiding claimant because claimant stated he had retired on his doctor's advice.

The Referee concluded that the defendant's failure to reopen claimant's claim based on the chart note of January 9, 1976 was not unreasonable but the claim should be reopened as of that date. Furthermore, he concluded that without assistance, both medically and vocationally, towards employment, claimant is perilously close to "odd-lot" permanent total disability.

The Referee found Dr. Post is still treating claimant conservatively with prospects of future improvement and he was not medically stationary. He remanded claimant's claim to the employer for reopening as of January 9, 1976 for further medical care and treatment, temporary total disability compensation and vocational rehabilitation services from the Board's Disability Prevention Division.

He concluded that claimant's counsel's attorney fee must come out of claimant's increased compensation. The employer had not rejected claimant's request for reopening, therefore, neither penalties nor attorney fees are justified. The situation is not the same as in Cavins v SAIF, 75 Or Adv Sh 1963.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated March 9, 1976, is affirmed.

WCB CASE NO. 76-1826 OCTOBER 26, 1976

ERNEST ALLEY, CLAIMANT
Rick McCormick, Claimant's Atty.
Lyle Velure, Defense Atty.
Amended Own Motion Order

On October 5, 1976 the Board entered its own motion order in the above entitled matter.

On October 12, 1976 the employer, by and through its attorney, filed a motion asking the Board to reconsider its Own Motion Order of October 5, 1976 on each of the following grounds:

> (1) The Board failed to consider the responsibility of employer, McQueary Company, who should be the responsible employer on this matter since the claimant had healed prior to his injury with that employer.
>
> (2) The Board is without authority to award attorney fees except when from compensation on own motion rulings.

WCB CASE NO. 75-3872 OCTOBER 26, 1976

HARLEY SHORT, CLAIMANT
Evohl Malagon, Claimant's Atty.
Richard Butler, Defense Atty.
Own Motion Order

On January 20, 1976 the claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on January 11, 1968.

On December 24, 1975 the claimant requested a hearing on a denial by the State Accident Insurance Fund, dated December 19, 1975, of an industrial injury alleged to have been suffered on February 27, 1975 while claimant was in the employ of Lane County. Claimant's employer in 1968 had been furnished workmen's compensation coverage by Aetna Casualty & Surety Company.

The Board did not have sufficient evidence to determine whether claimant had suffered a new injury in 1975, the responsibility of the Fund, or had suffered an aggravation of his 1968 injury, the responsibility of Aetna Casualty & Surety Company; therefore, it referred the matter to the Hearings Division on January 30, 1976 with instructions to hold a hearing, take evidence on this issue and thereafter to submit to the Board an abstract of the proceedings together with the Referee's recommendation.

On June 22, a hearing was held before Referee Gayle Gemmell and the Board has now been furnished an abstract of the proceedings and the advisory opinion of the Referee. After reviewing the abstract of the proceedings and studying the advisory opinion, the Board concludes that the Referee's advisory opinion, a copy of which is attached hereto and, by this reference, made a part of this order, should be accepted.

ORDER

Claimant's claim for his industrial injury suffered on January 11, 1968 is remanded to the employer, Unisphere Inc., and its carrier, Aetna Casualty & Surety Company, to be accepted for the payment of compensation, as provided by law, commencing March 12, 1976 and until the claim is closed pursuant to ORS 656.278, less time worked.

Claimant's counsel is awarded as a reasonable attorney fee a sum equal to 25% of any compensation which claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed the sum of $2,000.

The claimant has no right to a hearing, review or appeal on this award made by the Board on its own motion.

The Aetna Casualty & Surety Company may request a hearing on this order.

This order is final unless within 30 days from the date hereof the Aetna Casualty & Surety Company appeals this order by requesting a hearing.

(no number available) OCTOBER 26, 1976

BONNIE BROOKS, CLAIMANT
Michael Walsh, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On July 15, 1976 the claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury suffered on April 15, 1953 while working for the Pendleton Woolen Mills. The employer's workmen's compensation coverage at that time was furnished by the State Industrial Accident Commission whose successor is the State Accident Insurance Fund. Claimant's aggravation rights have expired.

On July 20, 1976 claimant's counsel was advised that it would be necessary to furnish current medical reports establishing that claimant's condition has worsened since the last closure and that the worsened condition is attributable to the original industrial injury. Counsel was also advised that copies of the application and supporting medical reports must be furnished to the State Accident Insurance Fund which would be given 20 days thereafter to inform the Board of its position.

On September 22, 1976 the Board received from claimant's counsel medical reports from Drs. Broth, Shiomi and Harding. Copies of these reports have been furnished to the Fund.

As of the date of this order no response has been received from the Fund and the Board assumes, therefore, that it has no objections to the reopening of the claim, based upon the medical reports of Drs. Broth, Shiomi and Harding.

ORDER

Claimant's claim for her April 15, 1953 injury is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date of this order and until the claim is closed pursuant to ORS 656.278.

Claimant's counsel is awarded as a reasonable attorney fee a sum equal to 25% of any compensation which claimant may receive as a result of this order, payable out of said compensation as paid, not to exceed $2,000.

WCB CASE NO. 76-146 OCTOBER 26, 1976

WANDA YOUNG, CLAIMANT
Brian Welch, Claimant's Atty.
William Holmes, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

On September 30, 1976 the Board entered its Order on Review in the above entitled matter. The second sentence of the next to the last paragraph on page 3 of the said order states, in part, that no brief was received from claimant and, therefore, claimant's counsel is not entitled to an attorney fee for his services at Board review.

Claimant's request for Board review of the Referee's Opinion and Order entered in the above entitled matter on July 30, 1976 is dismissed.

STIPULATION AND ORDER

The parties stipulate and agree as follows:

1. On or about May 17, 1970 claimant sustained a compensable injury arising out of and in the course of her employment by Payless Drug Store. Benefits were paid by State Accident Insurance Fund and the claim was closed by a First Determination Order entered and mailed December 27, 1971 in which claimant was awarded 16 degrees for unscheduled cervical disability. The claim was later reopened for medical treatment and payment of temporary total disability and was again closed by a Second Determination Order entered and mailed December 12, 1973 in which claimant was awarded an additional 16 degrees for unscheduled neck disability. Claimant filed a timely request for hearing on the Second Determination Order.

2. On July 23, 1976 a hearing was held and on July 30, 1976 Referee Page Pferdner issued an Opinion and Order awarding to claimant 96 degrees for unscheduled cervical and occipital disability resulting from the injury of May 17, 1970, an increase of 64 degrees over that previously awarded by the two determination orders. Claimant filed a timely request for review of the opinion and order and the matter is now before the Workmen's Compensation Board for review. In the opinion and order the referee made specific findings that claimant's rheumatoid arthritis has not been caused by nor aggravated by her compensable injury and her psychological/psychiatric dysfunction was not caused by nor materially aggravated by her compensable injury.

3. The parties agree that all issues which have been or could be raised by claimant in the review by the Workmen's Compensation Board may be settled and compromised by entry of an order awarding claimant 128 degrees for unscheduled cervical and occipital disability, an increase of 32 degrees over the permanent disability previously awarded to claimant in this claim, the award to be in lieu of all previous awards.

4. Claimant's attorneys, Malagon, Starr & Vinson, shall be entitled to a reasonable attorney fee equal to 25% of the additional permanent disability payable under this stipulation and order, the fee to be paid out of the additional award and not to exceed the allowable maximum.

WCB CASE NO. 76-2852 OCTOBER 26, 1976
WCB CASE NO. 76-2853

MARY E. HARTMAN, CLAIMANT
Sidney Galton, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Order

On October 7, 1976 the Board received from Underwriters Adjusting Company a motion for an expedited review of the above entitled matter.

A request for review will be expedited only if it is necessary to avoid a hardship case against the involved workman. The Board, after due consideration, concludes that such is not the situation in this case, therefore, the motion should be denied.

It is so ordered.

WCB CASE NO. 75-4628 OCTOBER 26, 1976

PATRICIA DIMMICK, CLAIMANT
Stephen Brown, Claimant's Atty.
Daryll Klein, Defense Atty.
Supplemental Order Awarding Attorney Fees

The Board's Order on Review issued October 8, 1976 in the above entitled matter failed to include an award of a reasonable attorney fee.

ORDER

It is hereby ordered that claimant's counsel receive a reasonable attorney fee in the amount of $300, payable by the employer, for services in connection with Board review.

WCB CASE NO. 75-4153 OCTOBER 26, 1976

JAMES MAULDIN, CLAIMANT
Jack Ofelt, Jr., Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On October 13, 1976 an Order of Dismissal was entered in the above entitled matter, based upon the State Accident Insurance Fund's withdrawal of its request for review.

The Board is now informed that the claimant has entered a vocational retraining program and has been receiving compensation for temporary total disability since March, 1976. These facts were unknown to the attorneys and the Referee at the time the Referee's Opinion and Order was entered on May 25, 1976. Furthermore, the Fund has been authorized to cancel the additional permanent disability award which was granted by the Referee's Opinion and Order. This was the basis for the Fund's withdrawal of its request for review, however, such facts were not known to the Board until this date.

The Board concludes that claimant's entry into a vocational retraining program has the effect of setting aside as premature the Opinion and Order entered on May 25, 1976. Therefore, the Order of Dismissal, dated October 13, 1976 should be set aside.

It is so ordered.

SAIF CLAIM NO. NC 47563 OCTOBER 26, 1976

JEFFREY DAVIS, CLAIMANT
Own Motion Determination

The Board issued an Own Motion Order on February 26, 1976 granting claimant compensation for temporary total disability only.

Claimant was not satisfied with the award but he had no appeal rights. The carrier, on its own volition, had the claimant re-examined by Dr. Larson and, based upon his report of April 28, 1976, the carrier requests a new determination by the Board.

Dr. Larson found claimant has increased degenerative changes since the original

WCB CASE NO. 75-4836 OCTOBER 27, 1976

STEVE BURTIS, CLAIMANT
William Schumaker, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

The State Accident Insurance Fund requests Board review of the Referee's order which granted claimant 64 degrees for 20% unscheduled disability. The Fund contends the Determination Order of July 14, 1975 should be affirmed.

Claimant, a truck driver, suffered a compensable low back injury on August 14, 1974; attempting to lift a 300 pound pallet jack, he strained his low back.

Claimant was treated conservatively and Dr. Church diagnosed lumbosacral myofascial strain. Claimant tried to return to work several times but each time his symptoms progressed. Dr. Church recommended vocational rehabilitation for evaluation and stated claimant should see his family physician for a program of weight reduction.

Dr. Mason, at the Disability Prevention Division, examined claimant on April 11, 1975 and diagnosed lumbosacral strain, mild at most; definite emotional overlay exaggeration. He recommended a job change for claimant.

A psychological evaluation of April 15, 1975 indicated claimant's injury had produced some psychopathology, however, with satisfactory rehabilitation no continuation of this was expected. Prognosis for restoration and rehabilitation was good.

A Determination Order of July 14, 1975 granted claimant 16 degrees for 5% unscheduled low back disability.

On September 9, 1975 claimant reinjured his back while picking up a lawn mower.

On January 15, 1976 claimant opened his own business, doing auto tuneup work; this job enables him to set his own pace. However, this endeavor has not proven to be as profitable as claimant had hoped and he is on the verge of quitting and looking for a job or seeking vocational counseling.

The Referee found, based on the reports of Dr. Church and Dr. Mason, that claimant's disability is minimal or, at most, mild. Claimant has an 11th grade education and has an average intelligence. He is somewhat obese.

The Referee concluded that claimant was still in the process of readjustment to the consequences of his injury and that he lost more wage earning capacity than the award of 5% granted by the Determination Order indicated. To adequately compensate claimant for his loss of wage earning capacity he granted him an additional 48 degrees a total of 64 degrees equal to 20% unscheduled disability.

The Board, on de novo review, affirms the Referee's order.

ORDER

The order of the Referee, dated June 8, 1976, is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with Board review the sum of $300 payable by the State Accident Insurance Fund.

WCB CASE NO. 75-4387 OCTOBER 27, 1976

GREGORY CHRISTIAN, CLAIMANT
Hugh Cole, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award for permanent total disability.

Claimant suffered a knee injury on October 4, 1972, his claim was denied. After a hearing, a Referee, on September 10, 1974, remanded the claim to the Fund for acceptance and payment of benefits for the right knee and generalized rheumatoid arthritis conditions.

A Determination Order of June 13, 1974 granted claimant 30 degrees for 20% loss of the left leg.

In October, 1974 Dr. Anderson stated claimant would be unable to return to his former occupation as a logger.

A Second Determination Order entered October 15, 1975 granted claimant an additional 48 degrees for 15% generalized rheumatoid arthritis involving multiple joints.

In April, 1975 Dr. Stoner examined claimant and stated there was no curative treatment for claimant's problem, the ultimate prognosis was totally unpredictable and this condition would be disabling. Claimant has times of exacerbation of this condition and times of remissions.

The Referee found that claimant now complains of swelling in all joints, especially the larger ones. He has minimal use of the right hand and experiences pain in his wrist when signing his name or gripping a steering wheel. He has trouble walking and putting on his shoes.

Claimant has passed the entrance examinations at River City College and has the intellectual capacity for college level study.

The Referee concluded that claimant is unable to be employed gainfully and regularly because of his present physical disability and he granted claimant an award of permanent total disability effective September 27, 1975, allowing the Fund to offset any previous payments for permanent partial disability made since that date.

The Board, on de novo review, concurs with the findings and conclusions of the Referee.

ORDER

The order of the Referee, dated June 2, 1976, is affirmed.

Claimant's counsel is granted as a reasonable attorney fee for his services in connection with Board review, the sum of $350 payable by the State Accident Insurance Fund.

WCB CASE NO. 75-4068 OCTOBER 27, 1976

ROBERT ROBINSON, CLAIMANT
Fred Allen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Claimant requests Board review of the Referee's order which affirmed the State Accident Insurance Fund's denial of claimant's claim for a bronchopulmonary disease.

Claimant is a 63 year old rock quarry worker who first experienced abnormal breathing in 1969. Claimant was a heavy cigarette smoker, smoking 4 or 5 packs a day until 1964 when he quit. He now smokes a pipe.

Claimant, in March, 1975, saw Dr. Wilson, an allergist, who diagnosed chronic obstructive pulmonary disease, chronic bronchitis. Dr. Wilson indicated claimant's work was not the cause of his pulmonary disease. On June 6, 1975 Dr. Wilson stated claimant's pulmonary disease was due to his long standing heavy cigarette smoking but was aggravated by heavy dust. In July, 1975 Dr. Wilson indicated that claimant's bronchopulmonary disease which he had had for many years could be increased if he were placed in an environment of air pollutants.

Dr. Mayo, a general practitioner, in December, 1975 felt that because claimant's examination in 1971 had indicated no bronchitis or coughing, the dust at the quarry had contributed to his present condition.

The Referee found claimant had failed by medical proof to prove he had a compensable condition, except on a temporary basis. Dr. Wilson felt claimant's job was not a material contributing factor; Dr. Mayo felt it was. Dr. Wilson had found that the aggravating effects of the dust exposure had disappeared.

The Referee concluded that the most weight should be given to the medical opinion of Dr. Wilson, a specialist, which was basically corroborated by the opinion of Dr. Hanson, also a pulmonary expert. He affirmed the denial.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated April 7, 1976, is affirmed.

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Claimant was referred to Dr. Nash who examined claimant on October 20, 1970 and found lumbosacral instability, possible ruptured intervertebral disc L5-S1, spondylolysis L5-S1. He recommended conservative treatment. On November 17, 1970 a myelogram was performed which proved normal.

A psychological evaluation of January 22, 1971 by Dr. Hickman indicated claimant's psychopathology was moderately severe and moderately attributable to the injury. Prognosis for successful rehabilitation was only fair.

On March 24, 1971 the Back Evaluation Clinic recommended claimant should not return to his former occupation.

On December 3, 1971 Dr. Schuler examined claimant and found claimant needed motivation to return to work. Dr. Schuler felt in time claimant could return to his former occupation. He rated claimant's permanent disability at that time as mild as far as loss of motion in the back was concerned.

On April 18, 1972 Dr. Nash and Dr. Eilers performed a lumbar laminectomy and spinal fusion. On March 22, 1973 Dr. Eilers performed an excision of a neuroma. On June 7, 1973 Dr. Eilers again explored the area of the spinal fusion. On February 6, 1974 Dr. Eilers performed another lumbar laminectomy.

On November 18, 1974 Dr. Eilers examined claimant and found his condition medically stationary. On March 10, 1975 Dr. Eilers said claimant should get back to doing something on a 2 to 3 hour a day basis which involved no great amount of bending or squatting.

On April 21, 1975 Dr. Seres, after examining claimant, stated he had no significant goals for rehabilitation. Claimant didn't feel he was employable; his major goal at that time was maintaining financial security.

After an examination of claimant on July 8, 1975 Dr. Eiler's opinion was that claimant's workmen's compensation benefits exceeded his prior earnings and for this reason claimant lacked incentive to return to work. He found some mild restriction in claimant's back motion, but felt claimant could return to gainful employment.

A Determination Order of August 11, 1975 granted claimant an award of 128 degrees for 40% unscheduled low back disability.

The Referee found that Drs. Seres, Newman and Russakov agreed claimant had, beyond a doubt, physical disability and pain. They also concurred that claimant's motivation factors rather than physical disability was his major problem. Claimant also lacked involvement when at the Pain Center.

The Referee found that Dr. Eiler, claimant's principal treating physician, had found only mild restriction of motion in claimant's back. A film was presented at the hearing which showed claimant in a variety of situations in active movement without any indication or visual sign of pain or distress. The Referee found claimant not a credible witness and his complaints of limitations were inconsistent with the film showing claimant effortlessly engaging in movement claimant testified he could not do without great distress.

The Referee concluded that claimant had failed to sustain his burden of proof, and therefore, he affirmed the Determination Order of August 11, 1975.

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ORDER

The order of the Referee, dated June 23, 1976, is affirmed.

WCB CASE NO. 75-56 OCTOBER 29, 1976

DAVID CHOSE, CLAIMANT
S. David Eves, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of permanent total disability.

On March 21, 1973 claimant suffered multiple injuries to his right foot, leg, left thumb, jaw, right hand and head when he fell 28 feet from a platform. Claimant was hospitalized and underwent surgery for closed reduction of mid-tarsal fracture dislocation and the fractured medial melleolus. On August 14, 1973 claimant returned to limited employment.

On November 9, 1973 Dr. Brooke examined claimant and found he was having emotional problems; claimant is afraid to go back to work and has a fear of heights. He has developed an explosive temper. Dr. Brooke felt claimant should see a psychiatrist.

On December 5, 1973 Dr. Brooksby, a psychiatrist, examined claimant and found mixed chronic brain syndrome, due to brain trauma and anxiety reaction, moderately severe.

After another examination on April 9, 1974, Dr. Brooksby stated that if claimant cannot resume electrician work he may be totally disabled.

Claimant was seen on July 10, 1974 at the Disability Prevention Division by Dr. Van Osdel who found minimal memory deficit and obvious gross functional overlay. Dr. Hickman found claimant's psychological problems were primarily attributable to his accident and that claimant may suffer permanent impairment of intellectual function as a result of his accident. He felt claimant had a need for rehabilitation but that it would be difficult to get claimant through a training program because of his persistent symptoms.

A Determination Order of December 17, 1974 granted claimant 144 degrees for 45% unscheduled head and back disability; 33.75 degrees for 25% loss of the right foot; and 20.25 degrees for 15% loss of the left foot.

On July 29, 1975 Dr. Knox, a neurologist, stated that because of claimant's continuing problems, he is currently unemployable and if he "does prove to have subtle organic changes in terms of cerebral function, then this will drastically reduce his ability to perform in any significant capacity in terms of being a useful employee."

On November 14, 1975 Dr. Ackerman, a clinical psychologist, found, based upon claimant's emotional and mental status, that he would not be capable of working. He also expressed the possibility that claimant's incurred brain damage was sufficient to result in chronic post-traumatic organic state of excessive libility, poor concentration and memory. "In many ways he may function like a post-lobotimized person for the rest of his life."

The Referee found claimant had had no physical limitations or emotional problems prior to his industrial injury. The weight of the medical evidence established that claimant's physical impairment is substantial and the weight of the psychological and emotional evidence established a substantial psychopathology which results in emotional instability and disorientation in claimant's daily life. Based upon this evidence the Referee found that claimant has proven he falls within the prima facie "odd-lot" category.

The Referee found that, claimant having proven he was prima facie "odd-lot", the burden is upon the Fund to show suitable and gainful employment which claimant would be physically and mentally capable of performing; it did not do this. Therefore, the Referee concluded that claimant was entitled to an award of permanent total disability as of the date of his order.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated February 3, 1976, is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with Board review, the sum of $400, payable by the State Accident Insurance Fund.

WCB CASE NO. 75-4823 OCTOBER 29, 1976

RALPH GUERRA, CLAIMANT
Richard Klosterman, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Request for Review by the Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks Board review of the Referee's order which found claimant to be permanently and totally disabled as of the date of his order (April 19, 1976).

Claimant, who is now 53 years old, suffered a compensable injury to his low back on Friday, May 31, 1974 while lifting a piano. He finished the shift and the following Monday was seen by Dr. Rutz; thereafter, he returned to work on a limited basis for approximately three weeks when he again injured his low back while loading a box car. Claimant underwent a long course of conservative treatment, his principal physician being Dr. Gambee. However, he was also examined by Dr. Marxer, an orthopedist and Dr. Van Osdel at the Disability Prevention Division.

Following the second injury, claimant's only attempt to work was as a dispatcher and he found he was unable to do this because of his back. Claimant had been adjudged not to be a suitable candidate for vocational rehabilitation. He has an eleventh grade education, served in the Marine Corp for nearly a year and since his discharge worked exclusively as a truck driver and furniture mover for transfer companies in the Portland area

At the present time claimant is receiving disability benefits from the Teamsters Union which amount to $216 a month and from social security in the amount of $220 a month, these sums are in addition to his present workmen's compensation benefits received as a result of the Determination Order mailed October 3, 1975 which awarded claimant 160 degrees for 50% unscheduled low back disability.

Claimant contends that he is permanently and totally disabled. He states he is precluded from accepting employment outside of the Teamster's Union because if he does he loses his Teamster's Union benefits which are based on 35 years of membership in the Union and his contributions to its retirement fund.

Claimant's only other health problem has been a heart condition dating back approximately five years and which apparently has not given him any problems recently. Dr. Gambee was of the opinion that back surgery was not advisable.

The Referee found that with the exception of Dr. Marxer, who was of the opinion that claimant could return to his former job, all the doctors who have treated and/or examined claimant were in accord with the finding that claimant would not be able to return to the type of work which he had done for the past 35 years.

The Referee found that the vocational coordinator had stated in his report that claimant was twice rejected for retraining and for working towards his GED but he concluded that there was no indication of a refusal to cooperate in vocational retraining efforts.

The Referee found that the basic question was whether or not claimant had sufficient motivation to return to work. He found, based upon his observation of claimant and the fact that claimant had a long steady work record and his determination to work following his first injury, that claimant was well motivated, despite the fact that claimant had accepted retirement as indicated by the benefits he is presently receiving from the Teamster's Union and under social security. He concluded that even in the absence of the disability pensions claimant was receiving, his efforts at re-employment would be futile and that motivation alone could not surmount the barrier of a lifetime employment at heavy labor and a limited educational background.

The Referee concluded that claimant has sustained his burden of proving that he is permanently and totally disabled.

The majority of the Board disagree with the conclusion reached by the Referee. The Board finds that the medical evidence supports an award of 160 degrees which is 50% of the maximum allowed by statute for unscheduled disability; that such an award would adequately compensate claimant for his loss of wage earning capacity.

The Board feels that the claimant chose to voluntarily retire from the labor market so that he could continue to receive his benefits from the Teamster's Union and under social security. Therefore, he is not entitled to benefits as a permanently and totally disabled workman under the Workmen's Compensation Law. The medical evidence, by itself, is not sufficient to establish that claimant is permanently and totally disabled. Dr. Van Osdel felt claimant probably would not be able to return to moving heavy furniture and he recommended a job change which involved no lifting over 50 pounds and no repetitive bending, stooping, or twisting. He made this recommendation not because claimant could not return to his former job but because he should not do so in order to avoid future back problems.

The Referee states in his order that claimant was twice rejected for retraining and for working towards the GED, however, the claimant's service coordinator in his report of March 31, 1975 states that his opening interview with claimant was also the closing interview as the claimant had twice rejected retraining and the pursuance of his GED. It would appear that rather than having been rejected for retraining, claimant himself has rejected any offer of a retraining program which might return him to the labor market.

The majority of the Board further finds that claimant has not made a prima facie case *that he falls within the "odd-lot" category inasmuch* as he has failed to show sufficient motivation. Claimant testified that he had not sought work outside the Teamster's Union; he attempted to justify this by saying he was precluded from such employment by the loss of his Teamster Union benefits. Again the majority of the Board finds that this is a choice which claimant must make. Dr. Munsey, after a psychological evaluation of claimant at the Disability Prevention Division, stated that the probability of claimant returning to full time gainful employment was in a large part contingent upon the status of his Teamster Retirement benefits and medical insurance coverage if he changes occupations. Dr. Specht was of the same opinion as of Dr. Van Osdel with respect to the necessity of claimant avoiding heavy lifting and repetitive bending or prolonged sitting; however, Dr. Specht, who is a rehabilitation expert, concluded that claimant was a suitable candidate for vocational rehabilitation.

The majority of the Board concludes that claimant has failed to prove prima facie that he falls within the odd-lot category, therefore, the burden remains with claimant to prove that there is no suitable and gainful employment presently available to him on a regular basis. He has failed to do so.

The majority of the Board concludes that claimant was adequately compensated by the award made by the Determination Order mailed October 3, 1975 and such Determination Order should be affirmed.

ORDER

The order of the Referee, dated April 19, 1976, is reversed.

The Determination Order mailed October 3, 1975 is affirmed and the employer may make such adjustments as may be necessary with respect to payments of compensation for permanent total disability previously paid claimant as a result of the Referee's order.

CLAIM NO. 541-CR 31683 OCTOBER 29, 1976

HELEN F. KELSO, CLAIMANT
C.S. Emmons, Claimant's Atty.
Own Motion Order

On October 14, 1976 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for an injury sustained on October 10, 1968 while working for Wah Chang Corporation whose workmen's compensation carrier was Insurance Company of North America. Claimant's claim had been closed and her aggravation rights have expired.

Claimant's request was supported by a letter from Dr. Spady, an orthopedic surgeon, dated September 24, 1976, which stated that subsequent to the performance of back surgery by Dr. Anderson in the latter part of 1960, claimant had made a good recovery and was able to return to work. However, following her return to work claimant had had gradual difficulties in her symptoms without any intervening traumatic episode, she has continued to have severe back pain and has been unable to return to work. Dr. Spady advised her not to return to work and placed her on conservative treatment with pain medication and rest. He intends to refer her to the Pain Clinic but is not certain whether claimant will ever be able to return to work.

The carrier, on February 11, 1976, advised the claimant that they had received Dr. Spady's report and also had been informed by the employer, Wah Chang, that claimant was losing time from work as of January 19, 1976. The carrier at that time denied the payment of compensation for temporary total disability inasmuch as the claimant's aggravation rights had expired.

Claimant had been off work continuously since January 19, 1976 and she has been advised by the employer that her absentee percentage is more than that allowable and if it continued she will be subject to dismissal.

The carrier was advised of claimant's request and given 20 days within which to notify the Board of its position. On October 20, 1976 the Board received a letter from the carrier acknowledging notification of claimant's request and also furnishing the Board a copy of its files, dating from February 20, 1976.

The Board, after due consideration to the report of Dr. Spady and the files furnished by the carrier, concludes that claimant's request made to the Board to reopen her October 10, 1968 claim should be granted.

ORDER

Claimant's claim for an industrial injury suffered on October 10, 1968, is hereby remanded to the employer, Wah Chang Corporation, and its carrier, Insurance Company of North America, to be accepted and for the payment of compensation, as provided by law, commencing January 19, 1976 and until the claim is closed, pursuant to ORS 656.278.

Claimant's counsel is granted as a reasonable attorney fee an amount equal to 25% of any compensation which claimant may receive as a result of this order, payable as paid, not to exceed the sum of $2,000.

WCB CASE NO. 73-3385 OCTOBER 29, 1976

ORVILLE LEE MIDDLETON, CLAIMANT
David Glenn, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

Claimant has requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on October 3, 1967. The claim was initially closed by a Determination Order mailed October 21, 1970 and, therefore, claimant's aggravation rights have expired. At the time of the injury claimant was employed by Spada Distributing Company, Inc., whose workmen's compensation coverage was furnished by the State Accident Insurance Fund.

On September 30, 1976 claimant's attorney wrote to both the employer and the Fund advising them that claimant's condition had become worse as a result of the 1967 injury and he was, by this letter, filing a claim for aggravation of claimant's injury which consists of trouble with claimant's hip. In support of this claim was a report from Dr. Matheson dated September 28, 1976 which stated that claimant has been having trouble with his left hip due to a previous surgery on his left knee.

On October 13, 1976 the Board advised the Fund that it had received claimant's claim for aggravation and that said claim was untimely but that the Board would consider the matter under its own motion jurisdiction; a copy of claimant's letter and of Dr. Matheson's report were forwarded to the Fund which was requested to advise the Board of its position within 20 days.

On October 21, 1976 the Fund responded, stating that claimant had suffered an injury to his left knee on October 3, 1967 which had required extensive treatment including many surgeries, the last a knee fusion which was performed on April 4, 1973. Claimant has been granted disability awards totaling 85% of the maximum allowable by statute for loss of a leg. After a hearing the Referee entered an order on April 23, 1974, stating that the loss of the function of the left leg was 85%. This opinion was affirmed by an Order on Review, dated October 8, 1974. There are no medical problems in the file other than those relating to the left leg.

Dr. Matheson's report of September 28, 1976 merely states claimant has been having trouble with his left hip due to surgery on his left knee; however, he does not recommend any treatment. The Fund found no justification for reopening the claim.

The Board, after due consideration of the matter, concludes that there is not sufficient evidence presented to it at the present time to justify reopening claimant's claim for the October 3, 1967 injury and, therefore, the request should be denied.

It is so ordered.

WCB CASE NO. 75-4443 OCTOBER 29, 1976

STANLEY ROBSON, CLAIMANT
Jerry Kleen, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

The employer requests review by the Board of the Referee's order which remanded claimant's claim for a left knee condition to it as a compensable claim.

Claimant, a logger and high climber, sustained a compensable injury to his mid and low back on November 9, 1974, diagnosed as a lumbosacral strain.

On May 31, 1975, during a social event at his home, claimant injured his left leg when he fell while climbing a tree. This injury was diagnosed as a fracture of the plateau of the left tibia with comminution.

Claimant contends that the May 31, 1975 tree climbing injury was a direct result of his prior injury due to the fact that his back gave out causing him to fall and because climbing a tree was part of the therapy prescribed by his doctor.

right knee. The Referee shall separately enter his Opinion and Order with respect to the alleged aggravation of claimant's November 15, 1971 low back injury.

Upon receipt of the transcript of the proceedings and the Referee's recommendation, the Board will enter its Own Motion Order with respect to claimant's 1966 claim.

CLAIM NO. D53-118109 NOVEMBER 2, 1976

ART CHEATHAM, CLAIMANT
Own Motion Determination

Claimant sustained a left eye injury on June 27, 1967. A Determination Order was entered on January 20, 1969 granting claimant an award of 100% loss of vision of the left eye. Claimant's aggravation rights have expired.

A report of November 25, 1975 indicated claimant's sightless eye had become painful and an enucleation was performed on January 27, 1976. Claimant returned to work on February 20, 1976.

On October 6, 1976 the carrier requested a determination. The Evaluation Division recommended claimant be granted temporary total disability compensation from January 26, 1976 through February 19, 1976 but no further award of permanent partial disability.

ORDER

Claimant is hereby granted an award of temporary total disability compensation from January 26, 1976 through February 19, 1976.

WCB CASE NO. 76-1606 NOVEMBER 2, 1976

VICTORIA DAVID, CLAIMANT
Allan Knappenberger, Claimant's Atty.
Merlin Miller, Defense Atty.
Own Motion Proceeding Referred for Hearing

On September 17, 1976 the claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and modify or change the Determination Order entered in the above entitled matter on January 6, 1971 to extend the time in which claimant may request a hearing on a claim for aggravation. The request was supported by the affidavit of claimant's attorney and a medical report from Dr. Logan, dated March 16, 1976.

The injury which claimant bases her claim for aggravation on was suffered on November 11, 1970 and her aggravation rights expired on January 4, 1976.

On October 6, 1976 the employer and its carrier responded to the request, stating that there was no evidence that the first Determination Order was erroneously made and that since the first Determination Order was not contested within one year of its issuance the time for seeking redress with respect thereto has long past. Since there was no issue with respect to the correctness of the original Determination Order there is no basis for the Board to change said determination.

With regard to the request for exercise of the Board's own motion jurisdiction, the employer and its carrier allege that the evidence did not support reopening on account of aggravation; that Dr. Logan's report indicates that if there was any worsening of claimant's condition it was due to her work at Woodland Park Hospital.

On March 31, 1976 (more than five years after the date of the first Determination Order) claimant had requested an aggravation hearing stating the issues to be litigated were (1) the amount of further medical care and treatment to be awarded claimant and (2) the amount of permanent partial disability to be awarded to claimant.

The evidence before the Board at the present time is not sufficient for it to determine the merits of the request made by claimant on September 17, 1976. Therefore, the matter is referred to the Hearings Division with instructions to hold a hearing and take evidence on the merits of claimant's request. Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board with his recommendations.

WCB CASE NO. 75-4843 NOVEMBER 2, 1976

JAMES FERDANI, CLAIMANT
J. David Kryger, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Claimant requests review by the Board of the Referee's order which granted claimant 57.6 degrees for 30% loss of the right arm. Claimant contends he is entitled to a greater scheduled award and that the award he received by the Determination Order mailed November 7, 1975, for his unscheduled disability is not adequate.

Claimant sustained a compensable injury on November 2, 1972 which caused a comminuted fracture of the midshaft of the right humerus and fractured ribs on the right side, plus abrasion burns.

On November 22, 1972 Dr. Ellison performed surgery for closed reduction of the right humerus. Thereafter, Dr. Ellison performed three more surgeries, the last was on April 3, 1974.

On July 30, 1975 Dr. Ellison found claimant medically stationary and stated that claimant was left with significant residuals, principally in terms of cosmetic appearance, atrophy and weakness in the extremity. Dr. Ellison thought these conditions were permanent.

A Determination Order of November 7, 1975 granted claimant 128 degrees for 40% unscheduled right shoulder disability.

The Referee found that the Determination Order did not grant claimant any compensation for disability to the direct injury to his right arm. The evidence clearly established that claimant has suffered physical impairment to the right arm; there is a definite loss of function in that extremity.

The Referee concluded that claimant was entitled to a scheduled award and granted claimant 57.6 degrees for 30% loss of the right arm but that claimant had been adequately compensated for his loss of wage earning capacity by the award of 128 degrees.

The Board, on de novo review, affirms the Referee's order

ORDER

The order of the Referee, dated May 25, 1976, is affirmed.

WCB CASE NO. 76-693 NOVEMBER 2, 1976

ROGER FRANKLIN, CLAIMANT
Jerome Bischoff, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above entitled matter by the State Accident Insurance Fund, and said request for review now having been withdrawn,

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 75-2238 NOVEMBER 2, 1976
WCB CASE NO. 75-5205

STEVEN GRINDEL, CLAIMANT
Richard Kropp, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Orders of May 9, 1975 and December 2, 1975. Claimant contends he is entitled to 40% unscheduled disability for injuries sustained on November 14, 1974 and April 24, 1975.

On November 14, 1974 claimant sustained a compensable injury to his right paravertebral musculature, upper and mid-thoracic region of his spine. Claimant was treated conservatively.

On April 11, 1975 Dr. Ellison found claimant medically stationary and released him from treatment.

On April 24, 1975 claimant sustained another compensable back injury. Thereafter claimant's back hurt much worse. This injury was diagnosed as thoracic back strain. Claimant attempted to seek treatment from Dr. Ellison again, however, Dr. Ellison refused to treat him and he was referred to Dr. Steele.

Dr. Steele examined claimant on May 2, 1975, claimant was complaining of pain in the right paracervical region and generalized weakness in the right upper extremity. Dr. Steele diagnosed a chronic cervical strain with C5-6 injury.

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On May 29, 1975 Dr. Rockey examined claimant and found no change in her condition. He stated claimant has chronic back pain of mixed etiology. He found claimant unable to perform any productive work which requires lifting, bending or prolonged standing.

On August 27, 1975 a Third Determination Order granted claimant additional temporary total disability compensation only. The claimant has a total of 160 degrees for her unscheduled disability.

On February 3, 1976 claimant was examined by Dr. Kernak who opined claimant has been "totally disabled for usual work that she did" and also she is permanently and totally disabled from any work that requires her to sit or stand for longer than a few minutes at a time.

On January 9, 1976 Dr. Rockey stated claimant could do light or sendentary work provided she could rest frequently and if the job could be properly modified so as to avoid lifting or bending.

On January 21, 1976 claimant was examined by the Orthopaedic Consultants who rated claimant's disability as moderately severe at 60-80%. They also advised job placement in the bookkeeping field.

Claimant has not worked since her injury.

The Referee found claimant's serious symptoms continuing, with severe pain upon most activity. She has limited range of motion in her back due to pain. Claimant has her GED and is of average intelligence, she has several years experience as a bookkeeper.

The Referee found claimant motivated to return to work; the fact that she has not sought employment is due to injury residuals of pain. He found claimant to be a credible witness.

The Referee concluded that claimant's condition permanently incapacitates her from regularly performing at any gainful and suitable occupation and granted claimant an award of compensation for permanent total disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated February 26, 1976, is affirmed.

Claimant's counsel is hereby awarded as a reasonable attorney fee for his services in connection with Board review the sum of $400, payable by the employer.

SAIF CLAIM NO. C 24841 NOVEMBER 2, 1976

JAMES STACEY, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Proceeding Referred for Hearing

Claimant suffered a compensable injury on July 10, 1966. At that time the employer's workmen's compensation carrier was the predecessor of the State Accident Insurance Fund, the State Compensation Department. Claimant's claim was closed by a Determination Order mailed April 13, 1967. Claimant's aggravation rights have expired.

At the present time claimant has received as a result of either a Determination Order or stipulation awards equal to 60% of the maximum for unscheduled disability. The last award was made on April 15, 1975.

On September 24, 1976 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim, alleging that his condition had worsened and he was in need of further medical care and treatment. The request was supported by reports from Dr. Cottrell addressed to the Fund and dated May 20, 1976 and also Dr. Cottrell's report to claimant's attorney dated August 25, 1976.

The Fund was advised of the request and furnished a copy thereof together with a copy of each of Dr. Cottrell's reports. The Fund responded on October 7, 1976 stating that it had authorized treatment and home traction apparatus on June 23, 1976 and noted that claimant had already received awards totaling 60% of the maximum. Dr. Cottrell had recommended that vocational rehabilitation be instituted and the Fund suggested that possibly the Board should assign the case to the Disability Prevention Division for further consideration for vocational retraining for claimant but it refused to reopen the claim for time loss payments.

At the present time the Board does not have sufficient medical evidence before it to justify the reopening of claimant's claim. Therefore, the matter is hereby referred to the Hearings Division to hold a hearing and to take evidence on the issue of whether the claimant's present condition has worsened since his last award or arrangement of compensation on April 15, 1975 and that said worsening is a result of his July 10, 1966 industrial injury.

Upon conclusion of the hearing, the Referee shall cause an abstract of the proceedings to be prepared and submitted to the Board together with the Referee's recommendation on said issue.

on May 7, 1974 Dr. Misko and Dr. Eckhardt performed an L5-S1 laminectomy and lumbosacral fusion.

On June 18, 1975 Dr. Newman and Dr. Painter interviewed claimant for a psychological evaluation and found claimant had had retraining as an accountant under the Division of Vocational Rehabilitation and claimant states now he would "rather die" than be an accountant. They found him to be of above average intelligence. They diagnosed depression, moderate to severe, psychophysiological reaction manifested in hysterical conversion tendencies, strong involvement in a "sick role" and rejection of attempts to help him.

On July 23, 1975 Dr. Misko recommended claimant's claim be closed and that claimant was permanently and totally disabled. A Determination Order of September 24, 1975 granted claimant 112 degrees for 35% giving claimant a total of 75% unscheduled disability.

Dr. Misko felt claimant could not return to his former occupation but would be able to be retrained. He also felt claimant's psychological disorder does not interfere with his ability to return to work. Claimant's primary disability is organic. Dr. Mighell was of the opinion claimant's difficulties were psychological in nature.

On December 11, 1975 claimant was examined by Dr. Quan who found the presence of emotional disorder. Dr. Quan diagnosed depressive neurosis, chronic, mild to moderate in the range of 10% to 15% impairment of the whole man. Dr. Quan felt that claimant's psychiatric disorders do not interfere with claimant's ability to return to gainful employment and that his primary disorder was organic.

The Referee found claimant has minor physical impairment and that this minor impairment has been substantially enhanced by claimant's psychological dysfunction. The Referee also found this psychological dysfunction pre-existed claimant's industrial injury. It was his further opinion that claimant is severely disabled and unable to work, however, even though the Referee felt claimant was not permanently and totally disabled as a result of his injury the Referee felt he couldn't find less than permanent total disability and awarded claimant permanent total disability.

The Board, on de novo review, disagrees with the conclusions reached by the Referee. The Board finds that claimant's physical disability, as based upon the medical reports is moderate. The Board gives great weight to the medical evidence of Dr. Quan and Dr. Misko, claimant's treating physician, who both were of the opinion that claimant's problems were organic in nature and felt claimant's psychological problems do not preclude claimant from returning to gainful employment. The Board concludes claimant did not sustain the burden of proving by the preponderance of the evidence that he is permanently and totally disabled. The Board further finds that the total awards granted to claimant of 75% adequately compensates claimant for any loss of his wage earning capacity.

ORDER

The order of the Referee, dated June 30, 1976, is reversed.

The Determination Order of September 24, 1975 is affirmed.

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problems which are exacerbated by severe stress including stress from pain.

On August 25, 1974 claimant was examined by Dr. Beale who precluded claimant from returning to heavy lifting because of her history of two significant episodes of back difficulties, a degenerative disease of her back and scoliosis.

After this industrial injury claimant had been examined by numerous orthopedists, neurologists, psychiatrists and psychologists. At the present time claimant is doing volunteer work at St. Vincent's hospital.

Dr. Kiest examined claimant on November 26, 1975 and found claimant's recurring and continuing problem is emotional instability. Orthopedically, he found her condition stationary. Dr. Kiest felt claimant has continuing subjective evidence of low back pain and he felt most of her symptoms are real. He found minimal low back disability.

On December 30, 1975 a Determination Order granted claimant 16 degrees for 5% unscheduled low back disability.

On May 6, 1976 Dr. Larsen, a psychiatrist, examined claimant and diagnosed chronic intermittent low back pain secondary to back injury and secondary intermittent psychosis exacerbated by low back pain. It was Dr. Larsen's impression that claimant, since 1967 or earlier, suffers from psychotic process which appears to be schizoaffective schizophrenia. In Dr. Larsen's opinion her psychotic illness "has been directly influenced by back pain, causing intermittent psychosis and paranoid thought." Claimant would continue to need psychiatric treatment he stated.

The Referee found claimant is not a malingerer nor is she feigning her symptoms but the latter is amplified by her mental state.

The Referee concluded that claimant's physical and mental conditions are intermittent, and when either or both become exacerbated, appropriate care can be provided without reopening her claim.

The Referee also found that claimant's long-standing psychiatric condition, is and will continue to be, exacerbated by her industrial injury residuals. He concluded that claimant has lost a greater amount of her wage earning capacity than that awarded by the Determination Order and granted claimant an award totaling 80 degrees for 25% unscheduled disability. He also granted her medical care from Dr. Larsen under the provisions of ORS 656.245.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 23, 1976, is affirmed.

WCB CASE NO. 76-1092 NOVEMBER 12, 1976

KENNETH MARTIN, CLAIMANT
Allen Owen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which sustained the employers denial of claimant's claim for aggravation.

Claimant, a 33 year old truck driver, sustained a compensable injury on March 3, 1972 when he fell. He was treated conservatively and returned to regular work in November, 1972. A Determination Order of November 6, 1972 granted claimant no award for permanent partial disability. Claimant filed a request for hearing. A negotiated settlement granted claimant 32 degrees for 10% unscheduled disability.

On November 22, 1974 claimant sought an examination from Dr. Rohrbert with complaints of lumbosacral musculature with right sciatic radiation.

On July 15, 1975 claimant was examined by Dr. Scheinberg whose impression was that claimant "had no physical findings to explain his rather remarkable complaints of pain" and it was the doctor's opinion that claimant has a possible lumbosacral strain with considerable degree of functional overlay.

On July 23, 1975 Dr. Scheinberg reported claimant had aggravated his symptoms playing donkey baseball. He found claimant to be medically stationary and released claimant for regular work on July 28, 1975.

In February, 1976 claimant requested reopening of his claim and on February 24, 1976 the carrier denied reopening on the ground that claimant sustained a new injury on July 22, 1975 playing donkey baseball.

Claimant testified he originally injured himself when a scaffold collapsed and timbers fell striking claimant in the ribs, back and hips. The first doctor's report indicates claimant fell off a ladder and injured his right chest. The subsequent medical report stated he slipped on a board with moss on it and injured his ribs. The event in February, 1976 supposedly was that claimant picked up a tool chest at home.

The Referee found claimant's testimony was so comprised by evasive rationalizations and magnifications as to make the cause of his increased symptomatology unimportant.

The Referee concluded that based upon claimant's lack of symptoms and treatment between September, 1972 and July, 1975, his prevarications concerning the donkey baseball game and that claimant is not a credible witness and that claimant has failed to carry his burden of proof. The Referee affirmed the denial of claimant's claim for aggravation.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 15, 1976, is affirmed.

WCB CASE NO. 76-1381 NOVEMBER 12, 1976

HECTOR N. MCLEOD, CLAIMANT
Allen T. Murphy, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above entitled matter by the Department of Justice, and said request for review now having been withdrawn,

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 75-5333 NOVEMBER 12, 1976

LYLE PINKLEY, CLAIMANT
Dan O'Leary, Claimant's Atty.
Chris Mullmann, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which granted claimant an award of 30 degrees loss of the right foot and an award of 128 degrees for unscheduled disability.

Claimant sustained a compensable low back and right foot injury on April 24, 1972 diagnosed as sacroiliac strain.

Dr. Schuler examined claimant and stated claimant was seen by him initially complaining of being incapacitated with severe pain and beginning to have weakness in both feet and had lost some sphincter control. On February 13, 1974 Dr. Schuler performed a laminectomy and two level fusion at L4-S1.

Dr. Schuler examined claimant on February 4, 1975, and found the claimant had some numbness in his right foot and occasional achiness in his back and found him to be medically stationary.

A Determination Order was entered on March 24, 1975 granting claimant 80 degrees for 25% unscheduled low back disability and 20.25 degrees for 15% loss of the right foot.

Claimant has returned to work for the employer at a lighter job at his former pay rate. Claimant testified he experiences pain and numbness in his right leg after heavy work.

The Referee found that both claimant's testimony and the closing report of Dr. Schuler indicate claimant's disability is in the area of the leg rather than the foot. Based upon this the Referee granted claimant 30 degrees for 20% loss of the right leg.

The Referee found that as far as the unscheduled disability is concerned claimant has not lost any earning capacity; however, he found claimant now in a sheltered work shop situation and if claimant were placed in the general labor market he would be at a disadvantage in securing employment. Based on this the Referee granted claimant an award of 128 degrees for 40% unscheduled disability.

The Board, on de novo review, agrees with the findings and conclusions reached by the Referee concerning his right leg disability. However, the Board disagrees with the award granted by the Referee for the unscheduled disability.

The Board finds that claimant's unscheduled disability is no greater than that awarded by the Determination Order of 25% based upon loss of wage earning capacity and the medical reports submitted. The affidavit of the employer to supplement the record is denied.

ORDER

The order of the Referee, dated May 19, 1976 is modified.

The Determination Order of March 24, 1975 granting 25% for loss of wage earning capacity is reinstated. The award granted by the Referee in the amount of 30 degrees for 20% loss of the right leg is affirmed.

WCB CASE NO. 76-1171 NOVEMBER 12, 1976

CHARLES STEINERT, CLAIMANT
Robert Bennett, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order which affirmed the Determination Orders of February 18 and March 4, 1976.

Claimant is a 59 year old potman who has worked for the employer for 26 years. He sustained a right knee injury on July 3, 1974 resulting in a right patella fracture. The fracture failed to unite so claimant underwent surgery in February, 1975. Claimant returned to work on April 19, 1975.

Dr. Logan examined claimant on November 5, 1975 and found claimant medically stationary with disability based primarily on claimant's inability to run, fully squat, and slight limitation of motion of the right knee.

On January 6, 1976 Dr. Robinson examined claimant and stated that claimant's flexion exercise as he prescribed them, would result in an improvement in claimant's condition. He rated claimant's disability at 5% loss of the right leg.

A Determination Order of February 18, 1976 granted claimant 15 degrees for 10% loss of the right leg; a Determination Order of March 4, 1975 amended the dates for time loss benefits only.

Claimant testified he can't run or squat any more and, as a hiker, he can only do a maximum of three miles now. Claimant is currently not under medical care. Claimant also limps on occasion.

The Referee found that claimant had testified that his condition is no different now than when he was examined by Dr.Robinson in January, 1976. Dr. Robinson recommended 5% loss of use of the right leg.

The Referee concluded that the Determination Orders awarding 10% loss of the right leg adequately compensated claimant for any loss of function to his right leg and he affirmed the Determination Orders.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 9, 1976, is affirmed.

WCB CASE NO. 75-3781 NOVEMBER 12, 1976

SALLY WALDROUP, CLAIMANT
C.E. Emmons, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which remanded claimant's claim for aggravation to it for acceptance and payment of all medical bills relating to claimant's back condition specifically those treatments by Drs. Moore and Lynch.

Claimant cross-appeals contending she is entitled to further award for temporary total disability, or, in the alternative, an increase in permanent partial disability.

Claimant suffered a compensable injury on March 26, 1971 while employed by J.C. Penney. Claimant, thereafter, refused a myelogram and possible surgery for this injury. A Determination Order issued on November 2, 1971 awarded claimant 32 degrees for 10% unscheduled disability which was affirmed, after hearing, by a Referee.

The Referee's decision was appealed to the Board and on January 12, 1973 the Order on Review affirmed the Referee's order but adding the comment that claimant's refusal to submit to a myelogram and possible surgery was unreasonable on claimant's part.

The Board's order was subsequently appealed and in a Judgment Order dated December 13, 1973, claimant was awarded 40% unscheduled disability.

On July 27, 1975 claimant filed a claim for an aggravation which was denied by the carrier on August 26, 1975.

On December 22, 1975 Dr. Lynch diagnosed severe lumbosacral, thoracic and cervical radiculities, parathesia extending into the lower left and right extremities, and paravertebral muscle spasms of lumbar, thoracic and cervical areas.

Dr. Moore examined claimant on March 31, 1975 with claimant complaining of increased pain in the lumbosacral region and right leg which gives way. His examination of her on May 21, 1975 found worsening of degenerative disc disease in the low back and increase in lumbar spurring. Dr. Moore repeatedly recommended a myelogram and possible surgery.

In Dr. Moore's letter of February 5, 1976 to the Travelers Insurance Company, he expressed his opinion that the chiropractic treatments being provided by Dr. Lynch were worsening claimant's condition and he emphasized claimant's need for a myelography and possible surgery.

Claimant testified that her condition is continuing to get worse and if this continues she would consider surgery. She stated she is afraid of surgery because of friends of hers whose experience with such surgery was not beneficial.

The Referee found no doubt whatsoever that claimant's condition had worsened, but the problem is of claimant's refusal to submit to a myelogram. The Referee felt that a myelogram only indicated the need for surgery and if claimant would refuse surgery then the myelogram would be useless. The Referee concluded that based on claimant's fear of surgery and the fact there are no guarantees that claimant's condition would improve with surgery, that claimant's refusal to submit to such was not unreasonable.

The Referee further concluded that the medical evidence did not state that claimant was incapable of working even though she has not worked since her injury and, therefore, he could not award temporary total disability compensation. The Referee remanded claimant's aggravation claim to the carrier and the medical bills to be paid by the carrier and for further medical treatment by Drs. Moore and Lynch.

The Board, on de novo review, disagrees with the conclusions of the Referee. It is the Board's finding that the claimant's refusal to submit to a myelogram and possible surgery render the evaluation of disability impossible. The Board is entitled to assume that proper surgical treatment would produce satisfactory and beneficial results. The claimant's condition may have worsened but the worsening has occurred because of her refusal to have her original injury treated in the manner recommended by her doctors. The claimant has the responsibility to make a reasonable effort to reduce her disability. She has failed to do so.

ORDER

The order of the Referee, dated May 10, 1976, is reversed.

The denial issued by the Travelers Insurance Company, dated August 26, 1975, is affirmed.

WCB CASE NO. 75-3606 NOVEMBER 12, 1976

IRENE DORIS GARDNER, CLAIMANT
Stipulation

It is hereby stipulated and agreed by and between the above-named claimant, acting by and through William D. Cramer, her attorney, and the State Accident Insurance Fund, acting by and through Allen W. Lyons, Assistant Attorney General, of its attorney, as follows:

That on December 15, 1975, an Opinion and Order was issued in this case which awarded the claimant 32 degrees for unscheduled disability;

That thereafter the claimant filed with the Workmen's Compensation Board a Request for Review alleging that the claimant was in the odd lot category, and in the alternative, that her physical disability was substantially more severe than the amount awarded by the hearing referee;

That this matter is currently pending before the Workmen's Compensation Board on claimant's Request for Review.

The parties being desirous to settle this claim, therefore further stipulate and agree as follows:

That to compromise and settle all issues raised and raisable by claimant's request for Board review, the parties agree that claimant shall be awarded an additional 5 percent unscheduled disability;

That claimant's attorney shall be paid an attorney's fee of 25 percent of the increased compensation, but not to exceed the amount of $825;

That claimant's request for Board review shall be dismissed with prejudice.

This Stipulation is hereby approved and claimant's Request for Review is hereby dismissed with prejudice.

WCB CASE NO. 75-4685 NOVEMBER 12, 1976

MARY WALDRUM, CLAIMANT
Pamela Daves, Claimant's Atty.
Noreen Saltveit, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 128 degrees for 40% unscheduled disability. Claimant contends she is odd-lot permanent total disability.

Claimant, a 50 year old cannery seasonal worker, was initially injured on October 2, 1973 and saw Dr. Hall who diagnosed dorsal strain and dorsal myositis and released claimant for work on November 12, 1973. A Determination Order of January 18, 1975 granted claimant temporary total disability compensation only.

Claimant injured herself again while working on an incline belt and quit working on August 10, 1974. On August 16, 1974 Dr. Hall diagnosed dorsal strain.

On October 14, 1974 claimant was examined by Dr. Pasquesi who diagnosed chronic lumbosacral instability. He felt claimant should avoid heavy lifting of more than 20 pounds, or constant stooping and twisting. He rated her disability at 20%.

Claimant was examined by Dr. Davis on January 6, 1975 who diagnosed minimal lower dorsal kyphosis. He recommended palliative treatment only. He also stated "there are no objective physical findings from which to make a definite report of abnormality."

A Determination Order of March 11, 1975 granted claimant 48 degrees for 15% unscheduled disability.

The Referee found claimant had testified she is never free of pain since October, 1973 and now she does practically nothing. She has not attempted any aid in obtaining employment. She apparently relies upon Dr. Hall to tell her what to do and is apparently convinced she can't work.

The vocational counselor who interviewed claimant felt that whether or not claimant was motivated she is faced with bleak prospects for returning to work. Dr. Davis and the vocational counselor opined that much of claimant's complaints are of a subjective nature.

The Referee concluded that the preponderance of the medical evidence does not support claimant's contention of inability to work, nor is claimant's injury so severe as to place her in the odd-lot category. The Referee found that motivation was definitely a factor and claimant's attempts to find employment is not convincing. Her treatment has all been palliative. Based on all of the above, the Referee concluded that claimant's loss of wage earning capacity was greater than that awarded by the last Determination Order and granted her 128 degrees for 40% unscheduled disability.

The Board, on de novo review, concurs with the findings and conclusions of the Referee.

ORDER

The order of the Referee, dated March 10, 1976, is affirmed.

WCB CASE NO. 75-2833 NOVEMBER 12, 1976

WALTER UMBER, CLAIMANT
Frank Susak, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant 192 degrees for 60% unscheduled right shoulder disability and 57.6 degrees for 30% right arm disability. Claimant contends he is permanently and totally disabled.

Claimant, a 60 year old carpenter, sustained an electrical shock on February 22, 1974, causing him to jerk his right arm and injurying his right shoulder. Prior to this injury claimant had suffered from bursitis or tendonitis of his right shoulder. This claim was denied but eventually remanded for acceptance by a Referee.

In May, 1974 claimant saw Dr. Geist who diagnosed avulsion of right rotator cuff superimposed on prior chronic tendonitis. On June 24, 1974 Dr. Geist performed exploratory surgery which affirmed a complete avulsion. The surgery was successful to the extent that claimant had no right shoulder pain thereafter under normal circumstances.

A Determination Order of July 3, 1975 granted claimant 128 degrees for 40% unscheduled right shoulder disability.

On January 30, 1976 claimant was examined by the Orthopaedic Consultants. It was their opinion claimant chooses to retire and he cannot return to his carpentry trade. Any activity and use of his right arm would be limited to waist level activity. They rated claimant's ability as moderate and loss of function due to this injury as moderate and found him medically stationary.

The Referee found that unscheduled disability is rated on the loss of wage earning capacity with consideration for age, education and adaptability. Claimant is 62 years of age with an 8th grade education. Dr. Geist felt there were certain occupations in which claimant could engage in like sales work, and driving a light vehicle.

The Referee concluded that claimant is not, based upon the medical evidence which finds moderate disability, and the fact that there are occupations in which claimant could engage, permanently and totally disabled. However, the Referee found that claimant's unscheduled disability is substantial for his loss of wage earning capacity and granted claimant an additional award of 20% for a total of 60% unscheduled disability and he awarded him an award of 57.6 degrees for 30% loss of his right arm.

The Board, on de novo review, affirms the award granted by the Referee for unscheduled disability. However, it disagrees with the award granted in the scheduled area. The Board finds there are no grounds for awarding any scheduled disability as there is no medical evidence to support any loss of function to claimant's right arm.

ORDER

The order of the Referee, dated June 11, 1976, is modified. The scheduled award of 57.6 degrees right arm disability is reversed. The award equal to 192 degrees for 60% unscheduled right shoulder disability is affirmed.

Claimant's counsel is to receive as a reasonable attorney fee 25% of the increase of 64 degrees in compensation from that awarded by the Determination Order not to exceed $2,000.

SAIF CLAIM NO. BC 191817 NOVEMBER 12, 1976

BRUCE HOLT, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on June 30, 1969; a Determination Order was issued on December 30, 1969 granting claimant an award of 5 degrees for 50% for amputation of the right ring finger.

The claim was reopened in 1972 as claimant developed pain in his stump. On March 22, 1972 the amputation was revised. A Second Determination Order granted, on June 2, 1972, an additional award of 1 degree for 10%. Claimant's aggravation rights expired in December, 1974.

The carrier voluntarily reopened claimant's claim on February 24, 1976 for further revision of the stump which was performed on February 16, 1976. Claimant became medically stationary on October 5, 1976 but returned to work on June 21, 1976.

On October 19, 1976 the State Accident Insurance Fund requested a determination. It is the recommendation of the Evaluation Division that claimant is entitled to temporary total disability compensation from February 16, 1976 through June 20, 1976 and to an additional award of 1.5 degrees for 15% loss of the right ring finger.

ORDER

Claimant is hereby granted temporary total disability compensation from February 16, 1976 through June 20, 1976 and to an award of permanent partial disability of 1.5 degrees for 15%.

WCB CASE NO. 76-1669 NOVEMBER 12, 1976

GRAYCE ZIMMERMAN, CLAIMANT
Thomas Huffman, Claimant's Atty.
Ron Podnar, Defense Atty.
Order of Dismissal

On September 28, 1976 a Referee's order was issued in the above entitled matter.

On November 1, 1976 claimant requested Board review.

More than 30 days elapsed between the mailing of the Referee's order and the making of the request for review.

The Referee's order has become final by operation of law in accordance with ORS 656.289(3) and the claimant's request for review should be dismissed.

It is so ordered.

WCB CASE NO. 75-4153 NOVEMBER 17, 1976

JAMES MAULDIN, CLAIMANT
Jack Ofelt, Claimant's Atty.
Dept. of Justice, Defense Atty.
Amended Order

On October 26, 1976 an order was entered in the above entitled matter which erroneously set aside the Order of Dismissal, dated October 13, 1976. The last sentence of the last paragraph of said order should be deleted and the following inserted in lieu thereof:

> "Therefore, the request by the State Accident Insurance Fund for review should be dismissed for the reason that the Opinion and Order of the Referee entered on May 25, 1976 has been set aside and there is no issue for the Board to review."

In all other respects the order entered in the above entitled matter on October 26, 1976 is reaffirmed and ratified.

SAIF CLAIM NO. NC 173183 NOVEMBER 17, 1976

JOHN MITCHELL, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant injured his back on March 3, 1969 while working as a truck driver. He underwent conservative treatment by Dr. Serbu and, on May 2, 1969, a Determination Order granted claimant temporary total disability compensation only.

Claimant's claim was reopened for surgery consisting of a laminectomy L4-5 performed by Dr. Serbu on April 11, 1972. A Second Determination Order granted claimant 48 degrees for 15% unscheduled low back disability. Claimant's aggravation rights have expired.

The carrier reopened claimant's claim and, on February 4, 1976, claimant underwent another laminectomy at L4-5. Claimant is currently in vocational rehabilitation.

On October 22, 1976 the State Accident Insurance Fund requested a determination. The Evaluation Division recommends temporary total disability compensation from February 2, 1976 through October 13, 1976 and an additional award of permanent partial disability of 48 degrees for 15% unscheduled low back.

ORDER

Claimant is hereby granted temporary total disability compensation from February 2, 1976 through October 13, 1976 and an additional award of 48 degrees for 15% unscheduled low back disability.

WCB CASE NO. 75-1355 NOVEMBER 17, 1976

HERMAN TILLERY, CLAIMANT
Nick Chaivoe, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of March 19, 1975.

Claimant has a past history of chronic arthritis, drug addiction and alcohol dependency. Claimant was on work release from prison when, on May 15, 1974, he slipped and fell, sustaining a mild concussion.

Subsequently, claimant came under the care of Dr. Foley who, in November, 1974, started diathermy treatments for claimant's muscle spasms in his low back.

Dr. Pasquesi examined claimant on January 17, 1975 and rated his disability at

9% of the whole man and found him to be medically stationary.

A Determination Order of March 19, 1975 granted claimant temporary total disability compensation only.

On October 31, 1975 claimant was examined by Dr. Snodgrass who found symptoms of cervical, lumbar and right shoulder strain but stated that claimant was so neurotic that an examination of him was difficult due to hysteria. Dr. Snodgrass recommended claimant be referred to the Pain Rehabilitation Center in Portland.

The Referee found that Dr. Snodgrass' recommendation to send claimant to the Pain Rehabilitation Center was excellent, however, there was no evidence to causally relate claimant's problems (antisocial behavior and drug dependency) to the industrial injury.

The Referee concluded that although claimant does need specialized care for his problems, he has failed to meet his burden of proving these problems are related to his industrial injury. Claimant also failed to prove he has sustained any permanent impairment from the industrial injury.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated April 29, 1976, is affirmed.

WCB CASE NO. 75-668 NOVEMBER 17, 1976

HAROLD CURRY, CLAIMANT
James Fournier, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On September 8, 1976, claimant, by and through his counsel, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury suffered on October 25, 1968. Claimant's claim, initially, was closed on January 19, 1970 and his aggravation rights have expired.

Claimant's request was supported by several reports from Dr. Cherry, the latest dated October 19, 1976, and also by a letter from the Portland Pain Center, dated July 22, 1976.

On September 13, 1976 the State Accident Insurance Fund was advised of the request and forwarded a copy of it together with all the medical reports except Dr. Cherry's report of October 19, 1976. The Fund was advised that it had 20 days within which to notify the Board with respect to its position.

On September 22, 1976 the Fund responded, stating that it had previously authorized enrollment of claimant in the Portland Pain Center but, as of the date of its response, there was no evidence that claimant had been enrolled. It stated that claimant had an apparently solid fusion and did not have any significant neurological findings. Dr. Cherry in a recent report indicated a transcutaneous nerve stimulator had been provided and claimant had used it for a month and received some relief from pain. The Fund felt

On January 29, 1976 claimant's attorney wrote the Fund advising it that claimant had been injured on December 28, 1975 in the course and scope of her employment and that the employer had notice and knowledge of the claim at that time; furthermore, that claimant was not able to work and was under the care of Dr. Mang. He also advised that claimant had received no compensation and more than 14 days had elapsed since the employer had knowledge and notice of the claim.

Claimant's attorney asked that benefits for temporary total disability be paid at once.

On February 9, 1976 claimant was paid $23.83 which constituted compensation for temporary total disability for one day, December 30 to December 31.

On February 11, 1976 claimant requested a hearing on the issue of unreasonable failure and refusal by the Fund to pay compensation, according to law. On March 4, 1976 claimant was paid the sum of $286.01 by the Fund. Dr. Mang's physician's initial report of work injury, dated March 5, 1976 was received by the Fund on March 8, 1976. On that date claimant was paid the sum of $1,120.20 by the Fund. According to the claim summary sheet this constituted payment of compensation for temporary total disability from January 14 to March 8, 1976. On March 8, 1976 the Fund denied the claim.

The Fund contends that there is no obligation for payment of temporary total disability as the employer did not have notice of a "compensable" injury at least until it had received some medical clarification and that the first such medical varification was the report from Dr. Mang, dated March 5, 1976. Claimant contends that the statute talks in terms of notice and knowledge of a claim and not of a "compensable" injury.

The Referee, taking note of ORS 656.262(4) which provides, in part, that the first installment of compensation be paid no later than the 14th day after the subject employer has notice or knowledge of the claim and ORS 656.262(5) which provides, in part, that written notice of an acceptance or denial of a claim shall be furnished to the claimant by the Fund or direct responsibility employer within 60 days after the employer has knowledge or notice of the claim and also the definition of "claim" provided in ORS 656.005(7) and the definition of "compensable injury" as provided in ORS 656.005(8), assumed there was a reason for the difference in the language in the statutes and that the legislative intent, with regard to requiring the commencement of compensation, that if the employer did not have a written request for compensation, notice of a "compensable injury" as distinguished from a notice of an injury was required. She found, therefore, that the employer was required to begin payment no later than the 14th day after <u>either</u> a written request for compensation from the subject workman or someone in his <u>behalf,</u> <u>or</u> any compensable injury of which the employer has notice or knowledge. She found the same to be true with respect to the provisions of ORS 656.262(5), relating to acceptance or denial of a claim.

The Referee further found that claimant had not yet established that the injury, which allegedly occurred on December 28, 1975, was compensable, therefore, the 14 day period under ORS 656.262(4) and the 60 day period under ORS 656.262(5) commenced on January 16, 1976, the date of claimant's written request for compensation.

The Referee found that the claimant's first installment of compensation was required to be paid at least once every two weeks thereafter, but that claimant did not receive any compensation until February 9, 1976 and then only payment for one day, and, thereafter, received no compensation until March 4, 1976 at which time he received compensation for the period between December 31, and January 14. The third and final payment

changing a light bulb and slipped off the ladder and fell, injuring his right foot. Dr. Martens diagnosed a sprain.

Claimant was referred by Dr. Martens to Dr. Tsai who examined him on March 29, 1976 and diagnosed right L5 radicular compression due to herniated nucleus pulposus at L4-5 with degenerative disc disease aggravated by the industrial injury. Claimant, in relating his history to Dr. Tsai, said that in January, 1976 while picking up a sock at home he experienced pain down the right leg.

On April 14, 1976 Dr. Martens felt claimant was not capable of returning to work as a mechanic, but he did feel claimant could do lighter work, such as paper work jobs, for his employer.

The Referee found that although claimant was a poor historian with some conflicting testimony, it was apparent claimant had sustained an industrial injury which resulted in some disability. He also found one or more separate intervening incidents which either caused additional injury; were not causally related to the industrial injury; or contributed to claimant's present impairment. Based upon these incidents, the Referee concluded that they were unrelated to the industrial injury and, therefore, must be disregarded in evaluating the extent of claimant's permanent partial disability.

Despite these incidents, the Referee found claimant's disability to be greater than that for which he had been awarded compensation, due to claimant's inability to return to the only occupation in which he has had experience. The Referee concluded claimant was entitled to an award equal to 112 degrees for 35% of the maximum for his unscheduled disability, based upon his loss of wage earning capacity.

The Board, on de novo review, adopts the Referee's order. The Board finds that claimant's contention that he is permanently and totally disabled is not supported by the medical evidence.

ORDER

The order of the Referee, dated June 25, 1976, is affirmed.

WCB CASE NO. 75-3468 NOVEMBER 18, 1976

LOLA MARTIN, CLAIMANT
Ronald Miller, Claimant's Atty.
Eugene Cox, Defense Atty.
Request for Review by Employer

The employer requests Board review of the Referee's order which granted claimant an award of permanent total disability, imposed a 25% penalty for the employer's failure to pay temporary total disability compensation from April 11, 1975 through June 10, 1975 and awarded an attorney fee to claimant's attorney equal to 25% of claimant's increased compensation, payable out of such compensation.

Claimant sustained a compensable injury on June 12, 1974 injuring her right elbow and right shoulder. The diagnosis was a fracture of greater tuberosity of the right humerus and possible rib fracture. Claimant underwent extensive treatment.

Claimant's claim was closed on September 8, 1975 by a Determination Order which granted her 32 degrees for 10% unscheduled disability, 19.2 degrees for 10% loss of the right arm and compensation for temporary total disability through June 10, 1975.

Claimant originally filed a request for hearing on August 20, 1975, complaining that she had not received any compensation since April 11, 1975. Compensation for temporary total disability had been paid from June 12, 1974 through April 11, 1975 according to the carrier's reports but, because these reports were filed prior to the issuance of the Determination Order, claimant obviously was paid no compensation after April 11, 1975. Claimant did not return to work before June 10, nor had she been released to return to work at any time between April 11, 1974 and June 10, 1975. There was no evidence presented to show why compensation for temporary total disability was not continued through June 10, 1975.

Dr. Davis examined claimant on March 24, 1975 and found her to be an obese female not in acute distress. He found she has restriction of motion in the right wrist with loss of 50% extension range and 50% of the abduction and adduction ranges.

On June 10, 1975 Dr. Davis rated claimant's disability as loss of function in the right upper extremity equal to 20% thereof.

Dr. Steinmann, claimant's treating physician, stated claimant cannot do any activity with her arm out at the shoulder and extended.

The Referee found that for all practical purposes claimant has lost 100% functional use of her right arm for work purposes.

Claimant also has substantial unscheduled physical disability; when she over-exerts she has searing pain which radiates from the shoulder upward into her neck.

The Referee found claimant, who is 60 years old, had a 7th grade education with no special skills or training. She does have substantial experience at cannery work. Her former employer will not rehire claimant with her limitations, precluding her from returning to that employment.

The Referee concluded, based upon a combination of claimant's scheduled and unscheduled impairments, that she is permanently restricted from engaging in any regular gainful and suitable occupation and he awarded her compensation for permanent total disability.

The Board, on de novo review, disagrees with some of the conclusions reached by the Referee.

Dr. Davis, who examined claimant, found loss of function of the arm at 20%. The Board finds, based upon the medical reports in the record, that claimant's disability is not severe enough to warrant an award for permanent total disability. Based on these medical reports, the Board does find that claimant has sustained a substantial loss of wage earning capacity, however, and grants claimant an award of 256 degrees for 80% unscheduled disability.

The Board further affirms the 10% loss of the right arm awarded by the Determination Order.

Also claimant's attorney should be awarded a reasonable attorney fee at the hearing level, payable by the employer, because of the employer's position of failing to pay compensation which forced claimant to seek legal counsel.

ORDER

The order of the Referee, dated February 18, 1976, is modified.

Claimant is hereby granted an award of 256 degrees of a maximum 320 degrees for unscheduled right shoulder disability. This is in lieu of the award for permanent total disability granted by the Referee's order of February 18, 1976.

Claimant's counsel is awarded, as a reasonable attorney fee for his services at the hearing, the sum of $750 payable by the employer. This is in lieu of the attorney's fee granted by the Referee's order, which in all remaining respects, is affirmed.

SAIF CLAIM NO. ZC 200693 NOVEMBER 18, 1976

TANYA KENISON, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable hip injury on August 19, 1969 and was subsequently seen by Dr. Vigeland who referred her to Dr. Becker. Dr. Becker's diagnosis was acute and chronic lumbosacral strain with probable degenerative disc disease at L4-5, L5-S1.

On April 27, 1970 claimant's claim was closed with an award of 5% unscheduled disability. On August 7, 1970 Dr. Becker requested the claim be reopened for physical therapy due to exacerbation of claimant's condition. Claimant was given treatment under the provisions of ORS 656.245 and on August 28, 1970 Dr. Becker stated claimant's condition was the same as on April 27, 1970. Claimant's aggravation rights have expired.

In January, 1976 claimant was still having problems and, on February 12, 1976, claimant underwent a hemilaminectomy with excision of bulging disc material. Dr. Becker related this bulging problem to claimant's 1969 injury.

On September 27, 1976 Dr. Becker found claimant medically stationary, he suggested return to lighter employment for her. Claimant has a limited tolerance for sitting, standing and sudden movement of her back. Dr. Becker recommended rehabilitation for another occupation and claimant has been referred and accepted to the Division of Vocational Rehabilitation.

On October 20, 1976 the State Accident Insurance Fund requested a determination. The Evaluation Division of the Board recommended payment of temporary total disability compensation from February 12, 1976 through April 20, 1976 and payment of temporary partial disability compensation from April 21, 1976 through September 27, 1976 and an award of 48 degrees for 15% unscheduled disability.

ORDER

Claimant is hereby granted 48 degrees of a maximum of 320 degrees for unscheduled disability. This award is in addition to previous awards for permanent partial disability.

Claimant shall receive compensation for temporary total disability from February 12, 1976 through April 20, 1976 and compensation for temporary partial disability from April 21, 1976 through September 27, 1976.

WCB CASE NO. 68-2054 NOVEMBER 18, 1976

HERMAN GREEN, CLAIMANT
Charles Paulson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On June 9, 1976 the Board received a request from the claimant in the above entitled matter asking it to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury suffered in 1967.

Initially, the medical reports furnished in support of the request were insufficient and claimant was advised to provide the Board with additional medical reports. This was done.

The Board, now having given full consideration to all of the medical evidence before it, concludes that it is not sufficient to justify the reopening of claimant's claim.

ORDER

The request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen claimant's claim for an industrial injury suffered on October 6, 1967 is hereby denied.

WCB CASE NO. 75-4990 NOVEMBER 18, 1976

ROGER G. GAYLORD, CLAIMANT
Stipulation and Order

It is hereby stipulated and agreed by and between Claimant, through his attorney, David A. Vinson, and the employer, and insurance carrier, through their attorney, Robert E. Joseph, Jr., that the above-captioned matter be remanded back to the hearing referee herein for the taking of evidence on the extent of Claimant's permanent partial disability, and for entry of an Opinion and Order thereon, and that Claimant's appeal from the Opinion and Order of the 22nd day of July, 1976 be dismissed.

It is so ordered, this 18th day of November, 1976.

WCB CASE NO. 75-2838 NOVEMBER 18, 1976

JAMES T. HANLON, CLAIMANT
Stipulation and Order of Settlement

The parties stipulate as follows:

(1) That claimant shall receive payment in a lump sum all monies due and owing him from the Determination Orders of January 24, 1974 and July 3, 1975, the Opinion and

Order of February 24, 1976, and the Stipulation of September 1, 1976.

(2) If claimant files a claim for aggravation during the period of time he would normally be receiving periodic payments under the Determination Orders of January 24, 1974 and July 3, 1975, the Opinion and Order of February 24, 1976, or the Stipulation of September 1, 1976, whatever remaining amounts of the lump sum payment that would still be paid out, if paid out in periodic payments, will be offset dollar for dollar against any expense of the aggravation including time loss payments and any award of permanent or permanent partial disability.

(3) Claimant's Request for Hearing shall be dismissed as to all issues contained therein.

Dated this 4th day of November, 1976.

ORDER

The matter having come before the Board on the stipulation of the parties and the Board being fully advised, it is hereby

Ordered that said settlement is approved as set forth in the above stipulation and claimant's Request for Hearing is dismissed with prejudice.

Dated this 18th day of November, 1976.

WCB CASE NO. 76-980 NOVEMBER 18, 1976

RAYMOND E. BOWLAND, CLAIMANT
Lawrence Dean, Claimant's Atty.
Jerard Weigler, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The Travelers Insurance Company requests review by the Board of the Referee's order which found that claimant's disability and medical treatments subsequent to August 31, 1975 were a continuation of his December 2, 1974 injury and, therefore, the responsibility of the employer, McCann Construction and its carrier, the Travelers Insurance Company, ordered Travelers to reimburse Argonaut Insurance Company for all sums paid to or on behalf of claimant as a result of the order designating Argonaut as the paying agent, pursuant to ORS 656.307, and directed this employer and its carrier to pay claimant penalties and attorney fees for unreasonable resistance to the payment of compensation.

On December 2, 1974 claimant, while working as a carpenter for McCann Construction, suffered a compensable low back injury. On August 31, 1975, while working as a carpenter for Wright-Schuchart, whose workmen's compensation coverage was furnished by Argonaut Insurance Company, claimant suffered another injury to his low back. Travelers, on December 24, 1975, denied responsibility for any disability or medical treatment since September 1, 1975.

The question is: was the August 31, 1975 injury a new injury or an aggravation of the 1974 injury?

The injury claimant suffered in 1974 was diagnosed as a back strain and sprain and claimant was hospitalized by Dr. Hauge for traction. Diagnostic testing ruled out a herniated disc, however, the back pain persisted. Claimant remained under Dr. Hauge's care and returned to carpentry work on advice of Dr. Hauge. He worked one week in January, 1975 for one company and one week for another company in February, 1975 but was laid off both jobs because he missed too much time from work on account of his back pain.

In July, 1975 claimant started working for Wright-Schuchart as a carpenter and his back pains continued and he continued to take pain medication.

On August 31, 1975 claimant was holding a 4 x 6 plywood sheet above his head when he slipped; he felt pain in his lower back on the left side, the same area injured in 1974.

Claimant had also injured his back lifting a tire out of his pickup in December, 1974 and was later involved in an automobile accident, however, neither of these instances materially contributed to claimant's back problem.

Dr. Hauge, on October 15, 1975, advised Travelers that he disagreed with its statement that claimant had suffered a new injury on August 31, 1975. Dr. Sterino, a neurologist, on September 26, 1975, had stated: "On my initial examination, I suspect that this 41 year old male looks like he sustained a lumbar sprain, as related to his on-the-job injury of 12-2-74, and more recently a lumbar sprain related to his on-the-job injury of 8-31-75." The Referee concluded, however, that Dr. Sterino's statement, standing alone and in context of the entire report, could not be interpreted as an opinion contrary to that expressed by Dr. Hauge.

The Referee found that the partial denial letter was mailed on December 24, 1975 and the basis therefor was not apparent. He found that claimant had never been symptom-free from the date of his first injury and that neither Dr. Hauge or any other doctor had ever given him an unqualified release to return to work.

The Referee further found that Travelers had never considered claimant's condition to be medically stationary; at least, there was no evidence that it had submitted the claim to Evaluation Division of the Board for closure.

The Referee concluded that claimant's disability and the medical treatments received subsequent to August 31, 1975 were a continuation of his December 2, 1974 injury and, therefore, the responsibility of his employer at that time, McCann Construction, and its carrier, Travelers.

Pursuant to ORS 656.307 the Argonaut Insurance Company had been directed by the Board on March 2, 1976 to pay compensation for temporary total disability to claimant until a determination of the responsible paying party was made. Having found that the responsibility was that of Travelers, the Referee directed it to reimburse Argonaut for all sums the latter had paid to claimant.

The Referee also ordered the employer, McCann Construction, and its carrier, Travelers, to pay penalties for unreasonable resistance to the payment of compensation from September 1, 1975 to the date of the hearing, May 13, 1976.

The Board, on de novo review, agrees with the Referee's conclusion that the August 31, 1975 incident was an aggravation of the December 2, 1974 injury and, therefore, the responsibility of the employer, McCann Construction, and its carrier, Travelers. However, on March 2, 1976 the Board had designated, pursuant to ORS 656.307, Argonaut as the paying agent and thereby made it responsible for the payment of compensation from that date until a determination of responsibility was made; in this case, the date of the Referee's order. Therefore, Travelers cannot be considered to have unreasonably resisted payment of compensation to claimant after March 2, 1976.

The Board concludes that the Referee's order should be modified with respect to the assessment of penalties against the employer, McCann Construction, and its carrier, Travelers; the 25% penalty should apply only to the compensation for temporary total disability from September 1, 1975 to March 2, 1976.

ORDER

The order of the Referee, dated June 1, 1976, is modified.

The employer, McCann Construction, and its carrier, The Travelers Insurance Company, shall pay to claimant as a penalty for unreasonable resistance to the payment of compensation a sum equal to 25% of the compensation for temporary total disability due claimant from September 1, 1975 to March 2, 1976.

In all other respects the Referee's order, dated June 1, 1976, is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with Board review in the sum of $100, payable by the employer.

WCB CASE NO. 75-4651 NOVEMBER 18, 1976

FLORENCE RUSH, CLAIMANT
Edward Daniels, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order which affirmed the Determination Order of April 10, 1975 which granted claimant time loss only. Claimant contends she has substantial permanent disability in her right leg.

On October 16, 1974 claimant sustained an injury to her right leg, causing a severe bruise. Claimant has suffered from varicose veins for a number of years and had an ulcer on her ankle in 1972. Claimant's doctor had recommended stripping of the veins as early as 1964.

Claimant contends that the varicose veins gave her no pain or difficulty prior to her industrial injury.

On December 3, 1974 Dr. Gerstner performed vein stripping surgery on both of claimant's legs.

The claim was closed by the Determination Order of April 10, 1975.

The issues before the Referee were whether the claimant was entitled to compensation for temporary total disability beyond September 25, 1974, whether she was entitled to household help from August 17, 1974 and the extent of her permanent partial disability.

Claimant had filed two claims for industrial injuries, one occurring on November 18, 1972 and one on November 18, 1973. The 1972 injury was never closed, however, the second injury claim was closed by a Determination Order mailed November 8, 1974 which awarded claimant compensation for temporary total disability from November 19, 1973 through September 25, 1974, less time worked, and 48 degrees for 15% unscheduled low back disability. The parties agreed that any award for permanent partial disability ordered by the Referee would take into consideration claimant's condition as affected by both injuries.

Claimant is 63 years old and has completed ten years of school. Her work background includes working as a bookkeeper and office manager, working in a real estate office and operating her own insurance office. Between 1962 and 1968 she operated an alcoholic rehabilitation home. In September, 1971 she became a patient at the Tillamook Care Center and, in August, 1972, she commenced working at this center doing cleaning and laundry work. Her 1972 injury was suffered when she was struck by a falling candy machine, the injury was diagnosed as a right paravertebral lumbar strain. Claimant was found to be medically stationary in March, 1973, however, six months later she was again complaining of low back and right shoulder pain and she was referred to Dr. Kayser, a Portland orthopedist.

On November 18, 1973 claimant again injured her low back when she slipped and fell. She sought chiropractic treatment and was also seen by Dr. Case who found no evidence of disability or limited motion of the neck or in the shoulders. With regard to the low back it was Dr. Case's opinion that there was lumbar nerve root irritation. He did not think surgical intervention was required. Claimant continued to be seen by Dr. Mullen, the chiropractor, who, in February, 1974, suggested she stop work for a period. Claimant has not worked since that time.

Dr. Case, in July, 1974, felt that the back symptoms due to the nerve root irritation had improved, he was of the opinion that the chiropractic treatments were of no value. On September 25, 1974 claimant was still complaining of back aches and some radiation down the right side, however, she told Dr. Case she was able to do all of her housework and he suggested she continue with her exercises and continue to wear the lumbosacral support corset, as prescribed. At that time he felt claimant's condition was medically stationary. Dr. Jackson, who had been giving claimant osteopathic treatment, and Dr. Katterhorn, who also had been treating claimant, agreed with Dr. Case's findings and evaluations. The claim was then closed with an award of 48 degrees for unscheduled disability.

After closure claimant requested the carrier to furnish her nursing care at home, alleging that she was unable to take care of herself. Dr. Case's opinion was that claimant did not need this type of care. Dr. Katterhorn, at first, agreed that claimant did not require any form of nursing care.

On February 5, 1975 claimant was examined by the Orthopaedic Consultants in Portland, still complaining of low back and right shoulder symptoms. Moderately severe osteoarthritis of the lumbar and dorsal spine with secondary right lower extremity radiculopathy was diagnosed. The doctors who examined claimant felt her condition was stationary, that no treatment was necessary and that physical therapy should be terminated. They felt claimant was unfit for any occupation and the loss of back function attributable to the industrial injuries was mildly moderate. Dr. Katterhorn requested a copy of this report from the carrier; the copy was provided Dr. Katterhorn was identical to the original report except the statement "she is unfit for any occupation" was omitted.

Thereafter, Dr. Katterhorn prescribed physiotherapy for claimant, although he felt, in fact, it was contraindicated; it was only at claimant's insistance that he prescribed it. On September 30, 1975 Dr. Katterhorn stated that he had authorized household help for claimant as of August 17, 1974.

The Referee found that Dr. Case, after examining claimant on September 25, 1974, found that her condition was medically stationary and that she did have a small amount of permanent disability from her industrial injuries. Subsequently, Dr. Jackson and Dr. Katterhorn agreed with Dr. Case's opinion. Based upon the three doctors' opinion that claimant was medically stationary, the Board terminated compensation for temporary total disability as of September 25, 1974 and the Referee found nothing in the record to justify extension of such benefits beyond that date.

With respect to claimant's entitlement to household help from August 17, 1974, the Referee considered the opinion expressed by Dr. Case that such home nursing care was not necessary, together with the inconsistent opinions of Dr. Katterhorn (he initially agreed with Dr. Case but later stated that he had authorized such help primarily upon the insistance of claimant) and concluded that the general tenor of Dr. Katterhorn's testimony was that he believed claimant could do her own house work. Inasmuch as no other doctor had recommended that claimant be furnished home nursing care, the Referee concluded that it was not the responsibility of the carrier to furnish such help.

On the issue of extent of permanent partial disability, the Referee found that claimant had been granted an award for low back disability only and she is now contending that the disability in her right knee and, possibly, in both knees and in her right shoulder are also attributable to the industrial injuries. The Referee found, based upon the evidence, that claimant's disability involved only her low back. There was some radiculopathy of the right lower leg secondary to claimant's overall back problems, however, the unscheduled low back award granted claimant took into consideration such condition. The Referee found no sufficient evidence to attribute any specific knee disability or injury to either industrial injury suffered by claimant. He further found that although claimant did suffer a right shoulder injury as a result of either one or both of the industrial injuries, there was no evidence of any residual disability of the shoulder.

With respect to her low back disability, claimant contends that she is now permanently and totally disabled. The Referee noted that the Orthopaedic Consultants stated claimant was unfit for any occupation but they did not attribute this "unfitness" to the injuries for which the defendant-employer was responsible. To the contrary, they indicated that claimant's loss of back function due to the industrial injuries was mildly moderate. Furthermore, Dr. Case was of the opinion that claimant had only a small amount of permanent disability resulting from the injuries. Dr. Katterhorn stated at the hearing that claimant was unfit for any occupation however he neglected to relate claimant's present condition to the industrial injuries.

The Referee concluded that there was some element of exaggeration with respect to claimant's complaints. Claimant might never return to the labor market, however, if she is not able to do so it is not the responsibility of the defendant-employer. He concluded the residuals claimant suffered as a result of her industrial injuries did not place her in a permanently totally disabled status and, based upon her loss of wage earning capacity, and considering the effect of both injuries, claimant was permanently and partially disabled to the extent of 30% of the maximum allowable by statute for unscheduled disability. Therefore, he increased the award to 96 degrees.

The Board, on de novo review, affirms and adopts the order of the Referee.

The Board believes, as did the Referee, that if it is true that the carrier deliberately deleted from the report of the Orthopaedic Consultants certain language when it furnished a copy of it to Dr. Katterhorn, such action certainly cannot be condoned. This type of conduct, if true, should be called to the attention of the State Insurance Commissioner. It is unconscionable that a carrier should alter a medical report or, for that matter, any report before forwarding such report to a doctor, an attorney or anyone entitled to request a copy thereof.

The Board does agree with the Referee that this was not a situation which justified the assessment of penalties and attorney fees as provided by ORS 656.262(8) or ORS 656.382(1).

ORDER

The order of the Referee, dated March 26, 1976, is affirmed.

WCB CASE NO. 75-4254 NOVEMBER 19, 1976

ELSIE GREEN, CLAIMANT
Don Swink, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks review by the Board of the Referee's order which granted claimant compensation for permanent total disability from the date of termination of temporary total disability with credit allowed for payments made on the permanent partial disability award resulting from a Third Determination Order issued on September 22, 1975.

Claimant, who was 48 years old at the time, sustained a compensable injury on July 14, 1967 and as a result thereof had pain in her lower back and right let. Claimant had been employed as a factory worker at Tektronix for eight years at the time she suffered her injury. Claimant had undergone two surgeries for a herniated lumbar intervertebral disc prior to the incident of July 14, 1967.

On September 5, 1967 claimant reported to Dr. Kloos, a neurosurgeon, who had treated claimant for her prior back problems. He diagnosed acute low back strain superimposed on her chronic low back problems and referred her to Dr. Jones for an orthopedic consultation. Dr. Jones recommended that claimant wear a back brace, he felt a fusion might be required but that claimant would first have to lose weight. Claimant consulted with Dr. Hudson who put her on a diet; she returned to work in October, 1967 and, on June 5, 1968, was examined by Dr. Pasquesi. On June 28, 1968 a Determination Order awarded claimant compensation for temporary total disability and 32 degrees for 10% unscheduled disability.

her industrial injury. Prior to her injury she had a stable work record; she returned to full time gainful employment after both of the back surgeries performed prior to her industrial injury on July 14, 1967 and following that injury she again attempted to return to work but she was unable to perform her job because of physical limitations. She made inquiry of her employer about obtaining work of a type of which she was capable of doing but the employer terminated claimant.

The Referee concluded that claimant's physical disability and psychological condition, combined with her age, education, work experience and training, place her prima facie in the "odd-lot" category of the work force and, therefore, the burden was upon the employer to show some kind of suitable work was regularly and continuously available to claimant. The employer attempted to do this, using Dr. Hickman's work potential evaluation and Dr. Rawlin's report which indicated there were certain jobs which claimant perhaps could be retrained to do. The Referee found that it was very significant that the most realistic job suggested was that of supervisor or foreman in the electronics industry, a job which could have been provided by claimant's employer upon her attempt to return to work after her injury. No such job was offered to her at that time by her employer nor did the Referee find any evidence that any such job had been offered to her at any time thereafter.

The Referee concluded that although the totality of the evidence shows that claimant possibly could have been trained for and employed in a supervisory or other capacity subsequent to her injury in 1967, the psychological effects of being absent from the work force for seven years plus her physical disability have made placing claimant into such a capacity at the present time highly unrealistic, if not entirely impossible.

The Referee found that both Dr. Hickman and Dr. Rawlins agreed that "herculean efforts" would be necessary at this time to return claimant to the work force and that the prognosis therefore was extremely guarded.

The Referee concluded that claimant was permanently incapacitated from performing any work at a regular, gainful and suitable occupation and, therefore, granted claimant compensation for permanent total disability.

The Board, on de novo review, affirms the conclusion reached by the Referee in her order.

ORDER

The order of the Referee, dated June 25, 1976, is affirmed.

Claimant's counsel is hereby granted as a reasonable attorney fee for his services in connection with Board review, the sum of $450 payable by the employer.

WCB CASE NO. 75-3767 NOVEMBER 19, 1976

GLADYS JONES, CLAIMANT
Ann Morgenstern, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award for permanent total disability, set aside the Determination Order of August 26, 1975 and allowed the Fund to credit the payments for temporary total disability if made against payments for permanent total disability, commencing July 14, 1975.

Claimant has a prior history of a substantial back injury which required surgery in 1964. On September 1, 1972 claimant sustained a compensable injury to her left shoulder and back diagnosed by Dr. Platner on September 14, 1972 as sprain of the lower lumbar spine with aggravation of an old degenerative disc disease at L4-5 and L5-S1.

On May 15, 1973 Dr. Platner performed a laminectomy and decompression of nerve roots L4-5 and removal of dense scar tissue.

Dr. Thurlow at the Disability Prevention Division examined claimant on February 26, 1975 and diagnosed degenerative disease of the intervertebral discs L4-5 and L5-S1 and osteoarthritis, dorsal spine.

A psychological evaluation on March 5, 1975 indicated it was highly doubtful that claimant would return to work because she has been home for three and one half years and now complains of considerable pain; also she was a poor candidate for employment. Claimant's psychopathology was laregly related to her accident. Dr. Perkins found it unlikely claimant would be rehabilitated, vocationally in the future; she recommended claimant return to work as soon as her health permitted but doubted that she would do so.

Dr. Thurlow's discharge examination reveals that he felt claimant's pulmonary disease condition (emphysema) precluded her from gainful employment.

Claimant was examined by the Orthopaedic Consultants on July 25, 1975 who diagnosed chronic low back sprain. They found claimant's condition medically stationary and stated she should not return to her former occupation but she could engage in other employment. Total loss of function due to this injury is moderate.

A Determination Order of August 26, 1975 granted claimant an award of 160 degrees for 50% unscheduled low back disability, 15 degrees for 10% loss of the left leg and compensation for temporary total disability from September 1, 1972 through July 14, 1975.

On December 10, 1975 Dr. Platner recommended claimant be granted permanent total disability and given further medical care; he believed claimant would not return any type of gainful employment.

Claimant, at the hearing, had a noticeable limp, she testified she has low back pain and her left leg is numb. She stated she has difficulty walking and that the instability of the left leg causes her to fall.

The Referee found that most of the medical findings were based on objective symptoms and he concluded that in light of two serious back injuries, that no employer would hire claimant and claimant was awarded permanent total disability as of July 14, 1975.

The Board, on de novo review, disagrees with the Referee. The Board finds no medical justification for an award for permanent total disability. Claimant's physical impairments are a combination of pulmonary disease, residuals of her 1964 back injury and degenerative disease of the intervertebral discs. The Board finds, based on the medical reports presented and the loss of claimant's wage earning capacity, that she is entitled to an award of 240 degrees for 75% unscheduled disability.

The Determination Order awarded claimant compensation for temporary total disability through July 14, 1975, there is no justification for setting aside this Determination Order and allowing the Fund to credit the payments for temporary total disability made pursuant thereto against payments for permanent total disability which the Referee found as of July 14, 1975.

ORDER

The order of the Referee, dated May 21, 1976 is reversed.

Claimant is hereby granted an award of 240 degrees of a maximum 320 degrees for 75% unscheduled low back disability.

WCB CASE NO. 74-2331 NOVEMBER 19, 1976

LELA DURFEE GAITHER, CLAIMANT
Robert Hagan, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Remanding
Proceeding for Hearing

On October 20, 1976 the claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for an industrial injury which she suffered on April 22, 1970. The request was accompanied by medical reports from Drs. Casey, May, Melgard and Reilly. Claimant's aggravation rights have expired.

The State Accident Insurance Fund was advised of the request and furnished the supportive medical evidence. On October 18, 1976 the Fund advised claimant that it had been informed by Dr. May that he was treating claimant for compression fracture and osteoarthritic changes in her spine and it did not believe, after reviewing claimant's file, that the present problems were the result of claimant's April 22, 1970 industrial injury and it, therefore, had no responsibility for any medical treatment required by such problems.

On November 3, 1976 the Fund advised the Board that it had substantial information that claimant's current problems were progression of her degenerative osteoarthritis and had no relationship to her April 22, 1970 injury.

The Board, at the present time, does not have sufficient evidence before it to enable it to make a determination as to the merits of claimant's request to have her claim reopened. Therefore, the matter is referred to the Hearings Division of the Board, with

surgery in October, 1975 to the 1968 injury. An investigation indicated that claimant had suffered an onset of pain on September 23, 1975 while sitting on his motorcycle with both feet flat on the ground, that his son grabbed the handle bars causing claimant to fall forward and thereafter he was unable to straighten up. Claimant had filed a claim for this injury which was denied as not being employment-related.

The Board, after giving full consideration to all of the medical reports, concludes that the evidence is not sufficient to justify the reopening of claimant's claim at this time. Apparently claimant's present condition is the result of an independent intervening non-industrial trauma.

ORDER

The request received by the Board on October 1, 1976 requesting it to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen claimant's claim for an industrial injury suffered on February 8, 1968 is hereby denied.

CLAIM NO. B 66126 NOVEMBER 19, 1976

BARBARA FOSS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

On October 20, 1976 the claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for a back injury suffered on June 22, 1964. Claimant's claim was initially closed on November 24, 1964, and her aggravation rights have expired.

The most recent medical report is one from Dr. Cherry to the State Accident Insurance Fund, dated September 2, 1976, in which he stated that claimant was anxious to have her claim reopened for treatment and he would appreciate it if the Fund would give it consideration. The report indicated that X-rays of claimant's low back revealed a slight list to the right, however, the disc spaces were well maintained and no osteoarthritic changes were seen; there was no evidence of an old or new fracture and there were not major anomalies.

The Fund was informed of the request and responded, stating it felt, based upon Dr. Cherry's report of September 2, 1976, that it had no obligation to reopen the claim.

The Board, after due consideration of the medical evidence, concludes that it is not sufficient to justify the reopening of the claim.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for an industrial injury suffered on June 22, 1964 is hereby denied.

also testified to breaking and bleeding of the skin on his hands and swelling and extreme pain when his hands are exposed to heat.

The Referee found that loss of function in rating a scheduled disability involves elements other than loss of motion. Claimant now suffers from super sensitivity as well as bleeding and swelling. The Referee concluded that these impairments interfere with the industrial use of the scheduled members and awarded claimant scheduled permanent partial disability in the amounts of 15 degrees loss of the left leg, 30 degrees loss of the left hand, and 30 degrees loss of the right hand.

The Board, on de novo review, agrees with the award of 15 degrees loss of the left leg granted by the Referee to adequately compensate claimant for his loss of function of that member; however, the Board finds that the loss of function of both of claimant's hands is sufficiently compensated for by an award of 15 degrees for each hand.

ORDER

The order of the Referee, dated January 30, 1976, is modified.

Claimant is awarded 15 degrees of a maximum 150 degrees for loss of the left hand, and 15 degrees of a maximum of 150 degrees for loss of the right hand. This is in lieu of the awards for the hands made by the Referee's order. The award granted by the Referee for the loss of the left leg is affirmed.

Claimant's counsel is to receive as a reasonable attorney fee 25% of the compensation awarded hereby, payable out of such compensation as paid, not to exceed $2,000.

WCB CASE NO. 76-35 NOVEMBER 19, 1976

IVAN STEPHENS, CLAIMANT
Willard Bodtker, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order which granted claimant an award of 80 degrees for 25% unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant injured his low back on July 19, 1973 when he fell 17 feet from a stepladder. The following day he saw Dr. Anderson whose diagnosis was spondylolisthesis with superimposed acute lumbosacral sprain, with marked paravertebral muscle spasm.

Claimant was hospitalized on August 2, 1973 and placed in pelvic traction. At this time Dr. Ackerman, a psychologist, found claimant to be tense and angry and it was his impression that claimant was preoccupied with his physical condition, pain and has a tendency to over-react to his physical injury.

On December 18, 1973 Dr. Steele released claimant to return on December 20, 1973 to his job as electrician. On February 22, 1974 he felt claimant was stable and was not limited in his work activities.

A Determination Order of March 21, 1974 granted claimant 16 degrees for 5% unscheduled disability.

The psychological discharge summary diagnosed psychological musculoskeletal reaction, low back pain, shoulder pain, mild secondary to the industrial injury and depression mild.

On January 16, 1975 Dr. Steele examined claimant and concurred with the earlier medical opinions of Dr. Bahrs and Dr. Tsai that claimant should make one more trial of returning to work. Dr. Steele released him to attempt this.

On April 29, 1975 claimant was seen by the Orthopaedic Consultants whose opinion was that the degree of interference in this examination from a functional standpoint was considered moderate. They believed that claimant would continue to need supportive care and that much of claimant's complaints were secondary to conversion reaction. They felt claimant could return to his regular employment if he avoids all stress and strain situations such as heavy lifting, reaching and overhead work. Total loss of function to his back was considered mild, due to the injury minimal. Loss of function to the neck and due to the injury was mild.

A Second Determination Order of May 16, 1975 granted claimant an additional 32 degrees.

On October 9, 1975 Dr. Rennebohm, a psychiatrist, felt claimant a poor candidate for vocational rehabilitation and felt claimant could return to his former occupation or a similar one.

On October 20, 1975 Dr. Fitchett examined claimant and found no orthopedic explanation for claimant's persistance of symptoms.

On November 7, 1975 a Third Determination Order only granted claimant additional compensation for temporary total disability.

Dr. Dixon, a psychiatrist, in February, 1976, after a psychological evaluation, stated that claimant was disabled from any meaningful employment due entirely to emotional factors and that the industrial injury precipitated the emotional problems.

The Referee found that the medical evidence indicated claimant's back and neck impairment was mild and the concensus of medical opinion was that claimant could return to his former occupation. The evidence indicates claimant is preoccupied with his physical condition and wishes to be retrained to a higher level occupation and will not be satisfied until he has reached this goal; that he will continue to be disabled until it is accomplished.

The Referee concluded, based upon the evidence presented, that claimant had not proven he was prima facie "odd-lot" permanently and totally disabled.

Claimant had already received 15 degrees unscheduled disability. Based upon claimant's loss of wage earning capacity, the Referee found this amount inadequate, i.e., claimant is now precluded from any heavy labor and he may suffer in the future by having to take less demanding jobs which will pay less. The Referee concluded that claimant was entitled to an award of 80 degrees for 25% unscheduled disability to adequately compensate him for his loss of wage earning capacity.

The Board, on de novo review, adopts the order of the Referee.

ORDER

The order of the Referee, dated April 16, 1976, is affirmed.

WCB CASE NO. 76-5 NOVEMBER 22, 1976

ROBERT COLLINS, CLAIMANT
William Whitney, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed a partial denial by the State Accident Insurance Fund of responsibility for claimant's left groin, abdomen, low back, right leg, left arm and psychological problems and granted claimant 16 degrees for 5% unscheduled disability to his neck, shoulders, and right groin. Claimant contends he is permanently and totally disabled.

On October 16, 1974 claimant was injured when a steel disposal container fell, pinning claimant to the floor by his right shoulder, right groin and right wrist. Claimant was seen immediately by Dr. Caron, and two days later by Dr. Vore who diagnosed sprain of the right wrist, and strain of the thoracic spine with no permanent disability indicated.

On May 20, 1975 Dr. Johnson performed a lumbar laminectomy due to claimant's continuing difficulties. On July 23, 1975 claimant was examined by Dr. Shlim who found tremendous functional problems and some organic residual. It was his impression that claimant's suit against the Coca Cola Company for an episode in which he found a rodent in a bottle of Coke accounted for some of claimant's symptomatology. He found claimant medically stationary.

Dr. Soot examined claimant on October 1, 1975 and found him medically stationary; he stated that claimant's subjective symptoms "continue to be significantly greater than his objective findings."

Claimant was seen at the Disability Prevention Division on October 30, 1975 by Dr. Van Osdel who found mild atrophy of the left thigh, he recommended a job change.

A psychological evaluation of claimant on November 5, 1975 indicated a psychopathology largely related to chronic personality characteristics and a hypochrondriacal component, the latter being, to a mild degree, influenced by the injury.

A Determination Order of January 7, 1976 granted claimant temporary total disability compensation only.

On January 29, 1976 claimant was seen by the Orthopaedic Consultants who diagnosed hysterical neurosis. They found loss of function of the neck to be minimal and, due to this injury, none. Loss of function of the right shoulder and right groin was none. They found the symptoms pertaining to the left groin, abdomen, low back, right leg and left arm not to be due to this injury and, on February 27, 1976 the Fund denied responsibility for these conditions. The Orthopaedic Consultants stated claimant could return to his regular occupation with limitation on lifting.

The Referee found claimant's emotional problems were not related to his industrial injury and, based upon the medical reports, that claimant's disability was quite minimal to his neck, right groin and shoulders. He concluded that claimant should be granted a minimal award for his disability. He awarded 16 degrees for 5% unscheduled disability.

The Referee also concluded that the symptoms claimant has to other body areas were not related to his industrial injury, therefore, he affirmed the partial denial.

The Board, on de novo review, adopts the Referee's order. The Board finds that there is no medical evidence to support claimant's contention that he is permanently and totally disabled.

ORDER

The order of the Referee, dated May 28, 1976, is affirmed.

WCB CASE NO. 75-4979 NOVEMBER 22, 1976

MELVIN FRITZ, CLAIMANT
Allan Coons, Claimant's Atty.
Ray Heysell, Defense Atty.
Request for Review by Leatherby

Reviewed by Board Members Wilson and Moore.

The carrier, Leatherby Insurance Company, requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment to claimant of all benefits provided by law.

Cabax Mills is the employer in this case. Its workmen's compensation insurance was furnished by Argonaut Insurance Company until May 1, 1975. Thereafter the coverage was furnished by Leatherby Insurance Company.

Claimant worked nine years for the employer as a spotter. Sometime in October, 1974 claimant experienced pain in his right leg which radiated into his hip and knee, and felt like a "hot poker." On November 7, 1974 the mill shut down for about five months. During this period claimant had little activity and the symptoms substantially subsided.

In April, 1975 claimant returned to the mill and the symptoms reoccurred. In July, 1975 the symptoms increased to the point that claimant sought treatment from Dr. Gulick. Dr. Gulick suggested claimant sit on a barrel while working and thereby relieve his pain caused by standing. This was done. Dr. Gulick referred claimant to Dr. Hockey, a neurosurgeon.

In November, 1975 the mill was again shut down. At this point in time claimant's symptoms were quite severe and during the layoff claimant stayed home and did practically nothing. In January, 1976 claimant was called back to work at which time the claimant's condition had improved, but upon returning to work his condition worsened, with pain down his leg into his foot, causing numbness.

On November 18, 1975 Dr. Gulick felt claimant's condition was directly related to the position claimant was required to assume while performing his work.

On February 3, 1976 Dr. Hockey performed a lumbar laminectomy; on February 16, 1976 he said that claimant's employment certainly had aggravated his problem.

A claim was submitted in late 1975 which indicated the employer first had knowledge of the injury on September 17, 1975.

The Referee found that the weight of the evidence established that claimant's back condition arose out of and in the course of his employment with Cabax Mills. There was no contradictory medical or lay evidence.

The Referee further found that although claimant's onset of symptoms occurred in October, 1974 it was the development of these symptoms which gradually worsened over many months between October, 1974 and the 1976 surgery. He concluded this indicated claimant suffered an occupational disease and the responsibility for claimant's occupational disease was that of Leatherby because claimant had a long history of exposure but without actual disability until early 1976.

The Board, on de novo review, adopts the Referee's order.

The appeal was initiated by the carrier, Leatherby, which failed to prevail, therefore, although the issue was the determination of which carrier was responsible, claimant's counsel is entitled to a reasonable attorney fee payable by Leatherby.

ORDER

The order of the Referee, dated May 13, 1976, is affirmed.

Claimant's counsel is hereby awarded, as a reasonable attorney fee for his services in connection with Board review, the sum of $150 payable by Leatherby Insurance Company.

WCB CASE NO. 75-2779 NOVEMBER 22, 1976

VELMA WOLFORD, CLAIMANT
C.S. Emmons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant 100% loss of use of the right forearm. Claimant contends her psychological problems are compensable.

Claimant began work for the employer in January, 1972; a month later claimant began to experience pain and numbness in her right arm. Subsequently, she was seen by Dr. Ellison whose diagnosis was a carpal tunnel syndrome. Three surgeries followed, none granting claimant any relief and, finally, after the third surgery, causing deterioration of the right forearm which is now rendered useless.

The Referee granted claimant an award for 100% loss of use of her right forearm.

On February 13, 1976 claimant was examined by Dr. Hickman, a clinical psychologist, who found claimant had relatively poor aptitudes, making it almost impossible for her to find suitable work. Dr. Hickman found moderately-severe relationship between claimant's industrial injury and her psychopathology and believed that this condition would likely be permanent. Claimant's pain keeps her in a constant state of emotional distress.

The Referee found this case did not involve much of a psychological problem. Claimant is suffering pain and unable to adjust her life to living without the use of her hand but this was not due to psychological problems. He granted claimant no award for unscheduled psychological disability.

The Board, on de novo review, agrees with the Referee's award of 100% loss of use of the right forearm. However, the Board finds that claimant should receive an award for her psychological problems.

The Board finds Dr. Hickman's report wherein he found a moderately severe relationship between claimant's industrial injury and her psychopathology to be uncontradicted. The Board concludes claimant should be granted an award of 80 degrees for 25% unscheduled psychological disability.

ORDER

The order of the Referee, dated June 7, 1976, is modified.

Claimant is hereby granted an award of 80 degrees of a maximum 320 degrees for unscheduled psychological disability. This is in addition to the award of 150 degrees for loss of the right forearm granted by the Referee's order, which is otherwise affirmed.

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

WCB CASE NO. 76-93 NOVEMBER 22, 1976

LONNIE ROACH, CLAIMANT
Jerry Kleen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of December 31, 1975 which granted claimant 27 degrees for 20% loss of the left foot, however, the Determination Order referred erroneously to the left foot and it was corrected by the Referee to the right foot.

Claimant, a mechanic, sustained a compensable right foot injury on March 20, 1975, i.e., a fracture of the right foot. He was seen by Dr. Degner who fitted claimant with a short leg cast. Subsequently, claimant, being unable to bear weight on the foot, was seen by Dr. Paluska who, in July, 1975, performed a bone shave surgery. Claimant returned to work on August 20, 1975. In November, 1975 he was laid off. Claimant presently is performing mechanical and welding work for an auto supply company on a part-time basis.

In October, 1975 Dr. Paluska stated claimant will have some permanent partial

The Board, after reviewing the file, giving considerable weight to the evidence of claimant's failure to cooperate in any of the vocational rehabilitation programs offered to him and also taking into consideration that claimant is only 43 years old at the present time, concludes that before claimant's present disability i.e., his loss of wage earning capacity, can be accurately determined a final attempt to rehabilitate claimant vocationally so that he perhaps can be returned to a segment of the labor market as a useful member thereof should be made.

At this time the Board is not accepting the recommendation of its Evaluation Division to increase claimant's award for permanent partial disability but is remanding the claim to the Fund and directing it to have claimant enrolled at the Disability Prevention Division of the Board for a complete vocational rehabilitation evaluation and, if found feasible, for subsequent referral to a retraining program suitable to claimant's present condition.

ORDER

Claimant's claim is remanded to the State Accident Insurance Fund with instructions to take the necessary steps to have claimant enrolled at the Disability Prevention Division of the Workmen's Compensation Board where he is to be given complete evaluation with respect to his potential for vocational retraining. Claimant shall receive compensation for temporary total disability from the date he is enrolled at the Disability Prevention Division and until his claim is closed pursuant to ORS 656.278.

Claimant's counsel is awarded as a reasonable attorney fee a sum equal to 25% of the compensation claimant is awarded for temporary total disability by this order, payable out of such compensation as paid, not to exceed the sum of $250.

WCB CASE NO. 76-1296 NOVEMBER 23, 1976

BETTY HICKS, CLAIMANT
Keith Tichenor, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of March 4, 1976 which granted claimant 32 degrees for 10% unscheduled disability.

Claimant, a 46 year old janitress, sustained a compensable injury to her low back on December 12, 1974 and was taken to Kaiser Hospital where she received out-patient care. Subsequently, claimant was admitted to Emanuel Hospital for conservative treatment by Drs. Ellerby and Church.

On October 1, 1975 claimant was examined by Dr. Pasquesi; she had not seen a doctor for ten months. Dr. Pasquesi diagnosed chronic lumbosacral instability on the basis of soft tissue structures rather than on bony abnormalities. He rated claimant's disability at 17% of the whole man.

On December 9, 1975 claimant was examined by Dr. Church whose impression

The Referee found that he had authority and jurisdiction to allow the requested offset adjustment. The Board, under the provisions of ORS 656.268(3), has authority to make necessary adjustments in compensation paid or payable which, by Board rule, has been designated to the Evaluation Division of the Board; however, there is nothing in the statutes which indicate that this is the only time during proceeding on an injured workman's claim that adjustments may be made. The Referee concluded that he had authority to make adjustments by the very nature of the decisions he was required to make and also that the Board, under the provisions of ORS 656.278(1), has continuing jurisdiction over findings and awards and may modify, change or terminate them in its own motion and this is sufficient jurisdiction conferred upon the Board and the Referee to provide for adjustments requested if such adjustments are appropriate.

The Referee found that the provisions allowing lump sum advance payments of a permanent partial disability award granted claimant are for the convenience of the claimant; that the claimant should not be allowed to take advantage of such provisions in order to substantially enhance his monetary awards by receiving considerably more than he is entitled to under the appropriate provisions of the Workmen's Compensation Law. In the instant case claimant had sustained a compensable injury in July, 1971 for which she was awarded compensation for 160 degrees for 50% unscheduled disability, the claim was later reopened and claimant received awards of compensation totaling 262 degrees for 85% of the maximum allowable for unscheduled low back disability. The last award or arrangement of compensation was pursuant to stipulation approved on August 17, 1973. Thereafter, claimant requested a lump sum payment of 50% of the remaining permanent partial disability payments due; it was approved by the Board on October 4, 1973. Subsequently, claimant requested that her claim be reopened for aggravation. As stated earlier in this order, the Fund denied the request and, after hearing, the Referee found that claimant's condition had worsened and that she was now permanently and totally disabled. After de novo review, the Board affirmed the Referee's findings of permanent total disability but remanded the matter on the issues stated earlier herein.

The Referee, with great clarity, set forth in his Order on Remand the bases for his finding that the Fund should be allowed an offset adjustment in the amount of $5,787.97 and it is not necessary to repeat them in this order.

The Referee further found that it was in the best interest of the claimant to specify that her monthly payments for permanent total disability should not be drastically reduced by the allowance of the offset adjustment, therefore, he directed that any reduction due to the offset greater than 10% of claimant's monthly permanent total disability payments would not be allowed.

On the issue of the amount of attorney fees granted by the Referee in his initial order, the Referee said he could consider and base his judgment solely on the issues presented to him at the hearing and that it was not appropriate for a Referee in one hearing to consider the factors related to the amount of work done regarding a prior hearing and on prior issues. He considered this matter only on claimant's effort regarding the aggravation proceedings which was initially before him and that he found it was appropriate to award as a reasonable attorney fee the sum of $600. He refused to take into consideration attorney fees which were previously granted.

The Board, on de novo review, affirms and adopts the well-written order of the Referee.

With respect to the cross-request for review made by the Fund, the Board notes that the award for permanent total disability was not granted by the Referee's Order on Remand entered on June 16, 1976, therefore, it gives no consideration to the Fund's cross-request for review on that issue.

ORDER

The Order on Remand and the corrected Order on Remand, both entered on June 16, 1976, are affirmed.

WCB CASE NO. 76-1981 NOVEMBER 23, 1976

CLIFFORD JOHNSON, CLAIMANT
Don Swink, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Second Determination Order dated April 12, 1976.

Claimant was 29 years old and employed as a laborer when he developed dorsal back symptoms on March 22, 1974. He was seen by Dr. Opsahl and released to work.

On October 25, 1974 claimant was seen by Dr. Mason at the Disability Prevention Division who diagnosed dorsal lumbar strain, mild, widespread subjective complaints and anxiety tension state with exaggeration, all due to the injury.

Claimant was examined by the Back Evaluation Clinic on December 13, 1974, the diagnoses was dorsal-lumbar strain. Claimant was found to be medically stationary and able to return to his former occupation or to truck driving, whatever he wished. Total loss of function of the back was mild and due to this injury mild.

Claimant underwent a psychological evaluation on December 20, 1974 which showed claimant had moderately severe anxiety tension reaction with depression and extreme preoccupation with physical and emotional complaints. Claimant's psychopathology is no more than mildly to moderately related to his industrial injury through aggravation of a pre-existing condition. Claimant's prognosis for restoration and rehabilitation is guarded; especially, if he cannot return to any type of heavy labor work.

A Determination Order of February 19, 1975 granted claimant 32 degrees for 10% unscheduled low back disability. A Second Determination Order of April 12, 1976 granted claimant compensation for temporary total disability compensation only.

The Referee found, based upon the medical reports, that claimant had many subjective complaints but that there were few objective medical findings. The Back Evaluation Clinic and Dr. Mason found claimant's low back disability due to the injury to be mild and both believed that claimant could return to his former occupation.

The Referee concluded that claimant had been adequately compensated for his loss of wage earning capacity by the award of 32 degrees.

The Board, on de novo review, concurs with the findings and conclusions of the Referee.

ORDER

The order of the Referee, dated July 14, 1976, as corrected on July 16, 1976, is affirmed.

WCB CASE NO. 75-1159 NOVEMBER 23, 1976

DARRELL LANNING, CLAIMANT
Frank Mowry, Claimant's Atty.
Roger Luedtke, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which granted claimant an additional award for 15% loss of the right arm equal to 28.8 degrees, making a total award for 90% loss of the right arm (172.8 degrees).

Claimant, on June 5, 1971, sustained a laceration of his right arm requiring suturing of the nerves and a vein graft. A Determination Order, dated February 4, 1975, granted claimant 144 degrees for 75% loss of the right arm.

Claimant has returned to work, driving a lift truck and loading boxcars. He testified that he can use a shovel by holding it with his right hand and lifting the weight with his left. He can make a fist and has a slight and very short term grip. Claimant cannot button a shirt, write, eat or perform intricate work with his right hand. He cannot now play musical instruments but he can drive a car and can shift with his right arm.

The Referee found claimant well motivated and a very credible witness. He also found all of claimant's activities which involve the use of his right arm are similar to the ability of using a prosthetic device. Claimant is 25 years old.

The Referee concluded that the loss of function of the arm was almost complete and that the award granted by the Determination Order was inadequate and he granted claimant 90% for 172.8 degrees loss of the right arm.

The Board, on de novo review, finds, based upon the medical reports, that claimant's loss of function of his right arm has been adequately compensated for by the award of 75% granted by the Determination Order. Claimant still maintains, in the Board's opinion, 25% use of the right arm.

ORDER

The order of the Referee, dated May 24, 1976, is reversed.

The Determination Order of February 4, 1975 is affirmed.

WCB CASE NO. 76-1413 NOVEMBER 23, 1976

DONALD LEE, CLAIMANT
Robert Martin, Claimant's Atty.
Roger Luedtke, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of February 5, 1976 which granted claimant 32 degrees for 10% unscheduled disability. Claimant contends he is entitled to an award for 50% unscheduled disability.

Claimant, a salesman, sustained a low back strain on January 23, 1974, he was hospitalized and given conservative treatment.

On July 25, 1975 Dr. North claimant's treating physician, diagnosed a chronic lumbosacral strain. On November 11, 1975 Dr. North found claimant was medically stationary, but not vocationally stationary. Claimant could not return to his former occupation as he was to avoid heavy labor. Dr. North felt claimant needed help in finding employment. He felt claimant is now susceptible to recurrent lumbosacral strain if he doesn't limit his activity.

On November 10, 1975 claimant was examined by Dr. Short who found no purely objective evidence of injury to claimant's back. Dr. Short did feel there was some instability in claimant's low back; he also found some functional overlay associated with claimant's injury causing claimant "to prolong and exaggerate his symptoms." Dr. Short rated claimant's disability as "mild to minimal."

In April, 1976 claimant suffered a heart attack and is presently unemployed.

The Referee left the determination of claimant's entitlement to vocational rehabilitation or job placement to the Disability Prevention Division as claimant has been in contact with it.

The Referee found claimant's disability consisted of subjectively manifested inability to engage in a physical stressful activities. He concluded that some of claimant's physical inability was due to his heart attack.

Taking into consideration claimant's intelligence and his wide variety of work experiences, the Referee concluded that claimant has been adequately compensated for his loss of wage earning capacity by the award granted by the Determination Order.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 23, 1976, is affirmed.

SAIF CLAIM NO. A 579585 NOVEMBER 23, 1976

JAMES NATIONS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left foot on October 17, 1956. On February 4, 1957 a Determination Order granted claimant an award for 5% loss of function of his left foot. On August 6, 1957 a Judgment Order of the Circuit Court increased claimant's award to 20% loss of function of the left leg. On November 26, 1958 a Stipulated Judgment further increased the award to 33.75% loss of function of the left foot.

Dr. Ozolin, a Tacoma orthopedic surgeon, performed an L4-5 laminectomy and disc excision surgery on May 1, 1973. Dr. Ozolin believed the 1956 injury was a material contributing factor to claimant's 1973 condition. Claimant's aggravation rights have expired.

On June 1, 1976 the Board, pursuant to its own motion jurisdiction, remanded claimant's claim to the State Accident Insurance Fund for payment of compensation, commencing March 27, 1973, the date of the pre-surgery myelogram, and until the claim was closed pursuant to ORS 656.278.

Claimant sustained a back injury on August 9, 1976 while working as a garage mechanic, his claim was accepted by the Fund as a new injury and presently remains in open status.

Claimant's attorney suggested a personal interview of claimant be conducted by the Board's Evaluation Division. However, the Division felt no useful objective information would be provided since the new injury is in the same body area and a current medical examination would be of little or no value in determining claimant's loss of wage earning capacity due to the 1956 injury.

On October 21, 1976 the Fund requested a determination. The Evaluation Division recommended payment of compensation for temporary total disability, per the Own Motion Order, dated June 1, 1976, from March 27, 1973 through April 30, 1974 and an award for 20% unscheduled low back disability.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 27, 1973 through April 30, 1974 and to an award for 20% unscheduled low back disability.

Claimant's counsel is hereby granted an award of 25% of the increased compensation granted by this order, not to exceed the sum of $2,000.

said claimant "is most definitely employable and could probably be retrained to do whatever he wished to do." He summarized by saying claimant's disability of the left foot results in some mild to moderate impairment in his future occupation as a painter.

A Determination Order of March 10, 1976 granted claimant 6.75 degrees for 5% loss of the right foot and 54 degrees for 40% loss of the left foot.

The Referee found that claimant's doctor had requested a pair of high top (work) shoes for him but the carrier had refused to pay for them. There was no record of the carrier's denying this request, however, the carrier questioned the need for a work shoe when claimant had not returned to work.

Claimant testified he has not returned to work because his doctor has not released him to do so. The Referee found that all claimant had to do was ask his doctor and a release would have been given him.

The Referee concluded that the awards granted by the Determination Order should be increased; that according to the medical evidence, if it were not for the brace for claimant's left ankle he would be reduced to very little walking. Based on the use claimant still has in his left foot, he concluded that claimant was entitled to a greater award of permanent partial disability. The Referee granted claimant 15% loss of the right foot and 55% loss of the left foot (an increase of 10% for each foot) and ordered the carrier to provide and pay for a work shoe for claimant.

The Board, on de novo review, disagrees with the Referee's assessment of claimant's scheduled disability. The Board finds, based upon the medical reports and a rating of scheduled disability solely by loss of function, that claimant's left foot disability is moderate and the disability to the right foot is minimal. Claimant can return to his job as a painter with bearable discomfort. His doctor was of the opinion that claimant was employable.

The Board affirms the Determination Order of March 10, 1975 as being adequate compensation for claimant's loss of function in each foot.

The Board agrees with the Referee's conclusion that the employer should provide claimant with a pair of work shoes, although the Referee did not specifically order the employer to do so.

ORDER

The order of the Referee, dated July 7, 1976, is reversed.

The Determination Order dated March 10, 1976, is affirmed. The employer shall provide claimant with the type of work shoes necessary for his work.

claimant compensation for temporary total disability from April 16, 1975 through May 21, 1975, assessed a penalty against the Fund equal to 25% of the temporary total disability compensation due claimant and awarded an attorney fee to claimant's counsel, payable by the Fund.

Claimant suffered a compensable injury on July 13, 1970. Her claim was closed by a Determination Order dated August 6, 1971 with an award of compensation for temporary total disability only. Claimant contends that as a result of this injury she sustained neck, right shoulder, right arm and hand injuries and injury to her low back.

Claimant filed a claim for aggravation on April 16, 1975 which the Fund denied on May 21, 1975. Due to claimant's financial inability to come to Portland her deposition was taken in Memphis, Tennessee.

In December, 1965 claimant had sustained a compensable injury in the State of Washington, diagnosed as lumbosacral strain with pain radiating down both legs. Claimant had filed a claim for aggravation of this Washington injury on June 19, 1967 and again on February 28, 1969.

In claimant's deposition she denied any pre-injury medical history or prior injuries and, based on this, the Referee questioned claimant's credibility. Therefore, he relied solely on the medical reports submitted in this case.

Dr. Bisson, claimant's treating physician in Tennessee, diagnosed an acute cervical strain, contusion of the right shoulder, acute lumbosacral strain and neuritis of the right hand and arm.

Claimant's initial treating physician, Dr. Rafferty, originally diagnosed muscle strain of the neck, rhomboid muscles and right sacroiliac joint.

The Referee felt that at the time of claimant's claim closure she had some permanent disability, however, the Determination Order was never appealed, therefore, there was no legal basis for making a determination of the extent of claimant's disability.

Dr. Bisson referred claimant to Dr. Kaplan on April 19, 1971 who diagnosed cervical strain, right shoulder contusion, lumbar sprain and functional overlay. On July 6, 1971 Dr. Kaplan again examined claimant and found her condition to be the same as in April.

The Referee found, based upon the medical evidence submitted by numerous doctors, that claimant's condition had not changed either before or after the issuance of the Determination Order in 1971.

Claimant's claim for aggravation was supported by a report from Dr. Bisson, dated August 11, 1975, as well as reports from Dr. Kaplan and other doctors. The Referee found that although these reports would be sufficient to support claimant's claim for aggravation which, prior to the passage of Senate Bill 741, would have entitled claimant to a hearing, the reports only state that claimant's condition has worsened without any specific findings which would indicate a worsening of her symptoms or disability. The entire medical evidence fails to show any significant change or worsening of claimant's condition.

The Referee found a five week period in which the Fund failed to accept or deny claimant's claim for aggravation and during which no compensation was paid.

The Referee concluded that claimant had failed to prove her condition has worsened since the issuance of the Determination Order. He also concluded that the Fund had failed to properly process claimant's claim and had offered no explanation for its conduct. Therefore, the Referee granted claimant compensation for temporary total disability for that period and assessed a penalty against the Fund of 25% of such compensation and awarded $600 attorney fees, payable by the Fund.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated January 30, 1976, is affirmed.

WCB CASE NO. 76-697 NOVEMBER 30, 1976

ESTHER NEUFELD, CLAIMANT
Rolf Olson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim for aggravation to it for acceptance and payment of compensation, as provided by law, and extended claimant's aggravation rights five years from September 23, 1975.

Claimant sustained a compensable injury on September 3, 1965 which caused an immediate onset of pain in her tailbone. Claimant remained off work through September 26, 1975.

On October 6, 1965 an order was entered by the State Industrial Accident Commission granting claimant time loss only. On this order there was no notice of claimant's rights to make an election between the two year aggravation rights provided under the old law and the five year aggravation rights provided by the law, as amended.

Claimant testified that she did not appeal the SIAC order because Dr. Fleming had stated her disability would disappear with time. In August, 1967 claimant again saw Dr. Fleming who, for the first time, diagnosed a fracture of the coccyx.

On August 28, 1968 Dr. Fleming examined claimant and wrote to the State Compensation Department asking for a consultation by an orthopedic physician. SCD responded that it felt it was no longer liable for claimant's condition. There was no notice of appeal rights from this decision and no mention of aggravation rights.

Claimant testified she has had continual pain in her tailbone since 1965 and now, due to this, is unable to work.

On October 23, 1975 Dr. Poulson said in a letter report that claimant's present condition was related to her industrial injury of September 3, 1965 and advised the Fund that his letter was submitted as "evidence of an aggravation of her condition."

On December 9, 1975 the Fund denied claimant's claim, stating claimant's aggravation rights had long expired.

The Referee found that the lay and medical evidence established a worsening of claimant's disability subsequent to the entry of the October 6, 1965 order by SIAC.

The Referee concluded claimant had proved aggravation, i.e., a worsening of her condition since her last award of compensation, and remanded claimant's claim to the Fund for acceptance and payment of compensation.

The Referee further concluded that claimant's aggravation rights should be extended for a period of five years from September 23, 1975 because claimant had never had notice of any appeal rights, either the two year or five year aggravation rights to which she was entitled.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 14, 1976, is affirmed.

Claimant's counsel is hereby awarded as a reasonable attorney fee for his services in connection with Board review, the sum of $400, payable by the State Accident Insurance Fund.

WCB CASE NO. 75-1556 NOVEMBER 30, 1976

LILLIAN SUCH, CLAIMANT
Rolf Olson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the State Accident Insurance Fund's denial of her claim for compensation.

On February 25, 1975 claimant filed a Form 801, alleging injury to her sinus, lungs and stomach from lye solution exposure over a twelve year period.

In May, 1974 claimant was examined by Dr. Squire, an allergist. Claimant has a past history of chemical bronchitis and allergy to penicillin. Upon skin testing claimant exhibited moderate sensitivity to house dust and dog hair. Dr. Squire, by deposition, stated claimant's immediate problems were caused primarily by infection rather than allergy.

Dr. Grossman, on June 15, 1975, diagnosed exposure to irritating fumes with rhinitis and bronchitis.

On December 7, 1971 claimant had filed a report of occupational disease for nausea, vomiting and headache. This claim was denied by the Fund on January 3, 1972. On November 21, 1973 claimant filed another report of occupational disease due to a pinprick to her right thumb. This claim was denied by the Fund on January 18, 1974.

severe depletion of claimant's monthly payments.

The matter of unilateral termination of benefits by the carrier must, by definition, be termed unreasonable. In the instant case the carrier had no authority from the Board to deduct $50 a month from the periodic payments on claimant's award for permanent total disability. The carrier must be penalized for its unilateral implementation on the grounds that the Board requires agency approval on a case by case basis to make lump sum awards and, therefore, the Board must require that its approval be received prior to decision by a carrier for offset of overpayments by such carrier. Therefore, the penalty assessed by the Referee and the award of attorney fees payable by the employer were proper.

ORDER

The order of the Referee, dated June 7, 1976, is modified.

The employer, through its carrier, Fireman's Fund Insurance Company, will be allowed an offset adjustment in the sum of $3,077.14 against permanent total disability compensation paid claimant, to be offset against each monthly payment in an amount not to exceed 10% of each monthly payment.

The carrier acted without Board authorization in deducting from claimant's payment for permanent total disability $50 per month, therefore, the employer, and its carrier, shall pay claimant an amount equal to 25% of the sums deducted from claimant's payments for permanent total disability prior to the date of this award, as a penalty for the unilateral deduction.

The award made by the Referee of $600 attorney fee payable to claimant's attorney by the employer and its carrier is affirmed.

WCB CASE NO. 76-331 NOVEMBER 30, 1976

ESTHER BOOTHE, CLAIMANT
Hugh Cole, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation as provided by law.

Claimant alleged she suffered an industrial injury to her back on August 14, 1975; she sought no medical treatment but worked until September 21, 1975 when she suffered severe back pain when she was home.

Claimant told two employees before she quit that she had hurt her back while lifting trays on the job; however when claimant's kitchen supervisor came to see her in the hospital claimant never mentioned any injury to her back suffered while at work but mentioned only that her doctor thought she was overweight and was on her feet too much. While hospitalized claimant requested a claim form.

Claimant was discharged from the hospital on October 4, 1975. She did not return to work but continued to stay at home undergoing conservative treatment of bed rest and traction until rehospitalized on December 5, 1975. She underwent surgery for excision of a L4-5 disc on December 8, 1975.

On March 12, 1976 Dr. Woolpert indicated claimant told him she injured herself lifting trays but was not sure of the exact date. It was Dr. Woolpert's opinion, based on claimant's history, that her work activity was a direct cause of her development of low back problems.

The Referee found this whole case rested solely on credibility. Claimant had the burden of proving her claim. Claimant's testimony was corroborated by two witnesses; one was uncertain of the date claimant allegedly injured her back, the other stated claimant injured her back in the latter part of August and that claimant had complained continually since then about back problems.

None of the kitchen personnel or supervisor personnel had heard of claimant's industrial injury, however, claimant testified that she did not associate her August incident with her present condition during her first hospitalization. After the second hospitalization claimant established August 15 as the date of her injury.

Claimant did not give notice of injury within 30 days, however, this issue was not raised at the hearing.

The Referee concluded that claimant's failure to discuss her injury with her supervisory personnel was not fatal to her case. He concluded, based upon the medical evidence and the testimony presented by the witnesses, that claimant had established that she had suffered a compensable injury. He remanded her claim to the Fund.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 12, 1976 is affirmed.

Claimant's counsel is hereby granted an award for a reasonable attorney for his services in connection with Board review, the sum of $400, payable by the State Accident Insurance Fund.

WCB CASE NO. 75-5362 NOVEMBER 30, 1976

LARRY KIRK, CLAIMANT
Stipulation to Settle Disputed Claim

It is hereby stipulated, claimant acting personally and by his attorney, Evohl F. Malagon, and the State Accident Insurance Fund acting by its attorney, W.D. Bates, Jr., Assistant Attorney General:

1. That claimant suffered a compensable injury to his left arm on December 7, 1973, and that the claim was closed with a determination order on October 23, 1974.

2. That on May 20, 1975, a stipulation awarded claimant additional permanent disability.

3. That on December 15, 1975, claimant filed a request for a hearing and an aggravation application.

4. That on March 9, 1976, claimant filed a supplemental request for hearing requesting penalties and attorney fees for failure to accept or deny the aggravation claim within sixty days.

5. That on March 25, 1976, the State Accident Insurance Fund denied claimant's aggravation claim on the grounds that his condition had not worsened and that the condition requiring treatment did not result from his industrial injury.

6. That on April 5, 1976, claimant filed another supplemental request for hearing concerning the denial.

7. That on May 27, 1976, a hearing was held before Referee Kirk A. Mulder, and the Referee's Opinion and Order was entered on June 11, 1976. Following a Request for Reconsideration by the State Accident Insurance Fund the Referee's Opinion and Order was re-issued on June 29, 1976.

8. That the State Accident Insurance Fund requested review by the Workmen's Compensation Board on July 9, 1976.

9. That there is a bona fide dispute between the claimant and the State Accident Insurance Fund. The claimant contends and the State Accident Insurance Fund denies that claimant's condition has worsened and that his psychiatric condition resulted from his industrial injury.

10. That all issues which were or could have been raised at the hearing on May 27, 1976, may be compromised and settled as a disputed claim by a payment from the State Accident Insurance Fund to claimant and his attorney of the sum of $7,840.00.

11. That payment of the agreed sum in no way implies that the State Accident Insurance Fund accepts responsibility for the denied conditions, or disabilities, or expenses resulting therefrom.

12. That the requests for hearing may be dismissed with prejudice.

13. That claimant's attorney is authorized to collect from claimant an attorney fee of 25% of the sum agreed upon as a reasonable sum for services rendered to claimant.

ORDER

Based upon the above stipulation of the parties, the Board finds that there is a bona fide dispute between the parties. Pursuant to ORS 656.289(4) the foregoing stipulated settlement is therefore approved.

WCB CASE NO. 75-5457 NOVEMBER 30, 1976

JACK A. McAMIS, CLAIMANT
Join Petition and Order of a Bona Fide Dispute

FACTS

Claimant, Jack McAmis, allegedly sustained an occupational disease or accidental injury arising out of and in the course of his employment on November 4, 1975. At that time the claimant was employed by Roseburg Lumber Company, an employer insured by Employers Insurance of Wausau.

The claimant filed a report of occupational injury or disease on November 13, 1975 alleging that an acute myocardial infarction arose out of and in the course of his employment.

On December 15, 1976 the insurance carrier for the employer issued a letter of denial.

A Request for Hearing was filed and a hearing was conducted on March 10, 1976 in Roseburg, Oregon and continued for the taking of additional evidence. The conflicting evidence and medical opinion were introduced by the employer and claimant. On September 9, 1976 an Opinion and Order was entered remanding the claim to the employer for the payment of compensation.

The employer has filed a Notice of Appeal maintaining its position that the condition requiring the emergency saphenous vein bypass graft surgery pre-existed the occupational event and was the cause of the medical procedure.

Claimant has returned to his prior occupation of driving a chip truck for Roseburg Lumber Company.

PETITION

Claimant, Jack McAmis, in person and by his attorney, Gerald C. Doblie, and the employer, Roseburg Lumber Company, and their insurer, Employers Insurance of Wausau, by their attorney, Philip A. Mongrain, now make this petition to the Board and state:

1. Claimant, Jack McAmis, Roseburg Lumber Company, and Employers Insurance of Wausau have entered into an agreement to dispose of this claim for the total sum of $12,000, said sum to include all benefits and attorney's fees.

2. The parties agree that from the settlement proceeds, $2,400 will be paid to the lawfirm of Bailey, Doblie and Bruun as reasonable and proper attorney fees.

3. Both claimant and respondent state that this Joint Petition for settlement is being filed pursuant to ORS 656.289(4) authorizing reasonable disposition of disputed claims.

4. All parties understand that if this settlement is approved by the Board and payment made thereunder, said payment is in full, final and complete settlement of all claims which claimant, Jack McAmis, has or may have against respondents for injuries claimed or their results, including attorney's fees and all other benefits under the Workmen's Compensation Law and that they will consider said award as being final.

claim for a new injury should have consolidated at the time the second request for hearing was made. The Board does not have jurisdiction to consolidate the two requests for review but it can, and does remand both cases to the Hearings Division for a hearing at which the employer, J.D. Dutton, and its carrier, Argonaut Insurance Company, and the employer, Umpqua Construction, and its carrier, Employers Insurance of Wausau, shall be made parties defendent and shall be given the opportunity to present such evidence as each desires on the issue of whether claimant suffered an aggravation of his September 12, 1974 injury or a new injury as a result of the incident occurring some time during June or July, 1975 and which employer and its carrier has the responsibility for claimant's present condition.

The Board further directs that this matter be heard by a Referee other than Referee Seifert or Referee Johnson.

Pursuant to the provisions of ORS 656.307(1), the Board designates Umpqua Construction Company, and its carrier Employers Insurance of Wausau, as the paying agent and directs that it shall immediately commence payment of all benefits due claimant, as provided by law, and continue to pay same until a determination of the responsible paying party has been made. Upon determination of the responsible paying party the Board shall direct any necessary monetary adjustment between the parties involved.

It is so ordered.

SAIF CLAIM NO. AC 262686 DECEMBER 1, 1976

HARMON WILSON, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

Claimant suffered a compensable industrial injury, i.e., a crushing type injury to his right lower leg and left thigh. Claimant has had a spastic left-sided hemiparesis since childhood. The claim was originally closed on August 6, 1971 with no award for permanent partial disability. On April 11, 1972 pursuant to stipulation, claimant was given an award for 10% of the left leg and 25% of the right leg and on the same date a disputed claim settlement was approved whereby claimant was paid $200 by the Fund in lieu of any and all sums claimed by him for his back condition and underlying spastic condition as well as any vascular condition which he might have. Claimant's aggravation rights have expired.

The Fund has provided claimant with a left leg brace which he must wear as a result of his industrial injury. Claimant has, through his doctor, requested the Fund to furnish claimant with shoes with some type of brace support to enable claimant to work; however, the Fund has refused. It appears that without this special type shoe the leg brace is useless.

The Board concludes that the Fund should, pursuant to the provisions of ORS 656.245, furnish claimant with the necessary orthopedic shoes; the shoe and brace has to be considered as an integrated unit and the use of this unit is required as a direct result of claimant's industrial injury to his lower extremities, a condition which the Fund has accepted as compensable.

his further medical opinion that the work activity of January 6 might have contributed to the workman's symptoms; however, the definition of exactly what was being performed at that time had not been clearly defined in the reports which were furnished to him. Dr. Griswold believed that the subsequent cardiac surgery was not a result necessarily of the work activity of January 6, that the workman already suffered from serious aortic stenosis and probably this was the most significant lesion rather than his coronary artery disease.

Dr. Starr, who is the senior partner in the same medical firm as Dr. Chapman, strongly disagreed with Dr. Griswold and Dr. Chapman, stating that the accepted heart injury of January was a material contributing factor to the workman's death in April insofar as the workman's symptoms were due to coronary disease; that the operation was for the correction of the coronary disease, and, therefore, a part of the original injury. Prior to the surgery and because of the special studies which revealed severe aortic valve stenosis and coronary heart disease, the workman had been referred to Dr. Starr for open heart surgery. Dr. Starr's opinion was that because of the severity of the workman's coronary disease and the aortic valve disease which was discovered when a cardiac catheterization was performed in the hospital, the operation had been advised by him and as a result of complications accruing from such operation the workman subsequently died.

Dr. Starr disagreed with that portion of Dr. Griswold's opinion which stated that the episode of January 6 was not probably of such magnitude as to aggravate coronary artery disease but merely would cause tension.

The Referee, confronted by conflicting medical opinions, chose to accept the opinion of Dr. Starr because he believed he was actually in charge of the doctor who operated on the workman, was in charge of the hospitalization and took care of the workman in relation to his surgery. Dr. Starr was convinced that workman's pre-existing condition had been aggravated by the accepted condition of January 6, 1975 and that this aggravation was a material factor in requiring the operation and subsequent complications which ultimately led to the workman's death.

Based upon Dr. Starr's opinion, the Referee concluded that the accepted industrial injury of January 6, 1975 was a material contributing factor to the operation and complications which followed and, therefore, the denial by the Fund was improper. He also concluded the claim for widow's benefits should be accepted by the Fund and he awarded claimant's attorney a fee of $2,000 payable by the Fund. He referred the matter to the Fund for acceptance and payment thereof.

The Board, on de novo review, finds that the preponderance of medical evidence does not support the opinion expressed by Dr. Starr. The opinion expressed by Dr. Froom cannot be given much weight as Dr. Froom, himself, stated he was not a cardiologist and he did not feel he could comment on the evaluation made by Dr. Griswold, one of the most prominent cardiologists in the state. Dr. Chapman, who performed the open heart surgery, Dr. Forsyth, the workman's physician after the January 6, 1975 incident, and Dr. Griswold all were of the opinion that there was no relationship between the workman's open heart surgery and his pre-infarction angina. The Fund denied responsibility for the heart surgery based upon Dr. Forsyth's report.

The Board is more persuaded by the opinions expressed by Dr. Forsyth, Dr. Chapman, and Dr. Griswold and concludes that the denial by the Fund of the claim for responsibility of the surgery and the following complications as well as its denial of widow's benefits was proper. The Referee's order must be reversed.

ORDER

The order of the Referee, dated April 29, 1976, is reversed.

WCB CASE NO. 75-1291 DECEMBER 7, 1976

FRED HENDRY, CLAIMANT
S. David Eves, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's denial of claimant's claim of aggravation of a heart condition suffered by claimant on May 21, 1970.

The May 21, 1970 heart attack was attributed to work and stress on the job as a waiter. Claimant was treated by Dr. Krakauer and hospitalized with a diagnosis of myocardial infarction, mild. He returned to light work on June 15, 1970 and on July 28, 1970 suffered a recurrence from which he made a good recovery. Dr. Krakauer concluded that claimant had skirted the edge of a significant coronary episode without full-blown infarction.

Dr. Keene felt that claimant most likely had a myocardial infarction four days prior to his admission to the hospital in May, 1970, and a current myocardial infarction in mid-July, 1970. The claim was closed by a Determination Order mailed July 6, 1971 and claimant was awarded 32 degrees for unscheduled heart disability.

Since claimant's last hospitalization on July 28, 1971 he has continued to smoke excessively and to work excessively putting unreasonable intermittent severe physical demands upon himself. On December 3, 1974 claimant was hospitalized with an acute myocardial infarction diagnosed as arteriosclerotic heart disease with a history of coronary insufficiency, hypertensive vascular disease, stable, nicotine habituation, and hyperlipemia. Claimant was discharged on December 24, 1974 and he returned to work.

Dr. Krakauer felt the last incident clearly was a continuation of his original problem of arteriosclerotic heart disease and coronary insufficiency which related to his industrial injury in 1970, and inasmuch as the responsibility for the original heart attack was accepted as work-related then the conclusion was inescapable that recurrent attacks would have some relationship to the original causal consideration.

Dr. Harwood, a member of the Fund's medical staff, felt that the incident of December 3, 1974 had no relationship or association with claimant's original heart attack of May, 1970 but was merely a manifestation of his generalized arteriosclerosis and arteriosclerotic heart disease which was a condition resulting from claimant's way of life and not related to any work activity.

Dr. Keene, who examined claimant on October 8, 1975, found that claimant had been working vigorously over the past ten months without any symptoms but was taking medication regularly; he concluded that claimant's condition represented the expected course of an individual with arteriosclerotic and hypertensive cardiovascular disease.

Claimant has had and will continue to have, in his opinion, repeated episodes of coronary insufficiency and possible myocardial infarctions. Although claimant was asymptomatic at the time Dr. Keene saw him on October 8, 1975 there was evidence of change in his findings which were made in December, 1974. Dr. Keene concluded there was a chronic disease process which in no way could be contributed to the overwork and stress in the summer of 1970. He did not believe that the December, 1974 infarct was contributed to by the 1970 incident.

The Referee found that an aggravation, to be compensable pursuant to ORS 656.273, must concern a worsened condition resulting from the original injury and caused by the specific injury on which the claim was based. In a heart case where the issue of original compensability is raised, in order for an award of compensation to be merited the evidence must support a finding that both legal and medical causation exist; however, in an aggravation claim the legal causation is admitted by the acceptance of the original claim but medical causation still must be established.

In the instant case there was a conflict of opinions expressed by the physicians involved. Both Dr. Keene and Dr. Harwood believed that the work stress had little, if anything, to do with the latest myocardial infarction suffered by claimant. Only Dr. Krakauer felt that claimant's chronic heart condition which he had had since 1970 could be exacerbated or influenced by various factors such as workload, smoking, fatigue and physical and emotional stress.

The Referee concluded that claimant had failed to establish medical causation; that the testimony was not enough, given the other facts of the case, to amount to a proof by a preponderance of evidence that the job-related stress was a material contributing factor of the December, 1974 myocardial infarction. Therefore, he affirmed the Fund's denial.

The Board, on de novo review, affirms the Referee's order.

ORDER

The order of the Referee, dated May 13, 1976, is affirmed.

WCB CASE NO. 75-3151 DECEMBER 7, 1976

GLADYS WOLF, CLAIMANT
Hugh Cole, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an additional award of 160 degrees for 50% unscheduled disability, making a total award of 240 degrees for 75% neck, head, shoulder and psychophysiological disability.

The State Accident Insurance Fund cross-requests review by the Board of the Referee's order.

Claimant, a 55 year old waitress, suffered an injury on May 20, 1971; her claim was denied by the Fund on July 15, 1971, however, by a stipulation, dated May 15, 1972, the claim was accepted. A Determination Order of September 11, 1973 granted claimant 32 degrees for 10% unscheduled disability. Claimant requested a hearing.

An Opinion and Order entered on August 30, 1974 remanded claimant's claim to the Fund for reopening for further medical care and treatment.

Claimant was examined on October 14, 1974 by Dr. Jones who found possible psychophysiological neuromuscular syndrome but no shoulder girdle atrophy to account for claimant's inability to elevate her arms over her head. Claimant suffers from dizzy spells and blackouts most likely resulting from her 1973 automobile accident.

On February 25, 1975 Dr. Jones reported that even though claimant's neurological examination appeared normal she will never return to gainful employment because, psychologically, she feels she never will be able to. It was Dr. Jones' impression that claimant suffers from post-accident neurosis and this is the primary problem which must be solved before claimant can return to work.

Upon examination of April 24, 1975 Dr. Kjaer found conversion reaction with depression. In his report of June 5, 1975 he reported he could not identify any psychological symptoms which were a direct or indirect result of her industrial injury.

A Second Determination Order, dated July 10, 1975, granted claimant an additional award of 48 degrees, giving claimant a total of 80 degrees for her unscheduled disability.

The Referee found that although Dr. Kjaer pre-dated claimant's psychological complaints from the 1971 industrial injury, claimant was able to work steadily until the accident, therefore, if any or all of her complaints traceable to the injury are functional, the impact of her fall and residuals of her disability are substantial. Claimant testified she still suffers blackouts.

The Referee concluded claimant has many medical problems, also that claimant's 1973 automobile accident was the cause of some of her complaints, i.e., blackouts; however, claimant was a credible witness, testifying to her neck, arm and shoulder problems and such testimony was corroborated by the medical evidence.

The Referee found claimant to be permanently and totally disabled; however, claimant had not proven that her dizziness or blackouts were traceable to the industrial injury, therefore, they are not the responsibility of the Fund. The Referee felt these symptoms of dizziness and blackouts were responsible for claimant's inability to return to gainful employment and concluded that claimant was entitled to, due to her physical disability and her loss of wage earning capacity as pertains to this injury, 256 degrees for 75% unscheduled neck, head, shoulder and psychophysiological disability.

The Board, on de novo review, finds that claimant's residuals from the industrial injury, as supported by the medical reports, when considered with claimant's obvious lack of motivation, justify no greater award than 160 degrees for 50% unscheduled disability (an increase of 80 degrees) to adequately compensate claimant for her loss of wage earning capacity.

ORDER

The order of the Referee, dated May 21, 1976, is modified.

Claimant is hereby granted an award of 160 degrees of a maximum 320 degrees unscheduled head, neck, shoulder and psychophysiological disability. This award is in lieu of the award made by the Referee's order, which is affirmed in all other respects.

WCB CASE NO. 75-5579 DECEMBER 7, 1976

The Beneficiaries of
LOUIS RAK, DECEASED
Donald Wilson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Beneficiaries

Reviewed by Board Members Wilson and Moore.

The beneficiaries of the deceased workman, hereinafter referred to as claimant, request review by the Board of the Referee's order which denied the claim for death benefits.

The deceased workman had been a sheetmetal worker who had suffered a fatal heart attack on August 19, 1969. Claimant filed a claim on November 3, 1975 which was denied by the State Accident Insurance Fund on December 19, 1975. The claimant testified that she did not file a claim until November, 1975 because she did not know a heart attack could be attributed to industrial work.

The night prior to his death, the workman had had a good dinner and a good night's rest according to the testimony of claimant. Upon arising the following morning the workman had made no complaints before going to work.

A co-worker of the deceased workman testified that prior to the heart attack, he and the workman had gone to a building quite some distance from the plant to retrieve some plywood from the roof of a building, using a ladder with the workman handing down the plywood to the co-worker. The workman had had no symptoms at that time and after the job was completed they drove the pickup back to the plant which took approximately one half hour.

Dr. Griswold testified there was no probable relationship between the workman's work activities and his heart attack; there was a remote possibility of relating the heart attack to the last work activity, but it was not probable. Dr. Griswold further testified that the autopsy showed a severely diseased heart of long duration. He stated that had the workman run up the ladder and immediately dropped dead then he would find the heart attack would be work related. However, more than one half hour had elapsed between any work activity and the heart attack.

Dr. Lee, a cardiologist, expressed his opinion that the workman's activity of removing the plywood off the roof required more physical exertion than he normally would use as a sheetmetal worker, therefore, the work activities were a material contributing factor. Dr. Matsuda, in his report of December 15, 1975 agreed.

The Referee found that the preponderance of the evidence did not sustain the claimant's burden of proving that the workman's work activities were a material contributing factor to his death. Also the workman, after performing this exertive work, had no symptoms and rode back to the plant, a half hour's drive, without any physical activity before his attack.

The Referee had difficulty evaluating the testimony and medical reports in this case because of the late filing of the claim; he felt this lapse of time made it extremely hard for claimant to present supportive evidence in behalf of the claim.

The Referee concluded that Dr. Griswold's testimony was the most persuasive and consistent with the usual tests of medical causation utilized by many cardiologists. He denied the claim for death benefits.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 28, 1976, is affirmed.

WCB CASE NO. 76-1661 DECEMBER 7, 1976

JAMES MACFARQUHAR, CLAIMANT
Dan O'Leary, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of February 27, 1976 which awarded claimant 128 degrees for 40% unscheduled low back disability.

Claimant was 38 years of age and a maintenance engineer at the time of his injury in February, 1972. Subsequently, claimant underwent four surgeries: a laminectomy and discectomy in November, 1972; disc exploration surgery in March, 1973; a two level fusion in August, 1974 and an excision of sinus tract in February, 1975.

Claimant has been evaluated at the Disability Prevention Division, including a psychological evaluation, and has been enrolled at the Portland Pain Rehabilitation Clinic.

Claimant is now precluded from heavy lifting, crawling, and he cannot walk very far or sit or stand for prolonged periods.

Claimant enrolled at Mt. Hood Community College, taking a general course of engineering. He completed the drafting course with "A's", however, his back caused him such pain that he quit.

Claimant is now working in a restaurant which he and his wife bought together with another couple; he is doing the cooking and bookkeeping and, generally, learning the business.

The rating of unscheduled disability is based on loss of wage earning capacity, taking into consideration such factors as age, intellectual ability, skills, training, education, etc. The Referee concluded claimant is young, industrious, intelligent and has a variety of aptitudes and, based upon these factors, he found claimant had been adequately compensated by the award of 40% granted by the Determination Order of February 27, 1976.

In September, 1972 claimant was found to be ineligible for vocational rehabilitation "due to lack of claimant's availability."

In October, 1972 Dr. Kloos reported he did not agree with the conclusion reached by the Back Evaluation Clinic that claimant's condition was stationary; he recommended physical therapy, a back brace and a referral to Dr. Davis for orthopedic consultation.

Dr. Davis, who examined claimant on November 21, 1972, diagnosed degenerative intervertebral disc disease with aberant recording of afferent impulses, or conversion reaction, or some type of neurological functional abnormality not diagnosable by him. He stated that claimant, without question, had abnormality of his low back in the form of degenerative disc disease but that his truly disabling symptoms were not organic in nature; he suggested a possible psychiatric evaluation.

On January 9, 1973 a Determination Order awarded claimant compensation for time loss and an award for 35% unscheduled disability.

On February 14, 1973 claimant was examined by Dr. Robinson, an orthopedist, who, after comparing his findings with the report of the Back Evaluation Clinic, felt claimant's condition was worse both as to physical examination and subjective complaints and concluded that claimant, in his present condition, was unable to carry on any gainful employment. He did not believe that claimant's present complaints were all psychosomatic but that there were some functional complaints mixed up with his physical complaints and claimant was having real pain. Dr. Pasquesi, who examined claimant on March 22, 1973, felt claimant was not capable of returning to a laboring capacity.

In the spring of 1973 claimant was given extensive psychological testing and evaluation by Dr. Ransmeier who felt that claimant was totally disabled from performing any work at any gainful and suitable occupation and that this condition would be permanent if claimant did not receive appropriate psychiatric treatment. On July 16, 1973 claimant was seen by Dr. Quan, a psychiatrist, who did not find claimant totally disabled from performing sustained gainful employment although he thought it rather difficult for claimant to return to his customary occupation. Dr. Quan felt that chance of improvement with psychiatric treatment was less than 50% but that it was worth a trial.

Claimant requested a hearing on the Determination Order award and an order was entered on October 10, 1973 which found that the claim had been prematurely closed and ordered it reopened for psychiatric therapy. The order also suggested referring claimant to the Pain Clinic, as recommended by Dr. Robinson.

Claimant was again seen by Dr. Ransmeier in November, 1974 who then believed that claimant had a continuing organic pain process of disabling nature; he referred claimant to the Pain Clinic, where he was seen from November 30, 1974 through January 3, 1975. Dr. Seres, in his discharge summary, reported that "From practical standpoint, the staff at the center saw the patient as moderately disabled at worst." He felt that claimant's motivation for further rehabilitation was "nil" and recommended claim closure.

A Determination Order mailed April 24, 1975 granted additional compensation for time loss and an additional award of 40% for unscheduled disability. Claimant, as a result of the two Determination Orders, has received awards totaling 75% of the maximum allowable by statute for unscheduled disability.

At the hearing, Dr. Robinson gave his opinion that even if claimant were highly motivated the most he could do in his present condition was the lightest work and that he could not work for an employer on an 8 hour basis where he could not cater to his complaints.

The Referee found claimant was 51 years old and had not completed his high school education nor had he received any education or training since the time he left school. His primary employment has been as a truck driver, an occupation he had for 26 years. The only other work done by claimant has been in the unskilled heavy labor category. Claimant has not worked since his accident and his current symptoms consist of constant sharp pain in the low back, right hip and right leg. He is unable to tolerate prolonged sitting, he can only drive for about one half hour before he is required to stop, nor can he run or walk fast. The Referee found that prior to the 1971 injury claimant was able to take care of his yard, paint, hunt, fish, water ski and bowl, now he is unable to do any of these things. Claimant testified that he is unable to return to truck driving because of his pain nor does he know of any type of work that he could do. Claimant's wife corroborated claimant's testimony regarding his physical limitations. The Referee found both claimant and his wife to be credible witnesses.

Based upon all the evidence, the Referee found that even if claimant were highly motivated to seek and did diligently seek employment or retraining he would not be able to obtain or hold gainful and suitable employment in the general labor market. Prior to his 1971 injury claimant had a very stable work record and he had been able to return to employment following other serious injuries received prior to 1971.

The Referee, relying upon the opinions of Dr. Robinson and Dr. Ransmeier, concluded that even with the highest motivation and without any psychological interference, claimant could not, due to his physical limitations, perform the quantity and quality of work which would make him employable in the labor market. Therefore, because of this and also taking into consideration claimant's age, education, skills, training, work experience and mental capacity, she found that claimant fell within the "odd-lot" category of the work force.

Claimant having established prima facie that he was an "odd-lot" employee, the burden shifted to the defendant to show that some kind of suitable work was regularly and continuously available to claimant. The Referee concluded that the employer had failed to present evidence sufficient to meet his burden, and she found claimant to be permanently and totally disabled.

The Board, on de novo review, affirms and adopts as its own the order of the Referee.

ORDER

The order of the Referee, dated June 22, 1976, is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with this Board review, the sum of $450, payable by the employer.

WCB CASE NO. 73-3484 DECEMBER 7, 1976

JERRY ARMSTRONG, CLAIMANT
William Bierek, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of that portion of the Referee's order which granted claimant an award for 65% unscheduled disability.

Claimant is a 35 year old laborer who has a significant prior contributing medical history, he is 5 foot 11 inches tall and weighs approximately 295 pounds. On May 4, 1975 claimant suffered a fracture of his left foot for which he filed a claim. It was ultimately closed and claimant granted an award for 15% scheduled disability of his left foot. During the treatment which included casting of the foot, claimant suffered severe complications which necessitated extended hospital treatment. It is not necessary to reiterate all the diagnoses which were clearly set forth in the Referee's order.

Dr. Cook indicated in his report that claimant's pre-existing conditions of primary hypothyroidism, adrenal insufficiency and diabetes mellitus were not related to the industrial injury but were triggered by a hormone deficiency in claimant's system, that claimant's system did not function properly when the injury and stress of complications of thrombophlebitis and pulmonary embolism were superimposed thereupon.

Dr. Hall, who examined claimant on behalf of the carrier, indicated that the complications following the original injury were all related in the chain of events to the original injury and its treatment. Dr. Fox, after examining claimant, concurred in the diagnosis of the other doctors and concluded that the swelling of the left leg and foot and the persistent swelling of the left forearm and hand, the left hemiporesis with seizures that occurred during treatment at the hospital, including the hypothyroidism and the hypoadrenalism were a direct result of the injuries and ensuing illness and further expressed the opinion that claimant would be unemployable in a non-skilled labor area.

Claimant's claim with the Division of Vocational Rehabilitation was closed on the basis that claimant was not yet ready for a program because of his physical condition.

Claimant's claim had been closed with an award for 15% loss of function of the left foot.

The Referee found that with respect to the disability of the leg it appeared to have commenced with the ankle and extended to the whole leg; however, the extension was systemic in nature and, therefore, should be treated on an unscheduled basis. He felt the award of 15% loss of function of the left foot was sufficient.

The Referee found, because of claimant's lack of education and lack of skills, that it was obvious that he would not be able to go back to his former work; however, there was nothing in the medical reports or other evidence to indicate that claimant could not do light unskilled work which obviously would not compensate him as well as the heavy work which he had been doing prior to the injury.

Based upon the entire medical record and taking into consideration claimant's limitations, the Referee concluded that claimant had sustained a disability to the left arm both on a systemic basis and because of the consequential trauma by way of surgery thereto, that claimant had a substantial unscheduled disability because of the complications arising from the industrial injury and the impairment of his earning capacity as well as his difficulties in securing employment in the future.

The Referee, in addition to affirming the award for 15% loss of function of the left leg, granted claimant an award for 25% loss of function of the left arm and an award for 65% unscheduled disability, based on the consequential injuries and loss of earning capacity.

The Board, on de novo review, finds no medical evidence to support a conclusion that claimant's left hemiparesis and seizure were related or aggravated by claimant's industrial injury. The last seizure suffered by claimant was in July, 1972. To the contrary, the doctors at the University of Oregon Medical School were of the opinion that the left-sided weakness was of an undetermined etiology and although claimant's treating doctor, Dr. Wheeler, and an examining doctor, Dr. Fox, both thought the problem was related neither thought it was a residual. There is no medical evidence to justify a conclusion that the claimant's pre-existing conditions of hypothyroidism, diabetis mellitus and hypoadrenalism were accident-aggravated. Dr. Cook stated that the conditions were neither caused by nor aggravated by the trauma. He thought such conditions were not only pre-existing but were unknown and that the traumatic stress for the first time revealed the fact of hormonal deficiencies so that the conditions became known but that they would have become evident shortly even without trauma.

The Board concludes that although the Referee correctly assessed claimant's scheduled disability there is no medical basis for his conclusion that claimant has any unscheduled disability as a result of his industrial injury of May 4, 1975. Therefore, the loss of claimant's potential wage earning capacity, if any, is not to be considered in determining claimant's present disability, which is limited to the scheduled areas.

ORDER

The order of the Referee, dated April 6, 1976, as amended by an order dated April 28, 1976, is modified.

The award for 65% unscheduled disability for consequential injuries and loss of earning capacity is reversed. The awards for the scheduled disabilities are affirmed.

The award of a reasonable attorney fee equal to 25% of the compensation payable out of such compensation as paid, granted by the amended order of April 28, 1976 shall apply only to the award of 25% loss of function of the left arm.

SAIF CLAIM NO. A 860714 DECEMBER 7, 1976

JAMES BURKS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a low back injury on May 5, 1961. He was treated by Dr. Fagan who, in August, 1961, performed a lumbar laminectomy and discectomy. A Determination Order was entered on March 30, 1962 granting claimant time loss benefits and an award for 15% loss of function of an arm for unscheduled disability.

In early 1965 the claim was reopened for further conservative medical treatment by Dr. Fagan. The claim was closed by a 2nd Determination Order of September 9, 1965 which granted an additional award for 5% loss of function of an arm for unscheduled disability, a total of 20%. Claimant's aggravation rights have expired.

The claim was reopened in January, 1976 and claimant was treated by Dr. Burr who diagnosed a left lumbar herniated nucleus pulposus. On August 6, 1976 Dr. Burr stated claimant was medically stationary.

On October 29, 1976 the State Accident Insurance Fund requested a determination. The Evaluation Division of the Board recommended compensation for temporary total disability be paid to claimant from January 16, 1976 through March 21, 1976 but no further award for permanent partial disability.

The Board accepts the recommendation. Claimant has been adequately compensated for his unscheduled disability by the awards of 20%.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 16, 1976 through March 21, 1976.

WCB CASE NO. 76-1892 DECEMBER 7, 1976

RICHARD P. CARLSON, CLAIMANT
Benton Flaxel, Claimant's Atty.
Robert Walberg, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks review by the Board of the Referee's order which affirmed the Determination Order mailed April 6, 1976 whereby claimant was awarded 40.5 degrees for 30% loss of the right foot. Claimant contends he is entitled to a greater award for his disability.

Claimant suffered a compensable injury to his right foot in August, 1975 while employed as a sawyer in a hard board plant. The lumber stacker ran over his right foot causing multiple fractures and soft tissue injury. Claimant had a satisfactory healing but was left with residual pain. His treating physician, Dr. Matteri, in his closing examination, noted that claimant had a slight limp, that there was a mild swelling of the forefoot, the metatarsal heads were tender but there was normal ankle motion and the fractures were well healed. Thereafter, the aforesaid Determination Order was entered.

The Referee, noting that claimant had suffered a scheduled injury for which the sole test in determining the extent of disability is the amount of impairment, found that the medical evidence, together with claimant's testimony, indicated and established that claimant's disability was the result of pain and that such pain was compensable. Claimant has persistent pain when walking which worsened with the duration of the walk; he also suffers pain with prolonged standing. Claimant is not able to use his foot to push down on a shovel due to the pain but is able to play five or six holes of golf at the present time; however, claimant testified that he was able to play up to 27 holes of golf prior to his injury. Claimant also testified that he had not had a good night's sleep since his injury because of the discomfort in his foot.

The Referee concluded that the medical evidence indicated claimant would be able to work 8 hours a day if he could remain seated for 4 of these hours. Such a job was provided claimant and he attempted to perform the job but lasted only 4 hours although 90% of those 4 hours claimant spent sitting. After the abortive attempt to return to work claimant took an early retirement. The Referee felt that claimant's decision to do this was not materially influenced by his foot discomfort or the limitations of that scheduled member.

The Referee found that all of the medical evidence in the record predated the mailing of the Determination Order and, therefore, was presumably available to and considered by the Evaluation Division of the Board prior to its entry of the Determination Order. He found that the testimony at the hearing did not necessarily differ from the information contained in the medical reports regarding the fact that claimant was bothered primarily by pain and as to the effect of claimant's activity based upon the extent of that pain.

He concluded that claimant had failed to prove that his disability exceeded that for which he was awarded 40.5 degrees for 30% loss of the right foot by the Determination Order of April 6, 1976. He affirmed this Determination Order.

The Board, on de novo review, affirms and adopts the Referee's order.

ORDER

The order of the Referee, dated June 23, 1976, is affirmed.

SAIF CLAIM NO. C 85844 DECEMBER 7, 1976

LEHMAN O. MYERS, CLAIMANT
Dept. of Justice, Defense Atty.
Amended Own Motion Determination

In the Board's Own Motion Determination order dated November 19, 1976 in the fourth paragraph on page 1 the date is stated as November 4, 1975; this should be corrected to read November 4, 1976.

In all other respects the Own Motion Determination dated November 19, 1976 is reaffirmed and ratified.

SAIF CLAIM NO. ZC 19729 DECEMBER 7, 1976

DOROTHY PENKAVA, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained an industrial injury on May 10, 1966 which subsequently required a lateral meniscectomy and a patellectomy. The claim was initially closed on July 12, 1967 with an award to claimant of 22 degrees for 20% loss of the right leg.

In July, 1970 the claim was reopened for a third surgery, i.e., excision of a Morton's neuroma. The claim was again closed by a 2nd Determination Order on October 20, 1970, granting claimant no additional permanent partial disability.

In 1971 claimant requested reopening of her claim for aggravation; she had fallen on a dance floor. The claim was denied by the State Accident Insurance Fund on November 19, 1971. Claimant requested a hearing after which the Referee remanded claimant's claim for aggravation to the Fund. On December 6, 1972 Dr. Slocum performed a repair of a dislocated petellar tendon, medial menisectomy and a pes anserinus transfer.

Claimant filed a claim for a low back condition in 1974 which the Fund denied on April 2, 1974 as being unrelated to the knee injury. However, on May 21, 1974, by stipulation, the Fund agreed to pay compensation for this condition.

A 3rd Determination Order of August 6, 1974 awarded claimant an additional 22 degrees for 20% loss of the right leg and 32 degrees for 10% unscheduled low back disability.

Claimant appealed the 3rd Determination Order but the request for hearing was dismissed on January 10, 1975 because, by stipulation, the claim was reopened for further medical treatment as recommended by Dr. Slocum. On January 23, 1975 Dr. Slocum performed a mervis saphenous neuroma excision and removal of silk suture granuloma of the right knee.

A 4th Determination Order of November 28, 1975 granted claimant time loss only.

On October 22, 1975 the Fund again denied responsibility for claimant's back condition, but again by stipulation dated March 12, 1976, accepted it. Claimant's claim was reopened on November 6, 1975 for further medical treatment for both the right knee and the low back condition.

In their report of September 10, 1976, the Orthopaedic Consultants found gross inconsistencies in their examination of claimant and the X-rays of the neck and back revealed no abnormalities. Claimant's back impairment was minimal and her knee condition stable.

On December 26, 1976 the Fund requested a determination. The Evaluation Division of the Board recommends awarding claimant compensation for temporary total disability from November 6, 1975 through October 19, 1976 and no further award for permanent partial disability.

The Board accepts this recommendation, it concludes claimant's awards for 10% unscheduled disability and 40% loss of the right leg adequately compensate claimant.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 6, 1975 through October 19, 1976.

Dr. Hockey in his report of February 13, 1976 which he found unfortunate because Dr. Hockey had examined claimant both before and after the last arrangement of compensation, had performed the 1971 surgery and, therefore, would be the medical expert who could best state if there had been an aggravation of claimant's condition in the interim. As the Referee interpreted this report, Dr. Hockey said both that claimant had not changed since the examination of June 13, 1974, but also that there had been a "slight natural progression" since that time; he found this somewhat ambiguous.

The Referee relied upon the statements made by Dr. Brown that claimant's present condition was related to his injury of July, 1971, aggravated with arthritic changes which had progressed over the past year, stating that, in his opinion, Dr. Brown's report constituted the evidence most favorable to claimant on the question of aggravation and, therefore, claimant had satisfied his burden of proof as required by ORS 656.273(7). The Referee ordered the claim reopened as of January 14, 1976, the day after the date of Dr. Brown's letter stating his opinion that claimant is unable to perform gainful employment.

The Referee found that penalties were not applicable in this case. The aggravation case was denied on September 19, 1975 and at that time the Fund had a "form report" signed by Dr. Hughes on August 15, 1975 which indicated that claimant, in Dr. Hughes' medical judgment, had a deterioration or worsening of his back condition resulting from his compensable injury. However, this "form report" was prepared by claimant's counsel and stated the facts in statutory rather than medical terms and for this reason, the Referee limited the weight given to it. The Referee gave more weight to Dr. Hughes' accompanying narrative report of the same date which did not indicate, in his opinion, that claimant's condition had become aggravated. Under these circumstances the Referee concluded that the Fund had not acted unreasonably in denying the aggravation claim.

The Board, on de novo review, finds that the bulk of the medical evidence in this case does not support a finding of aggravation. Dr. Hockey was, as indicated by the Referee in his order, in the best position to express an opinion as to whether or not claimant's present condition constituted a worsening since its last award or arrangement of compensation, i.e., September 24, 1973. After re-examination of claimant in June, 1974, Dr. Hockey stated that there were no objective findings differing from those found on previous examinations made by him of claimant, despite claimant's complaints. He stated, unequivocably, that he did not feel that there was any need to reopen claimant's claim and that claimant could do light work if such work was available to him.

Again, on February 13, 1976, claimant was re-examined by Dr. Hockey and he reiterated his earlier opinion that there has been no change from the previous examination on June 13, 1974, that there was some slight natural progression since that date but it was not the result of any intervening accident. Perhaps this is not an unequivocal opinion but it certainly is an understandable one. Dr. Hockey is saying that there has not been any changes in claimant's condition resulting from the accident, but that there has been a natural progression of claimant's degenerative arthritic disease, the only thing that would naturally progress. None of the medical reports indicate that the underlying condition caused by the accident in question has progressed or become worse, all of the reports refer to arthritic changes.

Dr. Younger, the Arkansas orthopedist, stated in his report of September 19, 1974 that claimant had a chronic lumbar strain with degenerative arthritis compatible with his age and past work history of the lumbar spine. Dr. Hughes found some degenerative changes present in the intervertebral joints and hypertrophic spurring along some of the lumbar vertebral bodies but the disc spaces were fairly well maintained and appeared normal on X-ray.

The Board concludes that the medical evidence does not show that the condition caused by claimant's industrial injury has become aggravated. Only the underlying degenerative arthritic condition had worsened and that worsening was not related to the claimant's injury. The claim was properly denied and the order of the Referee should be reversed.

ORDER

The order of the Referee, dated May 21, 1976, is reversed.

WCB CASE NO. 76-1041 DECEMBER 8, 1976

ALFRED MERRITT, CLAIMANT
Darrell Cornelius, Claimant's Atty.
Ron Podnar, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which remanded to it claimant's claim for surgery, payment of temporary total disability compensation benefits and all other benefits provided by law until the claim is closed pursuant to ORS 656.268.

There was no factual dispute in this case. Claimant had a pseudoarthrosis at L4-5 and Dr. Cook surgically repaired the condition and causally related it to claimant's industrial injury.

The dispute centers around Dr. Cook's failure to notify the carrier of the surgery in accordance with Rule 4 of the Board's Rules, causing the employer to be deprived of its right to obtain an independent medical examination.

Claimant had been at the Portland Pain Clinic from October 20, 1975 to November 7, 1975 and upon his discharge the physicians recommended no further surgery because it was their opinion it would not benefit claimant in any significant way. This report was never furnished to Dr. Cook.

Claimant underwent the surgery recommended by Dr. Cook in January, 1976 and had considerable relief as a consequence.

ORS 656.245 provides, in part, that claimant had the right to pick his own treating physician which included the right to accept that physician's recommended treatment. The Referee found Dr. Cook not only had never received a copy of Dr. Seres' report from the Pain Clinic but that there was no evidence that Dr. Cook was aware of Board Rules 4 and 10. Therefore, the Referee concluded claimant was entitled to receive from the employer compensation for temporary total disability and payment of his medical bills; he also remanded claimant's claim to the employer for payment of all benefits provided by law until closure of the claim.

The Board, on de novo review, concurs with the conclusions reached by the Referee. The evidence clearly shows that claimant's condition was benefited by the surgery.

ORDER

The order of the Referee, dated May 7, 1976, is affirmed.

Claimant's counsel is awarded as a reasonable attorney fee for his services in connection with Board review, the sum of $350, payable by the employer.

WCB CASE NO. 76-880 DECEMBER 8, 1976

GERIT BARNEY, CLAIMANT
Sidney Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which remanded claimant's claim to the State Accident Insurance Fund to pay compensation for temporary total disability through January 22, 1976 and awarded claimant 192 degrees for 60% unscheduled right shoulder disability. Claimant contends he is permanently and totally disabled or, in the alternative, is entitled to an award for 100% unscheduled right shoulder disability.

The Fund cross requests review by the Board contending the awards previously granted to claimant adequately compensated him for his disability.

Claimant sustained a compensable right shoulder injury on June 6, 1972 which was treated conservatively. The claim was closed by a Determination Order, dated April 30, 1973, awarding claimant 64 degrees for 20% unscheduled right shoulder disability.

Claimant returned to truck driving for another employer. Before claim closure an arthrogram had been performed which revealed a small rotator cuff tear. In June or July, 1974 claimant commenced having painful symptoms and his claim was reopened on June 11, 1975 and claimant underwent an acromiplasty and repair of the rotator cuff tear.

Dr. Hopkins examined claimant on September 1, 1975 and found limitation of motion and capsular dysfunction in the right shoulder. Claimant has hypertrophic arthritis of the spine and chondromalacia of the patella. Dr. Hopkins stated these combined disabilities, plus claimant's age of 59, probably make it impossible for claimant to return to truck driving; he recommended that claimant retire. However, claimant's shoulder disability is the only disability attributable to the industrial injury.

A Second Determination Order, dated February 12, 1976, awarded claimant 48 degrees for 15% unscheduled disability.

Dr. Cherry examined claimant on May 3, 1976 and found no reflexes in either arm, muscle atrophy in both upper extremities, the right due to the industrial injury. It was Dr. Cherry's impression that claimant has permanent partial disability of the right shoulder and right hand with mild neck disability. He rated claimant's total disability due to this injury at 50% of the maximum allowable by statute for unscheduled disability.

The Referee found claimant greatly lacking in motivation, he never really sought employment. Claimant now draws social security and a pension from the Teamsters.

The Referee concluded claimant is not permanently and totally disabled due to this industrial injury; however, claimant does have restrictions in the usage of his right shoulder which precludes him from returning to his former occupation. There are jobs which claimant could perform but he has made no effort whatsoever to find such work.

The Referee concluded, based upon the medical evidence submitted and claimant's loss of wage earning capacity, that claimant is entitled to an award of 192 degrees for 60% unscheduled disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 2, 1976, is affirmed.

WCB CASE NO. 75-5395 DECEMBER 8, 1976

MARGARET HUNT, CLAIMANT
Richard Kropp, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 48 degrees for 15% unscheduled low back disability. Claimant contends her disability is greater.

Claimant, a registered nurse, sustained a low back injury on June 24, 1974 when she slipped on a wet surface. She was first examined by Dr. Buell who diagnosed acute lumbar strain. He referred her to Dr. White, a neurosurgeon, who examined claimant on August 30, 1974 and diagnosed non-neurogenic low back pain. He thought perhaps claimant's back complaints might be related to her pregnancy.

A Determination Order of November 1, 1974 granted claimant time loss benefits only.

On June 3, 1975 claimant was examined by Dr. Berg who diagnosed chronic lumbosacral back strain with mild strain of muscles and ligaments of her mid-dorsal structures superimposed on congenital defects. Dr. Berg rated claimant's disability as mild. He felt claimant could return to her nursing job but only in a supervisory capacity.

A Determination Order of November 7, 1975 granted claimant 16 degrees for 5% unscheduled low back disability.

On March 3, 1976 Dr. Buell placed a maximum lifting restriction on claimant of

10 pounds and stated claimant was now limited from any work requiring standing, bending, twisting, lifting, stooping or prolonged sitting.

On March 29, 1976 claimant started working in a nursing home in a supervisory capacity.

The Referee found that claimant is now earning less money than she did prior to her injury because of the limitations she has, i.e. the types of nursing jobs she now can physically perform pay less.

Therefore, he concluded claimant was entitled to 48 degrees for 15% unscheduled disability to compensate her for this loss of wage earning capacity.

The Board, on de novo review, concurs with the findings and conclusions of the Referee.

ORDER

The order of the Referee, dated June 11, 1976, is affirmed.

WCB CASE NO. 75-5464 DECEMBER 8, 1976

DALE KELLEY, CLAIMANT
Ann Morgenstern, Claimant's Atty.
Roger Luedtke, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which awarded claimant 256 degrees for 80% unscheduled low back disability.

Claimant suffered a compensable injury to his back on September 27, 1970 which required three back surgeries between April, 1971 and February, 1974. Dr. Johnson, an orthopedic surgeon practicing in Boise, Idaho, performed all of the surgeries. In each instance claimant had immediate relief and was asymptomatic for a period of time and able to return to work as a millwright but the pain would gradually return until it became disabling. After the third surgery Dr. Johnson recommended a change in occupation.

On April 2, 1975 Dr. Johnson reported that claimant's fusion was solid and claimant could handle an electrician apprenticeship job at the mill; in his claim closure report he rated claimant's disability at "moderate severe." On November 20, 1975 a Determination Order awarded claimant 96 degrees for 30% unscheduled low back disability. Dr. Johnson felt this was not sufficient.

Claimant was a journeyman millwright at the time of his injury and for some years prior thereto had earned $4.72 an hour plus the usual fringe benefits; in the calendar year 1970 he earned a total of $13, 214.66. Since that date and following his injury claimant's earnings have been substantially less. The best year was 1974 when he earned approximately $9,500.

Claimant testified that his present condition was about the same as it was in October, 1975 when Dr. Johnson made his closing evaluation.

The Referee found that claimant's other occupations included working in lumber mills, operating a spreader, operating a Raimann machine, driving a jitney, and being an oiler on the greenchain. All these jobs requiring physical exertion and claimant says he is not able to do any of them at this time. The Referee found that there were other jobs at the employer's plant which possibly claimant might be capable of performing but that claimant indicated he didn't think he could, and he had not actually tried any of these jobs. Because of claimant's seniority he still remains on the payroll of the employer who testified that it would take him back on any job claimant felt he physically could do.

The Referee found that the claimant had been working close with the Division of Vocational Rehabilitation in an effort to retrain for a sedentary position. Initially, he was enrolled at Blue Mountain Community College in Pendleton but this required commuting 150 miles each day to attend classes. After completing one term and obtaining average grades, claimant discontinued. He testified he could not continue due to the discomfort of the long daily drive and also the expenses which were involved. Claimant's counsel testified that efforts were made to enroll claimant in a management trainee program at Eastern Oregon State College, located in La Grande, which would necessitate a far shorter daily drive from the claimant's home which was located near Elgin. Claimant did not evince much interest in this program, testifying that he was more interested in becoming self-employed in a building supply buisness which, with the help of his wife, he could handle by choosing his own hours and by being able to sit and stand as required to alleviate his pain.

The Referee found that claimant, who is only 32 years of age and has a GED certificate together with an 8th grade education, was not permanently and totally disabled because, by claimant's own testimony, there were various jobs which he could perform, particularly those involving self employment which would enable claimant to regulate his own physical activities. The Referee also found some indication that claimant had a lack of motivation in returning to school but claimant's testimony was to the effect that this reluctance came only from the extreme discomfort which resulted when he attempted to sit through classes. The Referee was at a loss to understand why the Division of Vocational Rehabilitation was attempting to make a "white collar" worker out of a man who would be far happier working with his hands and who has exhibited skills and the background necessary to be a successful small engine mechanic or to work in the building supply trade.

Based upon Dr. Johnson's report of October 16, 1975 which indicated a moderate severe disability and claimant's testimony which, in the Referee's opinion, supported such a rating, the Referee concluded that the claimant's disability was such that he was entitled to an award of 256 degrees for 80% unscheduled disability to adequately compensate him for his loss of wage earning capacity resulting from the industrial injury.

The Board, on de novo review, finds that the medical evidence indicates claimant has obtained a good result from his fusion and the deterioration resulted only because claimant continued to engage in his former occupation as a millwright upon recovery from each of the operations. This is commendable on the part of claimant; however, the evidence relating to the attempts to vocationally rehabilitate claimant does not indicate such commendable action by claimant. Claimant has not shown good motivation in attempting to rehabilitate himself into a less physically demanding field but has shown a stubborn reluctance to leave his rather remote living area even for a brief period of training which would have substantially improved his employment potential and qualified him for job opportunities that he could have pursued in his home area.

Claimant's testimony revealed that there was a wide range of employment opportunities available to him with or without training but that he had failed to avail himself of these opportunities.

The Board finds that claimant's lack of motivation to return to school was not solely because of the alleged extreme discomfort which he testified he suffered while attempting to sit through classes nor can it agree with the Referee's assumption that claimant did not wish to be trained to be a "white collar" worker.

The Board concludes that claimant simply did not wish to be retrained and did not make any bona fide attempt to follow through on the retraining programs offered to him. Therefore, it concludes that claimant is not entitled to an award in excess of 192 degrees which is equal to 60% of the maximum allowable by statute for unscheduled disability. Even assuming Dr. Johnson's rating of moderate severe to be correct such impairment results in a far less disability when it is incurred by a young, intelligent and fairly well educated person who can, if he is willing, be retrained for work suitable to his disability.

ORDER

The order of the Referee, dated May 28, 1976, is modified.

Claimant is awarded 192 degrees of a maximum of 320 degrees for unscheduled low back disability. This is in lieu of the award made by the Referee in his order which in all other respects is affirmed.

WCB CASE NO. 76-1169 DECEMBER 8, 1976

THOMAS ROLAND, CLAIMANT
Phil Ringle, Claimant's Atty.
Richard Lang, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which determined that claimant's application and receipt of a lump sum payment together with his waiver of hearing rights precluded him from appealing the adequacy of the award made by the Determination Order and dismissed the claimant's request for hearing.

A Determination Order of April 25, 1975 granted claimant an award of 48 degrees for 25% loss of his right arm. Claimant asked for a lump sum payment of that award. The application for lump sum payment which claimant signed contained the following clause: "I further understand that I will have waived my right to a hearing on this award by applying for and accepting an advance lump sum payment."

A psychological evaluation given to claimant found him to be functioning in the bright normal range of intellectual resources with excellent reading abilities. It is presumed, therefore, that claimant understood the document he signed.

The Referee found no evidence of misrepresentation or of the carrier having misled claimant.

The Referee concluded the Workmen's Compensation Act does not protect claimant from exercising bad judgment and that by accepting the lump sum payment claimant had waived his right to a hearing on the award granted by the Determination Order. The Referee dismissed claimant's request for hearing.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 17, 1976, is affirmed.

WCB CASE NO. 73-4063 DECEMBER 8, 1976

LEONA (SAMSON) SATTERWHITE, CLAIMANT
David Haugeberg, Claimant's Atty.
Samuel Blair, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which granted claimant permanent total disability to be continued in effect as directed by the order entered on March 18, 1974.

Following a hearing on February 23, 1974 an order entered March 18, 1974 granted claimant an award of permanent total disability. The Referee's order was affirmed by the Board's Order on Review, entered August 14, 1974, but upon appeal to the Circuit Court the matter was remanded to the Referee for further hearing.

Claimant testified she had done no work since the last hearing; she was asked if she had worked at Vicks Orchard in Lyndon, California in 1975 and she stated that she had been in Lyndon for 3 or 4 weeks but had not worked. She was also asked whether she had picked apples at Strand's Orchards in Colliche, Washington and she replied that she "tried it" for 3 weeks but "did not work steady."

When claimant was given a psychological evaluation in June, 1973 and found to have a low I.Q. with cultural and educational deprivations she was rated borderline dull normal.

The Referee, taking this into account, found the conflict in claimant's testimony regarding whether or not she had worked as understandable due to her inability to express herself and to make distinctions between short term jobs and employment trials.

Claimant testified that during that period of attempted work at Strand's she worked intermittently on a piece rate basis and that she picked apples to see if she was able physically to return to work; that she only worked on a 15 to 30 minute basis at that time. During this 3 week period claimant's back got progressively worse and she finally quit.

Claimant's husband corroborated claimant's testimony and stated that the $340 paid for the apples picked did not represent claimant's own picking production, in fact, he picked 2/3 of the bins picked.

The Referee found that the evidence received at this hearing on remand was not

Claimant filed a Form 801 with the Fund on December 29, 1975 for a condition of degenerative arthritis of both hands and wrists, aggravated by his work. On March 23, 1976 the Fund denied the claim.

The Referee found unjustifiable delay on the part of the Fund in accepting or denying claimant's claim within 14 days; the claim should have been accepted or denied within 14 days after February 28, 1976 based on Dr. Schroeder's report of medical notes. The Fund waited until March 23, 1976.

The Board, on de novo review, agrees with the findings and conclusions reached by the Referee that the Fund delayed payment of compensation to claimant and affirms the Referee's award of penalties and attorney fees.

ORDER

The order of the Referee, dated June 3, 1976, is affirmed.

Claimant's counsel is hereby granted as a reasonable attorney fee for his services in Board review, the sum of $250, payable by the State Accident Insurance Fund.

WCB CASE NO. 75-1987 DECEMBER 10, 1976

RICHARD CLARK, CLAIMANT
Bernard Jolles, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation, as provided by law, and set aside the employer's denial.

In January, 1976 claimant was a 53 year old sawyer performing a strenuous job. He had a pre-existing arteriosclerotic heart disease of which he was unaware, he was a heavy smoker with high blood pressure and he was overweight.

On the weekend of January 18, 1975 claimant experienced pain and numbness in his right shoulder and arm which he thought was caused by lifting at work. On Monday, while at work, chest pains began and claimant consulted his family doctor who diagnosed a myocardial infarction and he quit work on January 27, 1975.

Dr. John Rush, a cardiologist, testified that the diseased condition of claimant's arteries left them incapable of meeting the heart's increased demand for blood caused by claimant's work activities on or about January 20, 1975 and thus was a material contributing factor to claimant's heart attack. Dr. Grossman agreed.

Dr. Duncan, a consulting cardiologist, felt that it was unreasonable to conclude that claimant's work activities on or about January 20, 1975 caused his heart attack or angina pectoris; that claimant's coronary artery disease could not be aggravated by work activity.

There is no evidence claimant experienced chest pains prior to January 20, 1975.

The Referee found that the shoulder and arm pain and numbness which commenced in association with the work done just prior to the weekend would indicate that these experienced symptoms commenced in association with that work.

The Referee further found that the EKG studies done by Dr. Rush on January 25, and the hemotology report of January 27, indicate a recent infarct that could have occurred one to ten days earlier. Both Friday and Saturday, January 17 and January 18, 1975 fit within this time period.

The Referee concluded claimant had proved by a slight preponderance of the evidence that his heart attack arose out of and in the course of his employment and he remanded claimant's claim to the employer.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated February 23, 1976, is affirmed.

Claimant's counsel is hereby granted as a reasonable attorney fee for his services in connection with Board review, the sum of $400, payable by the employer.

WCB CASE NO. 75-4053 DECEMBER 10, 1976

JOSEF DATZ, CLAIMANT
Gary Kahn, Claimant's Atty.
Glen McClendon, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which denied claimant's request for payment of certain medical expenses incurred in 1975 and also denied claimant's request for penalties and an attorney fee, in connection therewith.

Claimant suffered an injury in the low back area on November 2, 1972, the claim was closed on June 7, 1973 by a Determination Order which was later modified by stipulated order, dated November 14, 1973.

Claimant consulted the Permanente Clinic in 1975 claiming that his low back condition had worsened due to heavy lifting. Claimant's claim for aggravation was denied and claimant requested a hearing.

A hearing was held on December 4, 1975 and, as a result thereof, the Referee entered his order on December 31, 1975, thereafter, claimant requested Board review of that portion of the order which denied claimant's claim for certain medical expenses, contending that the employer had unreasonably delayed and resisted payment of these medical bills to the extent that the employer was subject to penalties and payment of an attorney fee.

his back problems and concluded it was unnecessary to go into all of this evidence in detail.

The evidence indicates Dr. Cherry, claimant's treating physician, prescribed Tylenol #3 to relieve claimant's back pain. Tylenol #3 contains Codeine; this was claimant's only source of Codeine.

It was Dr. Cherry's opinion that this addiction is related to the compensable injury.

The Referee found there was an obvious link in the chain of causation of pain being the direct result of the industrial injury and the addiction to Codeine as a result of the use of Tylenol #3, containing Codeine, prescribed to ease that pain. He concluded the Codeine addiction was related to the compensable injury.

All of the medical reports concur that claimant is now suffering from Codeine addiction and urged medical treatment for claimant to be provided by the Portland Pain Clinic.

The Referee remanded claimant's claim for this addiction to the employer for acceptance and payments of benefits and for referral to the Portland Pain Clinic.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee. The Board concludes claimant's claim should be remanded to the employer on May 10, 1976, the date of the Referee's order.

ORDER

The order of the Referee, dated May 10, 1976, is affirmed.

The claim is remanded to the employer to comply with the directives of the Referee's order, commencing on May 10, 1976.

Claimant's counsel is hereby granted as a reasonable attorney fee for his services in Board review, the sum of $400, payable by the employer.

WCB CASE NO. 74-1825 DECEMBER 10, 1976

SHARON WYRICK, CLAIMANT
Burton Fallgren, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the Referee's order on remand which upheld the State Accident Insurance Fund's denial of claimant's claim for aggravation.

Initially, the matter was dismissed by the Referee on the basis that he had no jurisdiction; however, because of the retroactive aspect of the 1975 amendment to ORS 656.273, the matter was remanded to be heard on the merits.

Claimant suffered an injury to her left leg in October, 1968; after surgery the claim was closed by a Determination Order mailed April 25, 1969 which awarded claimant compensation for 10% loss of her left leg. Later, the claim was reopened and further surgery was performed in January, 1970. The claim was again closed on December 24, 1974 with an additional award of 10%.

In November, 1970 claimant commenced working at the Greyhound Bus Depot in Aberdeen, Washington and later worked for the Century Supermarket in Goldendale, Washington. She testified that sometime around October 4, 1973 while working for Century she suffered a painful episode which required treatment from Dr. Tupper who treated her for headaches and neck pain. Claimant told Dr. Tupper that both knees were aching, however, Dr. Tupper did not see claimant with respect to a knee condition until November 7, 1973.

Claimant, with the help of Dr. Tupper, filed a claim with the Oregon State Accident Insurance Fund which was received on February 20, 1974 and denied on March 21, 1974 without the Fund notifying claimant of her right to request a hearing. Claimant then submitted a claim to the Washington Department of Labor and Industries which was ultimately accepted on March 28, 1975.

Claimant did not seek any examination or treatment of her left knee between November 25, 1970 and November 7, 1973. On November 7, 1973 Dr. Tupper was of the opinion that claimant had suffered "a new condition, namely, a collateral ligament strain both laterally and medially, which she attributed to the October 4, 1973 incident at Century Supermarket."

The Referee found claimant was credible but, based upon the documentary evidence before him, that her testimony could not be relied upon as it was definitely contradicted by the documentary evidence. He concluded that claimant had failed to present satisfactory evidence that her condition had become aggravated since December 24, 1974 and, therefore, the other issues before him were moot. He affirmed the denial of claimant's claim for aggravation.

The Board, on de novo review, finds that claimant has failed to present sufficient evidence that her condition has become aggravated since the date of the last award or arrangement of compensation, i.e., December 24, 1974, therefore, it agrees that her claim for aggravation should be dismissed. The other issues presented at the hearing are moot.

The Board does not feel that it is necessary to comment on the application of the "full faith and credit" clause of the United States Constitution to claimant's aggravation claim.

ORDER

The order of the Referee, dated March 5, 1976, is affirmed.

SAIF CLAIM NO. YC 65692 DECEMBER 10, 1976

NATHAN ROTH, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable back injury on February 9, 1967, diagnosed as severe acute cervical radiculitis and he was treated conservatively. On February 15, 1968 Dr. Johnson performed an anterior interbody fusion at C5-6 and C6-7 levels.

The claim was closed by a Determination Order of September 23, 1969 granting claimant an award of 67 degrees for unscheduled disability. Claimant appealed the adequacy of this Determination Order and, after a hearing, was awarded a total of 192 degrees for his unscheduled disability. Claimant's aggravation rights have expired.

Claimant continued to have problems and, on May 14, 1975, Dr. Johnson performed surgery for excision with interbody fusion. The State Accident Insurance Fund voluntarily reopened claimant's claim for this surgery and medical care and paid him compensation for temporary total disability from March 3, 1975 through March 5, 1975. The most recent medical reports indicate that claimant is medically stationary but unable to return to any occupation.

On October 19, 1976 the Fund requested a determination. The Evaluation Division of the Board recommended payment of compensation for temporary total disability from March 3, 1975 through March 5, 1975 (which has already been paid) and from May 12, 1975 through November 30, 1976 and to an award for permanent total disability, commencing December 1, 1976.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 3, 1975 through March 5, 1975 and from May 12, 1975 through November 30, 1976 and is considered as being permanently and totally disabled commencing December 1, 1976.

WCB CASE NO. 75-4884 DECEMBER 10, 1976

ALICE M. BOOTH, CLAIMANT
Disputed Claim Settlement

It is hereby stipulated and agreed by and between Alice M. Booth, acting personally and by and through her attorney, Jeffrey M. Witteman, and the State Accident Insurance Fund, acting by and through James A. Blevins, Assistant Attorney General, as follows:

That claimant suffered an injury to her left shoulder on December 19, 1973, and filed a claim therefor; that by Determination Order of the Workmen's Compensation Board, issued and mailed on March 3, 1975, said claim was closed with an award of temporary total disability inclusively from December 20, 1973 through April 2, 1974 and no award of permanent partial disability; thereafter claimant contended that her "nervous breakdown" was causally related to the compensable injury of December 19, 1975; the State Accident Insurance Fund duly denied said condition by a letter dated and mailed on October 30, 1975; that thereafter claimant filed a timely Request for Hearing on said partial denial of the "nervous breakdown."

A bona fide dispute exists between the parties and the contentions of each are as follows:

1. Claimant contends that all of her emotional problems are the responsibility of the State Accident Insurance Fund.

2. The State Accident Insurance Fund contends that Claimant was having emotional problems due to personal circumstances prior to the industrial injury of December 19, 1973.

The parties are desirous of settling their differences in this matter, and in lieu of costs of litigation, the State Accident Insurance Fund agrees to pay to Claimant and the Claimant agrees to accept the sum of Ten Thousand Dollars ($10,000) in full and final settlement of the "nervous breakdown" condition; that in consideration of the promise to pay said sum, claimant agrees that said condition shall remain in its denied status; that there is no acceptance of it expressed or implied by the State Accident Insurance Fund, and that no other sum shall now or hereafter be paid or payable thereunder.

It is further stipulated and agreed by the parties that no permanent partial disability exists to the left shoulder which is the basis of this claim and claimant agrees not to file a Request for Hearing on the Determination Order of March 3, 1975. Claimant further agrees that the Request for Hearing may be dismissed.

It is further stipulated and agreed that Jeffrey M. Witteman, Claimant's attorney, shall be allowed the sum of $1,000.00, as and for his attorney's fees herein, said sum to be paid from the total settlement figure above mentioned, and not in addition thereto.

Approved and so Ordered and further Ordered that the Request for Review received from claimant on November 4, 1976 is hereby dismissed.

WCB CASE NO. 76-2336 DECEMBER 10, 1976

WILLIAM H. PAXTON, CLAIMANT
Stipulation and Order Approving
Disputed Claim Settlement

The claimant was hospitalized on or about April 15, 1975 for a heart condition, at Seaside General Hospital.

The claimant had coronary artery disease prior to the hospitalization of April 15, 1975.

The claimant had worked for the subject employer, Sunshine Biscuits, Inc., for a period of two days prior to his hospitalization.

The claimant, by and through his attorneys, filed his first Notice of Injury (Form 801) by transmittal letter dated April 20, 1976.

The claimant's claim for compensability of his heart condition was denied by the employer's insurance representative by letter dated April 30, 1976. Thereafter, claimant filed a Request for Hearing.

A formal hearing was held before Referee H. Don Fink in Portland on July 21, 1976. Referee Fink's Opinion and Order was issued by date of August 9, 1976, and held that the claimant's claim (1) was not time-barred and (2) was compensable.

A Request for Review was filed by the employer on or about September 7, 1976. The Request for Review is now pending, but briefs have not been filed.

On or about September 28, 1976, a medical report from Dr. D. Angus Duncan, heart specialist, was received by the employer's insurance representative. A copy of Dr. Duncan's September 28, 1976, medical report is attached hereto, marked Exhibit "A", and made a part of this Stipulation by reference thereto.

The parties hereto state that the two issues before the Referee and the Board, i.e., (1) timeliness and (2) compensability, are bona fide disputes.

The parties hereto desire to terminate these proceedings by a Disputed Claim Settlement, by which the claimant will be paid the gross amount of $2,500, covering any and all claims arising out of his employment with Sunshine Biscuits, Inc., and to dismiss his Request for Hearing. The employer desires to so settle this claim by such a stipulation.

The claimant realizes that by proceeding with the within stipulation, he shall be entitled to no workman's compensation benefits as a result of any heart, or related, condition claimed by him arising out of his employment with Sunshine Biscuits, Inc., during the two days of his employment with them. The claimant agrees that the sum of $ 2,500 is the total amount which he shall receive and the holding of the Referee that his claim is compensable shall have no force or effect.

It is so stipulated.

Based upon the stipulation of the parties hereto, and based upon a review of the evidence related to the disputes herein, the stipulation of the parties is hereby approved and the employer is hereby ordered to pay to the claimant the total sum of $2,500, less the sum of $500 payable to his attorneys, Pozzi, Wilson and Atchison, as and for reasonable attorneys' fees and this matter is hereby dismissed. Claimant's request for withdrawal of his request for benefits under the Workmen's Compensation Law is approved.

SAIF CLAIM NO. A 603186 DECEMBER 13, 1976
SAIF CLAIM NO. A 717527

ROY W. WEBB, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

On July 22, 1976 the claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278, and reopen his claims for industrial injuries to his left ankle. The first occurred on April 29, 1957, the second on April 22, 1958. Claimant contends that his present difficulties with his ankle have been long-standing and continuous.

The application was acknowledged and claimant's counsel was advised to supply the State Accident Insurance Fund with copies of the request and the supporting medical documents; also that the Fund would be given 20 days within which to respond, stating its

that based upon Dr. Pasquesi's evaluation and his statement that previous awards should be deducted from such evaluation, it did not feel claimant was entitled to any additional award for permanent disability because he already had received awards equal to 80%. The Fund, therefore, closed claimant's claim without any further award.

Claimant was given a psychological examination by Norman W. Hickman, a clinical psychologist, on numerous occasions between September 30, 1976 and October 29, 1976, he was also given psychotherapy on September 22 and October 28, 1976. Dr. Hickman discussed claimant's condition with an employee of the Fund who suggested that Dr. Hickman submit a report directly to the Board with a request that the claim be reopened for psychological care and treatment.

On November 17, 1976 Dr. Hickman wrote a very comprehensive evaluation of claimant's past and present physical and psychological conditions and, in conclusion, stated that it appeared clear that claimant's emotional condition had deteriorated very significantly since he was previously examined at the Psychological Center. Furthermore, because of the nature of claimant's current problems it was more than reasonably probable that his emotional condition had significantly deteriorated since his claim was closed in June, 1976, based upon Dr. Pasquesi's report.

Dr. Hickman requested that claimant's claim be reopened for psychological care and treatment. He felt although the prognosis needed to be guarded, even with effective psycho-therapy, it seemed obvious that claimant would have to be regarded as permanently and totally disabled if such treatment is not provided.

The Board, based upon Dr. Hickman's letter of November 17, 1976 which, among other things, indicates that the Fund apparently would furnish such medical care and treatment, concludes that the claimant's claim should be remanded to the Fund to be reopened for such medical care and treatment as may be necessary for his emotional problems and for the payment of compensation, as provided by law, from the date of this order and until his claim is closed pursuant to ORS 656.278.

It is so ordered.

SAIF CLAIM NO. EC 145539 DECEMBER 13, 1976

NELL CRANE, CLAIMANT
Dan O'Leary, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On November 23, 1976 an Own Motion Determination was entered in the above entitled matter. It now appears that claimant had filed a claim for aggravation within the five year period from the date of her first claim closure, therefore, when claimant's condition became medically stationary her claim should have been closed pursuant to the provisions of ORS 656.268 not pursuant to the provisions of ORS 656.278.

Claimant was found to be medically stationary on October 15, 1976 and, on October 29, 1976, the State Accident Insurance Fund requested a determination. Upon receiving the recommendation the Evaluation Division of the Board, the Board issued the Own Motion Determination whereas a Fourth Determination Order should have been issued whereby claimant would be granted the awards which the Evaluation Division found

Claimant was referred to the Disability Prevention Division of the Board for a work potential evaluation; while he was there he was given a psychological evaluation. As a result of the latter the psychologist commented that it was difficult to believe that claimant had ever reached the place where he should have been allowed to return to work, that he apparently had tried to recover from his stroke but it was doubtful that he was ever able to return to work. It was his opinion that claimant's emotional and intellectual problems were primarily attributable to his 1972 stroke, however, they were moderately aggravated by the industrial injury occurring on November 12, 1973. He felt claimant was unemployable because of the emotional and intellectual problems.

The employer does not deny that claimant is permanently and totally disabled but contends that claimant was disabled to that extent prior to the industrial injury and because of a non-work related condition, consequently, it is not responsible for the present admitted permanent total status.

The Referee found that claimant had no formal education, no skills, and, at best, was able to earn a rather limited wage for his labors and efforts. He was fully illiterate, being unable to either read or write. When claimant suffered, in early November, 1972, a non-work related stroke which permanently affected the left side of his body, his doctor, upon claimant's discharge from the hospital, reported claimant was "totally disabled." This was later substantiated by Dr. Hickman's opinion that it was difficult to believe that claimant could ever have reached the place where he should have been allowed to return to work and that it was doubtful that he would ever to able to return to work.

The Referee, relying upon the definition of permanent total disability (ORS 656.201(1)(a)) and on the doctrine of "odd-lot" category as definitely within the "odd-lot" status and was permanently and totally disabled prior to his return to work for the employer in November, 1973. The employer, being sympathetic with claimant's problems, created a "job" which, hopefully, claimant physically would be able to do but this is not sufficient to overcome the evidence that claimant had, as of November 1, 1973, no employment capabilities which he could have marketed in any competitive labor market.

If the 1972 stroke suffered by claimant had been a compensable incident rather than a non-work related one, the Referee stated that had he been required to adjudicate the extent of claimant's disability resulting therefrom, based on all of the medical evidence, he would have found claimant permanently and totally disabled. To be consistent the Referee concluded that it was necessary to reverse the Determination Order of January 2, 1975 because claimant's permanent total disability was the result of his hypertension caused stroke suffered in November, 1972 which was not work connected, not the result of the industrial injury of November 2, 1973.

The Board, on de novo review, affirms the well-written Opinion and Order of the Referee.

ORDER

The order of the Referee dated February 7, 1976 is affirmed.

ORDER

The order of the Referee, dated April 2, 1976, is affirmed.

Claimant's counsel is hereby granted as a reasonable attorney fee for his services in connection with Board review, the sum of $250, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-964 DECEMBER 13, 1976

MAJOR CANADY SR., CLAIMANT
R. Kenney Roberts, Claimant's Atty.
Roger Luedtke, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award for 32 degrees for 10% unscheduled disability.

Claimant had had a prior low back injury with this employer. On July 26, 1975 he reinjured his back; his treatment was conservative in nature with hospitalization. Claimant returned to work but contends he is in constant pain.

On August 26, 1974 a Determination Order granted claimant compensation for temporary total disability only. A Second Determination Order, dated January 16, 1976, awarded claimant 16 degrees for 5% unscheduled low back disability.

Claimant testified he still wears his back brace; this testimony was corroborated, he recently has seen a doctor for back pain, however, his complaints were all subjective.

The Referee found claimant's impairment was from strain superimposed on degenerative changes and/or spondylolysis.

The Referee concluded claimant's loss of wage earning capacity, after considering all pertinent factors, was not substantial but it was greater than that for which he had been awarded by the Second Determination Order. He increased the award to 32 degrees for 10% unscheduled disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 23, 1976, is affirmed.

WCB CASE NO. 76-1588 DECEMBER 13, 1976

ADRIAN HOLTEN, CLAIMANT
Sidney Galton, Claimant's Atty.
Don Swink, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of March 26, 1976.

Claimant, whose principal work experience is truck driving, sustained a compensable hernia on October 18, 1974 which required surgical repair on January 13, 1975.

Claimant returned to work in March, 1975 but stayed on the job only for a short period due to pain which he developed in his right groin, caused by a pulling incident.

In November, 1975 claimant returned to light employment, furnished by the employer, which could be performed while sitting. However, claimant testified that sitting for long periods caused pain in his side which also occurred if he stood for long periods.

On December 17, 1975 Dr. Zeller, claimant's treating physician, stated that he felt claimant would never work again; that claimant had considered the possibility of exploratory surgery but hadn't made up his mind.

Claimant underwent a psychological evaluation at the Disability Prevention Division on January 29, 1976 which indicated that claimant seems to be seeking total disability status as the best solution to his problems and this may be contributing to the maintenance of his symptoms. Dr. Munsey found claimant's prognosis for returning to work to be very poor from a psychological point of view; he felt claimant had decided to retire.

Dr. Holm of the Disability Prevention Division felt that the probability of a significant neuroma was unlikely and that claimant's emotional factors rather than his physical impairment were limiting claimant's work potential.

A Determination Order, dated March 26, 1976, granted claimant compensation for time loss only.

Claimant continued to complain of pain in his groin which radiates over the right hip and down into the right thigh. Claimant testified he had this pain daily.

The Referee found that none of the doctors could specifically state what caused claimant's subjective complaints. Dr. Zeller recommended exploratory surgery but claimant chose not to submit to such a procedure.

The Referee also found claimant had made only a minimal effort to return to work even though claimant was of average, and in some factors above average, intelligence and could be retrained for other types of employment. Claimant has "mentally retired" and cannot, therefore, expect his employer to finance this retirement through the guise of workmen's compensation benefits to which claimant is not entitled.

The Referee concluded that it was difficult to reconcile claimant's testimony of pain with his refusal to submit to a surgical procedure which has a good chance of finding and taking care of the cause of claimant's problems and is not too hazardous. The Referee concluded that claimant, by his own actions, has made the rating of his disability extremely difficult, if not impossible. He affirmed the Determination Order of March 26, 1976.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 16, 1976, is affirmed.

WCB CASE NO. 76-1442 DECEMBER 13, 1976

MAXINE LARVICK, CLAIMANT
Michael Strooband, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which dismissed claimant's request for hearing. Claimant contends the State Accident Insurance Fund should pay $145.60 for medical bills she received from Dr. Freiermuth.

Claimant has a history of complaints of bursitis and arthritis in both arms and shoulders which began in 1967. In 1974 she filed a claim for left arm problems which was accepted.

Claimant had been consulting Dr. Ray, a gynecologist, for her bursitis and arthritis conditions since 1967. In September, 1973 she came under the care of Dr. Mueller, an orthopedist.

Dr. Mueller examined claimant on August 8, 1975. Claimant was complaining of cervical and trapezius muscle pain and aching, complaints which she has had for three or four years. Anti-inflammatory agents did not improve her condition and Dr. Mueller referred claimant to Dr. Freiermuth for a complete physical examination and medical workup for degenerative arthritis of the neck, spine and hands.

Dr. Mueller's opinion was that these complaints of claimant's have no direct relationship to her left shoulder injury.

Claimant contends that the Fund is responsible for Dr. Freiermuth's medical billing because she was referred to him by her treating physician who has treated her for her compensable injury. The Fund contends that it is not its responsibility to pay this billing because claimant's symptoms were not related to her compensable industrial injury.

The Referee found that the Fund is responsible only for medical care and treatment which is directly related to the compensable injury. Dr. Mueller's opinion indicates the complaints for which Dr. Freiermuth's workup was requested were not related to claimant's injury to the left arm or shoulder.

The Referee concluded that Dr. Freiermuth's consultation was not required by claimant's compensable injury nor was it related thereto. He dismissed claimant's request for hearing.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 28, 1976, is affirmed.

WCB CASE NO. 75-3468 DECEMBER 13, 1976

LOLA MARTIN, CLAIMANT
Ronald Miller, Claimant's Atty.
Eugene Cox, Defense Atty.
Amended Order on Review

On November 18, 1976 an Order on Review was entered in the above entitled matter which, among other things, awarded claimant's counsel an attorney fee in the sum of $750 for his services at the hearing, said sum to be paid by the employer and to be in lieu of the award of attorney fees granted by the Referee's order which the Board had modified.

The Board, after reconsideration, concludes that the Order on Review should be amended by deleting the third paragraph on page 3 of said Order on Review and substituting in lieu thereof the following paragraph:

> "Claimant's counsel is awarded, as a reasonable attorney fee for his services at the hearing, the sum of $750, payable by the employer, and also to a sum equal to 25% of the compensation awarded by this Order on Review, payable out of said compensation as paid, not to exceed the sum of $1,250."

In all other respects the Order on Review entered in the above entitled matter on November 18, 1976 is ratified and reaffirmed.

WCB CASE NO. 75-5556 DECEMBER 13, 1976

ROBERT PARKS, CLAIMANT
Merwin Logan, Claimant's Atty.
J.W. McCracken, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Third Determination Order of November 25, 1975. Claimant contends he is entitled to a greater award.

Claimant sustained a compensable right knee injury on June 13, 1972. A medial meniscectomy was performed by Dr. Degge on November 17, 1972. In February, 1973 Dr. Degge found claimant medically stationary, with slight residual rotary instability; residual symptoms were considered mild to moderate in degree.

A Determination Order of March 22, 1973 granted claimant 15 degrees for 10% loss of the right leg.

In November, 1973 Dr. Degge performed surgery to reconstruct the medial collateral ligament and tightening of the posterior capsule and pes anserinus transplant due to claimant's continuing instability.

On April 11, 1974 Dr. Degge found claimant medically stationary with permanent residuals of moderate severity.

A Second Determination Order of May 23, 1974 granted claimant an additional award of 37.5 degrees, making a total of 52.5 degrees for 35% loss of the right leg.

In October, 1974 Dr. Degge recommended a third surgery; it was performed. In his report of October 10, 1975 he found claimant medically stationary with mild residuals.

A Third Determination Order of November 25, 1975 granted claimant compensation for temporary total disability only.

On February 17, 1976 Dr. Degge stated claimant should work on level surfaces and not place heavy demands on his knee, like climbing stairs.

Claimant testified that his pain is exacerbated by stress. The job claimant is presently performing conforms to claimant's physical limitations.

The Referee found claimant has not had such marked improvement as to reduce his disability from moderate severe to mild as indicated by Dr. Degge; however, none of the medical reports indicated residual impairment of his leg greater than the 35% He affirmed the Third Determination Order.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 4, 1976, is affirmed.

WCB CASE NO. 75-5454 DECEMBER 13, 1976

MICHAEL SHIFTON, CLAIMANT
Robert Babcock, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which approved the Fund's denial of claimant's claim. Claimant contends his claim should not be barred for late filing and that he was a subject workman.

The circumstances surrounding claimant's injury were stipulated at the hearing; no testimony was taken nor were any questions of fact presented. On September 1, 1971 claimant, a student at Rex Putnam High School, sustained serious injuries to his left hand from an explosion in a chemistry laboratory caused by claimant's mixing of certain chemicals.

Claimant was taking this class for special credit. No monetary remuneration was involved.

Claimant filed a claim on October 13, 1975 which was denied by the Fund on December 16, 1975 on the grounds that (1) claimant was not a subject workman and (2) his claim was not timely filed. Claimant also had sued the school district and other parties, apparently alleging negligence. This case was decided adversely to claimant by the Court of Appeals on June 28, 1974.

The Referee found, pursuant to ORS 656.265(4) that claimant did not file his claim within 30 days nor did he have good cause for his late filing. Claimant has been represented by legal counsel since September 21, 1971. He concluded claimant's claim was barred.

The Referee further found claimant admitted he was a student at the time of his injury. Claimant contends he was under the direction and control of the teacher for "remuneration" in the form of special credit. However, this situation of direction and control does not transform an academic situation into an industrial one.

The Referee stated that equating course credit with remuneration for services implies that the special credit is equivalent to board and room, etc. This is a fallacy of reasoning for education, while enriching the mind of the student and possibly increasing his future work and earning potential, does not constitute remuneration in the sense of something of monetary value to a student.

The Referee concluded claimant did not fall into the classification of "workman" as defined by ORS 656.002(22).

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 9, 1976, is affirmed.

WCB CASE NO. 74-4630 DECEMBER 15, 1976

DANIEL TANORY, CLAIMANT
Bruce Williams, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of 80 degrees for 25% unscheduled disability.

Claimant, a fire fighter, sustained a compensable injury on June 29, 1974 when he slipped and fell; this injury was diagnosed by Dr. Danner as lumbosacral strain. Treatment was conservative in nature. On August 8, 1974 Dr. Danner released claimant to return to work but advised him to avoid heavy lifting.

Claimant attempted to return to work but was told by his employer, Multnomah County Fire District, that he could not return to work until he could do so with no limitations. Claimant was subsequently dismissed from his job by the employer. (Claimant contested this dismissal and was reinstated.)

Claimant was referred to Dr. John Thompson, who stated, "I was most impressed with how interested he was in protecting his interests in his disability insurance and disability pension." Dr. Thompson diagnosed chronic lumbosacral strain secondary to degenerative disc disease L5-S1 endogenous obesity and poor posture.

On October 10, 1974 Dr. Pasquesi examined claimant and found no measurable impairment. He stated claimant told him he will be retired as a fireman which the doctor found hard to understand because claimant was 34 years old. Claimant indicated he plans to operate a ranch in eastern Oregon.

A Determination Order of November 18, 1974 granted claimant compensation for temporary total disability only.

On November 19, 1974 Dr. Burr diagnosed chronic low back instability, facet syndrome.

Dr. Danner, upon deposition, testified that when he saw claimant in September, 1975, claimant's back was not bothering him very much but that claimant could not return to heavy labor. Dr. Danner said that claimant's back condition then was as good as it was prior to the injury but that claimant was now more susceptible to recurrent back injuries.

The Referee concluded, based upon all of the evidence submitted in the record, that claimant has suffered a loss of wage earning capacity because he is now precluded from engaging in all heavy labor type occupations. He granted claimant an award of 80 degrees for 25% unscheduled disability.

The Board, on de novo review, finds, based upon all of the medical evidence, that claimant's greatest problem with his back is caused by his obesity. Furthermore, claimant is totally lacking in motivation. He has not made any attempt to find employment or be retrained in an occupation which does not involve heavy lifting, in fact, claimant contested his dismissal as a fireman and, after a hearing, was reinstated. Evidently he feels he could handle his old job if he wanted to do so. At the present claimant spends all of his time training horses.

The Board concludes that the Referee's order should be reversed and the Determination Order of November 19, 1974 reinstated. Claimant has not lost any wage earning capacity and his present problems are due to obesity which claimant can control rather than to his industrial injury.

ORDER

The order of the Referee, dated May 7, 1976, is reversed.

The Determination Order, mailed November 19, 1974, is affirmed.

CLAIM NO. 69-A-416 DECEMBER 15, 1976

SAMUEL TADLOCK, CLAIMANT
Evohl Malagon, Claimant's Atty.
Own Motion Order Remanding
the Matter for Hearing

On November 3, 1976 the Board received a request from claimant that it exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury suffered on December 13, 1969. A medical report from Dr. Tsai, dated October 20, 1976, supported the request.

On November 5, 1976 the employer, Boise Cascade Corporation, was advised that it had 20 days within which to respond to claimant's request. The claimant's letter, dated November 2, 1976, which accompanied the request indicated that Boise Cascade had been furnished a copy of the request and the medical report. As of the date of this order no response has been received from Boise Cascade.

The Board, after due consideration, concludes that the treatment recommended by Dr. Tsai in his medical report can be provided to claimant under the provisions of ORS 656.245; however, the issue of the claimant's entitlement to an additional award for permanent partial disability cannot be resolved by the Board at this time because of the insufficiency of medical evidence presently submitted to it.

Therefore, the matter should be submitted to the Hearings Division of the Board with instructions to set the matter for hearing and to take evidence from all parties concerned on the issue of whether claimant is entitled to any additional award for permanent partial disability. Upon conclusions of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendations on the aforesaid issue.

It is so ordered.

WCB CASE NO. 76-1074 DECEMBER 15, 1976

FREDA SHEFFIELD, CLAIMANT
Keith Swanson, Claimant's Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Third Determination Order, dated February 20, 1976.

Claimant suffered a compensable back injury in June, 1970 as a result of a compensable automobile accident. Her condition was diagnosed as strain of the cervical spine and she was treated conservatively. The claim was closed in August, 1970 with no award for permanent partial disability.

In 1973 the claim was reopened for recurring symptoms. A Second Determination Order of September, 1973 awarded claimant 16 degrees for 5% unscheduled neck and left shoulder disability. In December, 1973, by stipulation, claimant received a total award of 42 degrees.

In August, 1975 the claim was again reopened for aggravation and closed by the Third Determination Order which granted claimant additional compensation for temporary total disability but no additional award for permanent partial disability.

Claimant is presently employed as a project director, supervising 27 employees; she drives 1,000 miles a month, attends meetings, etc., as a part of her job. Claimant's present complaints relate to the upper back, neck, shoulder and right arm. She uses a full back brace during the day and uses a neck brace while sleeping.

The Referee found that not all of claimant's complaints were referrable to the 1970 industrial injury, some complaints she has had since an injury she suffered in 1966. Claimant's principal disability from the 1970 industrial injury, in the Referee's opinion, was a reduced capacity for sustained activity.

The Referee concluded that Dr. Spady's report of January 12, 1976 does not indicate that claimant is entitled to a greater award for her present disability than she has already received. He, therefore, affirmed the Determination Order, dated February 20, 1976.

The Board, on de novo review, affirms the conclusions reached by the Referee.

ORDER

The order of the Referee, dated June 30, 1976, is affirmed.

WCB CASE NO. 76-130 DECEMBER 13, 1976

FLOYD PARAZOO, CLAIMANT
David Vandenberg, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant a total award of 240 degrees for 75% unscheduled disability. Claimant contends he is permanently and totally disabled.

On December 7, 1973 claimant, a 61 year old trimmerman, injured his head and neck. Claimant tried to continue working that day but became so dizzy that he had to quit. He has not returned to any occupation since that date.

On January 14, 1974 Dr. Blinstrub diagnosed cervical vertigo syndrome. On July 18, 1974 Dr. Schleuning, an otolaryngologist, examined claimant and diagnosed positional vertigo accentuated by claimant's head injury. He felt if this condition did not improve within six to twelve months the condition was probably permanent and would continue to be disabling.

Neither Dr. Klump or Dr. Paxton, both neurologists, found claimant had neurological deficit. Dr. Paxton referred claimant to Dr. Schleuning.

On October 21, 1975 Dr. Schleuning felt claimant was employable, with certain

About 13 years prior to the hearing claimant had suffered an injury to his left hip; arthritis developed in the hip as a result of that accident and a cup arthroplasty was performed in 1961. Claimant's left leg is one and one half inches shorter than the right leg. Despite this and other pre-existing problems claimant had been able to engage in regular and gainful employment up to the time of his January 22, 1973 injury. Claimant had not had any prior injuries to his right shoulder or his right arm.

On March 3, 1973 Dr. Anderson did a surgical repair of a massive tear of the rotator cuff and, on May 14, 1973, expressed his opinion that a total hip replacement was indicated. On November 28, 1973 Dr. Anderson stated claimant was medically stationary, that his residual permanent impairment both in the right shoulder and left hip were substantial. It was his opinion that claimant would not be able to return to gainful employment.

The employer in an attempt to determine some employment which claimant could physically perform and continue his employment with the cannery, suggested three jobs which would be available to claimant in 1975. One job was driving a hyster -- this was the same job claimant was performing at the time he was injured -- another was pallet repair, a job which claimant could do pretty much as he pleased and with the assistance of a partner repairman; and the third job was belt inspection work, a job which claimant could do either sitting or standing at his choice because certain concessions would be made to him for his comfort and to alleviate as much as possible his problems which were the result of his industrial injury.

Dr. Anderson indicated that the belt inspection work would be a satisfactory type of occupation for claimant to do; however, claimant made no attempt to try any of the jobs offered although he knew that such work was available and that he could thereby return to full time employment with the employer.

The Referee found that, as a result of the industrial injury, claimant now has very little use of his right shoulder and right leg. Claimant can do no work which requires overhead working, heavy lifting, stooping, twisting, bending, climbing stairs or ladders, squatting or walking over rough terrain. Also claimant has incurred substantial psychopathology which is attributable to his industrial injury.

The Referee thought that the job description of the pallet repair seemed to fall within the limitations medically imposed on claimant as did the belt inspection work; Dr. Anderson, claimant's treating physician, had stated that claimant would be able to do the latter type of work. An employment counselor for an employment placement agency indicated that certain types of light employment which were available within the local area which might be work which claimant could do.

The Referee concluded that claimant was not a complainer but although his complaints were genuine there was some doubt about claimant's actual motivation to return to work. Claimant is now 63 years old and he has, in reality, retired on Social Security and compensation benefits since he doesn't feel he is able to do a full day's work.

The Referee concluded that claimant was not entitled to an award for permanent total disability. The evidence of claimant's remaining physical ability and the availability of jobs which he could perform within his physical capabilities did not indicate that the nature of claimant's impairment and his future ability to work was such that he could be considered a member of the "odd-lot" work force.

The Referee found that the awards of compensation granted claimant by the Determination Order did not sufficiently compensate him for his loss of wage earning capacity. All of claimant's prior work and experienced skills required heavy manual labor, claimant has only an 8th grade education and, therefore, the Referee concluded that he had lost a substantial portion of his wage earning capacity. He increased the unscheduled award from 128 degrees (40% of the maximum) to 208 degrees (65% of the maximum), awarded claimant 38.4 degrees for 20% loss of his right arm and affirmed the award made by the Determination Order of 30 degrees for 20% loss of the left leg.

The Board, on de novo review, agrees with the conclusions reached by the Referee. The claimant is a sincere person and does not appear to be exaggerating his complaints but apparently had decided to retire at 62. The jobs the employer offered to make available to claimant to enable him to see if he could physically perform them and continue his employment with the employer might not be exactly the type of jobs which would be available on a regular basis to a workman in the competitive market; however, claimant at least, should have made an attempt to determine whether he could physically handle any of the offered jobs. The Referee's order should be affirmed.

ORDER

The order of the Referee, dated June 24, 1976, is affirmed.

WCB CASE NO. 76-2527 DECEMBER 15, 1976
WCB CASE NO. 76-2528

EILEEN BARNEY, CLAIMANT
Allan Coons, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer, Dexter Market, requests review by the Board of the Referee's order which ordered it to continue payment of compensation to claimant until closure is authorized pursuant to ORS 656.268.

From 1974 through August 15, 1975 claimant was employed by Unity as a checker. Unity's workmen's compensation coverage was furnished by the State Accident Insurance Fund. On August 15, 1975 claimant was having trouble with her right shoulder which ultimately was diagnosed as tendonitis.

Claimant began working as a checker for Dexter Market on August 16, 1975; its workmen's compensation coverage was furnished by Employee Benefits Insurance. At Dexter claimant did not do as much heavy overhead lifting as she had done at Unity.

In September, 1975 the symptoms of shoulder problems persisted and claimant saw a chiropractor; this treatment did not improve her condition. This condition became increasingly worse and claimant sought treatment from Dr. Brooke, an orthopedist, in February, 1976 who advised claimant to quit work, stating such work was causing her problems. Dr. Brooke also advised claimant to file a claim which she did against Unity in February, 1976. A representative of the Fund suggested to claimant that she file a claim against Dexter because she had not received any treatment for her problems while working for Unity. The Fund denied claimant's claim after making one payment for temporary total disability.

Claimant testified that the discomfort which she experienced first began in the spring of 1975 and this testimony was corroborated by claimant's co-workers and by the owner of Unity.

The Referee found that the right shoulder problems developed in the form of an ache which she only experienced on lifting and would then go away; this was while working at Unity. These problems continued when she worked for Dexter Market and progressively worsened even though the work at Dexter was lighter in nature. He didn't think the situation fit the concept of occupational disease but rather that of successive injuries but the rule of responsibility is the same.

The Referee relied upon Mathis v. SAIF, 10 Or App 139 (1972) wherein the Court states that in an occupational ~~disease case the~~ last injurious exposure rule applies and that the employer takes the employee as he finds him. He found Dexter Market to be the responsible party because although claimant's problems began at Unity where she performed more strenuous work, the work at Dexter required lifting and this was the activity which precipitated claimant's problems and caused them to become disabling.

He ordered Dexter Market, and its carrier Employee Benefits Insurance, to continue to pay compensation to claimant until closure is authorized pursuant to ORS 656.268. (Employee Benefits Insurance had been designated as the paying agent pursuant to ORS 656.207(1)). He dismissed claimant's claim against the Fund.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 26, 1976, is affirmed.

CLAIM NO. 403 C 12628 DECEMBER 20, 1976

FRANK LENGELE, CLAIMANT
Thomas Reeder, Claimant's Atty.
Lyle Velure, Defense Atty.
Order of Rescission

On November 10, 1976 an Amended Own Motion Order was erroneously entered in the above entitled matter. This order should be rescinded and set aside in its entirety and the Amended Own Motion Order entered on October 26, 1976 reinstated in its entirety.

It is so ordered.

WCB CASE NO. 76-969 DECEMBER 20, 1976

LAWRENCE LAYTON, CLAIMANT
Robert E. Martin, Claimant's Atty.
Michael Hoffman, Defense Atty.
Order on Review

Reviewed by Board Members Wilson and Moore.

Claimant requests review of the Referee's order which affirmed the Determination Order of November 14, 1975 which awarded claimant no compensation for permanent partial disability.

Claimant sustained a compensable injury on August 7, 1974; he has worked only three days since his injury. His claim has been closed three times with awards for temporary total disability compensation only.

On November 7, 1974 Dr. Graham found claimant's subjective symptoms were more than to be expected in the absence of objective findings. He believed claimant could return to work but that claimant didn't feel that he could.

On December 3, 1974 claimant was examined by Dr. Pasquesi, who found claimant's symptoms could not be substantiated by the objective medical findings. Dr. Hopkins had claimant hospitalized for traction and, on June 26, 1975, stated claimant was much improved and he felt claimant's disability was on a functional basis.

On August 2, 1975 Dr. Hopkins indicated, after claimant had been evaluated at the Pain Clinic, that claimant's emotional distress complicated his orthopedic problems; without these emotional factors claimant's orthopedic problem was minimal.

On September 19, 1975 Dr. Russakov of the Portland Pain Rehabilitation Center found claimant had significant psychogenic components to his continuing disability, that his physical problems are mild, at worst.

The Referee found that claimant's physical disability, as indicated by the medical records, was minimal; there were no objective physical findings to substantiate claimant's continuing subjective complaints. He further found that claimant's psychological problems stemmed from family difficulties which pre-existed the injury and these emotional factors were not related to his industrial injury.

The Referee, therefore, concluded claimant is not entitled to any award for permanent partial disability and affirmed the last Determination Order.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 18, 1976, is affirmed.

WCB CASE NO. 75-1429 DECEMBER 20, 1976

JAMES MALONEY, CLAIMANT
Sidney Ainsworth, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation, as provided by law.

Claimant had suffered a compensable right arm injury about March 6, 1973, the claim was closed with an award of 9.6 degrees for 5% loss of the right arm. Claimant later developed right elbow pain and, on February 19, 1974, claimant underwent ulnar nerve surgery by Dr. Tennyson. After surgery claimant's arm was placed in a cast.

On February 25, 1974, while taking a bath, claimant slipped and fell on his right hip; the fall, in part, caused by his right arm impairment. Because of this incident, claimant developed back problems and, on March 25, 1974, underwent a laminectomy.

On April 11, 1974 Dr. Tennyson reported that claimant had said he fell while bathing due to weakness of his right arm, i.e., being unable to put weight on it. Dr. Tennyson felt this was a reasonable explanation.

On August 6, 1975 Dr. Tennyson indicated he felt the weakness in claimant's arm was a causative factor in claimant's fall in the tub. He further stated that the first time he was aware of claimant's complaints of back problems was on March 22, 1974.

The Referee found claimant's testimony to be forthright and convincing concerning the cause of his fall; as had Dr. Tennyson. After the arm surgery Dr. Tennyson had told claimant not to get the cast moistened; claimant testified this was why he took a bath rather than a shower. Claimant's arm was not normal or he probably could have broken his fall.

The Referee concluded claimant had proven he had suffered a compensable injury and he remanded claimant's claim to the Fund.

The Board, on de novo review, concurs that the weakness of claimant's arm may have prevented claimant from avoiding the fall in the bathtub which required the back surgery of March 25, 1974.

ORDER

The order of the Referee, dated January 6, 1976, is affirmed.

Claimant's counsel is hereby granted as a reasonable attorney fee for his services in connection with Board review, the sum of $400, payable by the State Accident Insurance Fund.

SAIF CLAIM NO. ZB 141617 DECEMBER 20, 1976

LEO CARPENTER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on August 3, 1965 to his right shoulder, hip and knee while employed as a lathe operator. Subsequently, he underwent a laminectomy, L5-S1. The claim was closed with an award of 72.5 degrees for 50% loss of an arm for unscheduled disability. Claimant's aggravation rights have expired.

Claimant continued with conservative treatment during 1971 but his claim was not reopened. Claimant returned to Dr. Reid in 1975 who diagnosed an L5 radiculopathy on the right; after a myelogram was performed on June 9, 1975 surgery was not recommended.

After a hearing to determine if claimant's present condition was related to his industrial injury, the Referee recommended the Board reopen claimant's claim under its own motion jurisdiction. An Own Motion Order, issued on August 11, 1976, remanded claimant's claim to the State Accident Insurance Fund to pay compensation, as provided by law, commencing November 17, 1975. However, claimant has lost no time from work since November 17, 1975.

The latest medical report from Dr. Buza finds claimant has continuing difficulties with his low back and right leg. The back condition has been the same for the last couple of years; however, the right leg condition has worsened.

On November 18, 1976 the Fund requested a determination. The Evaluation Division of the Board recommended no payment for temporary total disability, and an award of 15% loss of the right leg.

The Board accepts this recommendation.

ORDER

Claimant is hereby granted an award of 16.5 degrees of a maximum 110 degrees for 15% loss of the right leg.

WCB CASE NO. 75-3951 DECEMBER 20, 1976

ZELLA BAXTER, CLAIMANT
William Babcock, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the Referee's order which awarded her 208 degrees for 65% unscheduled disability. Claimant contends that she is permanently and totally disabled.

Claimant, who was 43 years old at the time, suffered an industrial injury on April 30, 1970 when she fell, landing on her buttocks. The original diagnosis was that of a lumbosacral strain. Conservative treatment did not resolve any of claimant's problems and eventually an myelogram was performed, followed by a lumbar laminectomy at L1-2 level with removal of a disc performed by Dr. Donald T. Smith.

In June, 1972 Dr. Smith felt claimant had made a satisfactory recovery, that she could not return to mill work and that she had a mild degree of residual permanent disability.

At the Disability Prevention Division of the Board Dr. Mason examined claimant and found a large element of emotional overlay but no objective findings to support her complaints of severe disability. Dr. Mason recommended claim closure and indicated a mildly moderate permanent disability. Based upon this report a Determination Order, of September 8, 1972, awarded claimant 128 degrees for 40% unscheduled low back disability.

Claimant was dissatisfied and requested a hearing which was held before Referee John F. Drake (WCB Case No. 72-2965). Referee Drake found that the Determination Order should be set aside and the claim be reopened for additional time loss and further medical treatment; basically, treatment for emotional or psychiatric problems which claimant was presently suffering and were related to the industrial injury.

The Board's Order on Review, dated October 10, 1973, affirmed the Referee's order which was based primarily on the report from Julia Perkins, a clinical psychologist. This report indicated that although claimant may have had pre-existing emotional disorder she had been able to work regularly in the employer's mill prior to her back injury and subsequent to the injury she remained at work for over a year. She felt that the combination of the physical problems, including the required surgery, and the emotional disorder had produced a condition which completely disqualified claimant from pursuing regular employment because of the level of pain. She did not feel that the claim should have been closed based upon Dr. Mason's recommendation.

On April 19, 1973 claimant began receiving treatment from Dr. Ruth Jens which were primarily directed to weight loss, correcting depression and modifying, while learning to live with, some pain. In October, 1973 and again in January, 1974 Dr. Jens repeated her understanding of the treatment goals which were exclusively psychiatric in nature.

A psychiatric examination by Dr. Parvaresh was arranged by the Fund. It was done in March, 1974. As a result of his psychiatric examination, Dr. Parvaresh found no degree of impairment which would preclude claimant from gainful employment and he doubted very much if there would be any permanent impairment because no significant impairment existed at that time. He felt claimant had received help from Dr. Jens.

In June, 1974 Dr. Henson, a psychiatrist in Bend, examined claimant and, based on his examination, disagreed with Dr. Parvaresh's conclusions; he felt that her psychiatric problems were preventing her from working and that the possibility of permanent psychiatric residue was an accomplished fact.

In February, 1975 claimant had her first physical examination with respect to her alleged disability in approximately three years. This examination was conducted by Dr. Cherry who found residuals of disc disease and considerable osteoarthritis in the back. He concluded that claimant was disabled and required additional treatment. Later, claimant was examined by the Back Evaluation Clinic where the physicians diagnosed a chronic lumbosacral sprain, together with the post-laminectomy residual pain and also found a rather marked functional overlay. Based upon this report a 2nd Determination Order, of May 20, 1974, awarded claimant an additional 32 degrees for 10% unscheduled disability, giving claimant a total of 50% of the maximum for unscheduled disability.

Claimant has continued to be treated by Dr. Jens. Both claimant and Dr. Jens admit that claimant has made a substantial improvement with her emotional problems since her claim was reopened in 1973, however, Dr. Jens maintains that claimant cannot do any type of work, basing this on claimant's physical complaints rather than on her psychiatric findings. The orthopedic reports of Dr. Cherry and the Back Evaluation Clinic disagree, stating that claimant cannot return to her former employment but could do lighter types of work.

The Referee found that claimant had failed to establish a prima facie case of odd-lot status because of the unanimity of the orthopedic reports indicating claimant could do some light work. Furthermore, claimant is only 49 years old, she has a high school education and has had one year of clerking experience in addition to her mill work experience and has been found to have an average range of intelligence. Therefore, motivation becomes an issue and, the Referee found that claimant had not carried her burden of proof; not having shown herself to be motivated to return to work or be retrained. To the contrary, the evidence indicates claimant preferred to remain at home with her invalid husband and 13 year old son; she has sought no employment whatsoever and has stated she would refuse certain jobs if offered to her.

The Referee concluded that because claimant was not entitled to be declared permanently and totally disabled under the odd-lot doctrine an evaluation must be made of her permanent partial disability. Prior to the hearing, claimant had received 50% of the maximum allowable by statute for her unscheduled disability. The Referee found that claimant could not return to mill work and was foreclosed from all types of heavy work activities, therefore, she has suffered a substantial dimunition of her earning capacity. Claimant's work history, although minimal, does indicate that she had the ability, prior to her injury, to do physical work on a daily basis and she is restricted to light, sedentary and generally unskilled job positions. He increased the award from 50% to 65%.

The Board, on de novo review, agrees with the conclusions reached by the Referee.

ORDER

The order of the Referee, dated July 6, 1976, is affirmed.

WCB CASE NO. 76-535 DECEMBER 21, 1976

GEORGE RICHARDS, CLAIMANT
Paul Rask, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

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

The sole issue before the Referee was the responsibility of Arrow Transportation

injury, claimant returned to work. Later, he discovered a numbness in his leg and was hospitalized for traction. Dr. Hockey, a neurologist, diagnosed an acute lumbosacral strain, and he recommended continuing the conservative treatment.

After claimant was released from the hospital he returned to work as a salesman for about five weeks and then obtained employment with Grant AMC Inc. in February, 1973. On June 25, 1973 claimant suffered an industrial injury the claim for which was closed on a "medical only" basis; at that time Grant's carrier was Fireman's Fund Insurance Company.

On August 3, 1973, based upon the closing evaluation by Dr. Schachner with which Dr. Hockey agreed, the first Determination Order was issued, awarding claimant 32 degrees for 10% unscheduled disability resulting from the October 3, 1972 injury. Claimant continued to work for Grant, however, his complaints persisted and he was seen by Dr. Hockey in January, 1974. Claimant's attorney advised him to file a claim against Home Indemnity Company who, at that time, was the workmen's compensation carrier for Grant. Home denied the claim. The Referee found that this denial was not valid, however, because of his final conclusion the invalidity was not an issue to be disposed of.

On January 29, 1974 Dr. Hockey performed a laminectomy on claimant and again on April 16, 1974 a similar surgery was done. Dr. Hockey, in his report of November 1, 1974, stated that claimant had a "moderate severe permanent partial disability." He felt that claimant was not a good candidate for retraining, that he had chosen to retire utilizing his social security. Dr. Hockey thought this was a good choice because although claimant might be able to do light work if it was available, considering claimant's age, it was not very reasonable to expect that it would be.

As a result of Dr. Hockey's report a 2nd Determination Order was issued on January 21, 1975 which awarded claimant the additional 128 degrees for his October 3, 1975 injury.

The Referee found that claimant had an excellent work record prior to his first injury in 1972, having worked for Bee Line Service for 25 years; that after the first surgical procedure and the resulting inability to hold down a job driving claimant, nevertheless, appeared to be well motivated while working at Grant. He testified that he worked with constantly increasing difficulty and as his condition deteriorated it became more and more difficult. This, ultimately, required the second surgery. Thereafter, claimant testified he could not return to work except for his short-term efforts to retrain his replacement.

The Referee found, based on the evidence, that claimant did not suffer a new back injury in January, 1974 although he did file a Form 801 at the suggestion of his attorney. He found that all of the medical reports indicate a clear situation of aggravation of the 1972 injury, that Industrial Indemnity, Bee Line Service' carrier, had accepted the fact of aggravation and had willingly reopened the claim paying compensation and medical benefits. On the date of the first hearing Industrial Indemnity became aware for the first time that a claim had been filed against Home, it then raised the issue of a new injury. The Referee concluded that there was no event, no occurrence, which could be classified as a new injury.

Insofar as the June 25, 1973 injury no reference was made by either Dr. Schachner or Dr. Hockey of an intervening injury in their respective reports upon which the first

Determination Order was based. The Referee concluded that medical reports, as well as claimant's own testimony, indicated that the June, 1973 accident had no bearing on the present issue, it did not involve a back injury nor did it contribute in any way to claimant's alleged present disability.

With respect to the extent of claimant's disability, the Referee found claimant was a member of the "odd-lot" work force, based upon claimant's physical condition, his rather limited education and lack of other skills than those of a mechanic and the fact that he had been found by an expert in the field of vocational rehabilitation not to be competitively employable even in light or sedentary types of work. The Referee found that even with the best of motivation claimant could not obtain and retain regular and gainful employment. He concluded that claimant was permanently and totally disabled and should be considered as such as of January 21, 1976, the date of the hearing before the Referee.

The Referee further concluded that claimant's permanent total disability was the result of the injury he suffered on October 3, 1972 and, therefore, the responsibility of his employer at that time, Bee Line Service, and its carrier, Industrial Indemnity Company.

The Board, on de novo review, affirms the findings and conclusions of the Referee. Although Fireman's Fund and Home Indemnity were joined as parties at the hearing, the request for review was made by Bee Line and its carrier Industrial Indemnity and the only issue upon review is extent of disability and responsibility therefor.

ORDER

The order of the Referee, dated July 13, 1976, is affirmed.

Claimant's counsel is hereby awarded as a reasonable attorney fee for his services in connection with Board review, the sum ot $300, payable by Bee Line Service and its carrier Industrial Indemnity.

WCB CASE NO. 76-715 DECEMBER 21, 1976

WALLACE PUZIO, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Amended Own Motion Determination

On December 1, 1976 an Own Motion Determination was made in the above entitled matter. This determination should be amended by deleting the first sentence of the fourth paragraph on page 2 thereof and substituting in lieu thereof the following:

> "The Board further concludes, based upon claimant's loss of wage earning capacity, that the Fund should pay claimant an award for 30% of the maximum allowable by statute for unscheduled disability at the time of claimant's injury in 1959."

In all other respects the Own Motion Determination is reaffirmed and ratified.

evidence regarding whether claimant's present physical condition was attributable to an aggravation of the 1966 injury or to her August 25, 1975 injury was in substantial conflict. Both Dr. Fleshman and Dr. Raaf did not believe claimant's neck, shoulder and left arm complaints were attributable to the 1975 injury.

On the opposite side were opinions expressed by Dr. Pullen and Dr. Tsai which attributed claimant's present physical condition to the August 25, 1975 occurrence.

The Referee found claimant has experienced periodic and intermittant flareups of her neck, shoulder and left arm conditions since her 1966 industrial injury; however, claimant had been able to return to work in 1967 following her first injury and had remained employed full time until her injury of August 25, 1975, her intermittant neck, shoulder and left arm condition did not have any substantial or apparent effect upon her ability to perform her job duties nor did claimant complain about her physical condition. After the August 25, 1975 injury claimant had to cease her employment; she was unable to resume employment activities because of her neck, shoulder and left arm conditions.

The Referee concluded, based upon the evidence, that claimant had proven by a preponderance of the evidence that her present neck, shoulder and left arm condition were the result of the injury she sustained on August 25, 1975. The Referee was favorably impressed by the medical opinions expressed by Dr. Pullen and Dr. Tsai; also by the evidence which indicated claimant had an excellent interim work record between September, 1967, when she returned to work after the first injury, and August 25, 1975.

Because the August 25, 1975 injury was found to be a new compensable injury the claim, therefore, was remanded to the employer and its present carrier, Industrial Indemnity Company.

The Board, on de novo review, affirms the findings and conclusions made by the Referee.

ORDER

The order of the Referee, dated June 30, 1976, is affirmed.

Claimant's counsel is hereby granted as a reasonable attorney fee, the sum of $450, for his services in connection with Board review, payable by the employer.

WCB CASE NO. 75-5316 DECEMBER 21, 1976

FRANCES KERNS, CLAIMANT
S. David Eves, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which awarded claimant 112 degrees for 35% unscheduled neck disability. Claimant contends she is permanently and totally disabled.

Claimant sustained a compensable injury on January 17, 1973 and within hours developed pain in her neck and back. She was first seen by Dr. Leman who referred her to Dr. Isgreen who found no objective neurological findings.

A Determination Order of March 12, 1973 granted claimant time loss only.

On April 26, 1973 Dr. Van Olst examined claimant and diagnosed ligamentous sprain of the cervical spine and upper dorsal spine, which aggravated her degenerative disc disease. He thought claimant should avoid heavy lifting or carrying although claimant's injury was not serious. After an examination of claimant on October 15, 1973 Dr. Van Olst found claimant to be medically stationary with a mild restriction in the range of motion of the cervical region.

A Second Determination Order of November 15, 1973 granted claimant 32 degrees for 10% unscheduled disability.

On October 11, 1975 Dr. Tsai performed a C5-6 discectomy and interbody fusion. Claimant's complaints continued and she was seen by Dr. Martens and later by the physicians at the Disability Prevention Division.

A Third Determination Order of December 8, 1975 awarded claimant 28.8 degrees for 15% loss of her left arm.

The Referee found that all of the physicians who examined claimant found she did suffer a valid accident and did have valid complaints of her neck and back and is now restricted from heavy manual labor. Several physicians recommended vocational rehabilitation but claimant refused.

He further found claimant obviously lacking in motivation. Claimant states if she can't do her housework then she can't do anything; this is untrue. The Referee concluded that claimant, based on her lack of motivation and the medical reports submitted, has not sustained her burden of proving she is permanently and totally disabled. He found claimant does have a greater loss of wage earning capacity than that previously awarded her as she is now precluded from her prior occupations and he awarded her an additional 80 degrees for a total of 112 degrees for 35% unscheduled disability. He found the award for claimant's left arm was adequate.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated April 12, 1976, is affirmed.

WCB CASE NO. 76-2135 DECEMBER 21, 1976

TERRENCE MCCORMICK, CLAIMANT
Gary Galton, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed defendant's motion and dismissed claimant's case.

The sole issue is the propriety of the termination by the Disability Prevention Division of claimant's authorized program of vocational rehabilitation.

Claimant suffered a compensable injury and compensation for temporary total disability commenced, later claimant was referred to vocational rehabilitation and entered into an authorized program of electronics. Claimant was reinjured and unable to attend classes and he was then terminated in the authorized program on April 9, 1976.

Claimant contends the Disability Prevention Division does not have the authority to terminate his program without a prior hearing. At the time of the hearing claimant was receiving compensation for temporary total disability benefits and was not medically stationary.

WCB Administrative Order 1-1976, 61-060 states, that an aggrieved party may request a hearing from a decision made by the Disability Prevention Division concerning that party's entitlement to vocational rehabilitation after becoming medically stationary.

The Referee found that the defendant's motion to dismiss is well taken. Claimant was still receiving compensation for temporary total disability at the time of the hearing and was not medically stationary.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 8, 1976, is affirmed.

WCB CASE NO. 76-1665 DECEMBER 21, 1976

LOWELL RALPH, CLAIMANT
Harold Adams, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order awarding him 15 degrees for 10% loss of the left leg.

Claimant sustained a compensable knee injury on July 30, 1975 which required a medial meniscectomy and sciving of the cartilage of the medial femoral condyle.

On February 5, 1976 Dr. Burr reported claimant was medically stationary with good improvement and recommended claim closure. Claimant had returned to work.

Claimant testified he has considerable pain and swelling in the knee after hours of usage of the knee. He limps and has restrictions in the use of his entire left leg. This is not supported by the medical reports.

The Referee found, based on claimant's testimony and the medical reports, that claimant definitely has some permanent disability which has slightly affected the loss of function of his left leg.

The Referee concluded that claimant's condition is more bothersome to him than disabling and claimant had been adequately compensated by the Determination for the loss of function of his left leg.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 21, 1976, is affirmed.

WCB CASE NO. 76-482 DECEMBER 21, 1976

EDYTHE SEVIER, CLAIMANT
John Fuller, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which denied claimant's claim for an industrial injury.

Claimant testified that on June 14, 1975 she fell in a walk-in cooler while picking up a beer box. There were no witnesses. Claimant testified that later that same day her boss' wife, Mrs. Tucker, and her daughter, were in the store and she told them she was sick to her stomach as a result of falling in the walk-in cooler. Both Mrs. Tucker and her daughter contradicted this testimony.

Claimant testified that the following Monday she called in and said she had a fall and would not be at work. Mr. and Mrs. Tucker both testified that claimant worked the entire following week. They further testified claimant called in on June 23 stating she had a fall in a field.

The evidence indicates that claimant did sustain a fall in a field while chasing a steer. Claimant testified she did not hurt her back in this fall. However, Mr. Clark, who took claimant home after this fall in the field, testified claimant said "she hurt her damn back." Claimant first saw a doctor after her fall in the field.

The Referee found that claimant's testimony alone was not sufficiently persuasive to establish a compensable injury and that claimant's testimony was uncorroborated. He found many contradictions in and to her testimony.

The Referee concluded claimant had not sustained her burden of proving she had suffered an industrial injury, therefore, he denied her claim.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 3, 1976, is affirmed.

WCB CASE NO. 75-5128 DECEMBER 21, 1976

SYLVESTER STAMM, CLAIMANT
Richard Sly, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the State Accident Insurance Fund's denial of claimant's claim. The claimant contends that the Referee cannot find claimant's injury non-compensable when the Fund had originally accepted the claim.

Claimant, on May 28, 1975, attended a safety meeting and participated in a demonstration of artificial respiration. While lying prone on the floor as part of this demonstration, claimant alleges he felt an immediate onset of severe pain in his mid-back when another participant applied pressure to that area.

Claimant treated his back at home, being unable at that time to afford medical care from a doctor. It wasn't until he became aware that he might be eligible for workmen's compensation benefits that he filed a claim on August 14, 1975.

On September 29, 1975 the Fund accepted claimant's claim as non-disabling and issued a check for time loss for two weeks but on October 1, 1975 it denied the claim.

Claimant underwent numerous physical examinations by several doctors which produced subjective findings of tenderness and objective findings of moderate rotation and scoliosis in the lumbar and dorsal spine. There was no medical evidence of permanent disability.

The Referee found that claimant filed his claim later than the allowed 30 days; however, the issue of untimely filing was not a proper defense for the Fund because it had paid compensation initially.

Claimant contends the Fund cannot deny a claim it at first had accepted, but the Referee found that, based on Holmes v. SIAC, 227 Or 562, the Fund could make such a denial. The Referee found that the Fund's denial was a full denial of responsibility.

The Refereee concluded claimant had failed to establish that he suffered a compensable industrial injury.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 14, 1976, is affirmed.

WCB CASE NO. 76-109-SI DECEMBER 22, 1976

In the Matter of the Petition of
D & M PRODUCTS, INC.
For Reimbursement from the Second
Injury Reserve Fund In the Case of
CHARLES WOODRUFF
Dept. of Justice, Defense Atty.
Order

On August 9, 1976 Referee William J. Foster submitted to the Board his recommended order in the above entitled matter. This order clearly sets forth the factual situation, the findings and conclusions of the Referee and, the Board, after de novo review of the proceedings of record and the exceptions and arguments presented by the involved parties, adopts as its own order the recommended order of Referee Foster, dated August 19, 1976, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The Determination Order of October 3, 1975 is rescinded and the Determination Order of November 26, 1975 is affirmed.

The employer, D. & M. Products, Inc., is directed to reimburse the Workmen's Compensation Board for all monies paid by it pursuant to the Board's Order of October 3, 1976.

WCB CASE NO. 76-2578 DECEMBER 22, 1976

DONALD SMITH, CLAIMANT
Allen Owen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of claimant's claim for aggravation.

Claimant sustained a compensable low back strain in 1971; subsequently, he underwent a two-level laminectomy and fusion. Thereafter, his claim was closed.

In October, 1975 claimant developed gastric symptoms and underwent a hiatus herniorrhaphy, vagotomy and pyloroplasty. The Fund issued a denial on claimant's gastric complaints and for any treatment therefor.

Dr. Moore, who has treated claimant since 1965, indicated that it was probable that an injury suffered by claimant in August, 1973 may have been a contributing factor in the development of claimant's hiatal hernia. Dr. Green who did the esophagogastroduodenoscopy prior to claimant's hernia surgery indicated "findings in no way related to any alleged injuries that occurred in 1971."

The Referee found claimant's injury was complicated by marital, psychological, drug and obesity problems. Claimant contends all of these problems stem from his 1971 injury; however, claimant was hospitalized eleven years ago for gastric distress and his family history indicates similar problems.

The Referee concluded, because of the above complicating problems and claimant's past history, that Dr. Moore's opinion of probable relationship was insufficient to carry claimant's burden of proof; especially in light of Dr. Green's contradictory opinion. He affirmed the Fund's denial.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 27, 1976, is affirmed.

WCB CASE NO. 75-2143 DECEMBER 22, 1976

MELVIN W. WALLACE, CLAIMANT
Stipulated Order

This matter having come on regularly before the Workmen's Compensation Board, upon the stipulation of the parties, claimant acting by and through his attorney, Garry Kahn, and the employer-carrier acting by and through its representative-attorney, Ronald J. Podnar, and it appearing that the matter has been fully compromised and settled, now, therefore, it is

Hereby ordered that claimant be and he is hereby allowed compensation for 192 degrees or 60 percent unscheduled permanent partial disability, that being an increase over and above the compensation heretofore awarded in the amount of 96 degrees, or 30 percent unscheduled permanent partial disability resulting from injury to the right shoulder, and

It is further ordered and adjudged that out of the compensation made payable by this order the employer-carrier shall pay to the law firm of Pozzi, Wilson & Atchison an attorney fee equal to 25 percent of the compensation made payable by this order, but not to exceed the sum of $2,000, and

It is further ordered that claimant's request for review be dismissed.

It is so stipulated.

WCB CASE NO. 76-1699 DECEMBER 23, 1976

HERBERT WONCH, CLAIMANT
R. Kenney Roberts, Claimant's Atty.
Ron Podnar, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order which granted him an award

to pay temporary total disability after the Determination Order of April 2, 1975 was not justified.

Claimant suffered a compensable injury on April 18, 1973. He was treated by Dr. Vinyard for neck, low back and left thigh pain for almost a year; such treatment included back bracing, pain medication and a period of hospital traction. In January, 1974 it was Dr. Vinyard's opinion that claimant could "not be returned to unlimited physical activity." A month later after examining claimant, Dr. Vinyard stated that claimant was "a candidate for permanent total disability" and "a loss to the labor market."

In November, 1973 claimant had suffered another injury for which he did not file a written claim although he did report it to his supervisor almost immediately.

Dr. Balme diagnosed a chronic low back pain with radicular pain on the left, and minimal to moderate degenerative arthritis of the lumbosacral spine; Dr. Pasquesi felt claimant could carry on a predominantly sedentary type of work not requiring stooping, hauling, lifting of more than 20 pounds and allowing claimant to sit and stand part of the time as his pain indicated; Dr. Bervin agreed with Dr. Pasquesi that claimant was not physically employable in his former capacity and that the back condition was a factor which kept claimant from working. Claimant was also given a neurological examination by Dr. Klump who discounted the possibility of a protruded disc. All of these doctors stated that their conclusions, diagnoses and ratings pertaining to claimant included consideration of both the April, 1973 and November, 1973 injuries.

The Referee found that the complaints expressed by claimant at the hearing were consistent with those he had made to the doctors who had examined him. There were two hearings, one on September 9, 1975 and the other on May 5, 1976; claimant stated that his condition had worsened between the two hearings.

The Referee found that there was no evidence that claimant's condition was not medically stationary, theretore, there was nothing upon which to justify reopening his claim; however, claimant was entitled to continued medical treatment pursuant to ORS 656.245. He found the claim closure by the Determination Order of April 2, 1975 was not premature and that claimant's aggravation rights should commence on that date.

The Referee found that claimant was permanently and totally disabled within the meaning of ORS 656.206, after considering claimant's age, education, training, work experience, potential for rehabilitation, and the extent of his impairment. He found, based upon the evidence, that the major factors resulting in claimant's present inability to go to work were the two 1973 industrial injuries, that claimant had worked regularly for many years at hard physical labor prior to the April 18, 1973 injury. After the first injury claimant returned to work, although at a lessened capacity, and worked until his November, 1973 injury; since that injury claimant has not been gainfully employed. The Referee found the movie film showing claimant changing a tire on his pickup was insufficient to change his conclusion, based upon the medical and lay testimony, that claimant was permanently and totally disabled. The film merely showed that in August, 1974 claimant was capable of removing and replacing a wheel on a pickup, it did not show the length of time claimant could sustain such activity nor did it reveal what disabling effects the activity might later have caused claimant.

With respect to claimant's request for the imposition of penalties and an award of attorney fees because of the carrier's refusal to pay compensation for temporary total disability after the Determination Order of April 2, 1975, the Referee found that there was no evidence in the record which would require the carrier to pay compensation for temporary total disability beyond the date set by that Determination Order which had awarded claimant compensation for temporary total disability from December 18, 1973 through March 18, 1975 and 112 degrees for 35% unscheduled low back disability and 19.2 degrees for 10% loss of an arm.

The Board, on de novo review, affirms and adopts the Referee's order.

ORDER

The order of the Referee, dated June 24, 1976, is affirmed.

Claimant's counsel is hereby granted as a reasonable attorney fee for his services in connection with Board review, the sum of $450, payable by the employer.

WCB CASE NO. 75-5302 DECEMBER 23, 1976

MARY SHANNON, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of 256 degrees for 80% unscheduled disability.

The claimant cross-appeals for Board review, contending she is permanently and totally disabled.

Claimant sustained a compensable back injury on September 29, 1972. On October 5, 1972 Dr. Golden performed a lumbar laminectomy; post-operatively Dr. Golden diagnosed herniation of L4-5 on the right and degenerative disc disease.

In April, 1972 claimant underwent a second laminectomy; also had a psychological examination which suggested hysterical neurosis, conversion type. After examination on September 10, 1973, Dr. Golden recommended claim closure, stating claimant had a mild degree of chronic back strain and mild radiculopathy.

Claimant was examined on November 6, 1973 at the Disability Prevention Division. Functional overlay mildly moderate due to this injury, degenerative disc disease with chronic strain and instability was found.

On December 12, 1973 claimant was examined at the Back Evaluation Clinic who found her medically stationary and total loss of function of the back to be mildly moderate due to this injury. Claimant could not return to her former occupation but could be re-employed.

A Determination Order of January 7, 1974 granted claimant 80 degrees for 25% unscheduled disability.

On May 22, 1974 Dr. Grewe performed a third laminectomy; on February 3, 1975 he said claimant could return to light employment.

A Second Determination Order of December 4, 1975 granted claimant temporary total disability compensation only.

Claimant's present complaints are of constant pain in the low back and periodic pain in both legs. Claimant testified she has good and bad days; on bad days she stays in bed all day.

Claimant was offered a job at a restaurant as a hostess for five hours a day, however, she felt she could not handle it and she knows of no job which she could perform with her present physical condition.

The Referee found, taking into consideration claimant's age, education, work experience, physical limitations and claimant's excellent intellectual resources, that claimant had failed to prove she is permanently and totally disabled. However, he found that claimant has a severe and significant physical impairment and limitation and this, when combined with her work experience, constituted a substantial loss of wage earning capacity.

The Referee concluded claimant was entitled to an award of 256 degrees for 80% unscheduled disability.

The Board, on de novo review, finds, based upon all of the medical reports, that claimant's disability is mildly moderate and all her treating physicians have stated claimant could return to a lighter occupation. Claimant is able to frequent night spots and go dancing, but she says she is too disabled to do any work. She has turned down a job which she could, at least, have attempted to do. This obvious lack of motivation plus the medical findings indicates that claimant certainly is not entitled to an award in excess of 112 degrees for 35% of the maximum for unscheduled disability to adequately compensate her for her loss of wage earning capacity.

ORDER

The order of the Referee, dated June 24, 1976, is modified.

Claimant is hereby granted an award of 112 degrees of a maximum 320 degrees for unscheduled disability. This is in lieu of the Referee's order, which in all other respects is affirmed.

WCB CASE NO. 76-183 DECEMBER 23, 1976

BETTY OLIVER, CLAIMANT
David Clark, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of claimant's claim.

Claimant alleges she sustained a compensable injury to her left shoulder on or about October 21, 1975 while employed as a waitress. She alleges she told her boss she was hurt but didn't tell him the details of how she became hurt. She didn't file a claim until December 2, 1975.

Claimant was examined by Dr. Unger who diagnosed, "Neuritis left cervical chain nervating left arm fasciitis of left trapezius muscle. Calcific tendonitis or (of) the left shoulder." He felt this was caused by "heavy lifting."

A co-worker stated that claimant had not worked on October 21, 1975 but had told her the following day that she hurt her shoulder but she didn't say it happened on the job.

A medical report of January 14, 1976 indicated claimant told the doctor she "slipped and fell to her back."

The Referee felt that claimant's credibility was significantly eroded by inconsistencies which cast doubt on the validity of claimant's claim.

The Referee concluded claimant had failed to sustain her burden of proving she had sustained a compensable industrial injury. He affirmed the Fund's denial of her claim.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 11, 1976, is affirmed.

WCB CASE NO. 76-1771 DECEMBER 23, 1976

GARY MURPHY, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Remanding for Hearing

On July 3, 1976 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury suffered in 1969.

The first closure of claimant's claim was mailed September 26, 1969 and his aggravation rights expired on September 25, 1974.

On April 20, 1976 claimant had filed a request for a hearing on the April 13, 1976 denial by the State Accident Insurance Fund of claimant's claim for aggravation and his request for further medical care and treatment, pursuant to ORS 656.245.

A hearing has been set for February 3, 1977 at Coos Bay, before Kirk Mulder on the issue of the Fund's denial. The Board remands claimant's request that the Board reopen his 1969 claim to the Hearings Division with instructions to Referee Mulder to take evidence on both the merits of the Fund's denial of April 13, 1976, and claimant's request to reopen his 1969 claim.

Upon conclusion of the hearing the Referee shall cause a copy of the transcript of the proceedings to be prepared and submitted to the Board together with his recommendation relating to the merits of claimant's request to reopen the 1969 claim. The Referee

On August 20, 1975 Dr. Martens indicated in his report that claimant had persistant pain in his thoracic spine with rheumatic spondylitis and had an increase in symptoms since his last examination on May 15, 1974. He stated the degenerative arthritis of the thoracic spine had been aggravated by the injury of September 28, 1972 and he did not feel it was reasonable to expect claimant to return to any gainful occupation. Dr. Davis prescribed muscle relaxers, analgesics and arthritic medication.

Claimant filed a claim for aggravation which was denied by the Fund on September 18, 1975, for the reason that the medical evidence it had indicated claimant's current complaints were due primarily to degenerative arthritis and rheumatoid spondylitis and that the latter was the primary reason for claimant's current complaints.

Dr. Rosenbaum examined claimant on December 2, 1975 at the request of the Fund. He did not believe that the diagnosis of rheumatoid spondylitis could be justified because claimant did not show the characteristic physical findings or X-ray changes that occur in rheumatoid spondylitis nor did he show the response to drugs which would be characteristic of rheumatoid spondylitis.

It was Dr. Rosenbaum's opinion that claimant had recently developed symptoms of a mild rheumatoid arthritis which could be very contributing to his back pain and aching. He said rheumatoid arthritis is an illness not an injury and in no way could the accident which claimant suffered be considered as a causative factor, particularly in view of the fact that the symptoms developed long after the 1972 accident.

Both Dr. Martens and Dr. Rosenbaum were deposed. Dr. Martens indicated that claimant probably did have X-ray changes of degenerative arthritis prior to his industrial injury but that it was not causing any symptoms until the accident when it became symptomatic. He stated his opinion that claimant's condition continued to get worse and that the accident which claimant sustained in 1972 was a contributing factor to his present worsened condition.

Dr. Rosenbaum agreed that trauma or strain which are superimposed on degenerative arthritis can cause aggravation of that condition. He did not dispute the fact that claimant had degenerative arthritis and had had an injury which resulted in a sprain but his interpretation of claimant's present condition was that it was due to a new disease, mainly, peripheral rheumatoid arthritis, and that such disease was not related to the injury.

The Referee was more persuaded by the opinion expressed by Dr. Martens. Although Dr. Martens in his report of August 20, 1975, indicated, in his opinion, that claimant was permanently and totally disabled and could not return to any regular gainful occupation, the Referee declined to rate claimant's permanent disability but remanded his claim to the Fund for acceptance of the aggravation claim and payment of temporary total disability compensation until the claim is again closed.

The Board, on de novo review, is persuaded by the more realistic and comprehensive medical evidence presented through the reports and testimony of Dr. Rosenbaum that claimant's present condition is the result of an illness identified by Dr. Rosenbaum as peripheral rheumatoid arthritis which is in no way related to the industrial injury of September 28, 1972. Dr. Rosenbaum admitted that if a person with peripheral rheumatoid arthritis receives an injury the arthritis would settle at the site of the injury but he did not believe that this happened in claimant's case, primarily, because there was medical evidence that claimant had only recently developed the symptoms of a mild rheumatoid arthritis at the time he examined claimant on December 2, 1975.

The Board concludes that the denial of claimant's claim for aggravation was proper and the order of the Referee should be reversed.

ORDER

The order of the Referee, dated June 1, 1976, is reversed.

WCB CASE NO. 75-4810 DECEMBER 23, 1976

BETTY DEBOLT, CLAIMANT
Milo Pope, Claimant's Atty.
Stephen Frank, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation from December 29, 1975, primarily, for hospital traction as recommended by Dr. Smith and until the claim is closed, pursuant to ORS 656.268.

In October, 1974 claimant sustained an injury diagnosed by Dr. Bangs on December 16, 1974 as muscle spasm, he recommended conservative treatment. Later, her neck got stiff and she saw Dr. Burnham on January 2, 1975 who diagnosed mid-dorsal spinal strain with interscapular myositis and advised claimant to quit work; she did as of that date.

Claimant was referred to Dr. Ho who found no serious orthopedic problems. In October, 1975 claimant was examined by the Orthopaedic Consultants who diagnosed very mild right "tennis elbow" and possible sprain at juncture of the manubrium in the body of the sternum. They further stated that inasmuch as claimant's husband mades $1800 a month there was no urgency for claimant to return to temporary work.

A Determination Order of October 29, 1975 granted claimant temporary total disability compensation from January 3, 1975 through October 10, 1975.

Claimant's attorney, in December, 1975, sent claimant to Dr. Smith who didn't know if claimant would benefit from further treatment; however, he recommended a period of cervical traction in the hospital. He said that "nothing could be lost by such a course of treatment."

The Referee found one and a half years have past since the accident and still claimant has not returned to work. The employer contends claimant's claim was timely and properly closed; that claimant has no atrophy, no objective medical findings and has full range of motion. The employer says claimant does not want to return to work and to reopen claimant's claim would encourage false claims.

The Referee concluded, notwithstanding the employer's contentions, that the claimant is not able to return to work and that Dr. Smith had recommended traction which might be successful, therefore, he remanded claimant's claim to the employer for such treatment and for payment of compensation for temporary total disability from December 29, 1975 until closure.

The Board, on de novo review, finds that the medical evidence clearly indicates claimant was medically stationary on October 10, 1975. It is quite obvious that claimant lacks motivation to return to any work of any kind. The Board concludes that claimant can have palliative treatment under the provisions of ORS 656.245; however, the award for time loss made by the Determination Order of October 29, 1975 was proper and correct.

ORDER

The order of the Referee, dated March 24, 1976, is reversed.

The Determination Order, mailed October 29, 1975, is affirmed.

WCB CASE NO. 76-1334 DECEMBER 23, 1976

CHESTER CLARK, CLAIMANT
Richard Kropp, Claimant's Atty.
Ron Podnar, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 20% unscheduled low back disability.

Claimant, whose pre-injury occupation involved welding, truck driving and other heavy type work, sustained a compensable injury on September 11, 1973, diagnosed as lumbar strain and right knee sprain. Claimant had a previous compensable back injury in 1971 for which he received time loss benefits only.

About May, 1975, at the recommendation of claimant's doctor, the employer gave claimant a job specifically made for him, i.e., handling safety equipment and driving a lift truck.

In January, 1975 claimant was examined by Dr. Becker who found acute lumbosacral sprain, no herniated intervertebral disc disease, but found moderate degenerative disc disease at multiple levels. In his report of January 26, 1976 Dr. Becker recommended claim closure. A Determination Order of March 5, 1975 granted claimant 7.5 degrees for 5% loss of the right leg and 32 degrees for 10% unscheduled low back disability.

Dr. Howard, a chiropractor, has also been giving claimant palliative treatment; he felt claimant could not return to his old job of welding, etc.

The Referee found claimant has lost some wage earning capacity because he has physical limitations and cannot return to his former occupation. However, claimant is regularly and gainfully employed and can handle, physically, this lighter employment.

The Referee concluded, based on the medical evidence and claimant's age, experience etc., that he is entitled to an award of 64 degrees for 20% unscheduled low back disability. He found the award for the right leg to be sufficient.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 27, 1976, is affirmed.

WCB CASE NO. 76-1451 DECEMBER 28, 1976

JAMES STEINER, CLAIMANT
Vincent Ierulli, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation, as provided by law, commencing on January 5, 1976 and until closure is authorized.

Claimant alleges he suffered an industrial injury on April 4, 1975 when he and a co-worker were removing garbage and claimant ran into a handle of a freezer door injuring his right shoulder. The co-worker was not called as a witness at the hearing by either party.

Claimant did not inform his employer of his alleged accident; the employer was informed by the Fund in the middle of April, 1975. Claimant testified he had had a prior right arm injury the year before.

The medical reports indicate claimant had a neurological sensory deficit of unknown etiology, possibly from a long-standing problem with alcohol. The day following the alleged injury, claimant went to the hospital where a diagnosis was made of a fracture with accessory fracture lines in the greater tuberosity of the right humeral. The chart note at this time indicates claimant was involved in an altercation. Hospital reports on January 8, 1976 indicate claimant fell on a wood pile two days prior thereto. On January 15, 1976 a history of the garbage carrying episode was given.

Claimant testified when he fell picking up wood he did not fall on the wood pile, but he fell to the ground not remembering what areas of his body, other than his head, were involved; this gives rise to the inference that claimant was under the influence of medication or alcohol.

The Referee found claimant although a poor historian hadn't fabricated the story; parts of claimant's testimony made certain inferences which were unrebutted because the co-worker was never called as a witness.

The Referee concluded the evidence preponderates in claimant's favor and remanded the claim to the Fund for acceptance.

The Board, on de novo review, finds claimant is not a credible witness. He gave many conflicting stories, was confused concerning dates and there is absolutely no corroboration of claimant's testimony. The Board concludes the preponderance of the evidence does not support claimant's allegation that he had sustained a compensable injury on April 4, 1975.

a report of September 30, 1975 Dr. Mack indicated claimant could not return to his regular employment but he was released on March 4, 1975 to work which involved no polluted areas to prevent a flareup of his basic disease.

The claimant contends that his predisposition for lung disease is permanently aggravated by his work exposure.

The Referee found, based on Dr. Mack's report and all of the medical evidence, that all of claimant's on-going complications were due to his underlying disease.

The Referee concluded that claimant had failed to prove that his lung condition had been permanently advanced by his work exposure with the employer.

The Board, on de novo review, adopts the Referee's order.

Claimant did not contest the Referee's findings relating to the assessment of penalties and award of attorney fees and the employer did not cross request Board review, therefore, those issues are not before the Board.

ORDER

The order of the Referee, dated April 6, 1976, is affirmed.

WCB CASE NO. 76-2015 DECEMBER 28, 1976

GLEN KUSKIE, CLAIMANT
J.W. McCracken, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review of the Referee's order which affirmed the Fund's denial of claimant's claim for aggravation. The claimant further contends he is entitled to an award of permanent total disability and attorney fees for the Fund's wrongful denial of his claim.

Claimant suffered a compensable back injury on November 23, 1971. Subsequently, claimant underwent three surgical procedures: a lumbar laminectomy in January, 1972, a second laminectomy in June, 1972 and a lumbosacral fusion in April, 1973. A Determination Order of May 14, 1974 granted claimant 192 degrees for 60% unscheduled disability.

Claimant appealed and, after a hearing, the Referee granted claimant an award for permanent total disability. The Board, on May 28, 1975, reinstated the award made by the Determination Order. On July 21, 1975 the circuit court modified the Board's order increasing claimant's award to 256 degrees for 80% unscheduled disability.

On November 14, 1975 claimant was seen by Dr. Baker, complaining that his back symptoms were worsening. Dr. Baker found claimant totally disabled for any work which entailed prolonged standing, walking, bending, twisting or lifting at that time. Dr. Baker stated claimant's aggravation was determined based upon his subjective complaints of back pain increasing after doing gardening and yard work. He didn't recommend further surgery.

In January, 1976 claimant consulted with a vocational rehabilitation counselor to determine if there was work which he could do. The counselor refused claimant's application, stating, his "disability was too severe to enable him to benefits from training activities."

Claimant testified his condition is worse now than in July, 1975, stating he is more nauseous, his legs numb more frequently and he knows of no work which he can perform.

The Referee found that the only basis for aggravation that Dr. Baker found were claimant's subjective complaints; the Referee found the evidence showed that claimant's complaints were no worse now than in 1975.

The Referee concluded claimant had failed to prove that his condition has worsened since the time of the last award of compensation on July 21, 1975. He affirmed the Fund's denial of claimant's claim. Having reached this conclusion, the other two issues before the Referee became moot.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 3, 1976, is affirmed.

SAIF CLAIM NO. HC 139336 DECEMBER 28, 1976

JERRY L. DYER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

On November 15, 1976 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a compensable injury which he suffered on August 5, 1968.

Claimant had previously requested the Fund to reopen his claim for the purpose of aggravation and the request was denied by a letter dated November 19, 1976 which stated that there was insufficient evidence that claimant's present condition was such as to require reopening of his claim.

The Board, having reviewed all of the medical evidence which has been made available to it, concludes that such evidence is insufficient to justify reopening claimant's claim at this time.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for his August 5, 1968 injury is hereby denied.

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left leg and, on January 11, 1974, while lifting groceries in a market where she was working, claimant suffered an exacerbation of her back problem. Claimant's treating physician was of the opinion that this was a continuation of the 1971 injury; the carrier felt that claimant had suffered a new injury.

On May 13, 1974, the carrier denied the claim of aggravation. On July 17, 1974 claimant requested a hearing. This request was received by the Board on July 22, 1974, more than 60 days after the date of the denial. A hearing was held on June 2, 1975 and at that time the employer was prepared to challenge claimant's contention that she had good cause to file an untimely request for hearing; however, claimant withdrew her request for hearing and Referee George Rode dismissed her claim. Another claim of aggravation was filed and the carrier issued another denial, relying on its previous denial.

The Referee found that shortly after claimant received the first letter of denial she was required to travel to Tennessee because of illness in the family. Claimant testified that she read the letter of denial before leaving and that she took it with her to Tennessee. After claimant had been in Tennessee six to eight weeks her husband was hospitalized for a heart condition and when he was released they visited other relatives in Tennessee and Missouri. While claimant was in Missouri she received her suitcase from Memphis which had, among other things, the denial letter. She then requested a hearing.

The Referee concluded that the evidence preponderated in favor of a justifiable excuse on the part of claimant in failing to request a hearing within 60 days. The Referee also concluded that claimant had shown through a preponderance of the evidence that she had aggravated her 1971 injury by the incident of January 11, 1974 and he remanded the claim of aggravation to the carrier.

The Board, on de novo review, finds that when the carrier issued its denial on May 13, 1974 it was a denial of all responsibility for claimant's symptoms and resultant physical condition; the carrier did not employ the traditional denial which recites that there had not been a "worsening" of the claimant's condition. The employer denied that any component of claimant's condition as of 1974 was due to her 1971 compensable injury, based on the fact that claimant had suffered a new accident.

At the hearing held on June 2, 1975 the burden was on the claimant to prove that her 1974 condition was an aggravation of her 1971 compensable injury; by her own volition claimant withdrew her request for hearing, thereby, affirming the employer's denial.

The second claim of aggravation was nothing more than a reiteration of the first claim of aggravation; claimant, at the first hearing, had been afforded the opportunity of showing that her 1974 condition represented an aggravation of her 1971 compensable injury. She chose to withdraw her request and Referee Rode dismissed the claim (WCB Case No. 74-2652). No appeal was taken, therefore, with respect to the issue of claimant's claim of aggravation, the matter is res judicata.

The Board, having made the above findings, concludes it would not be necessary to deal with the other issues which were before the Board on review; however, it desires to comment on the issue of whether claimant had good cause to exceed the statutory 60 day period in filing a request for hearing. In similar cases where a claimant has offered as proof of good cause a history of hardship, ill health, successive major changes of residences, etc., that the courts consistently have held such is not sufficient showing of good cause. In this case claimant received the letter of denial before she left for Tennessee, she had the opportunity to, and did read the letter, therefore, she must have been aware before she left the state that she had only 60 days within which to file a request for hearing.

Again claimant chose to do it her way.

The Board concludes that the denial by the employer and its carrier of claimant's claim of aggravation should be approved and the order of the Referee reversed.

ORDER

The order of the Referee, dated June 16, 1976, is reversed.

The denial by the employer, Low Cost Foods, Inc., of claimant's claim of aggravation is approved.

WCB CASE NO. 76-1944 DECEMBER 29, 1976

KENNETH BIEHLER, CLAIMANT
R. Ladd Lonnquist, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the denial of claimant's claim for a heart attack.

Claimant was employed as a gasoline delivery truck driver. On December 12, 1975, the day he suffered his heart attack, he was delivering gasoline and had to play out ten feet of hose and dump 200 gallons of supreme gasoline; using a finger motion on an electrical switch added a blend of regular gasoline. The physical effort involved was minimal; the grip pressure on the nozzle is three to five pounds. The next thing claimant realized he was in the hospital.

Dr. Azorr indicated claimant did not have any indication of a pre-existing heart condition when examined on November 29, 1974 nor on September 4, 1975.

Dr. Ames, who treated claimant after his heart attack, diagnosed acute myocardial infarction in December, 1975 and several days later, while at work, claimant had a cardiac arrest. He felt claimant had the myocardial infarction at least 24 hours before the cardiac arrest and, therefore, any activity, including work, was a material contributing factor to the cardiac arrest, based on the history of claimant.

Dr. Griswold was of the opinion claimant did not suffer a prior myocardial infarction but had had a heart attack on the job which he probably would have had anyway because his physical activities were modest and no increase in blood pressure was observed. Claimant's laboratory reports show serum enzymes were normal and did not elevate for four to eight hours thereafter.

Dr. Griswold commented that any pain claimant had prior to the attack, if coronary insufficiency was the diagnosis, was due to angina.

The Referee found legal causation but with respect to medical causation he found Dr. Griswold's opinion more persuasive because it was based on the laboratory reports whereas Dr. Ames based his opinion on claimant's history.

The Referee concluded the denial of April 2, 1976 must be affirmed.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 2, 1976, is affirmed.

WCB CASE NO. 75-581 DECEMBER 29, 1976

KATHLEEN JOHNSON, CLAIMANT
Richard Kropp, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of October 29, 1974.

On January 27, 1974 claimant slipped injuring her low back, she continued working that day but thereafter never returned to this job. Claimant saw Dr. Shull, complaining of pain in the coccyx area; he referred her to Dr. Schroeder who diagnosed chronic lumbar strain with possible discogenic disc and spondylolysis. He recommended conservative treatment.

On May 30, 1974 claimant was examined by Dr. Martens who diagnosed intervertebral disc rupture, L4-5. On September 20, 1974 claimant was examined by the Southwest Orthopedic Inc.; claimant's disability was rated at 10% permanent partial disability.

A Determination Order of October 29, 1974 granted claimant an award of 32 degrees for 10% unscheduled low back disability.

On November 5, 1975 Dr. Holbrook rated claimant's physical impairment as very minimal.

Claimant returned to work clerking on October 21, 1974. In December, 1975 she tripped and fell and noted pain in her upper back and stiffness in her neck. Examination by a chiropractor showed severe strain of C6-7 and severe muscle spasm of right cervical area and shoulder. By December 23 her neck and shoulder pain was so bad she quit work.

On April 27, 1976 claimant again saw Dr. Martens who stated claimant could not return to an occupation requiring bending, lifting, prolonged walking or standing.

Claimant testified that presently her neck and upper back pain is worse than her low back pain with the neck pain getting worse all the time.

The Referee found the injury of January, 1974 was to her right hip and low back. Claimant had returned to work in October, 1974 and at that time her impairment was minimal and, according to Dr. Holbrook, based on subjective complaints rather than objective findings. Claimant continued to work until she suffered a new injury in December, 1975.

The Referee concluded that the injury in December, 1975 was not a recurrence of the first injury, that the second injury was an independent intervening trauma and responsible for claimant's current problems. He affirmed the Determination Order of October 29, 1974.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 19, 1976, is affirmed.

WCB CASE NO. 75-4920 DECEMBER 29, 1976

MELVIN NELSON, CLAIMANT
Ernest Kissling, Claimant's Atty.
Jeffrey Alden, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review of the Referee's order which affirmed the Determination Order of November 22, 1974 awarding claimant no further award for permanent partial disability.

Claimant suffered a compensable back injury on July 9, 1970, diagnosed as strain of mid-lumbar paravertebral muscles; he was treated conservatively.

On September 29, 1970, after a lifting and twisting motion at work, claimant experienced pain in the same general area. Subsequently, claimant saw Dr. Wade who diagnosed spondylolisthesis. Claimant was released for light work on October 21, 1970. The claim was closed in February, 1971 with compensation for time loss only.

On August 24, 1972 claimant underwent a bilateral fusion of L5-S1 performed by Drs. Groth and Davis. He was examined by the Back Evaluation Clinic on October 10, 1973 and found to be medically stationary with total loss of function of his back due to this injury, mild. Claimant could return to his same occupation with limitations.

A Second Determination Order of November 28, 1973 granted claimant 80 degrees for 25% unscheduled low back disability.

Claimant continued to experience back pain and was unable, at times, to work; his claim was reopened by a stipulation for further medical. In March, 1974 claimant had work restrictions of no bending, overhead lifting, twisting, or remaining in one position for any length of time; claimant was working at this point, on a trial basis and was not medically stationary.

In April, 1974 claimant was examined at the Pain Clinic, the physicians diagnosed chronic low back pain, hysteroid personality and chronic cervical pain. Dr. Seres felt claimant could return to his regular work with limitations.

In July, 1974 claimant was examined by Dr. Russakov who felt claimant could not return to his regular work and should be retrained. It was suggested that claimant uses his pain to either avoid work or to be retrained in some other occupation.

The Third Determination Order entered on November 22, 1974 granted claimant compensation for temporary total disability only.

The Referee found the medical doctors were aware of the possibility of functional overlay, but none saw any merit in the possibility that claimant's complaints were emotionally caused.

The Referee concluded, based upon all of the medical evidence, that claimant had been adequately compensated for any loss of wage earning capacity by the award of 80 degrees for 25% unscheduled disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 16, 1976, is affirmed.

WCB CASE NO. 75-3228 DECEMBER 29, 1976

JERRY KNIGHT, CLAIMANT
John Svoboda, Claimant's Atty.
J.W. McCracken, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which approved the defendant's classification of claimant's claim as "non-disabling compensable injury" and also its finding of no permanent partial disability.

Claimant sustained a compensable injury to his right ankle on August 16, 1974, diagnosed as severe strain of the right ankle of the lateral malleolus. Claimant's treatment was conservative in nature and claimant was put on crutches.

The defendant accepted claimant's claim as a non-disabling injury and has never treated the claim otherwise.

Claimant returned to restricted work on August 19, 1974; he didn't return to his regular work for 25 to 30 days.

On July 5, 1975, while at the beach, claimant stepped across a creek, putting weight on his right foot, lost his balance and fell, causing immediate swelling of the right ankle.

Claimant saw Dr. McHolick who diagnosed a major lateral ankle ligament tear.

On July 14, 1975 claimant requested reopening of his claim for aggravation; on July 16, 1975 the defendant denied responsibility.

Dr. McHolick stated claimant's incident at the beach was a new injury rather than an aggravation because the extensive bleeding at the time indicated an acute injury rather than an unstable ankle being reinjured.

The Referee found that claimant's claim was a non-disabling claim as defined by ORS 656.005 (8) (b) (c) as claimant did not incur time loss beyond the three day waiting period; the modified work to which claimant returned did not reduce his pay, and permanent impairment as a result of this injury was highly improbable.

The Referee concluded claimant had failed to prove by a preponderance of the evidence that the classifying of his claim as non-disabling was erroneous. He also concluded that claimant had failed to prove his claim for aggravation; Dr. McHolick's report was most persuasive that claimant suffered an independent intervening non-industrial injury.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 27, 1976, is affirmed.

WCB CASE NO. 75-4891 DECEMBER 29, 1976

JERRY FRITZ, CLAIMANT
Dan O'Leary, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of benefits, as provided by law.

Around July 10, 1967 claimant alleged that an industrial injury occurred while he was moving boxes of shoes in the stockroom of the employer and developed an ache in his low back. He subsequently ran up a flight of stairs, sneezed and experienced acute pain, both sharp and severe, in his low back. The claim was initially accepted but by letter of March 22, 1976 the carrier denied claimant's claim stating his condition was not aggravated nor did it arise "out of and in the course of employment."

The carrier explains this lapse in time of eight years before denying the claim by stating that in September, 1975 a representative of the carrier interviewed claimant who indicated that while going up the stairs he sneezed and this caused the back pain. The Form 801 had stated that the injury occurred while lifting cartons of shoes.

The Referee found that the carrier has the right to deny a claim at any time, however, the passage of time makes it difficult to obtain evidence and witnesses who are often unavailable.

The Referee found that the report of the first treating physician, Dr. Daack, had three material discrepancies which should have triggered an investigation by the carrier at the time of the injury. (1) the date of claimant's first treatment was reported as June 26, 1967, two weeks prior to the alleged injury; (2) the Report of Accident states "washing upstairs at work," the parties assumed this should have read "walking" rather than "washing" but such assumption is, at best, weak, and (3) date of injury on the report was left blank. Defendant conducted an investigation on March 20, 1968 but ignored these discrepancies.

The Referee concluded that these discrepancies cannot be resolved after the passage of so much time, therefore, he concluded claimant's injury arose in the course of claimant's employment; whether it arose out of the employment was questionable; however, it is impossible to make a determination because of the employer and its carrier's failure to investigate the claim properly. The Referee remanded claimant's claim to the carrier.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 25, 1976, is affirmed.

Claimant's counsel is hereby awarded for his services in Board review an attorney fee in the amount of $350 payable by the employer and its carrier.

WCB CASE NO. 74-4508 DECEMBER 29, 1976

WILLIAM G. WAMSHER, CLAIMANT
Rod Kirkpatrick, Claimant's Atty.
Michael Hoffman, Defense Atty.
Order

On December 21, 1976 the Board received a request from claimant in the above entitled matter, by and through his attorney, that the Board exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen claimant's claim.

In 1974 claimant had filed a claim which was denied; claimant failed to request a hearing within 60 days after the date of denial and the employer filed a motion to dismiss. The Referee found that claimant had shown good cause for his failure to comply within the 60 day requirement and further found that claimant's condition had been aggravated by his work and was, therefore, the responsibility of the employer.

After de novo review, the Board reversed the Referee, finding evidence that claimant had read the letter of denial and was well aware that he had 60 days within which to appeal but simply failed to keep track of time. The Board concluded claimant had not shown good cause, there was no evidence indicating a change in claimant's condition which would interfere with his ability to request a hearing nor were there other events or occurrences in the life of claimant or his family which would divert his attention from the running of the appeal period.

The Board was subsequently affirmed by the Multnomah County Circuit Court and by the Court of Appeals and, on December 7, 1976, the Supreme Court declined to review the decision of the Court of Appeals.

Claimant's counsel contends that only the issue of timeliness has been litigated and, therefore, the issue of compensability is still litigable through the exercise of own motion jurisdiction by the Board.

The Board, after due consideration, feels that it would not be proper for it to exercise own motion jurisdiction in a situation such as this. At three levels of appeal it has been determined that claimant failed to show good cause for his failure to file a request for hearing within the 60 day limitation of ORS 656.262(2) and 656.319(2) (a); claimant cannot circumvent time limitations set by statutes by now contending that because, initially, the Referee found his claim to be compensable that the Board should ignore the untimeliness of his request for hearing and make a determination on the merits of his claim.

ORDER

Claimant's request that the Board take own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim is hereby denied.

WCB CASE NO. 76-1459 DECEMBER 29, 1976

FLOYD REESE, CLAIMANT
Douglas Hess, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of claimant's claim for aggravation. Claimant further contends he is neither medically nor vocationally stationary and is entitled to additional statutory penalties for the Fund's wrongful denial and resistance to payment of compensation.

In June, 1973 claimant sustained a compensable back injury. Dr. Burns, claimant's treating physician, released him to regular work on July 3, 1973. A Determination Order of January 15, 1974 granted claimant temporary total disability compensation only.

In 1975 claimant was working on a paint crew and his symptoms occurred again. On September 25, 1975 claimant again saw Dr. Burns. Claimant's complaints were not as severe as in 1973.

In September, 1975 claimant returned to the road maintenance crew and had no further back complaints until he quit work on December 11, 1975 because of back pains.

In December, 1975, after conservative treatment failed to benefit claimant, Dr. Burns referred claimant to Dr. Moseley, who hospitalized claimant in pelvic traction; claimant was released on December 29 with a back brace. On January 26, 1976 claimant was released to modified work; and on March 1, 1976 to regular work with restrictions of no lifting over 30 pounds, no excessive bending, pushing or pulling. Claimant was not allowed to return to work by the employer.

Claimant is presently not under treatment and has not seen a doctor since March 1, 1976.

Claimant testified he has applied for other jobs but so far has not returned to work. He said he had no problems at all from 1973 until he was working on the paint crew in 1975. The history given by claimant to Dr. Moseley recites claimant's 1973 injury and, contrary to claimant's testimony, recurring episodes every few months. Claimant testified he had no episodes at all in 1973, 1974 and the first half of 1975.

The Referee found no evidence indicating that when Dr. Burns examined claimant in December, 1975 it was for a job-related condition.

The Referee found claimant had not borne his burden of proof. Claimant contends Dr. Moseley's letter of January 19, 1976 was a claim for aggravation and temporary total disability compensation was due 14 days thereafter; none was paid prior to the denial of March 17, 1976.

The Referee concluded that the denial of claimant's claim for aggravation should be affirmed; however, claimant was entitled to temporary total disability compensation between January 19, 1976 and March 17, 1976 the date of the denial. He assessed a penalty equal to 25% of that temporary total disability compensation and awarded attorney fees to claimant's attorney.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 14, 1976, is affirmed.

WCB CASE NO. 76-3554 JANUARY 3, 1977

EUGENE BEAL, CLAIMANT
Joint Petition and Order of Bona Fide
Dispute Settlement

Eugene Beal, while employed by Mrs. Smith's Pie Co., in Portland, Oregon, allegedly suffered an injury on or about January and February, 1976. Claimant was made with the employer, and benefits were denied. Claimant subsequently requested a hearing before the Workmen's Compensation Board asserting that the denial was improper. A bona fide dispute arose as to whether or not the alleged injury had arisen out of or occurred in the course of claimant's employment. Hearing was held on August 23, 1976, and the Referee subsequently issued his Opinion and Order affirming the carrier's denial. Claimant subsequently requested Board review. Both parties have now presented evidence sustaining their views.

PETITION

1. Claimant, Eugene Beal, in person and by his attorney, Richard Maizels (Maizels & Marquoit) and employer, Mrs. Smith's Pie Co. and its insurance carrier General Adjustment Bureau, in person and by their attorney, Michael D. Hoffman (Souther, Spaulding, Kinsey, Williamson & Schwabe) now make this joint petition to the Board and state:

1. Eugene Beal and Mrs. Smith's Pie Co. and its insurance carrier, General Adjustment Bureau, have entered into an agreement to dispose of this claim for the total sum of $300.00, said sum to include all benefits and attorney fees.

2. The parties further agree that from the settlement proceeds, $45.00 shall be paid to the firm of Maizels & Marquoit as a reasonable and proper attorney fee.

3. Both claimant and respondent state that this joint petition for settlement is being filed pursuant to ORS 656.289(4) authorizing reasonable disposition of disputed claims. All parties understand that if this payment is approved by the Board and payment made thereunder, said payment is in full, final and complete settlement of all claims which claimant has or may have against respondents for injuries claimed or their results, including attorney fees, and all benefits under the Workmen's Compensation Law and that he will

consider said payment as being final.

4. It is expressly understood and agreed by all parties that this is a settlement of a doubtful and disputed claim and is not an admission of liability on the part of respondents, by whom liability is expressly denied; that it is a settlement of any and all claims whether specifically mentioned herein or not, under the Workmen's Compensation Law.

Wherefore, the parties hereby stipulate to and join in this petition to the Board to approve the foregoing settlement and to authorize payment of the sum set forth above pursuant to ORS 656.289(4) in full and final settlement between the parties and to issue an order approving this compromise and withdrawing this claim.

CLAIM # 52D-862588 JANUARY 5, 1977
(OLD CLAIM # 00262)

TRENTON J. WANN, CLAIMANT
Evohl Malagon, Claimant's Atty.
Richard Butler, Defense Atty.
Own Motion Order

On October 8, 1976 claimant, through his attorney, filed an amended request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim relating to an industrial injury suffered on June 21, 1966.

The employer, by letter dated October 14, 1976, was advised of the request, furnished the accompanying medical reports and correspondence and was given 20 days within which to state its opinion regarding this claim. On December 8, 1976 the employer responded, stating it opposed the request.

The Board, after due consideration of the medical evidence offered by claimant in support of his request, concludes that the claimant's request should be granted.

ORDER

The claimant's claim for an industrial injury suffered on June 21, 1966 is hereby remanded to the employer, Conifer Logging Company, and its carrier, Reserve Insurance Company of Chicago, for payment of compensation, as provided by law, commencing on the date of this order and until the claim is closed pursuant to ORS 656.278, less time worked, and for the payment of such further medical care and treatment as may be recommended by the physicians who have examined and/or treated claimant.

Claimant's counsel is awarded as a reasonable attorney fee the sum equal to 25% of any compensation for temporary total disability which claimant may receive as a result of this order, payable out of said compensation as paid, not to exceed the sum of $250. When the claim is ultimately closed pursuant to ORS 656.278 claimant's counsel's attorney fee will be taken care of in the own motion determination order.

SAIF CLAIM NO. YD 100466 JANUARY 5, 1977

GENEVIEVE REYNOLDS, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Determination

The Board, in its Own Motion Order of September 20, 1976 reopened claimant's claim pursuant to ORS 656.278 for further medical care and treatment as recommended by Dr. Parveresh in his report of April 14, 1976.

The State Accident Insurance Fund has now advised the Board that claimant has made no effort to date to avail herself of the recommended treatment and the Fund has requested claim closure.

The Evaluation Division of the Board recommends that claimant's claim be closed with no additional compensation for temporary total disability nor for permanent partial disability in excess of that previously awarded.

The Board accepts this recommendation.

It is so ordered.

WCB CASE NO. 75-5036 JANUARY 5, 1977

In the Matter of the Compensation of
JOHN F. BALL, CLAIMANT
and In the Matter of the Complying Status of
A & P SPORTS, EMPLOYER
Brian Welch, Claimant's Atty.
Robert Kirkman, Defense Atty.
Order of Dismissal

A request for review having been duly filed with the Workmen's Compensation Board in the above entitled matter by the claimant, and a cross request for review having been duly filed with the Board by the employer, and said requests now having been withdrawn,

It is therefore ordered that the request for review now pending and the cross request now pending before the Board are hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 74-3022 JANUARY 5, 1977

WILLIAM E. PATTERSON, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

The above entitled case was remanded to the Hearings Division for a hearing on the issues of claimant's entitlement to have his claim reopened, receive compensation for temporary total disability and have his attorney fee paid by the State Accident Insurance Fund.

On December 23, 1976 Referee Forrest T. James, after a hearing held on December 9, 1976, submitted his recommendations to the Board. Claimant was seeking compensation for temporary total disability from May 22 through November 5, 1974, from January 31 through June 23, 1975, and from August 20 through October 7, 1975; also, a reasonable attorney fee. The parties asked the Referee, should he recommend payment of the requested compensation for temporary total disability, to recommend the proper manner of allowing the Fund to take an offset for payments of compensation for permanent partial disability made by it.

The Referee recommended that the Board order the claim reopened with payment of compensation for temporary total disability made to claimant for the requested periods, upon medical verification that claimant, during these periods, was unable to work because of the condition of his right lower extremity and resulting from his April 6, 1972 injury. He further recommended that claimant's counsel be awarded a reasonable attorney fee.

The Board, after de novo review of the transcript of proceedings, accepts the recommendations made by the Referee.

ORDER

The claim is remanded to the State Accident Insurance Fund for the payment of compensation for temporary total disability from May 22, 1974 through November 5, 1974, and from January 31, 1975 through June 23, 1975, and from August 20, 1975 through October 7, 1975, less time worked. The State Accident Insurance Fund shall be allowed to offset against the payment of such compensation any payments of compensation for permanent partial disability which it may have made pursuant to the last closure of claimant's claim.

Claimant's counsel is awarded as a reasonable attorney fee 25% of the temporary total disability compensation granted by this order, payable as paid, not to exceed the sum of $300.

SAIF CLAIM NO. PB 94443 JANUARY 5, 1977

LINCOLN PENCE, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on November 9, 1964, i.e., a fracture of the left tibia and fibula. His claim was closed on July 12, 1965 with an award of 15% loss of function of the left foot.

On January 4, 1966 Dr. McIntosh diagnosed a venous stasis problems of the left leg and on April 29, 1966 the State Compensation Department reopened his claim for treatment of that condition. On November 18, 1971 the State Accident Insurance Fund closed the claim with no additional permanent partial disability.

By December, 1972 claimant had developed "chronic ulceration with venous insufficiency of the left leg." The Fund reopened the claim and claimant underwent skin grafts and vein surgery in the thigh. Claimant was then awarded an additional 55% of the left foot for a total award of 70%. Claimant returned to work.

On August 14, 1976 the ulceration broke again and claimant was hospitalized.

Another graft surgery was performed on September 3, 1976 and claimant was discharged on September 19, 1976.

On December 9, 1976 the Fund requested a determination. It was the recommendation of the Evaluation Division of the Board that because claimant's condition has remained the same for a number of years he is now medically stationary and no further award of permanent partial disability should be granted. However, claimant should receive additional compensation for temporary total disability from October 1, 1975, as paid, through September 19, 1976.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 1, 1975 through September 19, 1976.

SAIF CLAIM NO. EC 188268 JANUARY 5, 1977

CLARENCE E. BROWN, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

Claimant suffered an industrial injury in 1949 resulting in a fracture of the L4 vertebra and partial paralysis of the lower extremities. Dr. Slocum performed a spinal fusion in 1950. In 1958 claimant was first seen by the physicians at the University of Oregon Medical School and has been seen by them intermittently for the last 18 years. Claimant's claim was initially closed in 1953; his aggravation rights have expired.

On October 22, 1975 Dr. Beals of the University of Oregon Health Sciences Center requested the State Accident Insurance Fund to reopen claimant's claim so that claimant could be enrolled at the Pain Clinic at Emanual Hospital. Claimant's primary problem is that of percodan addiction. On November 26, 1975 the Fund refused to reopen, stating it did not feel it was responsible for the percodan addiction.

On December 14, 1976 Dr. Beals advised the Board that claimant's addiction was a consequence of his previous industrial injury, he also stated that he had made several attempts to have claimant's claim reopened all of which met with failure. Claimant is willing to enter the Pain Clinic for the purpose of drug withdrawal if appropriate arrangements can be made.

The Board is aware that the Pain Clinic does not treat out-patients, therefore, if claimant is enrolled in the Pain Clinic he would be entitled to compensation for temporary total disability during his enrollment.

Based upon Dr. Beals recommendation, the Board concludes that claimant's claim should be reopened to enable claimant to enter the Pain Clinic at Emanual Hospital for the purpose of drug withdrawal and that the Fund should pay claimant compensation for temporary total disability commencing on the date of his enrollment and until his claim is closed pursuant to the provisions of ORS 656.278.

It is so ordered.

WCB CASE NO. 75-5533-SI January 6, 1977

In the Matter of Second Injury Fund Relief of
N.W. NATURAL GAS, EMPLOYER
Craig Iverson, Defense Atty.
Order

On September 30, 1976 Referee James P. Leahy, after a hearing, made certain recommendations to the Board with respect to granting second injury fund relief to NW Natural Gas. On October 6, 1976 the Referee reissued his recommendation because the initial recommendation failed to contain the notice and certification as required by ORS 183.460.

The Board, after de novo review of the abstract of record and consideration of the recommendations made by Referee Leahy, adopts as its own the recommendation dated September 30, 1976, as amended on October 6, 1976, both documents being attached hereto and, by this reference, made a part of this order.

ORDER

The Determination Order dated September 9, 1975 and the Determination Order dated December 4, 1975, both of which denied the employer's request for second injury benefits relating to an industrial injury suffered by James A. Brawner on April 5, 1974 are approved.

WCB CASE NO. 76-1290 JANUARY 6, 1977

PAUL BRESNEHAN, CLAIMANT
Keith Tichenor, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 176 degrees for 55% unscheduled low back disability and affirmed the award of 15 degrees for 10% loss of the right forearm. Claimant contends he is entitled to an award for permanent total disability.

Claimant sustained a compensable injury on October 29, 1971 resulting in a fractured right wrist and compression fracture at L1 and low back strain. Claimant had a pre-existing spondylolisthesis at L5-S1 which this injury aggravated; there are degenerative changes throughout most of claimant's spine.

Dr. Pasquesi examined claimant on December 5, 1974 and rated his disability at 35% of the whole man. A report of December 22, 1975 from the Orthopaedic Consultants found claimant should not return to his regular occupation and rated his disability at 35% of the whole man, based upon disability in the spine; it was their opinion that claimant was not permanently and totally disabled as a result of this injury.

A Determination Order of February 26, 1976 granted claimant 15 degrees for 10% loss of the right forearm and 112 degrees for 35% unscheduled disability.

The Referee found, based on the medical evidence, that claimant had been adequately compensated for the loss of function of his right forearm by the award of 15 degrees.

The Referee concluded claimant can work in certain jobs with his limitations if he wants to and, therefore, he is not permanently and totally disabled from this injury. However, now that claimant is precluded from returning to his regular occupation the Referee found that he was entitled to a greater award for his loss of wage earning capacity than that granted by the Determination Order. He awarded claimant 176 degrees for 55% unscheduled disability.

The Board, on de novo review, agrees with the conclusions reached by the Referee.

ORDER

The order of the Referee, dated June 18, 1976, is affirmed.

WCB CASE NO. 76-324 JANUARY 6, 1977

NORMA ISAACS, CLAIMANT
John Jensen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of her claim.

Claimant alleges that on November 27, 1975 while lifting a patient from a chair to the toilet she wrenched her back. She finished her shift and then advised the resident nurse about her injury. Both claimant's husband and her daughter testified that that evening claimant had complained of back pain and had said she hurt her back at work.

Claimant had the next three days off, however, on December 1, 1975 claimant did not go to work because of back pain. Claimant saw Dr. Price who diagnosed lumbosacral sprain and recommended claimant see an orthopedic specialist. Claimant did not do so; instead she saw Dr. Almond, a chiropractic surgeon. Dr. Price released claimant to light work on December 11 but claimant has not returned to any employment.

Claimant testified that there was a witness to her accident, another nurses aid, whom claimant alleged she called about 1:30 p.m. to help her get the patient off the toilet after claimant had hurt her back. This witness testified, however, that she did not recall this episode, but does recall helping a patient off the toilet at 9:30 a.m. She specifically stated it didn't happen in the afternoon. The witness further testified that at no time did claimant mention anything to her about a bad back.

The Referee found that claimant was suffering from lumbosacral sprain, but certain factors prevented him from determining what caused it. Claimant told conflicting stories. The witness whom claimant alleged saw the accident did not corroborate claimant's testimony, in fact, she refuted the time of any such work episode.

The Referee concluded that claimant had failed to prove she had sustained a compensable industrial injury. He affirmed the denial.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 2, 1976, is affirmed.

WCB CASE NO. 76-1867 JANUARY 6, 1977

DEBRA NICOL, CLAIMANT
Kim MacColl, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the employer's denial of claimant's claim.

Claimant alleges she suffered an injury to her left ankle on January 8, 1976 as she was leaving the plant at the end of her shift and on her way to meet her husband. Claimant alleges her husband was late so she walked up the employer's driveway to meet him at the county road. Within 40 feet of the road her husband parked the car adjacent to the road. Claimant alleges she began running, or jogging, towards the car, stepped in a chuck hole, fell backwards, spraining her left ankle. Claimant's husband corroborated claimant's entire testimony.

One witness testified she had seen claimant when she later came to the plant to pick up her paycheck and had asked her why she was limping. Claimant had said she had turned her ankle getting into the car on the county road.

The manager for the employer testified claimant's husband told him that claimant injured her ankle getting into their car. The manager further testified that the location where the car was allegedly parked had no chuck holes.

There were no witnesses except for claimant and her husband and the Referee found their testimony was not credible. Claimant testified she commenced working for the employer in November, 1975, worked most of December and 5 days in January, 1976; when, in fact, the work records indicate claimant worked for the employer a total of 6 days.

The Referee further found it hard to believe the testimony of both claimant and her husband that claimant while jogging up an incline could conceivably fall backwards.

The Referee concluded the accident did not occur in the manner, place or time alleged and he affirmed the denial.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee.

ORDER

The order of the Referee, dated July 30, 1976, is affirmed.

SAIF CLAIM NO. GB 81210 JANUARY 10, 1977

JEANETTE FARAH, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on June 8, 1964 originally diagnosed as a collapse of T6 vertebra and a sprain. X-rays revealed substantial osteoporosis unrelated to and pre-existing her industrial injury.

The claim was closed on June 23, 1965 with an award for time loss only. On November 18, 1966, after a hearing, her claim for aggravation was denied; it was reopened in 1967 for periodic treatment and closed on May 16, 1969 with an award for 10% loss of function of an arm for unscheduled disability but no award, based on the advice of Dr. Shlim, for temporary total disability. Claimant's aggravation rights have expired.

On March 24, 1976 Dr. Shlim requested the claim be reopened and Dr. Noall authorized treatment. Dr. Noall recommended claim closure on October 13, 1976 rating her disability as moderate. Claimant is now retired and occasionally does light housework, takes pain medication and uses a lumbosacral support.

On December 14, 1976 the State Accident Insurance Fund requested a determination. The Evaluation Division of the Board recommended no further award for temporary total disability or permanent partial disability; it felt that claimant's retirement was not the responsibility of the Fund.

The Board accepts this recommendation.

ORDER

Claimant's claim for an injury suffered on June 8, 1964 is closed pursuant to ORS 656.278.

SAIF CLAIM NO. YA 625098 JANUARY 10, 1977

JAMES NEWTON, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable left knee injury on July 27, 1957. By an Own Motion Order, dated October 5, 1961, the State Industrial Accident Commission granted claimant an award of 15% giving him a total award of 40% loss of the left leg (claimant had received 25% loss of the left leg on March 18, 1960).

In June, 1972 Dr. Carrigan found claimant's condition to be aggravated and requested a reopening of claimant's claim. Claimant was referred to Dr. Slocum who indicated claimant had had a medial meniscectomy in 1959 and a lateral meniscectomy in 1961.

Dr. Slocum performed a high tibial osteotomy on October 18, 1972 and a lateral meniscectomy with a pes anserinus transfer on the left on April 10, 1973. Claimant had little relief and consulted Dr. James on October 17, 1973.

Dr. James performed two surgeries; one on December 3, 1973 and another on July 25, 1974 involving installation ot a total knee prosthesis.

On February 18, 1975 claimant was examined at the Disability Prevention Division where moderate degenerative changes were noted in claimant's right knee. Claimant stated he had received no relief from the surgeries on the left knee.

Claimant then came under the care of Dr. Neuman who performed a revision of the total knee prosthesis on May 9, 1975. Claimant complained of worsening of his right knee condition. Dr. Neuman reported on July 7, 1976 that there was no direct relationship between the right knee problem and the left knee injury; but that there would be an indirect relationship based on the additional stress placed on the right leg.

On October 18, 1976 claimant was examined by Dr. Harwood, a Fund medical examiner, who found claimant had severe left leg limp with swelling on the left and pain in both knees, greater on the left.

On December 6, 1976 the Fund requested a determination. It is the recommendation of the Evaluation Division of the Board, based on Dr. Harwood's examination and the multiple surgeries and claimant's significant physical impairment of the left leg, that claimant be granted an award for 50% loss of the left leg and to an award for 15% loss of the right leg based on the indirect relationship of that leg condition from claimant's left knee injury. Claimant also is entitled to compensation for temporary total disability from October 17, 1972 through November 20, 1976, which has already been paid by the Fund.

The Board concurs with these recommendations.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 17, 1972 through November 20, 1976 and to an award for 10% loss of the left leg and to an award of 15% loss of the right leg. These awards are in addition to all previous awards received by claimant.

WCB CASE NO. 76-109-SI JANUARY 10, 1977

In the Matter of the Petition of
D & M PRODUCTS, INC.
For Reimbursement from the Second Injury
Reserve Fund In the Case of
CHARLES WOODRUFF
William Purdy, Employer's Atty.
Amended Order

On December 22, 1976 an order was entered in the above entitled matter; however, service was not made on the proper parties. Therefore, the last paragraph on page 2 of said order is deleted and the following is inserted in lieu thereof:

D & M Products, Inc., 11320 N.E. Marx, Portland, Oregon 97220
William G. Purdy, Attorney, 39 S. Central, Medford, Oregon 97501

Legal Div., Workmen's Compensation Bd., Norman Kelley, Salem, OR
Evaluation Div., Jack Fullerton, Workmen's Comp. Bd., Salem, Oregon
State Accident Insurance Fund, Ed Swenson, Claims Div., Salem, Oregon

In all other respects the order entered on December 22, 1976 is hereby affirmed and ratified.

WCB CASE NO. 76-778 JANUARY 10, 1977

BOBBIE KING, CLAIMANT
Harold Adams, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review of the Referee's order which granted the Fund's motion to dismiss.

On November 6, 1974 claimant sustained an injury to his left knee; on March 27, 1975 Dr. Chester performed a left medial meniscectomy.

At the hearing on May 17, 1976 claimant moved to introduce evidence concerning the extent of his permanent partial disability, although no closure of claimant's claim had been made by the Evaluation Division.

Dr. Chester, in a report of December 19, 1975, had stated claim closure should not be done for at least another three months. On April 14, 1976 Dr. Chester recommended claim closure and rated claimant's disability as severe and permanent, as far as the left leg was concerned. This report was received by the Fund after the claimant had requested a hearing.

The Evaluation Division of the Board asked the Referee if they should close the claim since a hearing was pending, the Referee advised them not to close while the hearing was pending.

At the hearing the Fund moved for dismissal of the hearing as premature because the claim had not been closed by the Evaluation Division.

The Referee granted the Fund's motion.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 21, 1976, is affirmed.

SAIF CLAIM NO. YA 847668 JANUARY 10, 1977

BURGESS HOPPER, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his pelvis and ribs on February 20, 1961 when logs rolled off a truck he was loading causing fractures and a hiatal hernia.

All of the injured parts of the body healed well without significant residuals except for the pelvic fractures which healed with a deformity of leg length imbalance; the right leg was longer than the left. There was lumbar nerve root damage in the right leg and phlebitis caused edema in the right leg.

The claim was closed on July 13, 1961 with an award for 50% loss of an arm for unscheduled disability and 35% loss of the right leg. A Second Determination Order of May 17, 1963 granted an additional 35% loss of an arm for unscheduled disability and 20% loss of use of the right leg, making total awards for 85% unscheduled disability and 55% loss of use of the right leg. Claimant's aggravation rights have expired.

On September 15, 1975 claimant's claim was reopened because claimant sought treatment from Dr. Smith. The current diagnosis is thrombophlebitis of the right leg which is grossly swollen, being at times twice its normal size, with complications of pain, burning sensory loss and skin problems.

Claimant's treating physician finds him permanently and totally disabled caused by the threat of "throwing an embolus" to a vital organ.

On December 9, 1976 the Fund requested a determination. The Evaluation Division of the Board recommended compensation for temporary total disability from September 15, 1975 through November 16, 1976 and an award for 100% loss of the right leg. It did not consider permanent total disability because it found no factual aggravation of the unscheduled disability.

The Board concurs with the award of compensation for temporary total disability but finds claimant is entitled to an award of permanent total disability, based on claimant's overall condition which permanently incapacitates him from regular doing any work at a gainful and suitable occupation.

ORDER

Claimant is hereby granted an award of compensation for temporary total disability from September 15, 1975 through November 16, 1976 and is found to be permanently and totally disabled, as defined by ORS 656.206(1), effective as of November 17, 1976.

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

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WCB CASE NO. 75-4964-B JANUARY 10, 1977
WCB CASE NO. 75-4965-B

ROBERT D. GAY, CLAIMANT
R. Ladd Lonnquist, Claimant's Atty.
G. Howard Cliff, Defense Atty.
R. Kenney Roberts, Defense Atty.
Ray Mize, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer's carrier, Leatherby Insurance Company, seeks Board review of the Referee's order which remanded claimant's claim to it with instructions to accept said claim for the injuries suffered by claimant on July 1, 1975 and August 1, 1975.

Claimant was employed by Portland Wire and Iron Works and was originally injured on March 6, 1974 at which time the employer's carrier was Industrial Indemnity Company. The injury was diagnosed as a back strain. Claimant missed five days from work and his claim was closed by a Determination Order of May 15, 1974 with an award of compensation for time loss only.

On July 1, 1975, while lifting an object which weighed approximately 50 pounds, claimant, in a twisting position, again injured his back. This injury was diagnosed as a posterior thoracic muscle strain. Claimant was off work a few days and then returned and, on August 1, 1975, while bending to pick up a grinder, he felt a pop in his back and was unable to straighten up.

In October, 1975 claimant's injuries were diagnosed as chronic lumbosacral strain superimposed on congenital mal-alignment of the lumbosacral facets and increased lumbar lordosis. Dr. Graham, the treating physician, was of the opinion that claimant's lumbosacral discomfort "was a recurrent feature of his initial injury in March, 1974." At the time of the July and August, 1975 incidents the employer's insurance carrier was Leatherby Insurance Company. On November 13, 1975 Leatherby denied responsibility for the July and August, 1975 claims on the basis that they were an aggravation of the March 6, 1974 injury.

In January, 1976 Industrial Indemnity Company denied the claims on the grounds that a new injury occurred in July, 1975. Leatherby requested an order from the Board designating a paying agency pursuant to ORS 656.307. An order was issued on November 24, 1975 designating Leatherby as the paying agent.

The Referee was unwilling to accept Dr. Graham's opinion that the 1975 episodes were a continuation of, and due to, the 1974 injury because claimant had only been off work five days as a result of the 1974 injury, had returned to the same type of work and had received no treatment for his back between the March, 1974 incident and the July, 1975 incident. The Referee found that claimant had not made any complaints to his fellow-workmen nor to his supervisor that he had been hurting at any time between these two periods. The Referee found no reason to question the credibility of any of the witnesses but found that there were some discrepancies in the dates contained in the history related to the doctor by claimant and claimant's own statements as to the number of days he was off work as a result of pain after March, 1974.

The Referee concluded that the July and August, 1975 injuries were not aggravations of the March, 1974 injury but were new injuries and, therefore, the responsibility of Leatherby Insurance Company.

With respect to the issue of payment of a fee to claimant's attorney, both carriers took the position that the claim was not denied, only that each carrier felt that the other carrier was responsible. The carriers contend that the dispute is strictly between them and does not involve claimant except in a nominal way inasmuch as claimant has received compensation in accordance with ORS 656.307. The Referee concluded that, taking into consideration all of the factors involved, the position taken by the carriers was correct and he did not assess an attorney fee payable by Leatherby Insurance Company. He stated that claimant's attorney could, if he desired, charge claimant a reasonable attorney fee for his services pursuant to their attorney fee retainer agreement.

The Board, on de novo review, finds that the testimony of Dr. Graham that the 1975 incidents were merely a continuation of the problem caused by the first injury in 1974 and that the lifting incident of 1975 didn't change things in any particular way to be most persuasive. This medical testimony is uncontradicted. The only reason that the Referee gave for not accepting Dr. Graham's opinion was the testimony that claimant had been off work only a short period of time following the March 6, 1974 injury; however, the evidence indicates that claimant experienced throbbing and continuous pain in his back from March, 1974 until July, 1975 even though he had returned to work.

The Referee found claimant to be very credible in his testimony and yet ignored claimant's testimony that he had always had pain in his back after the March, 1974 incident and that he had had exacerbations of this back pain because of the necessity to do work which required bending and lifting.

When taken into consideration with claimant's entire testimony, the Board finds that Dr. Graham's medical opinion was reasonable and probable and that the incidents occurring in July and August, 1975 were merely recurrences of claimant's back pain which he had had since the injury of March, 1974. Therefore, relying upon the ruling made by the Court in Calder v. Hughes and Ladd, 75 Or Adv Sh 3495, the 1975 incidents represent aggravation of the 1974 injury and are the responsibility of Industrial Indemnity. The Referee's order must be reversed.

ORDER

The order of the Referee, dated May 26, 1976, is reversed.

Claimant's claim for injuries suffered on July 1, 1975 and on August 1, 1975 are remanded to the employer and its carrier, Industrial Indemnity Company, to be accepted for the payment of compensation as provided by law commencing on July 1, 1975 and until the claim is closed pursuant to ORS 656.268.

Industrial Indemnity Company is directed to reimburse Leatherby Insurance Company for all compensation it has paid to claimant pursuant to the order of November 24, 1975.

Claimant's counsel is awarded as a reasonable attorney fee for his services before the Referee, a sum of $300, payable by the employer and its carrier, Industrial Indemnity.

WCB CASE NO. 76-2356 JANUARY 11, 1977

NELVA DAVID, CLAIMANT
Stipulated Settlement and Order of Dismissal

Whereas, there is presently pending a Request for Review, filed by the claimant, of an Opinion and Order of Referee Johnson dated November 1, 1976; and

Whereas, the self-insured employer, D.G. Moulding, a Division of Di Giorgio Corporation, has Cross-Appealed from the claimant's Request for Review; and

Whereas, subsequent to the publication of the Opinion and Order above mentioned, a Determination Order, dated November 18, 1976, was issued, awarding the claimant 16 degrees for 5% unscheduled disability resulting from injuries received by her while employed with the subject employer on December 6, 1974; the Request for Review filed by the claimant stems from this injury; and

Whereas, claimant has indicated a desire to appeal the Determination Order of November 18, 1976; and

Whereas, the parties hereto desire to settle all disputes with respect to the Opinion and Order of November 1, 1976, and the Determination Order of November 18, 1976,

Now, therefore, for and in consideration of the dismissal of claimant of her Request for Review, and the dismissal of the employer of its Cross-Appeal, and the forbearance of the claimant to request a hearing on the Determination Order of November 18, 1976, it is hereby stipulated and agreed to between the parties herein that the claimant shall receive the relief grant by the Opinion and Order of November 1, 1976, to wit: payment of 25% penalties on the permanent partial disability award of November 18, 1976, being a total of $280, and payment of the attorney's fees of $650 granted therein; in addition, the claimant shall receive an increase in the Determination Order award of November 18, 1976 of an additional 5% permanent partial disability, making a total of 10% unscheduled permanent partial disability, for a total of $2,240 unscheduled permanent partial disability, of which 25% shall be paid to Claimant's attorney.

It is so stipulated.

Based on the stipulation of the parties hereto, the settlement is hereby approved and the claimant's Request for Review and the employer's Cross-Appeal are hereby dismissed. This approval further bars any appeal from the Determination Order of November 18, 1976.

WCB CASE NO. 76-1748 JANUARY 11, 1977

WILLIAM A. PERKINS, CLAIMANT
Peter Davis, Claimant's Atty.
Delbert Brenneman, Defense Atty.
Own Motion Order

On December 15, 1976 the claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and grant him compensation for temporary total disability for a period of 15 days between September 1, 1970 and December 2, 1975. Claimant alleges that on each of these days he made a round trip between his home in Salem and the Portland office of Dr. Gill, an orthopedist, who was treating claimant for his back injury and he lost one day's work each time he made a trip. Claimant also alleges that, pursuant to the advice of Robert E. Brinker, a chiropractic physician from whom he also received medical care for his back injury, he was off all work from March 22 to April 19, 1976 and was entitled to compensation for temporary total disability for this period as well.

Claimant suffered his low back injury on August 6, 1969 and his claim was closed by a Determination Order dated October 28, 1969. Claimant's aggravation rights have expired and his request for payment of compensation for temporary total disability as set forth above was denied by the Referee on the grounds that he had no jurisdiction.

The employer was advised of the claimant's request and responded, stating claimant failed to allege that his condition had worsened or that he was other than medically stationary at the time of the care and treatment he received; that claimant was merely receiving continuing medical care and treatment pursuant to ORS 656.245.

The Board, after due consideration, concludes that claimant was unable to work because of the necessity of making round trips between Salem and Portland on the specified dates (see attachment) and also was taken off all work by his treating chiropractor for the period March 22 to April 19, 1976 and, therefore, should be compensated for time loss.

ORDER

The employer, Redmond Industries, is directed to pay to claimant compensation for temporary total disability for the days specified in the letter from Dr. Gill dated November 1, 1976, a copy of which is attached hereto and, by this reference, made a part of this order, and also to pay claimant compensation for temporary total disability from March 22 to April 19, 1976.

Claimant's counsel is awarded as a reasonable attorney fee a sum equal to 25% of the compensation awarded claimant for temporary total disability by this order, payable out of said compensation as paid, not to exceed $200.

WCB CASE NO. 76-1819 JANUARY 12, 1977

FLOYD WOLFE, CLAIMANT
Donald Atchison, Claimant's Atty.
Delbert Brenneman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation as provided by law.

Claimant sustained a compensable injury on July 26, 1972; a Determination Order of July 27, 1973 awarded him 16 degrees for 5% unscheduled low back and neck disability. By stipulation, this award was increased to a total of 32 degrees for 10% unscheduled disability.

On June 17, 1974 Dr. Hauge, after examining claimant, said he could not return to his former occupation nor to any work requiring more than light use of his shoulder or with his arm above shoulder level. Dr. Hauge did not feel claimant was a good candidate for rehabilitation because of his age and his conditions of arteriosclerotic heart disease, degenerative arthritis of the spine and degenerative changes in his left shoulder.

Claimant had a psychological evaluation on August 27, 1974 which indicated moderate psychopathology, largely attributable to his industrial accident. Prognosis for restoration and rehabilitation was guarded. On October 16, 1974 the Determination Order was issued. The employer requested a hearing.

On January 13, 1975 Dr. Gripekoven examined claimant and found him medically stationary but with permanent residuals of the right shoulder; he stated claimant could be employed full time in a sedentary type job. On September 29, 1975 Dr. Gripekoven, after reviewing two films taken by an investigator, opined it appeared that claimant could use his right arm "for vigorous physical activities." He felt there was no reason claimant could not be employed full time.

The Referee felt that Dr. Gripekoven's opinion, expressed after reviewing the films, assumed that claimant could perform such activities on a sustained basis for 8 hours a day, day in and day out, throughout the years. The Referee found claimant to be a credible witness and his testimony indicated he could not sustain such activities over a prolonged period. The employer, at the hearing, offered claimant his former job but the Referee felt that all of the evidence supported a conclusion that claimant would be unable to regularly perform this occupation.

The Referee concluded that the Determination Order awarding compensation for permanent total disability was correct.

The Board, on de novo review, finds, based upon the medical evidence, that claimant can perform some sedentary occupations. It further finds that when claimant was offered the job as a clipper operator, a job that involved lighter work than that required when claimant previously performed it, claimant replied to the offer, saying no "I'm going to enjoy life." This shows an obvious lack of motivation as does claimant's failure to seek any sedentary job which he physically might be able to perform.

The Board concludes the Referee's order must be reversed. Claimant has lost substantial wage earning capacity but he will be adequately compensated for this loss with an award of 240 degrees for 75% unscheduled disability.

Claimant's attorney is not entitled to an attorney fee under ORS 656.382(2) but is entitled to an attorney fee out of the compensation granted by this order.

ORDER

The order of the Referee, dated August 5, 1976, is reversed.

Claimant is hereby granted an award of 240 degrees for 75% unscheduled low back disability. This is in lieu of the award granted by the Determination Order of October 16, 1974.

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

Dr. Seres found claimant lacked motivation.

The Referee did not agree with the Pain Clinic's evaluation that claimant lacked motivation but found that the problem of motivation was claimant's inability to assess and evaluate the realities of his total situation.

The Referee concluded, based upon the medical evidence, that there were jobs claimant could perform and, therefore, claimant did not fall within the odd-lot category and was not permanently and totally disabled. However, he concluded that claimant had a substantially greater amount of low back disability than the award of 40% represented and he increased the award 25%. The award for the upper back he affirmed.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated April 29, 1976, is affirmed.

WCB CASE NO. 75-5477 JANUARY 12, 1977
WCB CASE NO. 75-5478

LAUREY KNOWLAND, CLAIMANT
William Rutherford, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Argonaut
Cross-Request for Review by Travelers
Cross-Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Argonaut Insurance Company requested and Travelers Insurance Company and claimant cross-requested, Board review of the Referee's order which remanded claimant's claim for his February 7, 1974 injury to the employer and its carrier, Argonaut; remanded claimant's claim for his injury of September 3, 1975 to the employer and its carrier, Travelers, said compensation due from it to be for both payment of medical services immediately following the September 3, 1975 injury and compensation for temporary total disability until claimant returned to work later in September, 1975, plus additional compensation as a penalty in the amount equal to 25% of the compensation for medical services and the required compensation for temporary total disability; held the responsibility for continuing medical services after claimant returned to work in September, 1975 and for other compensation that might later be established to be attributable to both injuries to be the responsibility of both Argonaut and Travelers, apportioned on a 50-50 basis to each; held Travelers should be repaid by Argonaut for 50% of the compensation they had paid to or on behalf of claimant for the period since claimant returned to work in September, 1975 under the order designating a paying agent; ordered Argonaut and Travelers each to pay claimant's attorney an attorney fee of $600.

Claimant suffered a compensable injury on February 7, 1974 originally diagnosed as a dorsal-lumbar strain, he was off work for a few days; when he returned claimant received his regular wage. The employer's carrier, Argonaut, accepted the claim and eventually it was closed on April 5, 1974 with an award for temporary total disability only. Claimant continued to seek period treatment for residual symptoms from this injury which, at times, was for a mid-thoracic sprain and, at other times, for chronic lumbar strain. These treatments received from Dr. Howard, a chiropractic physician, were paid for by Argonaut as a residual consequence of claimant's compensable injury of February 7, 1974.

On September 3, 1975 claimant was injured again while working for the same employer; at this time the employer's carrier was Travelers. The injury occurred when a motor housing exploded and a large part of it struck claimant in the left shoulder and left knee, also in the right forearm and upper arm and right cheek. Claimant was hospitalized and later developed symptoms of pain in his back on the left side between the shoulder blades, his mid-back, his low back and his hips. Claimant missed one week from work, however, he took vacation time so he would not lose any wages, and then he returned to his regular job. Claimant continued to have pain in both the low back and the upper back and subsequently in both legs.

On November 19, 1975 Argonaut denied responsibility for any treatment or disability benefits after September 3, 1975, stating that claimant's medical problems thereafter were directly attributable to claimant's injury of that date.

On December 8, 1975 Travelers denied claimant's claim for the September 3, 1975 injury, stating that the medical information indicated that that injury was not the sole cause of the back condition but that the back injury of February 7, 1974 might be the significant cause. At the hearing Travelers conceded that it did have responsibility for a compensable industrial injury to the dorsal area of claimant's body for which it was not denying responsibility but that the medical evidence indicated that claimant's continuing problems were influenced by the prior injury residuals and, therefore, the responsibility of Argonaut.

On December 22, 1975 claimant requested a hearing on both denials. On January 9, 1976 the Board entered an order, pursuant to ORS 656.307, designating Travelers as the paying agent.

Claimant continued to receive medical treatment after the September 3, 1975 accident although he did return to work. It was noted by Dr. Howard's office that the treatment, injury and diagnosis was the same as before September 3, 1975, however, the medical reports indicated that claimant continued to have both upper and lower back problems and, occasionally, some radiation into both legs.

The Referee found that claimant had needed continuous medical treatment between February 7, 1974 injury and September 3, 1975. Claimant had residual physical impairment from the 1974 injury which required such treatment on a periodic basis in order to allow him to continue working.

The Referee found it reasonable to infer from the medical evidence that after claimant had returned to work following the second injury this need for medical treatment for his low back injury of February 7, 1974 still continued despite the increase of his symptomatology resulting from the September, 1975 injury. He concluded that Argonaut had some continuing responsibility for compensation, at least, for medical treatment for the continuing residuals of the February 7, 1974 injury.

He found that the evidence established claimant had suffered a compensable injury on September 3, 1975 which required medical treatment and caused, at least, temporary disability; that Travelers was solely responsible for the medical treatment rendered from immediately after the September, 1975 injury until claimant had returned to work and also for compensation for temporary total disability for the period of time claimant was off work despite the fact that he took this as vacation time.

that claimant had been treated continuously since the February incident, however, this is not true. Claimant also informed Dr. Fax that he had had no back problems prior to February, 1974 although he admitted on cross-examination that he had actually lost time from work because of the back injuries suffered in 1970 and again in 1972.

The Board concludes that the responsibility for payment to claimant for medical services received and compensation for temporary total disability is solely that of Travelers. It agrees with the Referee's assessment of 25% penalty against Travelers and the award of attorney fees payable by Travelers but reverses the Referee's order in all other respects.

ORDER

The order of the Referee, dated May 14, 1976, is reversed.

Claimant's claim for his September 3, 1975 injury is remanded to the employer and its carrier, The Travelers Insurance Company, for acceptance and payment of benefits as provided by law from September 3, 1975 and until the claim is closed pursuant to ORS 656.268.

Claimant is awarded a sum equal to 25% of the compensation for medical services furnished and temporary total disability due claimant from September 3, 1975 until he returned to work later in September, 1975, payable by The Travelers insurance Company.

The employer, and its carrier, The Travelers Insurance Company, shall pay claimant's attorney as a reasonable attorney fee the sum of $400.

Claimant's counsel is awarded as a reasonable attorney fee for his services at this Board review, the sum of $200, payable by the employer and its carrier, The Travelers Insurance Company.

WCB CASE NO. 76-383 JANUARY 12, 1977

LINDA KINGSBURY, CLAIMANT
Keith Evans, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which remanded claimant's claim to the employer to reopen with compensation for temporary total disability to commence when claimant is enrolled at the Portland Pain Rehabilitation Clinic and until closure is authorized. Claimant contends she is entitled to further compensation for temporary total disability.

Claimant's treating physician, Dr. Duff, recommended claimant be evaluated by the Portland Pain Rehabilitation Clinic and the employer agreed. The only issue at the hearing was whether claimant was entitled to compensation for temporary total disability while so enrolled. It was the contention of the employer that claimant could be evaluated under the provisions of ORS 656.245. Claimant contends she should receive compensation for temporary total disability commencing December 2, 1975 at which time she commenced

WCB CASE NO. 75-4092 JANUARY 12, 1977
WCB CASE NO. 75-4040

DORRIS DANIELSON, CLAIMANT
Robert Boyer, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of July 8, 1975 and August 29, 1975 and also affirmed the Determination Order of July 19, 1975.

This is a consolidated case involving two different denials but both were for the same accident.

On February 14, 1975 claimant's job included packing film holders and, due to faulty exhaust fans, paint fumes from an adjoining department pervaded claimant's work area and were inhaled by her. Claimant complained of shortness of breath and nausea. She was hospitalized and Dr. Hawkins diagnosed acute asthmatic bronchitis with acute allergic reaction from paint fumes. Thereafter, claimant was hospitalized a total of three times, the diagnosis each time was coronary insufficiency and coronary artery disease.

Dr. Hawkins, during claimant's third hospitalization, referred claimant to Dr. Gundry who, on April 9, 1975, stated claimant had suffered acute pulmonary embarrassment from the fume inhalation but the repeated hospitalizations were caused from acute asthmatic attacks which could not be related to the inhalation incident. He did not feel the "patients dyspnea and chest pain can continue to be related organically to the inhalation incident," however, claimant was upset with the incident and her anxiety could play a major role in repeated hospitalizations and, therefore, these symptoms are related to the original incident but not organically.

Dr. Hawkins referred claimant to the Thoracic Clinic and Dr. Crislip, a specialist in heart and lung disease, found little organic disability and stated her symptoms were on a psychological basis.

On July 1, 1975 Dr. Hawkins released claimant to part-time work. Claimant did not return to work and has never stopped receiving medical treatment from Dr. Hawkins.

The Fund first accepted claimant's claim for inhalation of pain fumes but on July 8, 1975 issued a partial denial denying a myriad of complaints alleged by claimant. Claimant then filed an aggravation claim which the Fund also denied.

Claimant's testimony at the hearing was full of contradictions. She first denied ever having prior asthma, then admitted she had the condition and took shots for it in California; she first denied ever having pneumonia, then admitted she may have had it; she denied any heart problems prior to the accident when, in fact, she had been taking Quinidine, a drug used for heart disease, for years prior to this incident.

The Referee found that the only medical evidence supporting claimant's claim that all of her problems were related to the injury was that of Dr. Hawkins. Dr. Hawkins has had his license suspended; the other physicians have stated that claimant is taking unnecessary medication and none connect claimant's problems with her injury. This, together with the questionable credibility of claimant herself, has persuaded the Referee that the actions taken by the Fund were proper and justified. He affirmed the two denials and the Determination Order which had awarded compensation for temporary total dis=ability only.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 18, 1976, is affirmed.

WCB CASE NO. 75-5184 JANUARY 12, 1977

In the Matter of the Compensation
of the Beneficiaries of
MELVIN BOTTS, DECEASED
William Reynolds, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant, widow of Melvin Botts, requests Board review of the Referee's order which dismissed her claim for compensation because of claimant's failure to request a hearing within 60 days after the denial of said claim by the State Accident Insurance Fund.

After the demise of the workman, the claimant signed a claim for compensation on May 20, 1975; on June 26, 1975 the Fund denied the claim. About a week after claimant received the denial letter she took it to her attorney's office and left it there. The attorney testified that he knew that he had not made out a claim and thought the Fund was trying to use the notice of death as a claim and attempting to improperly accelerate claimant's rights. He tried to make a claim by letter dated September 25, 1975 under the erroneous assumption that no claim had previously been filed but was advised that claimant already had made a claim. He requested a hearing.

ORS 656.319 provides that with respect to objection by claimant to a denial of a claim for compensation under ORS 656.262 a hearing thereon shall not be granted and the claim shall not be enforceable unless a request for hearing is filed not later than the 60th day after the claimant was notified of the denial or not later than the 180th day if the claimant establishes, at a hearing, that there was good cause for failure to file a request by the 60th day.

The Referee found, based upon the testimony at the hearing, that the claimant had left the letter of denial with her attorney and had made several visits to his office thereafter but apparently had never realized she had filed a claim for widow's benefits and, therefore, never advised her counsel of the claim.

The Referee further found that the attorney, being unaware of the filed claim, undertook to determine whether or not claimant had a justifiable claim and sought to gain as much information as possible prior to filing a claim in claimant's behalf.

The Referee concluded that claimant had not shown justifiable excuse for requesting a hearing more than 60 days after she had received the denial. Although claimant's attorney didn't know that she had filed a claim, the Referee felt the attorney had an obligation after reading the letter of denial to check with the Fund and ascertain the facts of the claim. Had he done so this would have brought forth the truth of the situation immediately and a request for hearing could have been timely filed.

The Referee, having determined that the request for hearing was untimely, concluded it was not necessary to determine whether the workman's work had been a material contributing cause to his death.

The Board, on de novo review, affirms and adopts the Referee's order.

ORDER

The order of the Referee, dated July 8, 1976, is affirmed.

WCB CASE NO. 76-1408 JANUARY 14, 1977

THEODORE BRYSON, CLAIMANT
Evohl Malagon, Claimant's Atty.
Lyle Velure, Defense Atty.
Order of Dismissal

A request for review having been duly filed with the Workmen's Compensation Board in the above entitled matter by the Department of Justice on behalf of the State Accident Insurance Fund, and said request for review now having been withdrawn,

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 76-1146 JANUARY 14, 1977

CLIFFORD MOORE, CLAIMANT
William Sizemore, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the denials dated December 5, 1975 and February 4, 1976.

At issue at hearing, and before the Board, is whether the incident of September 12, 1975 was a new injury or an aggravation of claimant's industrial injury of October 25, 1974. On March 9, 1976 United Pacific was designated the paying agent, pursuant to ORS 656.307.

Prior to the October, 1974 injury claimant had had back surgery in 1964, 1965 or 1966 for an injury which he suffered while in California. Thereafter, claimant had intermittent back pain but was able to work.

In August, 1971 claimant suffered a compensable injury and underwent medical treatment for his low back but lost no time from work.

On October 25, 1974 claimant again sustained a compensable injury to his low back; the claim was closed by a Determination Order dated February 25, 1975 with no award for permanent partial disability.

Claimant alleges that on September 12, 1975 he again sustained a low back injury. On September 15, 1975 claimant's physician, Dr. Hoggard, hospitalized him with acute low back pain; he indicated claimant did not give a history of an injury to his back in September. Dr. Hoggard related claimant's condition to the October, 1974 injury.

Claimant filed a claim for an injury on September 12, 1975. The Fund, on December 5, 1975, denied any aggravation claim and on February 4, 1976 United Pacific denied responsibility for any new injury benefits.

There was conflict in the evidence as to what happened when claimant's wife called the employer for claim forms. Claimant admits his wife requested a form for an off-the-job condition but testified this happened from confusion on his wife's part. Claimant stated he was to have an operation for a lesion on his forehead on September 16 and this caused his wife's confusion.

In March, 1976 claimant underwent surgery for radial bilateral discectomy L4-5.

The Referee found claimant had a ready explanation for every inconsistancy that arose with this claim. Claimant testified it was preposterous to say he suffered an off-the-job injury by lifting a sack of potatoes. Claimant further testified that he was in such severe pain that the only interest of his doctor at the time the history was given to the doctor by claimant was simply to just relieve his pain. The Referee found this equally preposterous.

It's an accepted belief that a history given by a claimant to a doctor at the time of, or close thereto the time of, injury is given accurately because claimant wants the doctor to be informed of everything in order to diagnose and treat him effectively. The Referee concluded claimant's alleged injury of September 12 did not occur.

Furthermore, the physicians' opinions relating claimant's September, 1975 incident to his October, 1974 injury were valueless because an imcomplete history had been given to them. Therefore, claimant also failed to prove he had aggravated the October, 1974 injury. The Referee affirmed both denials.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 21, 1976, is affirmed.

WCB CASE NO. 76-1811 JANUARY 14, 1977

PAUL SNYDER, CLAIMANT
Dan O'Leary, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On January 5, 1977 the Board received from claimant, by and through his attorney, a Motion for Reconsideration of its Order on Review entered in the above entitled matter on December 28, 1976.

The Board, after giving due consideration to the motion and the affidavit in support thereof, concludes that the motion should be denied.

It is so ordered.

WCB CASE NO. 74-3022 JANUARY 14, 1977

WILLIAM E. PATTERSON, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Amended Own Motion Order

On January 5, 1977 an Own Motion Order was issued in the above entitled matter. The date set forth in the sixth line of the third paragraph on page 1 of said order is erroneously stated as April 6, 1972; the order should be corrected to read April 6, 1962.

It is so ordered.

WCB CASE NO. 75-4888 JANUARY 14, 1977

BILLY NORTHCUTT, CLAIMANT
Frank Susak, Claimant's Atty.
Frank Lageson, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which awarded claimant 160 degrees for 50% unscheduled disability. Claimant contends he is permanently and totally disabled, or entitled to a greater award for his permanent partial disability.

Claimant sustained a compensable back injury on July 9, 1971. Thereafter, claimant moved to San Jose to live with relatives; he had no income. In 1972 Dr. Gardner, an orthopedist, performed a two-level laminectomy.

A Determination Order of August 24, 1973 granted claimant temporary total disability only.

In 1973 claimant moved to Boise and went to work for Morrison-Knudson, doing welding layout work for the Teton Dam. While employed there claimant's back became worse. A Boise orthopedist performed a laminectomy and fusion in 1974. Also while in Boise claimant had an ulcer which required removal of 3/4 of his stomach.

A Second Determination Order of October 24, 1975 granted claimant an award of 96 degrees for 30% unscheduled disability.

Claimant was sent to the Disability Prevention Division in March, 1976 where he was found to have problems primarily functional in nature. Claimant claims he cannot work; the doctors at the Disability Prevention Division felt that he would qualify for work other than that which he was doing at the time of his injury. Claimant has five convictions for DUIL but claims he doesn't have an alcohol problem but only drinks vodka to ease his back pain. Claimant testified he has not worked since 1973 and has made no effort to find work.

Claimant has been seen or treated by a roster of doctors. His condition was diagnosed as lumbosacral strain. During October, 1975, after his surgery, claimant was found to be medically stationary and his disability rated as moderate.

Dr. Berselli examined claimant in January, 1976 and found residual low back pain and left lower extremity pain.

The Referee found claimant was non-motivated; the preponderance of the medical evidence does not support a finding that claimant is permanently and totally disabled. It does indicate claimant's disability was moderate in range. The Referee concluded that the award made by the Determination Order of October 24, 1975 should be increased. He granted claimant an award of 160 degrees for 50% unscheduled disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 30, 1976, is affirmed.

WCB CASE NO. 76-2703 JANUARY 14, 1977

KATHEY CASEY, CLAIMANT
Charles Robinowitz, Claimant's Atty.
Ray Mize, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 16 degrees for 5% unscheduled disability, allowed the carrier an offset for overpayment of temporary total disability and approved the carrier's denial of payment of $406 bill from Dr. Oriente.

Claimant contends she is entitled to an award of 128 degrees unscheduled disability and that the carrier is responsibile for Dr. Oriente's bill. The offset for overpayment of temporary total disability granted by the Referee was not contested.

Claimant sustained a compensable injury on May 21, 1975 while working as a nurse's aide. Dr. Srinvivasan diagnosed low back pain and found no permanent impairment. Claimant returned to work but developed increased pain; she stopped working. Claimant was found to be medically stationary on June 13, 1975 and returned to work in September, 1975 but could not perform all of her duties as a nurse's aide.

On October 28, 1975 the Orthopedic Clinic reported a resolved acute lumbosacral strain and recommended claimant be retrained for some occupation not requiring heavy lifting. Claimant was then released for work on November 3, 1975.

Claimant was referred to Dr. Baskins who hospitalized claimant for traction. After her discharge Dr. Baskins, on October 28, 1975, reported claimant should be retrained for work not requiring heavy lifting.

A Determination Order of December 10, 1975 granted claimant compensation for temporary total disability only.

Claimant was referred through the Disability Prevention Division for vocational retraining but before anything could be done claimant moved to California. Claimant is presently in a rehabilitation program in California, studying to be an accounting clerk.

Claimant obtained a job as a coder during February, 1976 but sitting all day caused pain in her upper back. After claimant had seen Dr. Oriente about this pain her employer arranged for claimant to stand at her job four hours and sit four hours. She can tolerate the job under these circumstances. Based on Dr. Oriente's advice, claimant now wears flat shoes. Claimant's visit to Dr. Oriente was at her attorney's advice, however, the carrier denied the payment of his bill for $406, contending it was for the purpose of aiding claimant's case.

The Referee found claimant was still suffering pain and discomfort in her back and still taking medication for it. The Referee concluded this low back condition was, to a small degree, disabling and prevented claimant from doing certain types of work which she was able to do before her injury. He awarded her 16 degrees for 5% unscheduled disability to compensate her for her loss of wage earning capacity.

The carrier based its denial of payment of the medical billing of Dr. Oriente on the Court's ruling in Chapp v Miller, 264 Or 138 which disallowed such expenses when generated for litigation. The Referee found that Dr. Oriente's bill was for services that where not for treatment but were solely to assist claimant in preparing her case. The referee affirmed the denial.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 12, 1976, is affirmed.

WCB CASE NO. 76-237 JANUARY 14, 1977

ARLEEN DALKE, CLAIMANT
Donald Richardson, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of January 6, 1976. Claimant contends she is permanently and totally disabled.

Claimant sustained a compensable back injury in April, 1968. Claimant saw Dr. Pyrch on April 13, 1968 who found no permanent impairment and released claimant to work on June 3, 1968. Claimant was referred to Dr. Clarke in July, 1968. He felt claimant should continue to work and said there had been "no new injury and no other treatment." There was evidence of degenerative changes and arthritic problems superimposed on congenital unstable low back.

A Determination Order of September 11, 1969 granted claimant 64 degrees for 20% unscheduled disability.

Claimant underwent a hemilaminectomy on February 20, 1969 and was released to regular work on April 4, 1969.

In February, 1974 claimant had a flareup of symptoms and was hospitalized for conservative treatment. On April 9, 1974 Dr. Clarke performed a fusion at L4-S1.

On July 22, 1975 claimant was examined by the Disability Prevention Division who indicated a job modification was advisable with avoidance of heavy lifting, bending or twisting and that claimant was not medically stationary.

On November 10, 1975 Dr. Clarke stated claimant could not return to her regular work of cutting and wrapping meat but that there were jobs she could perform.

A Second Determination Order of January 6, 1976 granted claimant an additional 48 degrees for 15% unscheduled disability. Claimant now has received a total of 112 degrees for 35% unscheduled disability.

The Referee was not convinced that claimant could not do anything. Claimant contended she fell within the "odd-lot" category and was permanently and totally disabled. The medical evidence indicates claimant can return to full time work and there was no medical mention of claimant being permanently and totally disabled. The Referee concluded claimant had failed to meet her burden of proving "odd-lot" status.

The Referee further concluded claimant's emotional problems were interfering with her recovery and she is entitled to vocational counseling, although he doubted that this would help claimant. The Referee affirmed the Determination Order of January 6, 1976 on the basis that claimant had been adequately compensated for her loss of wage earning capacity by the prior awards.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 30, 1976, is affirmed.

WCB CASE NO. 76-356 JANUARY 14, 1977

DENNIS EASTON, CLAIMANT
John Bogardus, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of that portion of the Referee's order which affirmed the award for 30% loss of left leg made by the Determination Order of February 10, 1976.

Claimant contends he is also suffering from an unscheduled back disability as a result of his industrial injury and that he is entitled to penalties and attorney fees for the Fund's unreasonable delay in providing claimant with medical reports.

Claimant sustained a compensable left leg injury on September 23, 1974; he now wears a $\frac{1}{2}$ inch lift in his left boot. Dr. Bomengen noted the leg shortning created a tendency for claimant to have low back difficulties without the use of this lift.

The Referee found that with the use of the lift claimant's scheduled disability was lessened and that, considering the medical reports which indicated no abnormality structurally to account for the knee pain claimed by claimant and deciding the disability strictly on a loss of function basis, the award of 30% granted by the Determination Order of February 10, 1976 was adequate.

Claimant testified he does have back pain "just a little bit." The Referee concluded that pain without disability is not compensable, therefore, claimant had not proven he had sustained an unscheduled disability.

On the issue of penalties and attorney fees for delaying in forwarding medical reports, the Referee found that claimant's attorney's first written demand for medical reports was on February 12. The medicals were received on April 11. The Referee concluded that the only evidence of claimant's attorney's demands was this one letter and his attorney's other contacts were not documented, therefore, the Referee refused to assess penalties and award attorney fees for this alleged delay.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated October 21, 1976, is affirmed.

WCB CASE NO. 75-5175 JANUARY 14, 1977

EDWIN RESCH, CLAIMANT
Joel Reeder, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order, as amended, which remanded claimant's claim to it to provide claimant with treatment by Dr. Cote, including time loss from the first post-hearing treatment provided by Dr. Cote, until closure is authorized.

Claimant sustained a compensable injury on February 27, 1974 to his low back and groin, diagnosed as low back and sacroiliac strain. Claimant was released for light work on May 2, 1974. He did not return to work.

Claimant was seen by Dr. Thompson, a psychiatrist, who diagnosed chronically depressed passive-aggressive personality disorder, alcoholism and drug overdose.

In June claimant reinjured his back while working on his roof. Dr. Bolton indicated in his report of September, 1974 that claimant had no significant low back problem although he complained of great discomfort.

A Determination Order of October 31, 1974 granted claimant 32 degrees for 10% unscheduled disability which, by stipulation approved on February 24, 1975, was increased to 49.75 degrees.

On April 30, 1975 claimant was found to be vocationally handicapped and his claim was reopened. Dr. Walters examined claimant in June, 1975 and found no objective abnormality present.

Claimant's vocational rehabilitation program was suspended on August 12, 1975. In late 1975 claimant began seeing Dr. Cote for chiropractic treatments. Dr. Cote testified at the hearing that the treatment he was providing claimant for his back was causally related to claimant's original injury. Dr. Cote recommended further treatments.

The Referee found claimant's psychological problems have lessened. The medical evidence indicates only Dr. Cote finds claimant needs further treatment. However, chiropractic treatment is recognized in Oregon and claimant has the right to seek such treatment for an injury-related problem.

The Referee concluded that any treatment that might aid claimant in returning to the labor market should be provided claimant and he remanded the claim to the Fund to provide the treatment recommended by Dr. Cote and also for payment of time loss.

The Board, on de novo review, finds Dr. Bolton, who treated claimant for his industrial injury, states in his report of March 30, 1976, that he cannot substantiate all of claimant's complaints; he found no orthopedic defects and has no orthopedic treatment to recommend. He could make no objective finding of anything which would interfere with claimant's ability to work, he found no loss of function.

The Board concludes that the Referee's order must be reversed.

The Referee concluded that the opinions of Drs. Wysham and Deitz that claimant's heart attack was caused by worry about financial difficulties on company time which established a medical causal relationship between the myocardial infarction and claimant's employment were not legally tenable. Employment, per se, does not establish legal causation, nor does self-induced stress unrelated to the employment.

The Referee concluded claimant had failed to establish legal causation and he affirmed the denial of the employer.

The Board, on de novo review, adopts the well-written order of the Referee.

ORDER

The order of the Referee, dated June 18, 1976, is affirmed.

WCB CASE NO. 74-299 JANUARY 14, 1977

DON MILLER, CLAIMANT
David Vandenberg, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of October 29, 1973 for a chronic obstructive pulmonary disease.

Claimant is a 58 year old welding instructor at OTI who has been so employed for 20 years. While welding claimant wore gloves and a welding hood; the hood does not protect a person from the fumes. The density and duration of the fumes varied depending on the number of people welding.

Claimant was also exposed to asbestos dust used in cooling weldments; however, this exposure was only for one week, once each school term.

A breathing zone sample was performed by an industrial hygienist on October 11, 1973; 13 students were being instructed in welding. The conclusion reached was that the instructor would not be exposed to the welding fumes to a sufficient extent to be injurious to him. The conditions of this "sample" were not really typical of the conditions to which claimant was normally exposed because usually there were more than 13 students being instructed and the students become more proficient with such instruction, they are able to increase their welding and the concentration of fumes becomes much greater.

In January, 1976 another sample was taken and the asbestos exposure was found to be very low.

Claimant sought medical advice from his family physician, Dr. Kochevar, who reported lung abnormality from welding fumes. In August, 1973 claimant was referred to Dr. Perlman who found asthematic bronchitis due to chemical irritation based on exposure to welding fumes.

In September, 1973 claimant was seen by Dr. Hunt who found allergic rhinitis and chronic bronchitis which he attributed to cigarette smoking. Dr. Hunt did not relate claimant's problems to his work nor did he find that claimant's work had aggravated his condition.

On October 22, 1973 Dr. Parcher examined claimant and stated his pulmonary problems were not the result of welding fumes because the exposure would not be of lasting effect.

On January 22, 1974 Dr. Kochevar stated that it was a medical probability that claimant's work caused or aggravated his condition.

On May 6, 1974 Dr. Hunt indicated claimant had mild chronic obstructive pulmonary disease caused by heavy cigarette smoking, together with shipyard and asbestos exposure; later he stated it was not medically probable that the asbestos exposure had aggravated claimant's chronic obstructive pulmonary disease.

On August 20, 1974 claimant was examined by Dr. Berven who felt claimant had an "excellent history of asbestos exposure" but had none of the "classic features" of such.

The Referee found that as far as the asbestos exposure was concerned claimant had not proven it was causally related to his chronic pulmonary disease. This exposure was not daily and the preponderance of the medical evidence indicated it was not related.

The Referee found that if claimant's lungs were more susceptible to the disease because of his heavy cigarette smoking and he developed chronic obstructive pulmonary disease which was materially contributed to by his work exposure his condition would be compensable. This is strictly a medical question and there were medical opinions expressed both pro and con.

The Referee concluded that the preponderance of the evidence did not support a finding of a relationship of claimant's work to his present condition. Dr. Hunt, who has treated claimant from 1971 and saw him in 1974 and 1976 found no causal connection between the welding fumes exposure and claimant's conditions.

The Referee concluded the denial of October 29, 1973 was proper.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 26, 1976, is affirmed.

SAIF CLAIM NO. WC 212199 JANUARY 14, 1977

ROB O'CONNOR, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable low back injury on October 7, 1969 and underwent a laminectomy on December 5, 1969. His claim was closed on May 4, 1970 with an award of 32 degrees for 10% unscheduled low back disability. Claimant's aggravation rights expired on May 3, 1975.

On December 1, 1975 claimant's claim was reopened for aggravation. On February 19, 1976 claimant underwent another laminectomy at L5-S1 and a spinal fusion. Dr. Rockey found claimant medically stationary on November 8, 1976 and claimant was released to full activities with the exception of repetitive heavy lifting. Dr. Rockey rated claimant's loss of function of his back as mild.

The State Accident Insurance Fund requested a determination on December 1, 1976. The Evaluation Division of the Board recommends compensation for temporary total disability from December 1, 1975 through November 8, 1976 and an additional award of 32 degrees for 10% unscheduled low back disability.

The Board agrees with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 1, 1975 through November 8, 1976 and awarded 32 degrees for 10% unscheduled disability. This is in addition to all previous awards received by claimant.

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