VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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SAIF CLAIM NO. GA 721998 October 4, 1979

HOMER O. BROWN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The claimant suffered a compensable injury to his low back on March 23, 1959 while working for Elk Creek Logging Company. The claim was accepted and initially closed by an order dated November 3, 1961 which granted claimant an award for permanent partial disability equal to 75% loss of function of an arm for unscheduled disability.

On April 23, 1978 Dr. Goodwin requested the Fund to reopen claimant's claim for treatment and surgery. Inasmuch as claimant's aggravation rights had expired, the Fund referred the claim to the Board for a reopening pursuant to ORS 656.278 if the medical evidence justified it. On December 13, 1978 the Board issued its Own Motion Order which remanded claimant's claim to the Fund to be accepted and for the payment of compensation to commence on the day claimant entered the hospital.

Claimant was hospitalized on April 6, 1978 and on April 17, 1978 back surgery was performed.

On June 19, 1979 Dr. Goodwin advised the Fund that claiment was approaching a stationary stage and that treatment from that point on would be palliative rather than curative; however, Dr. Goodwin felt claimant would benefit from physical conditioning and therapy at Callahan Center. He suggested that a closing evaluation be done either at the center or by an independent physician. Claimant received physical therapy treatments from Dr. Hughes and was later referred to Dr. Hopkins for a closing examination on August 7, 1979.

Dr. Hookins stated that claimant's pain in his back and legs had been considerably alleviated by the 1978 surgery and that he rated claimant's back disability as a severe

disability of the whole man.

The Evaluation Division recommended to the Board that the claim be closed with additional compensation for temporary total disability from April 6, 1978 through August 7, 1979 and additional compensation equal to 20% loss function of an arm for his unscheduled disability.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from April 6, 1978 through August 7, 1979 and compensation equal to 20% loss function of an arm for his unscheduled disability. These awards are in addition to all previous awards claimant may have received as a result of his March 23, 1959 industrial injury.

CLAIM NO. A42CC155294MR Ocotber 4, 1979

LEONARD COBB, CLAIMANT
Edwin S. Nutbrown, Claimant's Atty.
Own Motion Order

On August 24, 1979 claimant, by and through his attorney, requested the Board to reopen his claim for an injury sustained August 30, 1972. Claimant's claim was first closed on October 18, 1972 and his aggravation rights have expired. Attached to claimant's petition were numerous medical reports, all indicating claimant was having problems with his knee going out on him but that he was not a good candidate for surgery.

Dr. Seacat, on March 21, 1979, indicated claimant was suffering from a recurrent subluxation of the patella with associated synovitis. He felt there was a direct relationship between claimant's industrial injury in 1972 and his present condition and that claimant was disabled for work even at a sedentary type job. He recommended claimant be paid time loss benefits.

The Board, on August 31, 1979, requested the carrier to advise it within 20 days of the carrier's position with regard to claimant's request. On September 5, 1979 the claimant again requested that his claim be reopened.

The carrier failed to respond to the Board's letter.

The Board, after thoroughly considering the medical evidence before it, finds that claimant's condition is directly related to his 1972 industrial injury and that his condition has worsened since the last arrangement or award of compensation. The Board concludes that claimant's claim should be reopened at this time for further benefits.

ORDER

Claimant's claim for his August 30, 1972 industrial injury is hereby remanded to the carrier for acceptance and payment of compensation to which claimant is entitled, commencing on March 21, 1979 and until closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation granted by this order for temporary total disability, payable out of said compensation as paid, not to exceed $750.

CLAIM NO. C604-24788 October 4, 1979

WILLIAM GIEBLER, CLAIMANT
Belli & Choulos, Claimant's Attys.
Stipulation

On or about May 24, 1977, claimant was injured during the course and scope of his employment with Nicolai Door Company when he was struck by a freight car under the control of the Union Pacific Railroad. He incurred the loss of his right leg at the hip as a result of the injury.

Liberty Mutual Insurance Company, the Workers' Compensation carrier for Nicolai Door Company, accepted the claim and has paid the sum of $25,164.57 for temporary total disability and the further sum of $30,889.74 for medical care and associated expenses.

An action at law was filed on behalf of claimant in the United States District Court for the District of Oregon being entitled "William Giebler, Plaintiff vs. Union Pacific Railroad, Defendant," Civil Number 77-767. The said action at law has been settled for the sum of $399,500. Claimant, William Giebler, and Liberty Mutual Insurance Company, desiring to settle and compromise any and all claims under the Oregon Workers' Compensation laws hereby agree and stipulate as follows:

(1) That Liberty Mutual Insurance Company will be paid out of the proceeds of this settlement aforesaid the sum of $56,054.31 representing all sums paid by them for temporary total disability and medical benefits.

(2) That all the rest and residue of said settlement, after deduction of attorney fees and court costs, to be paid to BELLI & CHOULOS, Attorneys at Law, who have represented claimant in his action at law against Union Pacific Railroad, said balance being the sum of $205,279.02 be paid to claimant and such sum to be paid free and clear of any claim or demand of Liberty Mutual Insurance Company.

(3) That in consideration of said release of any claim by Liberty Mutual Insurance Company upon the money resulting from the settlement aforesaid, claimant, WILLIAM GIEBLER, releases and waives all future rights and benefits to which he may be entitled under the Workers' Compensation law of the State of Oregon, such as additional compensation pursuant to a determination order from the Workers' Compensation Board of the State of Oregon; the right to additional compensation for aggravation of his disability, the right to additional medical benefits and the right to own motion orders pursuant to ORS 656.278.

IT IS SO STIPULATED:

The foregoing stipulation for compromise and settlement of the Workers' Compensation claim of Willaim Giebler is hereby approved and upon payment of the sum set forth above, Liberty Mutua Insurance Company and Nicolai Door Company are exonerated from any future liability to William Giebler for injuries incurred on May 24, 1977 while in the employ of Nicolai Door Company.

SAIF CLAIM NO. GC 319260 October 4, 1979

GEORGE A LINGREN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his treating physician, Dr. Boyden, has requested that his claim for an industrial injury of August 2, 1971 be reopened. At that time claimant caught his right hand in a cable and his right small finger had to be amputated. Claimant's claim was closed on November 4, 1971 with an award of 3° for partial loss of the right little finger; claimant's aggravation rights have expired.

Dr. Boyden's report of July 31, 1979 indicated that claimant's finger is continually breaking open and draining. Surgery would be required to correct the problem. He related the condition to claimant's 1971 industrial injury. Surgery was set for August 8, 1979.

On September 24, 1979 the Fund indicated it had no objection to claimant's claim being reopened for the recommended surgery.

The Board, after thoroughly considering the medical evidence before it, concludes that claimant's claim should be reopened for his August 2, 1971 industrial injury as of the date claimant entered the hospital for the recommended surgery and until the claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-4721 October 4, 1979

GEORGE L. MADISON, CLAIMANT
Cliff S. Bentz, Claimant's Atty.
Thomas J. Mortland, Employer's Atty.
Stipulation And Order Of Dismissal

THIS MATTER having come on regularly before the Workers' Compensation Board upon the Stipulation of the parties, Claimant, acting by and through his attorney, Cliff S. Bentz, (of Yturri, Rose & Burnham), and it appearing that the matter has been fully compromised between the parties and that this order may be entered, not, therefore,

IT IS HEREBY ORDERED that the Claimant be, and he is hereby, awarded $5,000.00 for home nursing care.

IT IS FURTHER ORDERED that payments for home nursing care services provided by Mr. Madison's wife shall be in the amount of $973.33 per month. It is further ordered that this sum be increased or decreased by the insurer in January of each year during which this agreement is in effect. This increase or decrease shall be made in direct relation to the percentage increase for all urban consumers for medical care as set forth in the United States city average in the Consumer Price Index for the month of January of the year involved.

IT IS FURTHER ORDERED that Cliff S. Bentz, Claimant's attorney, be, and he is hereby awarded, a reasonable attorney fee of $1,666.33 out of the lump sum payment of $5,000.00, made payable by this Order, and

IT IS FURTHER ORDERED that Claimant's request for a review and the employer's request for a review be, and hereby are dismissed.

IT IS SO STIPULATED

IT IS SO ORDERED:

SAIF CLAIM NO. C 74796 October 4, 1979

GORDON E. MAURER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant has requested that his claim be reopened for the industrial injury of May 31, 1967 which resulted in injury to his spine and shoulder. His claim was first closed on August 19, 1968 with an award of 5% loss of the left arm, 30% loss of the right arm and 30% loss of an arm by separation for unscheduled disability; claimant's aggravation rights have expired.

Claimant saw Dr. Ash, a neurologist, who on August 21, 1979 reported claimant had complaints of increasing head and neck pain and aching and burning in the right shoulder. Dr. Ash found traumatic C-6 compression fracture with a history of instability. Dr. Curtis Hill, on August 24, 1979, indicated claimant should undergo a myelogram and possibly an anterior decompression and fusion for stabilization would be necessary. He related claimant's problems to his 1967 industrial injury.

On September 24, 1979 the State Accident Insurance Fund forwarded copies of these medical reports to the Board and stated that it would not oppose a reopening of claimant's claim for the August 19, 1968 injury.

The Board, after thoroughly considering the medical evidence before it, concludes that claimant's claim should be reopened as of the date of Dr. Hill's report, August 24, 1979, and until closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. EC 325941 October 4, 1979

PHYLLIS C. RICKS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her left thumb on February 11, 1972 when she closed a car door on it. The diagnosis was a transverse fracture of the distal phalanx with avulsion of the nail and skin. The claim was closed on December 14, 1972 with an award of 5% loss of the left thumb. Claimant's aggravation rights have expired.

Claimant's claim was reopened by a Board's Own Motion Order, dated October 19, 1978 at the recommendation of Dr. Nathan who felt claimant's condition at that time was related to her industrial injury and further surgery was necessary. On September 21, 1978 a surgical release of the triggering thumb was performed. Claimant's thumb has healed well and she has no problems with it. Claimant advised the Fund she had been off work only two days as a result of this surgery.

On August 14, 1979 the Fund requested a determination of claimant's current condition be made. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss for September 21 and 22, 1978 only.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 21, 1978 through September 22, 1978.

WCB CASE NO. 78-811 October 4, 1979
WCB CASE NO. 78-9651

RICHARD D. SHERMAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
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 remanded claimant's claim for a new injury to the employer, Fuhrman Homes, and its carrier, EBI, with instructions to accept the claim and pay claimant compensation as provided by law, commencing April 23, 1978 and until the claim is closed pursuant to the provisions of ORS 656.268 and also ordered this employer and its carrier to pay a sum equal to 25% of the medicals which were outstanding as a penalty under the provisions of ORS 656.268(8) and to pay claimant's attorney an attorney's fee of $250 pursuant to ORS 656.282. The order further directed that this employer and its carrier pay a sum of $600 to claimant's attorney as a reasonable attorney's fee pursuant to the provisions of ORS 656.386. The denial of claimant's claim for aggravation made by the employer, J. H. Baxter Company, and its carrier, Gates, McDonald Insurance Company, dated September 1, 1978, was affirmed and claimant was awarded 80° for 25% unscheduled back disability, said award to be in lieu of and not in addition to the award previously granted claimant. Finally, the order directed that claimant's attorney be awarded as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted claimant.

The Board, after de novo review, affirms and adopts as its own the findings of fact and the conclusion set forth in the Referee's Opinion and Order, a copy of which is attached hereto and, by this reference, is made a part hereof. However, the Board does not accept the rationale expressed by the Referee on page 6 of his Opinion and Order, namely, that the determination of disability should be made by a comparison of awards granted in similar cases. Instead, the Board finds that in the instant case the medical examination

justifies a finding that claimant is entitled to an award of 80° which represents 25% of the maximum for unscheduled disability.

ORDER

The order of the Referee, dated January 29, 1979, is affirmed.

WCB CASE NO. 78-6973 October 4, 1979

BRYAN TULK, CLAIMANT
Franklin, Bennett, Ifekt & Jolles,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which found claimant was not entitled to additional compensation for temporary total disability nor was he entitled to penalties and attorney's fees based upon the carrier's alleged unreasonable delay in the payment of compensation.

Claimant, at that time a 36-year-old printing supervisor, sustained an injury on January 5, 1977 when a shelf containing heavy paper collapsed and fell on him. Dr. Cohen, who saw claimant from the date of the injury, diagnosed contusion of the abdomen and hip and groin region and hospitalized claimant from January 5 through January 21, 1977. Dr. Cohen continued to be claimant's treating physician and on July 5, 1977 stated that he felt claimant was probably stationary and there would be some permanent partial disability resulting from his injuries. A week later Dr. Cohen stated that claimant was making slow improvement although he still had pain in his lower back, right hip, right thigh and both knees. He felt that the slow improvement would continue during the following year.

Claimant went to work for Alpha 4 Litho on October 26, 1977 and, at that time, benefits for time loss were terminated by the carrier for the defendant-employer. Claimant's new employment was as a cameraman stripper. He further testified that he was capable of performing work as a cameraman stripper but that he was assigned to other work which he was unable to perform and, therefore, left this employment on December 29, 1977.

Claimant said that the Alpha 4 Litho could not afford to keep him so that it was mutually agreed that he would leave and that would enable him to collect unemployment compensation. Claimant's employer at Alpha 4 Litho testified that the job required no heavy work and that he had never observed claimant having any physical difficulties doing the work nor did claimant ever make any complaints of physical problems. He stated that there was a gradual slowing down in the business and, therefore, it was not possible to keep claimant on a full time basis. He gave claimant the option of remaining employed on a part time basis or being terminated. Claimant chose the latter, according to the defendant-employer.

After claimant left his employment with Alpha 4 Litho he called the representative of the defendant-employer's carrier and advised her that he was physically unable to work and requested that compensation for time loss be reinstated. Apparently, the representative of the carrier hung up on claimant. She testified that she did so because she had had numerous conversations with claimant previously on the same subject and had told him that she needed medical verification for payment of time loss. She also testified that claimant told her he was going to find his own work.

On January 31, 1978 Dr. Cohen examined claimant and reported to the carrier that claimant was still complaining of severe pain, that he had examined claimant but could not find any specific orthopedic condition which would cause this pain. Dr. Cohen reported that claimant felt he was incapable of working and though Dr. Cohen did not know of any orthopedic treatment for claimant he did advise that claimant be examined by Dr. Uhle to determine whether any pathological disturbance was causing the complaints made by claimant.

On February 2, 1978 Dr. Uhle examined claimant and recommended further muscle reconditioning. Claimant returned to Dr. Cohen's care and was examined by him on February 14, 1978. On that date he reported to the carrier that he believed that claimant had pain and thought that it "was probably necessary for him to be off work during the six week period". He said he knew of no ready answers except for claimant to enter a different field of employment and further stated: "At the present time I do not think his claim is yet stationary".

Based upon Dr. Cohen's report, the carrier for the defendant-employer paid claimant compensation for temporary total disability from January 1, 1978 through February 14, 1978.

On March 8, 1978 Dr. Cohen reported to the carrier that claimant was unable to perform the work at Alpha 4 Litho and repeated that he was of the opinion that claimant's claim was not stationary and that the kind of work which he had been required to do was causing him too much pain and that he could not continue to do it. He recommended a referral to the Vocational Rehabilitation Division. On May 20, 1978 claimant became employed as a youth counselor on a job funded by CETA; he worked at this job until September 1978 when he commenced working full time publishing a small newspaper.

On December 13, 1978 the physicians at Orthopaedic Consultants examined claimant and found his condition was medically stationary. Claimant had mild loss of function to his pelvic and hip regions. On January 19, 1979 Dr. Cohen agreed with this report.

The claim has not yet been closed, therefore, the only question to be answered is whether the carrier for the defendant-employer had the right to terminate compensation for temporary total disability on February 14, 1978. The Referee, citing Jackson v. SAIF, 7 Or App 109 (1971), found that in the absence of a Determination Order the carrier was justified in terminating compensation for temporary total disability when claimant's doctor released him to return to regular work or when the claimant returned to regular work. The carrier was not required to pay compensation to a claimant who had returned to regular work even though his condition was not medically stationary. The Referee found that in this case claimant returned to regular work at Alpha 4 Litho on October 26, 1977 and the carrier terminated the payment of time loss benefits. The Referee found that claimant left his job with Alpha 4 Litho because of lack of work not because of his physical inability to do the work and that he thereafter continued to seek employment.

The Referee concluded that the carrier was not, under these circumstances, required to resume payment of temporary total disability compensation except upon medical verification of claimant's inability to work. The only medical verification of inability to work was Dr. Cohen's report of February 14, 1978, in the opinion of the Referee and the carrier paid for the six weeks which Dr. Cohen authorized. She denied claimant's request for additional compensation for temporary total disability and found no basis for the assessment of penalties or an award of attorney's fee.

The Board, on de novo review, finds that the carrier had on February 22, 1978 the report of Dr. Cohen dated February 17, 1978 and upon receipt of that report the carrier placed a memo in its file stating: "Before we pay more compensation benefits we want to talk to Dr. Cohen and confirm further facts with him." The carrier's representative admitted that she received from Dr. Cohen a report dated March 8, 1978 in which he stated, in part: "I am still of the opinion that the claimant's claim is not as yet stationary." The representative admitted that she received and read the report from Dr. Cohen, including the above quoted portion thereof but she did not recommend that the carrier pay claimant any time loss benefits beyond February 14. The evidence indicates that the responsibility for paying the time loss benefits was passed along to the service coordinator with a reference to whether or not claimant would get some form of vocational rehabilitation. The carrier's representative made no effort to find out whether that was ever done nor did she ever contact claimant again according to her own statements.

The Board finds that when the carrier received Dr. Cohen's letter of March 8, 1978 claimant had done all that the carrier had requested him to do. If the carrier, at that time, was not satisfied with Dr. Cohen's report there was nothing to prevent it from having claimant examined by another physician. Instead, the carrier's representative hung up the phone and her only excuse for the rude termination of the conversation between her and the claimant was that he had asked the same question before and she had repeatedly told him that he would have to have medical verification. That is exactly what Dr. Cohen's report of March 8, 1978 was.

The Board concludes that the actions of the carrier for the defendant-employer represent unreasonable refusal to pay compensation. At the time of the refusal, it had in its possession a medical verification of claimant's inability to work, a statement that claimant's condition was not medically stationary. In short, it had everything it needed to justify reinstatement of time loss benefits and should have commenced paying such benefits from February 14, 1978 until May 20, 1978 when the evidence indicates that claimant became employed as a youth counselor.

The carrier's refusal to pay this compensation justifies the assessment of penalties and an award of an attorney's fee to claimant's attorney.

ORDER

The order of the Referee, dated February 22, 1979, is reversed.

The employer and its carrier are hereby directed to pay claimant compensation for temporary total disability commencing on February 14, 1978, the date he was terminated by the carrier, to May 20, 1978, the date claimant became fully employed.

The employer and its carrier are further directed to pay claimant additional compensation equal to 25% of the compensation due claimant for temporary total disability from February 14, 1978 to May 20, 1978 as a penalty for their unreasonable refusal to pay compensation and are directed to pay claimant's attorney as a reasonable attorney's fee the sum of $450.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded claimant as a result of this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 77-4262 October 4, 1979
WCB CASE NO. 77-6559

In the Matter of the Compensation of
The Beneficiaries of
WILTON A. WENTWORTH, DECEASED
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

On September 25, 1979 the Board entered its Order on Review affirming and adopting the order of the Referee. It has come to the attention of the Board that it inadvertently failed to grant claimant's attorney a fee for his services at Board review.

On page one, the following paragraph should be inserted in the "Order" portion:

"Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund."

IT IS SO ORDERED.

WCB CASE NO. 78-4846 October 4, 1979

LYLE H. WIESE, CLAIMANT
C. H. Seagraves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

The claimant seeks review by the Board of the order of the Referee which granted him an award of 240° for 75% unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant was employed by Wells Logging and on July 8, 1975 he was struck in the back of the head by a snag. He was hospitalized and the diagnosis was severe comminuted fracture dislocation C1-2, cerebral concussion and cervical spondylosis C5-6. Claimant has not worked since this injury.

On July 16 Dr. Campagna performed an occipital cervical fusion. Claimant progressed well but on November 11, 1975 Dr. Campagna reported claimant was having severe dizzy spells. Claimant's neck motion was limited to 10% of normal in all directions with no weakness, atrophy or sensory loss. Claimant was not taking medication.

Dr. Campagna's closing evaluation report of April 15, 1976 indicated claimant felt he could not return to work in the woods. Claimant's neck motion was still limited by 10% but his condition was medically stationary. Dr. Campagna felt claimant could no longer be a timber faller and he rated his disability as moderately severe.

A Determination Order was issued on June 24, 1976 and granted claimant 96° for 30% unscheduled disability.

Claimant was evaluated at the Disability Prevention Center by Dr. Holm on April 15, 1977 and he reported claimant was asymptomatic except for limitation of motion of the cervical spine. He felt claimant did have a substantial vocational handicap but would qualify for light to medium work. Claimant must avoid work requiring looking up or rotation of the head. Vocational rehabilitation was recommended.

On October 25, 1977 a Second Determination Order granted claimant compensation for temporary total disability only.

By a report of September 7, 1978 Mr. Adolph, a vocational consultant, reported claimant had a high school education and was an average student. In Mr. Adolph's opinion claimant was best suited for motel or apartment house management as he could perform light maintenance, janitorial, security and clerical duties.

Mr. Malcom, another vocational counselor, testified at the hearing that claimant's testimony that he must lie down three hours a day precludes employment, as does claimant's residency which offers very few opportunities. He disagreed with Mr. Adolph that claimant could do motel/apartment house management as these jobs required quite heavy physical work.

Claimant testified that he can barely turn his head or look up and his neck is stiff. He has headaches intermittently.

The Referee found claimant impressive and motivated to return to work. Most of claimant's adult working life has been spent in the logging industry. However, he found there was no justification of a finding that claimant is incapable of working.

The Referee concluded that claimant was severely handicapped and was entitled to an award of 240° for 75% unscheduled disability.

The Board, on de novo review, concurs with the conclusion reached by the Referee.

ORDER

The order of the Referee, dated November 24, 1978, is affirmed.

WCB CASE NO. 77-5844 October 9, 1979

RUBY BOHL, CLAIMANT
Olson, Hittle, Gardner & Evans, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

On September 19, 1979 the Board issued its Order on Review in the above entitled matter whereby it affirmed and adopted the Opinion and Order of the Referee, a copy of which was attached to the Board's Order on Review and made a part thereof.

The request for review was made by the Fund and inasmuch as it failed to prevail claimant's attorney is entitled, under the provisions of ORS 656.386, to receive an attorney's fee payable by the State Accident Insurance Fund for his services at Board review. Inadvertently, the award of an attorney's fee was omitted from the Order on Review. Therefore, the Order on Review should be amended by inserting after the third paragraph on page one thereof the following:

> "Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $350, payable by the State Accident Insurance Fund."

In all other respects the Order on Review, dated September 19, 1979, should be reaffirmed and republished.

IT IS SO ORDERED.

CLAIM NO. D53-146770 October 9, 1979

DAVID P. CALAHAN, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury to his right knee on June 17, 1972 while working for John R. Wood Trucking, Inc. The original diagnosis was sprain and contusion of the right knee. The claim was first closed by a Determination Order dated October 3, 1972 which granted claimant compensation for temporary total disability only. Claimant's aggravation rights have expired.

Claimant continued to have problems with his knee and in November 1973 Dr. Thompson diagnosed internal derangement in the joint. The claim was reopened and a meniscectomy was performed in December 1973 and the claim was closed on September 9, 1974 with an award of compensation equal to 7.5° for 5% loss of the right leg.

Claimant saw Dr. Weinman in late 1978 who, on January 18, 1979, excised the torn lateral meniscus and a ganglion-like cyst which had formed in the joint. Claimant was released to work on March 12, 1979. Dr. Weinman's closing report indicated claimant was doing quite well on his right knee although he still gets a burning pain over the medial and lateral jointlines. Stability is good and there is no swelling; range of motion is 0-137 degrees. He considered claimant to be medically stationary with a little quadriceps atrophy on the right which claimant should work on with continued exercise.

On September 13, 1979 the carrier requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted compensation for time loss from January 18, 1979 through March 11, 1979 and additional compensation equal to 30° for 20% loss of the right leg.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 18, 1979 through March 11, 1979, less time worked, and compensation equal to 30° for 20% loss of the right leg. These awards are in addition to any previous awards claimant has been granted for his June 17, 1972 industrial injury.

WCB CASE NO. 77-7168 October 9, 1979

BRUCE A. COLLIER, CLAIMANT
Steven C. Yates, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The sole issue is determination of claimant's extent of permanent partial disability resulting from a compensable injury sustained on May 20, 1975.

Claimant injured his back while restacking 100-pound seed bags on pallets. He twisted to the left while lifting one of these sacks and felt a snapping sensation, with immediate aching of the interscapular area. He also had intermittent numbness and aching radiating into the area of the left trapezius down to the left elbow.

The claimant was first seen by Dr. Bassinger who diagnosed a cervical strain on the left, with a possible C6-7 nerve root injury. He took x-rays and prescribed a cervical collar for claimant and advised him not to work for awhile. Dr. Bassinger released claimant to return to work on August 4, 1975, stating he was somewhat skeptical that claimant would be able to return to work even for the employer at his job which required steady lifting of grain sacks weighing up to 100 pounds. He felt this type of work might reproduce the cervical sprain on the left and he felt that time would be needed before he could give an opinion on whether or not claimant's condition was stable. If claimant did not have a recurrence of his neck sprain within three months after he had returned to work then he would consider claimant's condition to be stationary and would feel that claimant had sustained no permanent injury as a result of the May 20, 1975 injury.

On January 8, 1976 a Determination Order was entered whereby claimant was awarded compensation for temporary total disability from May 21, 1975 through August 3, 1975, less time worked.

In May 1976 claimant experienced discomfort in his low back. He received medical treatment from Dr. Woolpert, an orthopedic surgeon, who, based upon his examination of claimant and the history given to him by claimant, felt that claimant should either have a myelogram to rule out definite disc pathology or assume a medically stationary condition inasmuch as he did not feel that further conservative treatment would give claimant much significant help. He recommended that claimant choose either course; claimant had been instructed to let him know within the next week of his decision.

On December 8, 1976 a panel of physicians at the Orthopaedic Consultants examined claimant and diagnosed a cervical-dorsal sprain, by history; lumbar sprain, subsiding, and congenital lumbarization of the first sacral segment with pseudoarthrosis of the left side. They felt that his condition was not stationary and believed he should have a strenuous physical rehabilitation program, as directed by his treating physician, with some consideration of referring him to the Workers' Compensation Board rehabilitation center. They stated he should be re-evaluated upon completion of their work-up and said they would hesitate to have a myelogram performed because their findings were not that impressive. They found claimant had a congenital anomaly and should not be employed in the heavy labor market.

The claimant was referred to the Disability Prevention Center (Callahan Center); his first appointment was for March 15, 1977. On April 6, 1977 Dr. Halferty, at the Center, examined claimant and recommended x-rays of the lumbosacral spine and also certain lab tests for rheumatoid factor. He also recommended that claimant be sent to the clinical psychology department for personality evaluation and vocational, interest and aptitude testing and also to physical therapy and occupational therapy for progressive training and indoctrination program and stabilizing exercises for the low back and the optimum use of the low back; also for observation of vocational tolerances and proclivities and progression to general conditioning program including heated swimming pool.

On July 14, 1977 Dr. Fitchett examined claimant. Dr. Fitchett was able to review the records from Dr. Woolpert's office and also the evaluation done by Dr. Halferty. Based upon these and his examination of claimant, Dr. Fitchett recommended claimant should remain as active as possible, selecting tasks which were commensurate with his physical activities. He did not feel that claimant should be involved in any heavy manual labor at that time and recommended that he proceed with an exercise program primarily oriented towards his abdominal muscles and also towards hamstring stretching exercises.

On October 27, 1977 claimant was mailed a notice of referral for vocational rehabilitation. However, because of non-attendance claimant was dismissed before an evaluation could be completed. An on-the-job training program in auto mechanics was set up for claimant but on November 8, 1977 claimant's wife called the counselor and stated that claimant was dropping out of that program and wanted to go to school. Later, claimant called the counselor and said he did not want to continue with the on-the-job training because of Dr. Fitchett's report. This report indicated that Dr. Fitchett hoped claimant was being oriented more towards small machine mechanics or bench mechanics and that he did not feel, at that time, that he was capable of doing a regular, hard mechanics work which involved such things as moving engines, going into exaggerated bending and stooping positions. Claimant was also involved in two other vocational programs, neither of which he completed.

On February 21, 1978 claimant's claim was closed by a Determination Order which awarded him additional compensation for temporary total disability and 32° for 10% unscheduled low back disability. Claimant's condition was found to be medically stationary as of November 9, 1977. On August 28, 1978 a Determination Order awarded claimant additional compensation for temporary total disability and on December 4, 1978 an Administrative Determination Order which indicated that claimant subsequent to the Determination Order of August 28 had been referred to Vocational Rehabilitation and that said program had been terminated, granted claimant additional compensation for temporary total disability from September 18, 1978 through October 30, 1978. The order stated that upon re-determination claimant's disability was found to be the same as that determined on the Determination Order of August 8, 1978 and the aggravation date of January 8, 1976 remained unchanged.

The Referee found that other than odd jobs claimant has not worked since 1975. Previous to his injury all of his employment involved bending, lifting and/or stooping. None of these jobs are now available to claimant because of the limitations placed upon his work activities by the doctors who have examined him. Claimant testified that even with such limitations he had applied, without success, for employment at service stations, mills, a mobile home plant and a fiberglass boat plant. He also testified that he doubted that he could have done any these jobs because of his limitations.

Claimant's credibility was attacked on the grounds that he appeared uncertain of dates and specifics relating to the various vocational programs; however, the Referee found that the history he gave the doctors was fairly consistent and, therefore, the medical records have provided a reliable source to be used in determining claimant's extent of disability.

She found that claimant's confusion about the vocational programs and his failure to complete them substantiated the questioning of his interest to obtain retraining which would enable him to return to work. At the present time claimant is not on compensation and he appeared to the Referee to resist any help which was available to him through the state for vocational rehabilitation. His attitude apparently was that he had not been helped by the state and that he could do just as well on his own.

The Referee found that claimant's refusal to allow a realistic evaluation to be made of his vocational rehabilitation made it very difficult to determine the extent of his disability. She did not feel that the loss of wage earning capacity of claimant could be properly evaluated until his vocational abilities are determined. Claimant had the responsibility to make a reasonable effort to reduce his disability and to attempt to become employable even if it required retraining. Claimant had been given several opportunities to return to the labor market through retraining but for various reasons failed to avail himself of such opportunities.

However, the Referee found uncontradicted medical evidence that claimant could not return to heavy manual labor and it had been specifically stated by the several physicians who had treated claimant that he should do nothing heavier than medium work. She concluded that based upon the medical evidence alone claimant had some permanent disability which prevented him from returning to the previous types of employment in which he had engaged prior to his industrial injury. However, she stated she was unable to determine the extent of his job potential based on the lack of successful vocational training. She awarded claimant an increase of 10% over his prior award.

The Board, on de novo review, agrees with the conclusion reached by the Referee that claimant is entitled to 64° which represents 20% of the maximum for unscheduled disability.

The sole criterion for determining the extent of unscheduled disability is the worker's loss of wage earning capacity. It is obvious from the medical evidence that claimant cannot return to any of the types of employment in which he engaged before he was injured, therefore, it is a reasonable assumption that a certain segment of the labor market is no longer available to claimant and that he should be compensated for the resulting loss of wage earning capacity.

ORDER

The order of the Referee, dated April 24, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

WCB CASE NO. 78-2113 October 9, 1979

PATRICIA A. GEESEY, CLAIMANT
Galton, Popick & Scott,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which denied claimant's claim for reopening and found claimant was not entitled to an award for permanent partial disability.

Claimant suffered a compensable back injury on March 12, 1977 while attempting to lift a rug shampooer. At the time claimant was injured she and her husband were assistant managers of an apartment complex. She sought medical attention at the Kaiser Foundation Hospital where her injury was diagnosed as a cervical dorsal strain, and treatment was conservative.

Claimant was examined by Dr. Shlim who reported on September 15, 1977 that, after palpating her back, he found that she was tender through the back area. He found no areas of muscle spasm. The neurological examination was entirely normal and although claimant complained of pain in her back radiating into her legs the examination did not support any abnormal findings. Dr. Shlim felt that claimant should have an orthopedic consultation and noted that she had an appointment to see Dr. Geist on September 16. He felt there was tremendous functional overlay and a severe psychological reaction and he was unable to ascertain the degree of organic disease that claimant had but it was his impression that it was minimal.

Dr. Geist examined claimant on September 16, 1977 and, as a result thereof, was doubtful that claimant would respond to any type of treatment. He found claimant had complaints far out of proportion to any objective findings and her physical findings were not compatible with any serious organic disease or injury. He did not think she would respond favorably to vocational rehabilitation. He recommended that her claim be closed and her disability rated. He thought she was capable of doing light to moderate work if properly motivated.

In November 1977 Dr. Zimmerman recommended that claimant be enrolled at the Callahan Center, stating that he felt claimant had been inadequately rehabilitated. Claimant did not report to Callahan Center on January 13, 1978 as scheduled because she felt the procedure would take too long and she didn't want to leave her husband for that period of time.

On March 2, 1978 a Determination Order was entered which awarded claimant compensation for temporary total disability from March 12, 1977 through January 13, 1978, less time worked. Her failure to keep her appointment at the Callahan Center was the basis for the closure of the claim as recited in said Determination Order.

On October 30, 1978 Dr. Pasquesi examined claimant. At that time claimant was complaining that pain between the shoulder blades and extending up to the occiput. She claimed she has headaches almost every day and takes Tylenol #3. Based upon his examination and the history of claimant's complaints, Dr. Pasquesi was of the opinion that since claimant had had the symptoms for approximately a year-and-a-half she probably had chronic cervical and dorsal instability of some sort. He rated this instability as moderate and stated that claimant had 10% impairment of the whole man on the basis of the chronic moderate pain, probably secondary to ligamentous or articular imbalance which could not be objectively determined. He felt claimant should be able to return to some type of work which would not require repetitive bending, stooping, twisting or lifting more than 30 pounds. However, his general impression was that claimant has a great amount of functional overlay or depression and he was unable to determine how much had been caused by her industrial accident. Although from an orthopedic standpoint she was stationary, Dr. Pasquesi suggested claimant be seen and evaluated by a psychiatrist and/or a neurologist to determine if she had problems in addition to her orthopedic condition which might be related to the industrial accident.

According to claimant's testimony, she had had several jobs of short duration since her industrial injury. Each job had been just a little too much for claimant to tolerate. Claimant testified that she had to soak in a bathtub and to lie down at home after work. She felt her present problems were worse and that she was swollen on the top of her shoulders and neck and had muscle spasms; she also had swelling at her ankles.

The Referee found that claimant had failed to meet her burden of proof. He found no substantial medical evidence to support claimant's many and varied subjective complaints that were non-anatomical in nature. Claimant has had a longstanding psychological depression problem, according to Dr. Pasquesi, which pre-existed her injury on March 12, 1977 and the Referee found no evidence that these pre-existing problems were activated by her industrial injury. He concluded that claimant's request to reopen her claim should be denied and by finding that she was not entitled to an award for permanent partial disability did, in effect, affirm the Determination Order of March 2, 1978.

The Board, on de novo review, finds that although claimant has substantial functional overlay which has hindered the several physicians who have examined claimant in their attempt to determine the amount of disability attributable to her industrial injury, nevertheless, the medical evidence does indicate claimant has lost a small portion of her wage earning capacity as a result of her industrial injury. Claimant, at the time of the injury, was engaged in an occupation involving work considered moderately heavy. Since her injury, claimant has had five separate jobs, all of short duration and most of them requiring physical exertion. Her first job at Oak Villa as a nurse's aide caused her so much back pain she was unable to return to it. The next job was working for Del-Lu Health Care Center as a housekeeper; she lasted approximately a month. The head of the center testified that claimant was not terminated but she simply did not show up for work. Claimant also had three other jobs; two involving similar types of work and one as a bartender.

Dr. Pasquesi, who examined claimant at the request of the carrier, found that she had a moderate impairment equal to 10% of the whole man. Dr. Pasquesi could not find any objective orthopedic findings but he recommended that claimant be seen by a psychiatrist and/or a neurologist to determine if she had other problems which might be related to the industrial injury. The carrier never responded to this suggestion.

Claimant has a 10th grade education and her background is of menial work activity with no specialized training. Claimant appears well motivated to work as evidenced by her various attempts to work after her industrial injury. Because of her industrial injury claimant is precluded from any type of work which involved lifting, bending and stooping and those limitations prevent claimant from returning to the only type of work in which she has had any experience prior to her industrial injury.

The Board concludes that claimant is entitled to an award of 48° which represents 15% of the maximum allowable by statute for unscheduled disability.

ORDER

The order of the Referee, dated April 4, 1979, is reversed.

Claimant is awarded 48° of a maximum of 320° for 15% unscheduled low back disability. This award for permanent partial disability is in addition to the award granted claimant for temporary total disability by the Determination Order entered on March 2, 1978.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this Board review a sum equal to 25% of the increased compensation granted claimant by this order, payable out of said compensation as paid, not to exceed a maximum of $3,000.

SAIF CLAIM NO. HC 214818 October 9, 1979

RUBY J. IRVINE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

In early 1979 claimant requested that the Board exercise its own motion jurisdiction and reopen her claim for an injury sustained on November 1, 1969. Claimant's claim was first closed on March 19, 1971 and her aggravation rights have expired.

The Board, on February 28, 1979, requested that claimant forward current medical reports in support of her contentions and she subsequently furnished the Board with Dr. T. L. Miller's March 19, 1979 report which indicated claimant was dislocating her right shoulder periodically.

The Board again wrote to claimant, asking for a report which related these episodes to her 1969 industrial injury. On June 11, 1979 the Board received a report from Dr. Miller reiterating the same information he stated in his earlier report but adding that these dislocations were related to her 1969 injury and her disability was probably aggravated due to these episodes. Claimant also advised the Board that she had been seen by Dr. Lisac who had recommended surgery.

On June 13, 1979 the Board requested the Fund to advise it within 20 days of its position with respect to claimant's request for own motion relief. The Fund stated it wanted to have claimant examined by the Orthopaedic Consultants before it made any decision. An appointment was made for claimant on July 10, 1979. Claimant failed to keep it. After two letters from the Board claimant finally was examined by the Orthopaedic Consultants on September 4, 1979. They indicated to the Fund that claimant's dislocation problems were associated with the industrial injury of 1969 by history.

The Fund, on September 24, 1979, indicated it would not oppose reopening.

The Board, after thoroughly considering the medical evidence before it, finds that claimant's claim should be reopened. There is no medical report from Dr. Lisac in the record but apparently the surgery he recommended was also recommended by Dr. Miller. The Board feels the claim should be reopened as of that date of this recommended surgery.

ORDER

Claimant's claim for an industrial injury sustained on November 1, 1969 is hereby remanded to the State Accident Insurance Fund for payment of compensation, as provided by law, commencing on the date claimant is hospitalized for the recommended surgery and until closed pursuant to ORS 656.278.

CLAIM NO. D53-135664 October 9, 1979

ALFRED J. MERRITT, CLAIMANT
Own Motion Order

On May 25, 1979 the Board entered its Own Motion Order in the above entitled matter whereby claimant's claim for an industrial injury sustained on September 22, 1969 was remanded to the Employers Insurance of Wausau for reopening commencing March 5, 1979 and until the claim was closed pursuant to ORS 656.278.

Subsequent to the issuance of the Own Motion Order, Wausau arranged to have claimant examined by a panel of physicians at the Orthopaedic Consultants on May 20, 1979. That appointment was not kept. Another appointment for claimant to be examined was set for July 17, 1979.

On July 23, 1979 Dr. Warren Anderson, a neurologist, and Dr. Orville N. Jones, an orthopedic surgeon, both members of the Orthopaedic Consultants, advised Wausau by letter that their evaluation of claimant was terminated prematurely because claimant became hostile and abusive and refused to answer questions regarding his medical history and pertinent personal history. The panel of physicians made clear to claimant that he could stay and complete the examination but only if he were to be cooperative about it and that if he did not feel that he could be cooperative in answering the questions which they felt necessary it would be best for him to terminate the examination. Claimant chose to terminate the examination.

On August 21, 1979 Wausau requested the Compliance Division of the Workers' Compensation Department to give it permission to terminate compensation payments to claimant on the basis of lack of cooperation and medical examinations. This claim was opened under the Board's own motion jurisdiction granted to it pursuant to ORS 656.278, therefore, if the carrier requests permission to terminate the compensation to claimant for temporary total disability which it was ordered to pay by the Board's Own Motion Order of May 25, 1979 its request must be directed to the Board. The provisions of ORS 656.325 do not apply.

The Board notes that on June 18, 1979 the Compliance Division of the Workers' Compensation Department advised claimant that they were allowing Wausau to suspend payment of compensation to claimant as of May 30, 1979 because of his failure to keep the first medical examination appointment. This consent to suspend is of no force or effect. The carrier, if not notified by claimant within 30 days that he will submit to an examination by a physician of their choice, does not have the right to request the Department to issue a Determination Order closing claimant's claim. Only the Board can enter a closure of claimant's claim under the provisions of ORS 656.278.

The above is set forth with the hope that it will clarify similar situations which may arise in the future.

The letter which Wausau wrote under date of August 21, 1979 and the attached letter signed by Dr. Anderson and Dr. Jones, under date of July 23, 1979, convinces the Board that Wausau should be permitted to terminate payment to claimant of compensation for temporary total disability directed to be paid claimant by the Own Motion Order of May 25, 1979.

Inasmuch as claimant did call and explain why he was unable to keep the first appointment, the Board concludes that the suspension of payment of compensation should commence as of the date of the second medical examination, July 17, 1979 and continue until claimant appears before, and cooperates with, a doctor or doctors designated by Wausau to examine him. In the event that claimant fails to do this, upon request from Wausau, the Board will give consideration to the entry of an Own Motion Determination order closing claimant's claim pursuant to ORS 656.278.

ORDER

The employer, Archer Blower and Pipe Company, and its carrier, Employers Insurance of Wausau, are hereby permitted to suspend payment of compensation for temporary total disability to claimant as directed by the Own Motion Order, dated May 25, 1979 and to continue to suspend payment until claimant receives a full examination by a physician or physicians designated by the carrier.

WCB CASE NO. 78-9593 October 9, 1979

DOROTHY I. REED, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' 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.

CLAIM NO. D53-142786 October 9, 1979

WILLIAM ROTHWELL, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury on August 20, 1971. His claim was closed on May 15, 1973 and his aggravation rights have expired. Claimant has been granted awards totalling 96° for 30% unscheduled pelvis disability and 15% loss of function of the right leg.

On July 20, 1979 the Board reopened claimant's claim based on a report by Dr. Edwards indicating claimant would need a hernia operation. He felt claimant's hernia had been aggravated by an injury to his pelvis or groin and, therefore, related it to claimant's 1971 industrial injury. Surgery was performed on May 1, 1979. On August 3, 1979 Dr. Edwards stated that claimant was medically stationary as of June 15, 1979 and no permanent disability would result from the surgery.

On September 19, 1979 the carrier requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department found that claimant was entitled to additional compensation for time loss from May 1, 1979 through June 15, 1979. Based on Dr. Edwards' report, it felt claimant was not entitled to any further permanent disability award.

The Board concurs.

ORDER

The claimant is hereby granted compensation for temporary total disability from May 1, 1979 through June 15, 1979, less time worked. This award is in addition to any previous awards claimant has been granted for his August 20, 1971 industrial injury.

SAIF CLIAM NO. C 88939 October 9, 1979

GEORGE ZOLNIKOV, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 12, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury to his low back sustained on August 11, 1967. Claimant's aggravation rights have expired. Attached to the petition were several medical documents in support of claimant's request. Claimant indicated in his request that his low back disability had progressed to the point that in June 1977 he was no longer able to work as an upholsterer or at any other job for which he was suited. Claimant contends his present condition is related to his 1967 industrial injury.

On March 27, 1979 the Board informed the Fund of claimant's request and asked it to advise the Board of its position with regard thereto. It took the Fund several months to reconstruct the file and on September 24, 1979 it forwarded to the Board a report from the Orthopaedic Consultants with the statement that the Fund opposed reopening the claim.

Dr. Campbell, on November 13, 1978, had indicated claimant had numerous complaints; however, the objective findings were essentially normal. He referred claimant to Dr. Kloos who found no positive neurological findings. The Orthopaedic Consultants, on August 28, 1979, stated claimant's present symptoms were secondary to the natural progression of his underlying degenerative disc disease and not causally related to his 1967 industrial injury. They recommended conservative treatment only.

The Board, after thoroughly considering the evidence before it, finds that it is not sufficient to warrant a reopening of claimant's claim at this time. The request by claimant for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-3907 October 11, 1979

SALLY AKIN, CLAIMANT
Gary J. Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant had requested the Board to reopen her claim for an injury sustained on March 30, 1972 through the exercise of its own motion jurisdiction granted by ORS 656.278. Claimant believed her aggravation rights with respect to that claim had expired.

Previously, claimant had requested a hearing on the Determination Order issued on August 10, 1977 (WCB Case No. 78-3907). The issues involved in that case were whether claimant's condition was stationary at the time of claim closure, claimant's entitlement to compensation for temporary total disability from July 26, 1977 forward and extent of disability.

On May 12, 1978 the Fund had denied claimant's request to reopen her claim on the basis that she had sustained a new injury on January 10, 1978 rather than an aggravation of her pre-existing condition. The claimant requested the Board refer her petition for own motion relief to its Hearings Division to be heard together with the issues created by the Fund's denial. The Board did so by order, dated July 18, 1979, and instructed the Referee conducting the hearing to determine whether there was justification to grant the relief claimant requested and to determine the propriety of the Fund's denial, dated May 12, 1978.

As a result of the hearing, Referee Fink issued his Opinion and Order on September 19, 1979 affirming the Fund's denial dated May 12, 1978 based upon his conclusion that the January 10, 1978 was not an aggravation of the March 30, 1972 industrial injury. He further found that claimant's claim was still in an open status when the Determination Order of August 10, 1977 was issued, therefore, she was entitled to claim closure pursuant to ORS 656.268 rather than ORS 656.278.

On October 1, 1979 Referee Fink forwarded to the Board a transcript of the proceedings together with his recommendation that the Board do not exercise its own motion jurisdiction.

The Board has been advised that claimant, by and through her attorney, has requested Board review of the Referee's Opinion and Order, dated September 19, 1979 and, therefore, it is not necessary in this order to restate the findings and conclusions upon which the Referee based his recommendation.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an injury sustained on March 30, 1972 is hereby denied.

WCB CASE NO. 78-9307 October 11, 1979

PAUL BRESNEHAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Roger R. Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated December 21, 1978 which awarded claimant 176° for 55% unscheduled low back disability. Claimant contends that he is permanently and totally disabled.

Claimant, at the time of his injury on October 29, 1971, was a 59-year-old heavy duty mechanic who had worked 21 years for the defendant/employer. On October 29 claimant fell backwards from a tractor onto the ground and, as a result, suffered a fractured right wrist, and a compression fracture at L1. Claimant was originally treated by Dr. Logan who hospitalized claimant and prescribed a back support and also a cast for his fractured right wrist.

On December 5, 1974 claimant was examined by Dr. Pasquesi who rated claimant's impairment at 35% for cervical and lumbar spine and 16% loss of the right upper extremity.

On December 16, 1975 he was examined by the panel of physicians at the Orthopaedic Consultants who diagnosed healed compression fracture L1 with adjacent osteoarthritis, spondylolisthesis L5-S1 with degenerative joint disease L5-S1 and L4-5, spondylosis three levels cervical spine and osteoarthritis of carpal radial joint right wrist. Claimant's condition was medically stationary and claimant was precluded from his regular occupation but was employable. Claimant was not permanently and totally disabled.

On February 26, 1976 the claim was closed by a Determination Order which awarded claimant compensation for temporary total disability from October 31, 1971 through December 16, 1975 and 15° for 10% loss of the right forearm and 112° for 35% unscheduled low back disability.

Claimant requested a hearing on the adequacy of the award and, as a result of that hearing, the Referee granted claimant 176° for 55% unscheduled disability, being an increase of 20% over the award made by the Determination Order, and affirmed the award of 15° for 10% loss of the right forearm. This award was affirmed by the Board and the circuit court.

On April 13, 1978 Dr. Cruickshank reported claimant still had low back pain and had claimant's low back x-rayed. He referred claimant to Dr. Goodwin.

On May 1, 1978 Dr. Goodwin, an orthopedic surgeon, advised Dr. Cruickshank that upon examining claimant he had found some chronic instability of the lumbar spine L4 to the sacrum, and some element of compression of cauda equina due to spondylolisthesis, weakness of abductors of the right hip and atrophy of quadriceps on the right in all probability associated with his low back. His opinion was that claimant could be improved by a posterior decompression such as a Gill procedure and he would not entirely rule out a transverse process fusion at the same time.

On June 9, 1978 Dr. Cruickshank performed a Gill procedure, with decompression of the cauda equina and S1 nerve roots, bilaterally.

On August 2, 1978 claimant was re-examined by the physicians at the Orthopaedic Consultants. Their diagnoses were as previously expressed in their December 22, 1975 report plus additional diagnoses of spinal stenosis. They felt that claimant's condition was stationary and did not recommend any further treatment. They believed that claimant's present symptoms were partly due to the industrial injury but said it was impossible to determine with reasonable medical probability whether the present symptoms would have occurred without that injury or to say whether or not the same problems would have occurred whether he had the accident or not. They stated that the spinal canal stenosis was not caused by the injury and emphasized that the condition

appeared to be stable following the examination in 1975 until approximately five months before their re-examination on August 2, 1978 when claimant commenced complaining of numbness in his legs. Dr. Cruickshank concurred in the opinion expressed by the Orthopaedic Consultants, with the exception that he felt the condition of spinal stenosis was related to the industrial injury.

On December 21, 1978 a Second Determination Order awarded claimant additional compensation for temporary total disability from May 1, 1978 through October 10, 1978 but no additional compensation for permanent partial disability in excess of that granted by the Referee in his Opinion and Order dated June 18, 1976.

Claimant has a 9th grade education and has not worked since 1971 and has sought no employment. However, in May 1977 claimant drove a pickup to Swan Island and delivered the employer's products to shippers two-three times a week for almost a year. He was paid 18 cents a mile and $4.00 an hours.

The Referee found that the medical evidence did not support a finding that claimant's condition was worse at the present time than it was on December 21, 1978, the date of the last award or arrangement of compensation which claimant received.

He concluded, based primarily on the report from the Orthopaedic Consultants, dated August 15, 1976, in which Dr. Cruickshank concurred, that the Second Determination Order which affirmed the award granted by the Referee's Opinion and Order and awarded claimant some additional compensation for temporary total disability adequately compensated claimant for his loss of wage earning capacity.

The Board, on de novo review, affirms the conclusion reached by the Referee. The evidence indicates that this claimant has sustained a substantial loss of wage earning capacity as a result of his industrial injury; there is no doubt that he cannot return to his former occupation in which he had engaged since 1951 nor can he return to any type of work which involves heavy manual labor. However, claimant can return to other types of employment and has made no attempt to seek retraining. In fact, the record indicates there is a good basis for concluding that claimant had decided to retire in view of his physical infirmities although they do not appear to be as severe or as constant as he would portray them to be.

With respect to the award for the scheduled member, the Board concurs that the award of 15° for 10% loss function of the right forearm adequately compensates claimant for the loss function of that scheduled member.

ORDER

The order of the Referee, dated April 9, 1979, is affirmed.

WCB CASE NO. 78-552 October 11, 1979

CLYDE CATHCART, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

The claimant seeks review by the Board of the Referee's order which awarded him 37.5° for 25% loss function of the left leg and 154.5° for 48.28125% unscheduled low back disability in lieu of the award granted by the Determination Orders. Claimant contends he is permanently and totally disabled.

Claimant suffered a prior compensable injury in December 1959 for which he subsequently underwent two laminectomies and a fusion. Claimant testified that after this surgery he continued to have intermittent problems until 1965.

At the time of the injury before us, January 14, 1972, claimant was employed as a welder for Weyerhaeuser and on that date he slipped in some oil and fell, re-injuring his back.

Dr. Hews, a chiropractor, initially diagnosed lumbosacral facet syndrome with associated sciatic neuralgia and injury to supportive tissue.

In October 1972 Dr. Pasquesi examined the claimant and rated his impairment at 28% of the whole man.

Claimant was examined by the Back Evaluation Clinic in February 1974 and the report indicates claimant should now avoid prolonged sitting and heavy lifting. Total loss of function was mildly moderate and claimant's condition was medically stationary.

On June 17, 1974 a Determination Order granted him 96° for 30% unscheduled disability.

Claimant testified that after this injury he returned to work for four days, then quit until May 1972 and then he was off and on the job for the next three years until he was forced to quit his employment because of his back, in December 1975.

Claimant's claim was reopened for an aggravation in September 1974 and he was again found stationary in December 1974. A Second Determination Order of June 19, 1975 granted claimant additional time loss only.

On July 1, 1975 claimant was examined by Dr. Nielsen who found muscle spasms and diagnosed disc syndrome with paresthesia and radiculitis over the branches of the left sciatic nerve into the left leg and foot.

Claimant was re-examined by Dr. Pasquesi who reported on December 9, 1976 that claimant's total impairment of the whole man was 46%. Claimant could perform light work but he did have a chronic heart problem and this heart condition was more important in respect to the restrictions placed on claimant's work activities, although the back condition was also limiting.

A Third Determination Order of January 5, 1978 granted claimant 96° for 30% unscheduled disability giving claimant an award to date of 60% unscheduled disability.

Claimant underwent a neurological examination performed by Dr. LaFrance on May 15, 1978. The examination revealed slight weakness over the left anterior tibia and questionable atrophy, hypesthesia along the entire lateral aspect of the left leg and the entire dorsum of the left foot. The diagnosis was chronic mild nerve root impingment of the L5 root. Dr. LaFrance felt that claimant, objectively and subjectively, could not hold a regular productive job.

Mr. Maddox, a vocational consultant, reviewed claimant's file and reported that, in his opinion, claimant was permanently and totally disabled.

On September 6, 1978 claimant was examined by the Orthopaedic Consultants who diagnosed degenerative disc disease, severe and chronic emphysema. Claimant's condition was medically stationary and considering claimant's level of disability, his age, cardiac and lung problems, claimant was unemployable. Total loss of back function from this injury was rated as moderately severe.

Claimant had undergone vocational rehabilitation after his 1959 injury in heliarc welding. Claimant has an eighth grade education, was 64 years old at the time of the hearing, and had work experience on a dairy farm, as a millwright, a welder and a steamfitter.

Mr. Rollins, a vocational rehabilitation consultant, testified at the hearing, that in his opinion claimant was employable and named many jobs he felt claimant could perform and which were available on the labor market.

The Referee found claimant was not credible and that he had voluntarily retired from the labor force. He did feel that claimant's compensation should have included some loss of function of his left leg. He concluded that claimant had not carried his burden of proving that he was entitled to any greater award for unscheduled disability. He granted claimant 37.5° for 25% loss of the left leg and 154.5° for 48.28125% unscheduled low back disability.

The majority of the Board, on de novo review, finds that the medical evidence indicates that claimant has sustained a much greater loss of wage earning capacity than thus far awarded However, the majority of the Board finds that the evidence is not sufficient to support a finding that claimant is permanently and totally disabled.

The majority of the Board concludes there was no basis for doubting claimant's credibility and claimant would be adequately compensated by an award of 75% for his loss of wage earning capacity.

ORDER

The order of the Referee, dated March 1, 1979, is modified.

Claimant is hereby granted an award of 240° for 75% unscheduled low back disability. This award is in lieu of the award granted by the Referee's order for claimant's back disability; the order, in all other respects, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

Board Member Phillips dissents as follows:

I respectfully dissent from the majority opinion of the Board and find claimant is permanently and totally disabled.

I find that the evidence in the record indicates most of claimant's entire work history has been as a welder or steamfitter; jobs which claimant is now totally precluded from performing due to this industrial injury. Claimant, based on the medical restrictions placed on him, can now only perform work not requiring prolonged sitting or heavy physical labor.

The later medical reports of record, by Dr. LaFrance, based on objective clinical findings and claimant's subjective complaints, indicate that claimant could not hold down a regular productive job. The opinion of the Orthopaedic Consultants was that claimant's impairment from this injury was rated as moderately severe.

Based on these medical opinions, claimant's age of 64, his entire work history involving heavy physical labor from which he is now precluded and the unfeasibility of vocational retraining, I find that claimant's loss of wage earning capacity is permanent and total.

SAIF CLAIM NO. B 116636 October 11, 1979

WILLIAM V. GELBRICK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left eye on March 31, 1965. His claim was originally closed on December 6, 1965 with an award equal to 50° for 50% loss of vision of the left eye. Claimant's aggravation rights have expired.

Claimant continued to have problems with the eye and on August 16, 1978 Dr. Chenoweth recommended surgery to reattach the retina in the left eye. Surgery was scheduled for November 27, 1978. The Board, by an Own Motion Order dated December 7, 1978, reopened claimant's claim as of November 27, 1978 for the recommended surgery.

Because claimant's claim had not been reopened in time, claimant's surgery was not performed until January 9, 1979. The surgery was successful physically, but the functional result was very poor. Claimant has been unable to see from the left eye since the surgery and should be considered to be functionally blind in that eye.

On July 26, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on October 3, 1979, recommended claimant be granted compensation equal to 50° for 50% loss of vision of the left eye for a total award of 100% and temporary total disability from November 27, 1978 to March 12, 1979 (claimant returned to work on March 13, 1979).

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 27, 1978 through March 12, 1979 and compensation equal to 50° for 50% loss of vision of the left eye. These awards are in addition to all awards previously granted claimant for his March 31, 1965 injury. The record indicates, that claimant has already been paid a portion of the time loss benefits due him.

WCB CASE NO. 79-199 October 11, 1979

GREGORY REID, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the order of the Referee which reopened claimant's claim for aggravation as recommended by Dr. Maurer and ordered it to provide claimant the benefits to which he is entitled by law and awarded claimant's attorney an $800 attorney fee.

Claimant was employed by the Josephine County Forestry Department and on January 17, 1978 he fell backwards off a log and injured his back. Claimant was hospitalized and underwent conservative care.

On February 2, 1978 Dr. Renaud examined claimant in consultation and diagnosed radiculopathy with paresthesia on the lateral aspect of the foot associated with low back pain. Claimant had marked functional overlay. Dr. Renaud felt that the diagnoses of paresthesia and spondylolisthesis were consistant with claimant's complaints. The doctor did consider the possibility that claimant might be a malingerer but was unable to say that he was.

On February 2, 1978 claimant was evaluated by Dr. Kaufman, a psychiatrist, who diagnosed an inadequate personality with sociopathic tendencies. He was not willing to say that claimant's pain was imagined. He did feel there was reason to believe that there was considerable manipulation and secondary gain factors present.

On February 3, 1978 claimant was examined by Dr. Campagna. He diagnosed spondylolisthesis L5-S1 bilaterally and bilateral ulnar palsy. A myelogram was recommended and carried out which affirmed the diagnosis of spondylolisthesis.

Dr. Shapiro, another psychiatrist, evaluated claimant on February 21, 1978 and felt that claimant had conversion reaction. He commenced psychiatric counseling.

Claimant testified that on April 17, 1978 he had low back and left leg pain and was wearing a back brace. On this date he was visiting his brother who was feeding his horse and the horse became spooked. A chain snapped and flew through the air striking claimant in the forehead and glancing off of his shoulder. He testified the blow did not knock him down nor did it injure his back. Claimant was taken to the hospital and had many stitches taken in his head. Claimant's testimony was corroborated by that of his brother.

On April 18, 1978 claimant had a re-check examination by Dr. Campagna. Dr. Campagna felt claimant's back condition was stationary with no disability from the January 1978 industrial injury and that claimant's present symptoms were related to the April 17 incident.

On May 24, 1978 a Determination Order granted claimant compensation for temporary total disability only.

Dr. Shapiro referred the claimant to Dr. Maurer on September 1, 1978. Dr. Maurer's diagnosis was chronic lumbosacral strain secondary to spondylosis L5 and its related spondylolisthesis. The doctor felt this defect appeared to be congenital but was aggravated by claimant's industrial fall.

On November 20, 1978 Dr. Maurer requested the Fund to reopen claimant's claim for surgery. He felt claimant had severe debilitating pain and claimant was emotionally mature enough to tolerate the recommended surgery. Dr. Maurer felt claimant's pain was real.

On November 28, 1978 Dr. Maurer performed surgery for a lumbosacral fusion.

On December 5, 1978 the Fund denied the claim for aggravation on the ground that the more recent injury was responsible for claimant's condition.

The Referee felt this was a close case and hinged on the credibility of the witnesses. He concluded that Dr. Maurer's opinion was persuasive to him and claimant's testimony was corroborated and he remanded the aggravation claim to the Fund for acceptance.

The majority of the Board, on de novo review, disagrees with the conclusion reached by the Referee. The majority of the Board finds the opinion expressed by Dr. Campagna to be more persuasive. Dr. Campagna had treated claimant after his January 1978 industrial injury, had a full history of the intervening incident of April 17 and based on this opined that claimant's present problems were not related to the industrial injury.

Therefore, the majority of the Board concludes that the denial of aggravation must be affirmed.

ORDER

The order of the Referee, dated April 12, 1979, is reversed.

The State Accident Insurance Fund's denial of claimant's aggravation claim, dated December 5, 1978, is hereby affirmed.

Board Member Phillips dissents as follows:

I respectfully dissent from the majority opinion of the Board and would affirm the conclusions reached by the Referee.

I find the testimony of the claimant, which was corroborated by his brother concerning the incident of April 17, 1978, to be uncontradicted in the record. I find their testimony to be credible as it is supported by the hospital report of April 17. That report indicates that the injury on that date required 45 stitches in claimant's forehead and that he suffered tenderness over the distal clavical. This report makes no mention of any further injury to claimant's back, nor did claimant have any back complaints.

Because there is no proof that the April 17 incident was an intervening injury in relationship to his back condition that in any way aggravated that condition and because of lack of evidence of any other cause for claimant's continuing symptomatology, I give Dr. Maurer's opinion the greater weight over that of Dr. Campagna.

Dr. Maurer felt that claimant's continuing problems were caused by a congenital defect which was aggravated by claimant's fall at the time of his industrial injury. I would affirm the Opinion and Order of the Referee.

SAIF CLAIM NO. PB 120250 October 11, 1979

ERWIN L. RICHERT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his low back on April 16, 1965. The claim was closed on July 23, 1968 with an award for 75% loss of function of an arm for unscheduled disability. Claimant's aggravation rights have expired.

In June 1977 Dr. Woolpert indicated claimant's non-union was related to the 1967 fusion necessitated by the 1965 industrial injury. In October 1978 Dr. Streitz diagnosed pseudarthrosis, L5-S1 level, and recommended a refusion of the area because of the pseudarthrosis. He also related claimant's present condition to his 1965 injury.

Claimant's claim was reopened with time loss commencing on December 22, 1978; surgery was performed on January 8, 1979. By his report of June 5, 1979, Dr. Woolpert released claimant to regular work as of May 14, 1979. He found claimant stationary and indicated he had suffered no additional permanent disability.

On August 21, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended claimant's claim be closed with an additional award of time loss from December 22, 1978 through May 13, 1978.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 22, 1978 through May 13, 1978, less time worked.

SAIF CLAIM NO. KC 353010 October 11, 1979

GLENNA SMITH, CLAIMANT
Corey, Byler & Rew, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Own Motion Order

On January 26, 1979 claimant requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on February 14, 1972 while working for St. Anthony's Hospital whose carrier was the State Accident Insurance Fund. Claimant requested several medical reports by Dr. Smith which indicated that he had treated her in 1972 for her back injury and didn't see her again until October 1978 as a result of an episode at work.

Dr. Smith felt claimant's present condition was related to her 1972 injury, however, the Fund advised the Board that it felt claimant had sustained a new injury on October 3, 1978 while working for Prowler Industries and her condition was the responsibility of Employee Benefits Insurance Company. A hearing had been requested on the denial of the 1978 injury (WCB Case No. 78-9034) and the Board felt it would be in the best interests of the parties to have a consolidated hearing to determine whether claimant's present condition had resulted from a new injury in 1978 or was related to her 1972 industrial injury.

After a hearing on August 22, 1979, Referee Don Fink found that claimant's 1972 injury claim had been closed on August 10, 1972 with an award of 48° for 15% unscheduled low back disability. In August 1976 claimant went to work for Prowler Industries of Oregon. She had no time off because of her back until the incident of October 3, 1978. On this date claimant was apparently in a bent or stooped position installing a valance with a screwdriver when she felt a sharp pain in her back. She worked until her lunch hour that day and has not worked since.

Dr. Smith felt claimant's work activity at Prowler had caused her back condition to worsen. X-rays in October 1978 revealed a pseudoarthrosis which he felt was aggravated by her work at Prowler.

Referee Fink found claimant's testimony to be entirely credible. He felt that two out of the three witnesses produced by the employer actually corroborated claimant's testimony. He found some minor inconsistencies but felt that claimant had met her burden of proving that she had sustained a new injury while working for Prowler. He, therefore, remanded claimant's claim to it for acceptance and payment of compensation to which she was entitled and recommended that the Board deny claimant's request for own motion relief.

The Board, after thorough consideration of the evidence before it, together with Mr. Fink's recommendation, concludes that claimant's request for own motion relief should be denied.

ORDER

Claimant's request for own motion relief for her injury sustained on February 14, 1972 is hereby denied.

WCB CASE NO. 77-6177 October 11, 1979
WCB CASE NO. 78-10263

MARJORIE THEONNES, CLAIMANT
Douglas Minson, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

The claimant seeks review by the Board of the order of the Referee which affirmed the Fund's denial of claimant's claim for aggravation and affirmed the denial of an occupational disease issued by United General Insurance Co.

Claimant was employed as a waitress by Sweetbrier Inn and on December 31, 1970 she slipped on ice and fell, injuring her back. The Fund was the workers' compensation carrier. Dr. Glaubke diagnosed a lumbosacral sprain with an aggravation of a previous sacral sprain. On February 10, 1971 she was hospitalized for bedrest and traction. Subsequently, claimant underwent physical therapy.

In August 1971 a myelogram was performed and it was normal.

Claimant saw Dr. Robinson on September 2, 1971 with complaints of back pain and discomfort into both legs. The diagnosis was chronic lumbosacral strain syndrome with mild intermittent right sciatica. Dr. Robinson felt claimant's complaints outweighed the physical findings.

Claimant was enrolled at the Disability Prevention Center for a period commencing on January 4, 1972. In March Dr. Robinson reported claimant should seek out lighter employment.

On April 25, 1972 a Determination Order granted claimant 32° for 10% unscheduled disability.

On June 4, 1973 Dr. Pasquesi examined claimant and diagnosed lumbosacral myofascitis with some radicular pain in both legs. He rated her impairment at 2% of the spine and felt claimant's condition was the same as when she was examined by Dr. Robinson in 1972. He felt claimant's claim should have been reopened but now her condition was again medically stationary.

On June 20, 1973 a Second Determination Order granted claimant additional time loss only.

After his industrial injury claimant did not return to work for Sweetbrier Inn and in September 1974 she commenced employment with Ron's Metzger Grocery as a clerk. Ron's Metzger Grocery's workers' compensation carrier was United General Insurance Company. Claimant testified that while so employed she did not suffer any new injury.

On May 31, 1976 Dr. Struckman hospitalized claimant. He reported that claimant had been working for two years and doing well until one month prior when the pain began to recur. This time the pain down claimant's left leg was severe and unremitting.

A myelogram was performed on June 8 and was normal. Claimant was discharged from this hospitalization on June 19, 1976.

On March 25, 1977 Dr. Keizer reported claimant had an aggravation of her low back pain while working at Metzger. Claimant's condition was recurrent and he requested claim reopening.

On July 6, 1977 Dr. Pasquesi re-examined claimant. The only additional medical finding from his last examination was paresthesia of the left great toe and lateral calf, otherwise the condition was the same. He felt claimant's job as a checker aggravated her pre-existing condition. Dr. Pasquesi was of the opinion that claimant had an occupational disease superimposed on a pre-existing injury.

On August 5, 1977 the Fund issued its denial of claimant's claim for aggravation.

A chart note of May 26, 1978 indicates claimant could now only perform work of a sedentary or light nature with no prolonged standing or walking or lifing over 20 pounds repetitively or 30 pounds.

On June 27, 1978 Dr. Keizer reported claimant possibly has early disc disease of the lumbar spine with symptomatic left radiculopathy. He felt claimant could not perform medium or light work but could perform sedentary employment. Dr. Keizer, in December 1978, reported that claimant's condition had not significantly deteriorated based upon objective clinical findings.

Claimant filed a claim for occupational disease against Ron's on December 6, 1978 after her attorney explained to her the definition of an occupational disease. On December 22, 1978 United General Insurance Company denied the occupational disease claim.

The evidence indicates that the Fund did not pay claimant compensation for temporary total disability but did pay for claimant's hospitalization.

The Referee found that claimant's claim for an occupational disease was timely filed. However, he found that the evidence was insufficient to establish that claimant's work exposure resulted in any compensable occupational disease and he affirmed that denial.

The Referee concluded that both Drs. Keizer and Pasquesi found claimant's condition had not changed from one examination to another, therefore, claimant had failed in her burden to establish that she had suffered any aggravation of her December 1970 industrial injury. The Referee affirmed the Fund's denial.

The Referee further concluded there was no basis for assessing a penalty against the Fund for its failure to accept or deny claimant's claim for aggravation within 60 days as there was no interim compensation due the claimant and no valid claim of any worsened condition on which to base such an assessment.

The Board, on de novo review, concurs with the Referee's conclusion that there is no valid claim or sufficient proof of any occupational disease arising out of or in the course of claimant's employment with Ron's Metzger Grocery and would affirm that denial.

With respect to the claim for aggravation, the Board finds that the evidence quite clearly indicates that claimant was hospitalized from May 31, 1976 through June 19, 1976. Even though this hospitalization may have been for diagnostic purposes only, it is, nevertheless, true that claimant worked up until her hospitalization and thereafter. While hospitalized, she obviously was unable to work. Therefore, the Board concludes that claimant's hospitalization cannot be handled pursuant to ORS 656.245.

ORDER

The order of the Referee, dated May 9, 1979, is modified.

The State Accident Insurance Fund's denial of claimant's claim for aggravation is hereby reversed and the claim is remanded to the Fund for acceptance and the payment of compensation, commencing May 31, 1976 through June 19, 1976 and that the claim be processed pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services at the hearing and at Board review, the sum of $750 payable by the Fund.

In all other respects the Referee's order is affirmed.

WCB CASE NO. 78-8650 October 11, 1979
WCB CASE NO. 79-1249

BETTY WALLICK, CLAIMANT
Thomas J. Mortland, Employer's Atty.
Motion And Order To Dismiss
Request For Review

COMES NOW the Employer/carrier (Safeway Stores, Inc./The Travelers Insurance Company) and moves for an order dismissing the employer/carrier's Request for Review of the Opinion and Order of Referee Rode, Dated May 9, 1979.

IT IS SO ORDERED

CLAIM NO. WC 213375 October 12, 1979

GIORDANO ZORICH, CLAIMANT
Gary M. Galton, Claimant's Atty.
Stipulation And Order Of Dismissal

This matter coming on regularly before this Board upon stipulations of the parties, Claimant appearing personally and by and through one of his Counsel, Gary M. Galton of Galton, Popick & Scott, and the Employer, Advanced Interiors, appearing by Nony Capellan, Claims Representative of General Insurance Company of America, Claimant through his Counsel having requested claim reopening, the Carrier having initially deferred the claim and all issues now having been fully compromised and resolved by the respective parties as evidenced by their signatures below, the following Order may now be entered:

IT IS HEREBY ORDERED that this claim is accepted and reopened for payment of all benefits as provided by law;

IT IS FURTHER ORDERED that Temporary Total Disability (TTD) shall be paid from April 2-6, April 19, 20, 23-27, 30, May 2, 10, 11, 14, 15, 23, 24, 25, 28, 29, 31 and from June 1, 1979, until terminated pursuant to ORS 656.268;

IT IS FURTHER ORDERED that the Carrier shall pay all causally-related medical expenses incurred for treatment of Claimant's industrial injuries, including reimbursement of Claimant's Counsel, Galton, Popick & Scott, the sum of $10 for medical reports instrumental in claim reopening;

IT IS FURTHER ORDERED that pursuant to Claimant's Retainer Agreement with his Counsel, Galton, Popick & Scott are awarded reasonable attorneys' fees of 25% of the additional temporary compensation made payable by this Order to a maximum of $750, together with 25% of any additional permanent disability, total fees not to exceed the sum of $2,000;

IT IS FINALLY ORDERED that all issues concerning Claimant's request for reopening are dismissed.

IT IS SO STIPULATED:

WCB CASE NO. 78-8657 October 15, 1979

JOHN L. BRANNON, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

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

Claimant was employed as a truck driver for Beaver State Sand & Gravel and on January 10, 1972 he suffered right hip and back injury when his truck hit a chuck hole. The diagnosis was acute sacroiliac sprain.

Claimant was released to return to regular work on February 5, 1973.

A Determination Order of May 29, 1973 granted claimant one day of time loss only.

In July 1973 claimant's condition became aggravated and he experienced hypesthesia into both legs and was hospitalized for conservative care.

The diagnosis in 1974 was degenerative disc disease and the Back Evaluation Clinic felt claimant should get into a work situation. However, he was precluded from returning to his regular occupation and total loss of function was considered mild.

A Determination Order of April 3, 1974 granted claimant 48° for 15% unscheduled disability.

By September 1974 Dr. Cherry found claimant's condition symptomatic and reported he was unable to work. Claimant needed to get into light employment.

On October 14, 1974 a stipulation of the parties reopened claimant's claim.

Claimant had been in an authorized program of vocational rehabilitation but in September 1974 he suffered an unrelated heart attack and was forced to terminate his welding school.

A Determination Order of April 14, 1975 granted claimant compensation for time loss only. Claimant appealed this Determination Order and, after a hearing, by an Opinion and Order of October 17, 1975 Referee Danner found claimant was not permanently and totally disabled from his back condition but was entitled to an award of 75% unscheduled disability to compensate him for his loss of wage earning capacity.

Dr. Wilson reported in November 1976 that claimant had pretty well recovered from his heart attack. Claimant was now seeking pain relief for his injury-related condition.

Dr. Wilson referred claimant to Dr. Dunn who examined him on December 2, 1976 and diagnosed probable L5 nerve root compression bilaterally. A myelogram was recommended and claimant was hospitalized on December 27, 1976. On January 24, 1977 Dr. Dunn performed a laminectomy and spinal fusion.

On November 4, 1977 Dr. Peterson reported that claimant was ready for light duty work excluding prolonged sitting, frequent bending or any lifting over 20 pounds. On December 1, 1977 Dr. Peterson found claimant's condition medically stationary.

On February 27, 1977 the Fourth Determination Order granted claimant an award of 160° for 50% unscheduled disability in lieu of Referee Danner's Opinion and Order.

By March 30, 1978 claimant's symptoms returned with back pain radiating into both legs. On June 29 Dr. Dunn requested claim reopening for an aggravation. Claimant was provided with a stimulator.

Claimant was examined by the Orthopaedic Consultants who found claimant's cardiac condition was stable. Claimant's complaints were low back pain with nearly constant aching, deep pain in the left buttock and down the left leg. The physicians felt claimant's condition was chronic and is apt to be waxing and waning, and claimant would need palliative care from time to time. Claimant's condition was medically stationary and he was capable of light employment. His disability was rated as moderately severe with prognosis for employability poor due to his age, his six years of unemployment, marked functional components and his failure to exploit vocational rehabilitation opportunities.

A stipulation of the parties of August 4, 1978 reopened claimant's claim commencing May 18.

On September 5, 1978 Dr. Dunn reported he was in concurrence with the Orthopaedic Consultants report.

Claimant testified his heart condition is stable, in fact, since September 1974 he has only taken two nitroglycerin tablets but does take a pill a day for regulation of his heart.

Claimant testified he has actively sought employment on his own and has looked for light work from Medford to Portland. He has sought custodial work, watchman, service station work, clerk in grocery stores, shoe stores and testified he has made at least 100 applications in the last year to no avail.

Claimant testified he could stand for one hour at the most, and could walk 1/2 mile. Claimant is 56 years of age with a 7th grade education and all past working experience has been in heavy manual labor occupations.

The Referee found his view of the record does not indicate failure on the part of claimant to exploit vocational rehabilitation opportunities but was the result of physical limitations. He concluded, based on claimant's worsened condition, that he is permanently and totally disabled.

The Board, on de novo review, finds that claimant has proven his condition is such that it renders him totally unemployable in the broad field of industrial occupations and his loss of wage earning capacity is complete. The Board concludes that claimant is entitled to an award of permanent total disability.

ORDER

The order of the Referee, dated May 23, 1979, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review the sum of $300, payable by the Fund.

WCB CASE NO. 77-5177 October 15, 1979

MARLENE J. HODGES, CLAIMANT
Martin, Bischoff, Templeton, Biggs & Ericsson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the second order of the Referee. The Referee's original Opinion and Order affirmed the Fund's denial of July 7, 1977 which denied responsibility for muscle strain of the right arm and possible carpal tunnel syndrome; reversed the Fund's de facto denial for carpal tunnel syndrome as an occupational disease and remanded the claim to the Fund for acceptance; affirmed the Third [sic] Determination Order, and ordered claimant be granted 22.5° for 15% loss of the right forearm for disability arising out of the carpal tunnel syndrome.

After the Fund requested reconsideration for that Opinion and Order the Referee vacated that order and subsequently issued a Second Opinion and Order which deleted all references to the claim for carpal tunnel syndrome and the award he granted for loss of the right forearm because a separate and specific claim for carpal tunnel syndrome was filed and denied and was not an issue properly before him.

Claimant was employed at G.I. Joe's as a marker and stocker in the shipping and receiving department and sustained her first injury on July 14, 1975 while she was unloading a truck and injured her back bending over. This injury was diagnosed as a low back sprain. The claim was closed by a Determination Order of December 9, 1975 which granted her time loss only.

The injury before us occurred on June 25, 1976 after claimant had been lifting water skies at work and developed muscle spasms. She sought medical care from Dr. Cantrell.

On November 1, 1976 claimant was examined by the physicians of the Orthopaedic Consultants. They reported claimant returned to light duty work in August and worked two hours and was terminated. Claimant had complaints of paresthesia of the right arm and neck and back pain. The diagnosis was cervical, dorsal and lumbar strain by history; x-rays were normal, probable carpal tunnel syndrome. The physicians found her neck and back conditions were medically stationary. Claimant could not return to her regular occupation, but could with limitations. The total loss of function of her back and neck were minimal.

Claimant's claim was closed by a Determination Order of January 27, 1977 which granted her 32° for 10% unscheduled neck and back disability.

On July 7, 1977 the Fund issued a denial of responsibility for muscle strain of the right arm and possible carpal tunnel syndrome.

Claimant, under the auspices of vocational rehabilitation, commenced school at Chase Business School in December 1977 and graduated as a medical/receptionist in November 1978.

On December 12, 1978 a Second Determination Order granted claimant compensation for temporary total disability only.

Dr. Cantrell reported on January 2, 1979 that he was continuing medical treatments for claimant's back condition.

Claimant has not worked since the injury in June 1976 except for the two hours in August, and she testified she is seeking a position as a typist. Claimant has a high school education with past working experience as a clerk, a cashier in a dimestore and an assembler of trophies.

The Referee found that the award granted by the Determination Order of 10% unscheduled disability adequately compensated claimant for her loss of wage earning capacity. He further affirmed the denial of responsibility issued by the Fund on July 7, 1977 for muscle strain of the right arm and possible carpal tunnel syndrome as not being compensably related to her 1976 industrial injury.

The Board, on de novo review, concurs with the conclusions reached by the Referee in his Second Opinion and Order.

ORDER

The Second Opinion and Order of the Referee, dated February 6, 1979, is hereby affirmed.

WCB CASE NO. 77-1741 October 15, 1979

JAMES OHLIG, CLAIMANT
Burton J. Fallgren, Claimant's Atty.
Souther, Spaulding, Kinsey,
Willaimson & Schwabe, Defense Attys.
Order On Review

Reviewed by Board Members Wilson, Phillips and McCallister.

On August 31, 1979 the Board entered its Order on Review in the above entitled matter which reversed the Referee's Opinion and Order, dated October 20, 1978 and remanded claimant's claim for his back problems to the employer/carrier for the payment of compensation, as provided by law, commencing on January 10, 1975 and until the claim was properly closed. The Board's order also awarded claimant additional compensation equal to 25% of the compensation due him from December 20, 1977 to August 25, 1978 as a penalty for unreasonable delay in the payment of compensation; affirmed the Determination Order dated February 28, 1968 and awarded claimant's attorney a fee of $1,000 for prevailing on a rejected claim both at the hearings and Board review levels, payable by the employer/carrier.

On September 6 the employer/carrier, by and through one of their attorneys, filed a motion requesting the Board to reconsider its order, stating there was no basis for the assessment of penalties, that if claimant's back condition was found to be related to the industrial injury then both the back condition and the right foot condition, as related conditions, should have been remanded to the carrier for closure and also that claimant had failed to meet his burden of proving by a preponderance of the evidence that his back condition was work-related.

On September 19, 1979 the Board, after reading the brief filed in behalf of the employer/carrier, concluded that it would be in the best interests of all parties concerned to grant the motion and allow claimant, by and through his attorney, to respond thereto. The Board allowed claimant 20 days from the date of the order, September 19, 1979, within which to file his brief and set aside its order of August 31, 1979 until such time as the Board was able to give complete consideration to both briefs.

On October 5, 1979 the Board received claimant's brief in response to the motion for reconsideration. Claimant also filed a motion for reconsideration of the award of $1,000 as a reasonable attorney's fee granted by the Board in its order of August 31, 1979, contending it was not reasonable.

After giving full consideration to the briefs filed in behalf of the employer/carrier and in behalf of claimant and also the motion to reconsider the attorney's fee granted by the Board's order, the majority of the Board concludes that its Order on Review entered in the above entitled matter on August 31, 1969 should be set aside permanently and that the Opinion and Order of the Referee, dated October 20, 1978, should be affirmed and adopted as the Board's own order. A copy of the Opinion and Order of the Referee is attached to the Board's order and, by this reference, made a part thereof.

ORDER

Upon reconsideration, the Opinion and Order of the Referee, dated October 20, 1978, is hereby affirmed.

The Order on Review, dated August 31, 1979, is hereby set aside and held for naught.

Board Member Phillips dissents as follows:

I would rely on the statement of facts and the opinions expressed in the Order on Review issued August 31, 1979.

The medical opinions of Dr. Blosser and Dr. Kloos give a logical explanation of the problems experienced by the claimant and the ultimate medical solution. They also logically explain the failure of the early medical treatment. They early diagnosis missed the basic cause of claimant's difficulties and the back surgery eliminated those difficulties.

The request for reconsideration did contain a valid point in that the Order on Review ordered a closure on part of a claim and remanded the remainder of the claim to the carrier for processing. That procedure was improper and should be corrected.

On reconsideration, this reviewer should republish the Order on Review, dated August 31, 1979, with the exception of the paragraph affirming the Determination Order which should be deleted and would increase the reasonable attorney fee to $2,000.

WCB CASE NO. 79-3371 October 15, 1979

WALTER PECK, CLAIMANT
Mark Bocci, Claimant's Atty.
Delbert J. Brenneman, Employer's Atty.
Joint Petition And Order

Walter Peck, while employed by Rough Rider Camper Mfg. Company in Portland, Oregon suffered an injury to his back and shoulder on or about July 25, 1978. Claim was made with the employer, and it was accepted as a non-disabling injury on September 12, 1978. Claimant subsequently was involved in a fight in a tavern at approximately 9:00 p.m. on or about September 23, 1978. Following this incident, the claimant missed time from work and received medical care and treatment. On March 29, 1979 the employer denied any further responsibility for the July 25, 1978 incident. Instead, it was the employer's position that the September 23, 1978 fight was a new injury which completely superseded, intervened, and terminated all further responsibility of the employer for the July 25, 1978 injury. It was the claimant's position that the September, 1978 fight merely constituted a continued aggravation of the July, 1978 industrial injury and that responsibility with the employer should continue. Claimant, therefore, subsequently requested a hearing before the Workers' Compensation Board assertir that the denial was improper. A bona fide dispute arose as to whether or not the claimant's symptoms and condition after Septembe 23, 1978 was a result of an aggravation of the claimant's July 25, 1978 industrial injury or the result of a new non-industrial injury which occurred on September 23, 1978. Both parties had evidence sustaining their views.

PETITION

Claimant, Walter Peck, in person and by his attorney Mark Bocci (Pippin & Bocci), and employer, Rough Rider Camper Mfg. Company, and its insurance carrier, EBI Companies, in person and by their attorney Delbert J. Brenneman (Souther, Spaulding, Kinsey, Williamson & Schwabe), now make this joint petition to the Board and state:

I.

Walter Peck and Rough Rider Camper Mfg. Company and its insurance carrier, EBI Companies, have entered into an agreement to dispose of this claim for the total sum of $4,500, said sum to include all benefits and attorney fees.

II.

The parties further agree that from the settlement proceeds, $1,125 shall be paid to the firm of Pippin & Bocci as a reasonable and proper attorney fee.

III.

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 the July 25, 1978 injury or its results, including attorney fees, and all benefits under the Workers' Compensation law and that he will consider said payment as being final.

IV.

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 continued liability on the part of respondents, by whom liability is expressly denied; that it is a settlement of any and all claims arising out of the July 25, 1978 injury whether specifically mentioned herein or not, under the Workers' 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 sums 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.

IT IS SO STIPULATED:

WCB CASE NO. 77-4715 October 15, 1979

ERNEST WISEMAN, CLAIMANT
Hal F. Coe, Claimant's Atty.
Mel Kosta, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which awarded claimant interim compensation for temporary total disability from April 4 to April 29, 1977; awarded an additional sum equal to 25% of this interim compensation, pursuant to the provisions of ORS 656.262(8) and awarded claimant's attorney an attorney fee of $500 payable by the employer under the provisions of ORS 656.382.

Originally, a hearing was held on this matter on January 11, 1978 and the Referee's Opinion and Order was entered on April 14, 1978. The claimant sought review by the Board of the Referee's order and on November 22, 1978 the Board issued its order referring the matter back to the Referee under the provisions of ORS 656.295(5) to take evidence sufficient to determine if and when a denial was issued, why and when surgery was performed, if penalties and attorney's fees were appropriate and any and all issues properly presented by the parties.

As a result of this order of remand the Referee convened a hearing on April 18, 1979 for the determination of the above issues and additional evidence was received which was considered by the Referee along with the other evidence presented at the January 11, 1978 hearing.

The Referee found that Dr. Lilly's letter, dated April 4, 1977, directed to the employer's carrier, indicated that examination revealed claimant had advanced degeneration of the L5-S1 disc and possibly some nerve root irritation, probably the S1 roots. He requested that the claim be reopened; it was his opinion claimant's problems were the result of the March 1973 injury.

On April 11, 1977 claimant's attorney requested that the carrier advise him whether or not the claim was to be reopened.

On April 18, 1977 the carrier asked Dr. Lilly to advise it whether or not claimant's condition had worsened since the October 12, 1976 disability award.

On April 22, 1977 Dr. Lilly replied that when he last saw claimant it appeared that claimant's condition had worsened as he was having some more symptoms of low back pain and leg pain than when he had seen him previously.

On April 29, 1977 the carrier, by and through its claims representative, advised the claimant's attorney that the claim would not be reopened for time loss until medical verification was received that symptoms had worsened.

On September 2, 1976 Dr. Balme had seen claimant. At that time claimant stated that his back problems commenced in August 1967 when he was involved in an automobile accident. His present complaints were that his entire back and both legs were painful. He told Dr. Balme that he had had no low back pain prior to the fall of 1973, however, he had suffered one other injury to his back in December 1975 when his car was rear-ended in an automobile accident. Dr. Balme found no significant problems with the back that would allow him to conclude that surgery was indicated or warrant future diagnostic procedures. He felt no limitations need be placed on claimant's activities.

On June 28, 1977, the carrier wrote Dr. Lilly acknowledging receipt of a June 17, 1977 letter wherein he had stated that claimant could not work at his job of ranching because of low back problems and that he had been incapacitated from work since October 1976. The carrier's insurance representative enclosed a copy each of Dr. Balme's reports dated May 15, 1977 and September 2, 1976 and requested advice as to whether or not Dr. Lilly concurred in Dr. Balme's report.

Dr. Lilly replied, stating basically the same things he had stated in his letter dated April 18, 1977 and concluded that the claimant's condition had worsened to the point that he required back surgery on August 18, 1977.

The Referee was of the opinion that the letter from Dr. Lilly, dated April 4, 1977, indicated claimant was having continued pain which interfered with his activities and rendered him unable to continue his farm work. He also found that Dr. Lilly requested that the claim be reopened and that the present problems claimant was having were the result of the March 1973 injury. On April 29, 1977 the carrier advised claimant's attorney that the claim would not be reopened without medical verification that claimant's symptoms had, in fact, worsened. An additional medical examination was arranged.

The Referee concluded that claimant was entitled to receive interim compensation from the date his claim for compensation was filed until the date the employer sent notice of denial of the claim with the first installment being due in 14 days, citing Jones v. Emanuel Hospital, 280 Or 147. He concluded that claimant was entitled to be paid interim compensation from April 4 through April 29, 1977.

The surgery which was performed on August 18, 1977 was necessitated, in the opinion of Dr. Lilly, by claimant's worsened condition and that said condition had worsened since his last award or arrangement of compensation and that the back pain was the result of the industrial injury of 1973.

The Referee found that claimant was entitled to medical services, pursuant to ORS 656.245, however, because unscheduled disability was determined not by impairment but by loss of earning capacity and that evidence of impairment was relevant only as it affected earning capacity, he concludes that claimant's physical impairment might have increased but his unscheduled disability had not been aggravated.

The Board, on de novo review, finds that medical verification of a worsened condition was established by Dr. Lilly's report of April 4, 1977 and claimant's aggravation claim should be remanded to the employer and its carrier to be accepted and for the payment of compensation, as provided by law, commencing on April 4, 1977, the date of Dr. Lilly's report to the carrier, and until the claim is properly closed pursuant to the provisions of ORS 656.268.

The Board further finds that failure to process the aggravation claim constitutes unreasonable resistance and should subject the employer/carrier to penalties and attorney fees in accordance with ORS 656.262 and 656.382.

ORDER

The order of the Referee, dated May 18, 1979, is reversed.

Claimant's claim is remanded to the employer, Sierra Trailer Sales, and its carrier, The Home Insurance Company, to be accepted and for the payment of compensation, as provided by law, commencing on April 4, 1977 and until the claim is closed pursuant to the provisions of ORS 656.268.

It is further ordered that The Home Insurance Company shall pay to claimant an amount equal to 25% of the temporary total disability compensation which should have been paid from April 4, 1977 to the date of the hearing, April 18, 1979.

It is further ordered that claimant's attorney shall be paid the sum of $1,000 as a reasonable attorney fee at this Board review; said sum to be paid in addition to and not out of the compensation to claimant.

CLAIM NO. 87 CM 24082X October 16, 1979

ELLEN A. JONES, CLAIMANT
Pozzie, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Merten & Saltveit, Employer's Attys.
Own Motion Determination

On October 13, 1972 claimant, a 35-year-old packer employed by Pacific Fruit and Produce Company, whose workers' compensation coverage was furnished by Kemper Insurance Company, sustained a compensable injury to her lower back. The injury which occurred while claimant was lifting a heavy article and slipped on the wet floor, was diagnosed as a low back strain. The claim was initially closed on May 7, 1973 with an award of compensation for temporary total disability. Claimant's aggravation rights expired on May 7, 1978.

Pursuant to a Stipulation approved on September 6, 1976 the claim was reopened and again closed by a Determination Order, dated June 10, 1977, which awarded claimant additional compensation for temporary total disability and 32° for 10% unscheduled low back and neck disability. Another Stipulation approved on November 21, 1977 awarded claimant an additional 48° giving claimant a total of 80° for 25% unscheduled low back and neck disability.

All of the above reopenings and closures occurred within the five-year aggravation period; however, on May 16, 1978, after the expiration of the aggravation period, claimant's treating physician, reported that claimant was not able to work and that the reason therefor was that she had aggravated the October 13, 1972 injury. Pursuant to a Stipulation approved on November 20, 1978 the claim was reopened for payment of compensation for temporary total disability from May 9, 1978 through June 9, 1978 and for such treatment as claimant might require.

Claimant's condition is now stationary and there has been no change in her disability. Vocational Rehabilitation assisted claimant in re-employment and indicated that claimant returned to work on August 22, 1978.

The Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with an award for temporary total disability from May 9, 1978 through June 9, 1978 but recommended no additional award for permanent partial disability in excess of that previously granted.

The Board concurs in these recommendations.

Because the last reopening of claimant's claim occurred after the expiration of her aggravation rights, the claim must be closed pursuant to ORS 656.278.

ORDER

Claimant is awarded compensation for temporary total disability from May 9, 1978 through June 9, 1978. This award is in addition to all previous awards claimant has received for her October 13, 1972 industrial injury.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in behalf of claimant in this matter a sum equal to 25% of the additional compensation for temporary total disability granted claimant by this order, payable out of said compensation as paid, to a maximum of $750.

WCB CASE NO. 78-5797 October 16, 1979

KENNETH LUNDY, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
Souther, Spaulding, Kinsey,
Willaimson & Schwabe, Defense Attys.
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of the order of the Referee which ordered it to recompute claimant's temporary total disability retroactive to June 28, 1977 based on a daily wage of $50.03 for a weekly wage of $250.15 at the time of his injury; that claimant be paid in a lump sum the difference between what should have been paid in temporary total disability and what was paid from June 28, 1977 to the date of his order; that temporary total disability be paid to claimant from the date of his order until claim closure based upon the weekly wage established by his order and an attorney fee of 25% of the increased compensation to claimant's attorney.

The claimant cross-requests review by the Board contending that the Referee erred in using the period July 1, 1976 to September 1, 1976 to compute claimant's overtime and contends the period September 1, 1975 to September 1, 1976 should have been used.

Claimant was employed by Borden Chemical Company and sustained a compensable injury to his neck on September 1, 1976 which was initially accepted by the employer, a self-insurer, as non-disabling.

Subsequently, claimant filed a claim for aggravation which the employer denied and claimant appealed. After a hearing, by an Opinion and Order, the Referee reopened claimant's claim as of June 28, 1977.

Borden, the employer, began paying compensation to claimant for temporary total disability pursuant to this Opinion and Order at a rate of $229.20. This figure was arrived at by multiplying claimant's wage of $5.73 times 40 hours.

Claimant's contention at the hearing was that the computation should have included overtime wages.

The employer contended at the hearing that claimant's overtime worked was irregular and erratic and was therefore not to be included in the computation of claimant's weekly wage.

There was no testimony taken at the hearing. The parties stipulated to an agreed set of facts and together with pertinent documentary evidence submitted the matter to the Referee.

The Referee found that the only rational way to consider irregular overtime in the computation of claimant's daily wage is to average a reasonable statistical sample of work history. He found the only available sample was the period July 1, 1976 to September 1, 1976. The Referee concluded that claimant's weekly wage should have been computed by including an average of the overtime hours worked during that period.

The Referee then ordered, applying that formula, claimant's weekly wage be computed at $250.15 or $50.03 per day.

The Board, on de novo review, disagrees with the conclusion reached by the Referee and finds that the overtime worked by the claimant was neither "regular" nor "required".

ORS 656.210(2) provides that the weekly wage of a worker is computed by multiplying the daily wage the worker was receiving at the time of his injury. In this case claimant was working five days a week. The statute is silent with regard to overtime.

There are certain circumstances under which overtime should be included in determining the proper rate for temporary total disability, however, there must be some objective standards by which the overtime can be measured.

A reasonable construction of ORS 656.210 as applied in prior cases requires that overtime be substantial or regular and required. For example, if a worker is employed regularly for 10 hours a day, he is entitled to straight-time rate for the first eight hours and overtime rate for the remaining two hours and in the computation of his weekly wage, both the straight-time and the overtime should be included.

In the case before the Board there were many weeks when claimant worked no overtime at all, some weeks where he worked only a few hours overtime and other weeks were he put in substantial overtime hours. Most of the overtime put in by claimant was necessitated by the failure of the second shift operator to show up for work, but this was not on a regular basis and this type of overtime is not predictable.

Furthermore, in the present case, the parties had stipulated that only regular and required overtime should be included in the computation. The Referee ignored this stipulation and concluded that a liberal construction of the words, "regularly employed" as used in ORS 656.210(2) required the inclusion of overtime in computing claimant's weekly wages.

The Board concludes that the evidence as set forth in the documentary exhibits and the stipulations, as amended and supplemented, do not support a finding that claimant's overtime should have been considered "regular" and "required"; to the contrary, the overtime put in by claimant during the period specified by the Referee was erratic and irregular. The necessity for it could not be predicted with any certainty.

It is true that when a statute appears ambiguous it should be construed liberally in favor of the injured workman, however, in this case, the Board finds no ambiguity in ORS 656.210.

ORDER

The order of the Referee, dated May 30, 1979, is reversed.

WCB CASE NO. 78-4472 October 16, 1979

JUANITA MILLION, CLAIMANT
Coons & Anderson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund seeks review by the Board of the order of the Referee which set aside its denial, dated May 31, 1978, of claimant's claim for an occupational disease, and remanded the claim to it for acceptance and payment of compensation, as provided by law, until closure pursuant to ORS 656.268. By a Supplemental Order of March 22, 1979 claimant's attorney was awarded $2,500, as a reasonable attorney's fee payable by the Fund.

The Fund contends that claimant's claim is not compensable and is res judicata.

Claimant was employed by Southern Oregon Lumber Company as a tailer. This job entailed picking up pieces of wood of various dimensions used in making furniture which had been thrown onto a table by the sawyer. The pieces were stacked by the tailer according to size and when the stacks were 10-20 high the tailer carried them 6-10 feet to a pallet and stacked them.

On March 24, 1972 claimant was struck on the right thumb by a piece of wood thrown by the sawyer. Claimant continued working and when her condition worsened she saw Dr. Campbell, a chiropractor. Her complaints were aching and numbness in the right arm and hand. The diagnosis was dorsal cervical strain with tender right extension neuralgia, and associated subluxation C5-6 and sprain of the right thumb.

Claimant continued to work and sought no further treatment until she returned to Dr. Campbell on April 10, 1973. At that time she complained of severe pain in the right shoulder for one week. Dr. Campbell could not relate this complaint to her injury due to the time span.

Claimant was examined by Dr. Potter on October 1, 1973 with complaints of pain and numbness of the right hand. The diagnosis was carpal tunnel syndrome. On October 5 Dr. Potter performed surgery for carpal tunnel release. Dr. Potter released claimant for work on December 17.

On October 31, 1973 the Fund denied responsibility for the carpal tunnel syndrome. However, by stipulation of January 11, 1974 the Fund accepted responsibility for this condition.

A Determination Order dated March 14, 1974 granted claimant 15° for 10% loss of the right forearm.

Claimant did not return to work.

On May 1, 1974 Dr. Matthews examined claimant. Examination revealed both shoulders had full range of motion and claimant had no shoulder complaints. Dr. Matthews referred claimant to Dr. Tennyson.

Dr. Tennyson examined claimant on June 19, 1974. All of claimant's complaints concerned her right hand and she denied any shoulder pain. The diagnosis was thoracic outlet compression and left median nerve compression syndrome. On July 1 Dr. Tennyson performed surgery consisting of thoracic outlet decompression.

On August 7, 1974 the Fund denied responsibility for the thoracic outlet syndrome.

On January 8, 1975 Dr. Tennyson re-examined claimant for his complaints of right shoulder pain. Claimant had minimal decrease in right shoulder motion. Her condition was stationary.

The Fund, by stipulation of April 25, 1975, accepted responsibility for the thoracic outlet syndrome.

On August 26, 1975 Dr. Matthews performed surgery for chronic rotator cuff and tendinitis right shoulder, consisting of an acromionectomy. Dr. Matthews' chart note of September 29, 1975 causally related claimant's right shoulder condition to her industrial injury of December 1975. Claimant's condition was medically stationary.

On December 16, 1975 the Fund denied responsibility for the acromionectomy. Claimant appealed from this denial and after a hearing, by an Opinion and Order dated June 9, 1977, Referee Ail affirmed the Fund's denial and granted claimant 60% loss of the right forearm. This order was affirmed by the Board and by the Court of Appeals.

On March 7, 1978 claimant filed a new form 801 for a right shoulder condition. She claimed the right shoulder condition arose out of an occupational disease occurring between 1971 and October 1973. On May 31, 1978 the Fund denied the occupational disease claim.

Dr. Matthews' testimony at deposition was that the claimant first mentioned the right shoulder problems in December 1974. He diagnosed the condition as chronic rotator cuff tendinitis. He testified this condition can become symptomatic from repetitive activity. He opined that claimant's repetitive work was a material contributing cause to the aggravation of her shoulder condition.

The Referee found claimant to be credible. The Referee found that just because claimant's right shoulder condition had been previously adjudicated adversely to her was not, in his view, res judicata as to her assertion of an occupational disease theory to support her new claim filed March 7, 1978.

The Referee concluded that claimant had sustained her burden of proof that the occupational disease claim was compensable and remanded the claim to the Fund for acceptance and the payment of compensation as provided by law until closure pursuant to ORS 656.268.

The majority of the Board, on de novo review, disagrees with the conclusion reached by the Referee. The majority believes that the issue presented at the hearing of December 10, 1978 had been fully disposed of by the earlier hearing which resulted in the Referee's order affirming the Fund's denial of responsibility for the shoulder surgery performed by Dr. Matthews. This order of the Referee was affirmed by both the Board and the Court of Appeals. Therefore, the majority of the Board concludes that the issue before us is res judicata.

Assuming, for the purpose of argument only, that the claim was not barred, the majority of the Board finds that the medical evidence of record does not support a finding of any causal relationship of claimant's right shoulder condition and her work activities. (In fact, claimant ceased working in October 1973.) The first medical report indicating any complaints by claimant of right shoulder pain first appeared upon examination by Dr. Campbell of April 10, 1973 with no further complaints until January 8, 1975, long after she ceased working in October 1973. In fact, the medical reports in the interim period indicate on May 1, 1974 full range of shoulder motion with no complaints. Therefore, the Board concludes there has been no proof of a causal relationship.

ORDER

The order of the Referee, dated March 6, 1979, is reversed.

The denial by the Fund, dated May 31, 1978, is affirmed.

Chairman Wilson dissents as follows:

The majority of the Board has reversed the Referee's Opinion and Order on two theories. The first is that the present claim of disability for repetitive trauma resulting in an occupational disease is barred by the application of the res judicata principle since it has been judicially determined that the Fund was not responsible for a partial acromionectomy by Dr. Matthews because the condition operated was not related to the original injury of August 24, 1972. The second ground of reversal "for argument purposes only" is on the grounds that the medical evidence does not support a finding of any causal relationship of the right shoulder condition and the claimant's work activities.

It would be difficult to deal with the res judicata contention any more succinctly than did the Referee in his order, in which he states as follows:

> "The point at issue before Referee Ail, and on appeal from Mr. Ail's order, was whether the industrial injury to claimant's hand on August 24, 1972 was a material causative factor as to claimant's shoulder disability. The fact that this issue was adjudicated adversly [sic] to claimant is not, in my view, res judicata as to the different issue raised here, namely, the question of the impact of the job routine over a period of time on claimant's shoulder pathology."

The original course of litigation was confined to a specific incident for a finger and shoulder injury. The Fund ultimately was held responsible for thoracic outlet surgery, which was found to be related but it was held that claimant failed to prove that Dr. Matthews' surgery was for a condition caused by the subject injury.

The current litigation is on an entirely different theory, to-wit: occupational disease, from repetitive use in employment and other and different exposures than the one-time incident of August 24, 1972. This theory was not considered nor litigated in the previous hearing, review or appeal to the Court of Appeals.

Insofar as the proof of medical causation issue is concerned, Dr. Matthews' medical reports and his extensive testimony on deposition, together with the conclusions of Dr. Campbell, establish beyond the usual degree of proof in such cases, that the two years of repetitive use in employment was a material cause of the development of the condition requiring surgery. I find no persuasive evidence to the contrary.

I respectfully dissent from the majority holding of the Board and find that the Opinion and Order of the Referee should be affirmed.

WCB CASE NO. 78-8817 October 16, 1979

GAROLD R. WOODCOCK, CLAIMANT
Carney, Probst & Cornelius,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

The claimant seeks review by the Board of the order of the Referee which granted him an award of 224° for 70% unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant was employed as an iron worker for Atlas Erection Company, and on December 1, 1975 he was using a torch and his pants caught on fire and he jumped backwards and struck his hip into a stairway and fell to the ground on his back.

Claimant came under the care of Dr. Utterback, his treating physician, who reported on December 2 that he felt claimant had true sciatica most likely secondary to direct trauma to that nerve.

On December 15, 1975 Dr. Utterback performed surgery for a herniated nucleus pulposus, L4-5.

On March 22, 1976 Dr. Utterback reported that claimant could never return to his regular occupation; he might be able to do welding, but it was doubtful.

On May 21, 1976 Dr. Utterback reported claimant had chronic mechanical low back strain without neurologic deficit. Claimant's condition was medically stationary with restriction of neither standing nor sitting for prolonged periods and he must avoid leaning forward and no lifting over 20 pounds.

A Determination Order was issued on September 22, 1976 granting claimant 96° for 30% unscheduled disability.

Dr. Utterback referred claimant to Dr. Franks who, after examining claimant, reported on October 19, 1976 that claimant had some slight weakness of the extensor hallucis longus bilaterally more severe on the left. Dr. Franks felt claimant was in need of further surgery.

On December 7, 1976 claimant underwent a myelogram which was normal.

On January 11, 1977 Dr. Utterback reported that the restrictions he placed on claimant absolutely precluded him from returning to his regular occupation and made it difficult for claimant to engage in a gainful occupation commensurate with his training and ability. Vocational rehabilitation was strongly recommended.

Claimant was placed in a vocational rehabilitation program, going to school to learn welding. He had a high average I.Q. but had a 7th grade education and needed to upgrade his math and English.

On January 1978 claimant slipped on ice getting out of his car in the school parking lot and reinjured his back. Claimant was forced to quit school.

On March 23, 1978 Dr. Utterback reported that after this re-injury claimant was in significant pain and had muscle spasms. Claimant's main trouble in school was doing overhead work in welding and leaning forward. The doctor felt this occupation was no good for claimant.

The claim was again closed by a Second Determination Order of November 2, 1978 which granted claimant compensation for time loss only.

Mr. Rollins, a vocational rehabilitation consultant, reported on January 22, 1979 the he had evaluated claimant's work potential and it was his opinion that claimant has experienced a total loss of wage earning capacity following his 1975 injury. He added that if claimant had a change in his tolerance levels he still could only perform sedentary work earning minimum wages.

Claimant testified he contacted his union and also his employer for work to no avail; otherwise claimant has not actively sought employment.

Claimant testified he wears a steel brace and uses a stimulator daily. He is only comfortable when lying flat on his back using traction. He testified he is in constant pain.

The Referee found considering the medical and non-medical evidence, that claimant had failed in his burden of proving he is permanently and totally disabled. However, the Referee concluded claimant does suffer substantial impairment and a significant loss of wage earning capacity. He granted him an award of 70% unscheduled disability.

The majority of the Board, on de novo review, disagrees with the conclusion reached by the Referee and finds that the evidence supports a finding that claimant is permanently and totally disabled.

All of the claimant's past work experience, that of an ironworker, plasterer and bricklayer, all required heavy physical labor; employment to which this claimant is now precluded. Further medical reports of Dr. Utterback and Dr. Franks verify that claimant is, indeed, suffering from chronic pain. Claimant is 59 years old with a 7th grade education and based upon all of the evidence of record, claimant is unable to be regularly and gainfully employed in the broad field of industrial occupations, due to his industrial injury of December 1, 1975, considering the physical restrictions placed on him by his treating physician.

ORDER

The order of the Referee, dated April 18, 1979, is modified.

Claimant is awarded compensation for permanent and total disability, payments therefor to commence as of the date of this order.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this order, payable out of said increased compensation as paid, not to exceed $3,000.

Chairman Wilson dissents as follows:

The Opinion and Order of the Referee should be affirmed and adopted as the Board's order in this matter.

The medical evidence coming from an orthopedist and neurosurgeon establishes substantial impairment and disability, but falls short of permanent total disability. Both specialists strongly recommend vocational rehabilitation.

David T. Rollins, PhD., is of the opinion that it is unlikely that claimant would be able to perform full time employment unless there was a dramatic change in his tolerance levels. Neither of the medical experts found a condition of this serious degree.

I prefer to accept the opinion of medical experts as to the degree of impairment, tolerance and residuals from the industrial injury.

SAIF CLAIM NO. KC 338026 October 18, 1979

MARY TURNER ADAMS, CLAIMANT
Gary L. Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 30, 1979 the Board received from claimant, by and through her attorney, a request for the Board to exercise its own motion pursuant to ORS 656.278 and reopen claimant's claim for an industrial injury which she sustained on October 16, 1971 while employed by Clyde Ward and Sons. Claimant's aggravation rights have expired.

In support of the request claimant submitted medical reports from Dr. Koch. A copy of the request for own motion relief and Dr. Koch's reports were furnished to the State Accident Insurance Fund.

On August 7, 1979 the Board requested the Fund to advise it within 20 days of its position with respect to the claimant's request for own motion relief. On August 13, 1979 the Fund responded, stating that the medical evidence submitted by claimant left considerable doubt as to the relationship between claimant's present condition and her industrial injury of October 16, 1971. Therefore, the Fund stated that it was making arrangements to have claimant examined by the physicians at the Orthopaedic Consultants in Portland and as soon as their report was received it would advise the Board of the Fund's position.

On October 8, 1979 the Fund advised the Board that claimant failed to show for the examination for which he was scheduled with the physicians at Orthopaedic Consultants on September 27, 1979. It also furnished the Board with copies of medical reports relating to claimant's condition. The Fund opposed the reopening of the claim on the basis of claimant's failure to cooperate and submit to the independent consultation set up for her and because the medical evidence submitted by the claimant clearly indicates a separate intervening injury sustained on December 11, 1978, to-wit: Dr. Koch's "History and Physical", dated December 11, 1978, which indicated claimant had multiple contusions and sprains about the back which resulted from her being kicked in the back by her husband the previous evening.

The Board, after reviewing all of the medical evidence and taking into consideration claimant's refusal to keep her appointment with the physicians at the Orthopaedic Consultants as scheduled by the Fund after claimant had been fully advised of the date of the examination, concludes that claimant's request to reopen her claim pursuant to ORS 656.278 should be denied.

IT IS SO ORDERED.

CLAIM NO. FB 125983 October 18, 1979

WILLIAM BUCKINGHAM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his right leg and ankle on May 17, 1965 while working for Albright Brothers Glass Company. His claim was closed on March 30, 1966 with an award of permanent partial disability equal to 50° equivalent to 50% loss of function of the right foot. Claimant's aggravation rights have expired.

On July 7, 1972 a Stipulated Order was approved whereby claimant was awarded compensation equal to 85° loss of use of the right foot (this order indicates that it represents an increase over and above the compensation heretofore awarded in the amount of 10° loss of use of the right foot, however, the file indicates no award preceeding the Stipulated Order other than the order issued by the State Compensation Department on May 17, 1965 which granted claimant 50°).

Dr. Logan, who had examined claimant on June 29, 1971, re-examined claimant on April 2, 1979. At that time claimant was complaining of more pain in his right foot and Dr. Logan felt that the claim should be reopened for further treatment because claimant might need an additional fusion of his talonavicular and calcaneocuboid joints. On May 30, 1979 the Fund advised Dr. Logan that it would provide whatever treatment he recommended and on September 17, 1979 Dr. Logan advised the Fund that having examined claimant on September 7, 1979 he had scheduled him for surgery on December 5, 1979.

On October 9, 1979 the Fund forwarded the documents previously referred to to the Board, stating that it would not oppose reopening if the Board found justification therefor

The Board, after full consideration of the evidence, concludes that the claimant's claim should be reopened for the payment of compensation, as provided by law, commencing on December 5, 1979, the date claimant is scheduled to be hospitalized for the proposed surgery by Dr. Logan, and until the claim is closed pursuant to the provisions of ORS 656.278, less any time worked.

IT IS SO ORDERED.

WCB CASE NO. 78-4250 October 18, 1979

CLIFFORD L. ELLINGSWORTH, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which awarded claimant 64° for 20% unscheduled right shoulder, skin and torso disability; 19° [sic] for 10% loss of the left arm, including the left thumb and index finger of the left hand and 19.2° for 10% loss of the right arm. Claimant contends that the awards for his scheduled and unscheduled disabilities are not sufficient.

Claimant is a 43-year-old married man who has worked in his employer's sawmill in Independence since he graduated from high school in 1954. He has worked his way up from clean-up man to mill manager, the job he now holds.

He has been plant manager since 1975. As plant manager he oversees the plant operations and occasionally volunteers assistance with repairs.

On June 30, 1977 claimant was inspecting a malfunctioning switch panel when some arcing of the current occurred and caught his clothes on fire. Claimant suffered burns to his right arm, left forearm and hand, trunk, right shoulder, face and right leg. He was taken to the hospital immediately and came under the care of Dr. Gottschalk. Claimant received second and third degree burns which were estimated to cover 40% of his body surface area. He was hospitalized for 47 days during which time he had multiple surgeries and skin grafts performed by Dr. Gottschalk.

Approximately a week after claimant was released from the hospital he returned to work. At first he worked only one or two hours a day and then gradually increased until he was working full time, however, since his injury claimant has not been able to "go out into the plant", his work is now restricted to a purely supervisory activity.

As a result of the permanent scarring caused by the burns claimant has suffered some loss of motion in various areas of his body. He has loss of motion in the thumb and fingers on the left hand and there has been a dimunition in his ability to hold on to objects and a general inability to pick up small items. He has minimal loss of function in the left wrist. Claimant has attempted to wear gloves from time to time to protect his skin which is sensitive due to the burns; his skin itches in all of the burned areas. He has some difficulty in extending the right arm at the elbow and some lack of motion in the right wrist. He also has a loss of strength in his right arm which precludes claimant from lifting small motors or heavy lumber similar to objects which he could lift prior to his injury. Coordination between his right and left arm is somewhat diminished although his grip was found to be generally satisfactory.

Claimant's major complaints are that he cannot do similar physical activities that he could perform prior to his injury because of the burns which had resulted in permanent scarring. When he attempts to work he experiences sweating, itching and burning all over the scarred areas of his body. He stated he could not stay out in the yard for more than one hour and was required to stay out of the sun because exposure to the sun causes the scar areas to perspire and itch.

Claimant is now back at work doing the same type of work as he had done prior to that injury but that he is unable to help in the mill as previously. He was not cannot to go back to a mill foreman's job nor do other jobs in the mill which require lifting, extensive bending or other similar physical activities which would cause him to perspire and thereby create an itching or burning sensitivity to the scarred areas. His present job does not have any physical requirements and for the last six months claimant's condition has been stationary. Claimant is earning more now than he did before the accident and he intends to continue as a plant manager for the employer, anticipating that the job will continue as long as the plant is in existence. The employer considers claimant to be a valued employee with good skills, knowledge and training in his field.

On February 23, 1978 the claim was closed by a Determination Order which awarded claimant 19.2° for 10% loss of his right arm and 32° for 10% unscheduled right shoulder and skin disability.

The Referee concluded that claimant had been able to do such types of work in the sawmill as working the gang saw, decking and dumping the logs and other similarly physical strenuous jobs prior to his injury and that he had had no physical restrictions which would have precluded him from any segment of the labor market based on either physical or mental impairment. However, now, because of his extensive scarring and the resulting limitation of motion,, itching, etc., he is restricted to managerial or supervisory work.

The Referee concluded the award of 32° did not sufficiently compensate him for his loss of earning capacity. He found that claimant's work history, educational training and general skills made him well suited for his present vocation and, therefore, his loss was moderate. He stated that the fact that claimant was earning more now than before his injury was of no substantial significance, relying on the Court's ruling in Ford v. SAIF, 7 Or App 549.

The Referee further concluded that claimant had received nothing for his loss of function of the left forearm including his thumb and index finger and that loss of function of those members was not a part of the unscheduled disability area already evaluated. He found no evidence to support an award for loss function of claimant's right leg nor any evidence that the scarring on claimant's face, right ear or neck added to his loss of earning capacity. He found that the award made by the Determination Order for the loss function of the right arm was adequate.

Therefore, the Referee granted claimant 19° [sic] for 10% loss of the left arm including the left thumb and index finger and 64° for 20% unscheduled disability for his right shoulder, skin and torso injuries. He affirmed the remaining awards.

The Board, on de novo review, finds that claimant is not adequately compensated for his loss of wage earning capacity by the award granted by the Referee. The Referee quoted in part from the Court's ruling in Ford but apparently did not give consideration to the fact that although claimant's present employment appeared to be secure, if the mill should

shut down or if for some other reason claimant should terminate his present employment it would be exceedingly difficult for claimant, with all of his problems of itching, burning, and marked sensitivity to heat in the scarred areas, to find employment elsewhere.

Any physical exertion such as walking for a block and a half will cause the burning in the scarred areas of the body; as the Referee noted,claimant cannot tolerate heat, sunshine or temperatures over 65 degrees nor can he tolerate cold temperatures below 35 degrees. Because of this sensitivity claimant is precluded from being employed in any occupation which requires physical exertion. This means he cannot return to any of the previous jobs he held in the employer's sawmill nor can he be employed in any occupation where the primary duties involved manual labor. Claimant is unemployable in any occupation which involves outdoor work.

The Referee evaluated claimant's loss of wage earning capacity as moderate. Normally, a person who has sustained a moderate loss of wage earning capacity is entitled to a greater award than that granted by the Referee. The Referee's award would indicate claimant had suffered only mild loss of earning capacity.

The Board concludes, based upon the medical evidence, that claimant is entitled to an award equal to 35% of the maximum to adequately compensate him for his loss.

Claimant contended that the Referee was in error in failing to award any scheduled disability for loss of function of claimant's right leg. On this issue, the Board agrees with the Referee's conclusion.

The Board also agrees with the claimant's award for 10% loss function of the left forearm but corrects what must have been a typographical error. 10% of the forearm is 15° not 19°.

The Board agrees with the Referee's conclusion that claimant is entitled to no greater award for his loss of the right arm than had been granted by the Determination Order.

ORDER

The order of the Referee, dated May 18, 1979, is modified.

Claimant is awarded 112° of a maximum of 320° for unscheduled right shoulder and skin disability and 15° of a maximum of 150° for 10% scheduled loss of the left forearm. These awards are in lieu of the awards for unscheduled disability and for scheduled loss of the left forearm granted by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted claimant by this order, payable out of said compensation as paid, not to exceed a maximum of $3,000.

CLAIM NO. B53-126953 October 18, 1979

PHILIP E. GALLATY, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury on October 8, 1968 while employed by Lee Turzillo Construction Company. Claimant was first seen and evaluated by Dr. Begg who diagnosed coxa malum senilus, severe, of the right hip. Claimant was given conservative treatment until January 4, 1969 when he was involved in an automobile accident and suffered injuries to his cervical spine area and developed rectal bleeding. The responsibility for these two conditions was subsequently denied by a partial denial letter issued by the carrier on January 24, 1969.

In February 1969 claimant had a Smith-Peterson cup arthroplasty of the right hip. In February 1970 claimant was evaluated at the Physical Rehabilitation Center of the Workers' Compensation Board (Callahan Center) and it was determined that claimant needed vocational rehabilitation. Claimant has a third grade education and a low-average intellect. He was found to be functionally illiterate and his work background consisted of heavy manual labor. However, due to lack of response on the part of claimant, no vocational rehabilitation program was set up.

Dr. Begg continued to treat claimant until the closing evaluation was performed by Dr. Pasquesi on April 6, 1971. Dr. Pasquesi found that claimant had practically no active motion in the right hip and all passive motion caused severe pain; it was also noted that claimant had a 3/4" shortening of the right leg and atrophy of the right thigh. Claimant was unable to stand very well without using a cane. He was considered to be medically stationary. On April 22, 1971 a Determination Order granted claimant an award of compensation for temporary total disability, 113 degrees for partial loss of the right leg and 37 degrees for permanent loss of wage earning capacity.

On April 14, 1972, pursuant to a Stipulation, claimant was awarded 135° for 90% loss of use and function of the right leg and an additional award for his unscheduled disability equal to 138°, including the 37° previously awarded for loss of wage earning capacity.

Dr. Begg recommended on June 14, 1973 that claimant have a total hip replacement because of claimant's continued discomfort and pain. On September 4, 1973 claimant had a total hip reconstruction, consisting of removal of the Smith-Peterson cup prosthesis and the insertion of a Charnley prosthesis. Dr. Begg continued to treat claimant until June 22, 1976 when, after examination, the panel of physicians at Orthopaedic Consultants found claimant to be medically stationary with a moderately severe loss function in the right leg. Claimant's right leg was 3/4" shorter than the other leg and caused severe pain upon weight bearing to the extent that claimant was unable to walk without the use of a cane.

On September 15, 1976 a Second Determination Order closed the claim with additional compensation for temporary total disability but no compensation for permanent partial disability in addition to that previously granted claimant by the first Determination Order and the Stipulation.

Sometime in 1977 claimant saw Dr. Manley who continued to furnish him medical treatment for the discomfort of his right hip. On May 21, 1978 claimant was admitted to the hospital because of increased right hip pain. An arteriogram was performed which revealed a loose prosthesis and the old femoral prosthesis was removed and a new one inserted. Dr. Manley continued to treat claimant until he was declared to be medically stationary on March 6, 1979.

Subsequently, the carrier requested Dr. Manley to re-evaluate claimant and he did so on April 26, May 21, and finally submitted a closing evaluation on August 24, 1979. In the last evaluation Dr. Manley expressed his opinion that claimant was totally unable to perform any type of construction work such as he had done prior to his injury. Claimant had undergone three major hip reconstructions and was left with significant loss of motion in his right hip and was unable to walk without the aid of a cane. Claimant has chronic mild pain and his right leg is now 1-1/2 inches shorter than his left leg.

On September 14, 1979 the carrier requested a closing evaluation.

The Evaluation Division of the Workers' Compensation found claimant to be permanently and totally disabled, taking into consideration his advanced age (claimant is 68 years old), his functional illiteracy which would significantly hinder any attempts to retrain claimant and the severity of the physical disability of the right hip and right leg. They further recommended that claimant be awarded compensation for temporary total disability from May 20, 1978 to the date of the Board's Own Motion Determination.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from May 20, 1978 to the date of this order and shall be considered to be permanently and totally disabled as of the date of this order forward.

SAIF CLAIM NO. KA 963813 October 18, 1979

NATHAN S. RANDALL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his left leg as a result of a logging accident on November 9, 1962. Claimant underwent several surgeries. The original file has been purged, however, the Fund advised the Board that an order, dated October 21, 1966, had granted claimant compensation for 50% of the left leg. The claim was reopened in 1967 for more surgery and it closed again on June 24, 1968 with no additional compensation for permanent partial disability. Claimant has suffered intermittently as a result of this injury and has been paid time loss benefits numerous times between December 1970 and March 1978.

On June 5, 1978 the claim was reopened for further medical care and treatment and, on February 1, 1979, Dr. Beals indicated that claimant was making some progress and his condition was stable. On March 13, 1979 the Fund requested a determination of claimant's present disability and the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from June 5, 1978 through August 23, 1978 and from September 8, 1978 through February 1, 1979 and additional compensation for permanent partial disability equal to 25% loss of the left leg, giving claimant a total award of 75% loss of the left leg.

On April 23, 1979 the Board issued its Own Motion Determination which followed the recommendations of the Evaluation Division.

The claimant advised the Fund that on February 3, 1979 he had another case of leg infection and was hospitalized from February 3, 1979 to February 8, 1979 and from that time on until May 1, 1979 he convalesced at home. He stated that he was then released by Dr. Courogen to go back to work on a part time basis. He stated that he had not received any compensation for time loss because of this last illness from February 3-May 1, 1979. He requested the Fund to contact Dr. Courogen at Bess Kaiser Hospital.

On September 11, 1979 Dr. Courogen advised the Fund that claimant had been hospitalized in February 1979 for palliative treatment of recurrent cellulitis of the left leg. He stated it required five days of intravenous antibiotics, then rest at home for several weeks on oral antibiotics. Claimant recovered enough to resume part time work on April 30, 1979. In Dr. Courogen's opinion the claimant's disability during this period of time was a direct result of the November 9, 1962 industrial injury and he felt that there would be additional periods such as this in the future which would require palliative treatment.

On October 8, 1979 the Fund advised the Board of claimant's request for additional time loss benefits and because claimant's aggravation rights had expired, stated it was referring the matter to the Board for own motion consideration. Attached to their letter were copies from the Fund's file. The Fund stated it was not opposed to a determination of additional temporary total disability, however, because of Dr. Courogen's report of September 1979 which indicated that it was palliative treatment for a recurrent cellulitis episode, the Fund felt the claim should not be left in an open status.

The Board, having considered all of the medicals, concludes that claimant is entitled to compensation for temporary total disability from February 3, 1979 to May 1, 1979 and for temporary partial disability from May 2, 1979 until September 1, 1979, the approximate date the rehabilitation supervisor, David Balding, advised the Field Services Division of the Workers' Compensation Department that claimant would be able to work eight hours a day, less any time claimant may have worked part time prior to September 1, 1979.

IT IS SO ORDERED.

WCB CASE NO. 79-2958 October 18, 1979

GARY LEE SPEAR, CLAIMANT
Jerry. E. Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Or Dismissal

The requests for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by both parties, and said requests for review now having been withdrawn,

IT IS THEREFORE ORDERED that the requests for review now pending before the Board are hereby dismissed and the order of the Referee is final by operation of law.

CLAIM NO. 99W-10-5044 October 18, 1979

RICHARD M. VERNON, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
Own Motion Determination

Claimant was a 28-year-old construction laborer who sustained a laceration of the left forearm on July 17, 1972 when a piece of chisel which he was using to chip mortar broke and penetrated his left wrist area. The injury damaged the radial nerve requiring surgical repair. As a result claimant was left with some decreased function of the radial nerve and his claim was closed initially on August 20, 1973 with an award for permanent partial disability equal to 7.5° for 5% loss of the left forearm.

Claimant requested a hearing and as a result thereof claimant was granted 25.5° for partial loss of the left forearm by the Referee's Opinion and Order, dated January 22, 1974.

The claim was reopened for surgery on December 16, 1974 and additional surgery consisting of a nerve graft was done on May 30, 1975. The claim was closed by a Determination Order, dated February 3, 1977, whereby claimant was granted an additional 7.5° for 5% loss of the left forearm and on May 9, 1977 a Stipulation was approved whereby claimant was granted an additional 7.5°, giving claimant a total of 40.5° for 27% loss function of the left forearm.

In the spring of 1979 claimant had additional difficulties with his left arm and, on March 8, 1979, it was felt that the problem was caused by a neuroma which required surgery. The carrier, on March 15, 1979, denied claimant's request to reopen the claim, however, the surgery was performed on March 27, 1979.

On May 1, 1979 the Board entered its Own Motion Order reopening the claim for the surgery and directing the carrier to pay compensation, as provided by law, commencing on the date claimant entered the hospital for the surgery.

Claimant was released to return to work on May 1, 1979 and has not been seen since June 1979. On September 11, 1979 the carrier requested a determination based upon claimant's refusal to return to the doctor for further follow-up examination which the carrier had requested. Claimant refused because he felt that the doctor had cut on him too much already and he had no intention of returning to see him.

The Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with an award of compensation for temporary total disability from March 27, 1979, the date of the surgery, through April 30, 1979, the last day before claimant was released to return to regular work. They recommended no additional award for permanent partial disability.

The Board concurs in these recommendations.

ORDER

Claimant is granted compensation for temporary total disability from March 27, 1979 through April 30, 1979. This award is in addition to all previous awards claimant has received for his industrial injury sustained on July 17, 1972.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in behalf of claimant in this matter the sum equal to 25% of the additional compensation for temporary total disability awarded claimant by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 77-7786 October 19, 1979

ELSIE M. CASPER, CLAIMANT
Ringle & Herndon, Claimant's Attys.
Souther, Spaulding, Kinsey,
Willaimson & Schwabe, Defense Attys.
Order Awarding Attorney's Fees

On September 6, 1979 Referee James P. Leahy entered his Opinion and Order in the above entitled matter in which he found claimant to be permanently and totally disabled. Claimant had been granted 32° for 10% unscheduled disability by the Determination Order. Inadvertently, this Opinion and Order failed to provide for an attorney's fee for claimant's attorney.

An attorney's fee agreement signed by claimant and his attorney was received in the record and it appears on the face of it to be a proper attorney's fee agreement which allows claimant's attorney a fee in the sum equal to 25% of any additional compensation which claimant's attorney shall secure for claimant as the result of his appearance before the Referee.

Before the omission of the attorney's fee was noticed the defendant-employer had requested Board review and the claimant had cross-requested Board review, therefore, jurisdiction became vested in the Board. An attorney's fee payable out of compensation is considered as compensation and, therefore, such a fee is covered by the provisions of ORS 656.313 and the filing of an appeal does not stay payment thereof.

IT IS HEREBY ORDERED that the Opinion and Order entered in the above entitled matter on September 6, 1979 is corrected by inserting after the last paragraph on page four of said Opinion and Order the following paragraph:

> "Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to 25% of the additional compensation awarded claimant, payable out of said compensation as paid, not to exceed a maximum of $3,000."

WCB CASE NO. 79-85 October 19, 1979

In the Matter of the Compensation of
The Beneficiaries of
KEITH COOKUS, DECEASED
Robert McConville, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the SAIF, 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. 78-6828 October 19, 1979

FRANCIS LIVINGSTON, CLAIMANT
Luebke & Wallingford, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order, dated August 21, 1978, which granted claimant no compensation.

Claimant is a 31-year-old lift truck driver who has worked for the defendant-employer since 1969. On February 25, 1970 claimant injured his back while alighting from a forklift truck. The injury was initially diagnosed as a myofascial strain and daily diathermy and massage was recommended. Claimant was permitted to return to work and came under the treatment of Dr. Metz, who released claimant for his regular work on October 14, 1970.

On October 20, 1970, while claimant was performing his regular job, he developed pain in his right buttocks and sought treatment at the Industrial Clinic. Dr. Rieke, after examining claimant, advised him to try reasonable work on the job and to soak in hot tubs to ease his back pain. Claimant continued to work at his regular job until October 1976 except during 1975 when he worked on the drill press. Since October 1976 claimant has been off work and on unemployment except for a few months when he worked as a salesman.

Claimant filed a claim for his February 25, 1970 injury which was accepted as non-disabling by the Fund, the employer's carrier at that time. Claimant missed no time from work nor was he authorized by any physician not to work. Claimant filed a second claim for his October 20, 1970 accident which was treated by the Fund as a continuation of the February 25, 1970 injury. Again claimant missed no time from work. These claims were closed on a "medical only" basis rather than pursuant to ORS 656.268.

In 1976 the employer switched his workers' compensation coverage to Employers Insurance of Wausau and in July and October of 1976 claimant again sought treatment for his back and neck problems at Kaiser Permanente.

In October 1976 he filed an occupational disease claim which Wausau denied. Claimant requested a hearing. The Referee at that hearing affirmed the denial. This order was appealed to the Board which, after reviewing all the facts, ordered the claim remanded to the Referee to join the Fund as a party. After the case had been remanded claimant requested the matter be dismissed which it was by an order dated February 16, 1979.

On November 9, 1977 claimant filed an aggravation claim which the Fund denied on December 27, 1977. At a hearing on this denial before Referee Leahy the Fund moved for a dismissal on the grounds that claimant's aggravation rights had expired and that his only remedy was under the provisions of ORS 656.278. Referee Leahy found that claimant had failed to prove he had aggravated any condition resulting from the two incidents in 1970 and that if it had been appropriate and timely to make an aggravation claim, the Fund's denial would have been approved; however, claimant could not file an aggravation claim because the original 1970 claims were never closed pursuant to ORS 656.268. The Referee, on May 30, 1978, ordered that claimant's aggravation claim, dated August 9, 1977, and the Fund's denial, dated December 12, 1977, be considered as nullities.

The Fund sent the 1970 claim to the Evaluation Division of the Workers' Compensation Department and on August 21, 1978 a Determination Order was issued on the October 1970 injury which allowed claimant no compensation.

Claimant requested a hearing on the adequacy of the August 21, 1978 Determination Order. The only issue at this hearing was whether claimant had sustained any disability as a result of his 1970 industrial injury.

The Referee found claimant had sustained a myofascial back strain as a result of two incidents which occurred in 1970 and for which he received medical treatment but which did not require him to miss any time from work prior to

1976. No doctor had authorized time loss nor stated that claimant had a permanent injury as a result of the 1970 work incidents. It was not until October 1976 that claimant had to leave work because of back pain and he was off work until March 1978 when he returned to a job which paid less. Even during this period of time no doctor authorized claimant's time loss.

The Referee concluded that whatever had happened to claimant's back in October 1976 was not the responsibility of the Fund. His problems in 1976 were due either to his congenital problems or his work for the employer when its carrier was Wausau.

Claimant had no problems in 1975 while working on the drill press. His problems began the next year when he returned to driving a truck. Dr. Gritzka was of the opinion that claimant's job activities aggravated claimant's congenital condition but he made no distinction between the part that claimant's 1970 incidents played and his work activity in 1976.

The Referee concluded that the evidence before her did not reveal that claimant sustained any permanent impairment as the result of his 1970 work incidents nor was he entitled to any compensation for temporary total disability because he had missed no time from work.

The Board, on de novo review, finds that Referee Leahy's order nullifying the claim for aggravation and the denial thereof had the effect of remanding the claim for closure because claimant had never had his claim for the 1970 incidents closed pursuant to ORS 656.268. The Fund complied but claimant was not satisfied with the Determination Order and properly requested a hearing.

Dr. Gritzka examined claimant on October 14, 1976 and also took a history from claimant to the effect that claimant's onset of low back pain which he attributed to driving a truck over rough roads had commenced sometime in 1970. Claimant told him that he had been seen by Dr. Rieke and also by Dr. Metz. Dr. Rieke told him that he had a "congenital condition". The doctors at Kaiser Permanente Hospital told claimant that he would continue to have back problems as long as he did heavy work.

At the time of the examination by Dr. Gritzka claimant was complaining of pain primarily in the right lumbosacral area which he said caused him constant pain and radiated down his right leg to the lateral side of his right foot. It was Dr. Gritzka's impression that claimant's recent episodes of loss from work were job related; he believed that claimant had an antecedent condition which had been aggravated by his activities on the job over a long period of time. He felt claimant's work as a hyster driver had aggravated his low back condition and contributed to its progression and he concurred with the opinion expressed by the physicians at Kaiser Permanente that as long as claimant continued to do heavy labor or to drive heavy equipment he would continue to have back pain. He did not feel claimant was totally disabled by his condition but he felt claimant's condition was compatible with activities which did not require repeated bending, stooping or lifting nor require operating vibrating or heavy machinery. He considered claimant's condition as representing approximately 7.5% total body permanent physical impairment which translates into a mild to moderate disability.

The Board concludes, based upon the medical evidence, especially giving weight to the opinion of Dr. Gritzka, that claimant has suffered some loss of wage earning capacity as a result of his industrial injury in October 1970 and, therefore, that the Determination Order of August 21, 1978 is inadequate.

Claimant is entitled to an award of 32° which represents 10% of the maximum allowable by statute for unscheduled disability to compensate him for his loss of earning capacity. There is no evidence that claimant lost any time from work as a result of his injuries, therefore, he is not entitled to any compensation for temporary total disability.

ORDER

The order of the Referee, dated April 18, 1979, is reversed.

Claimant is awarded 32° of a maximum of 320° for 10% unscheduled low back disability.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation awarded claimant by this order, payable out of said compensation, not to exceed $3,000.

WCB CASE NO. 78-7367 October 19, 1979

KENNETH M. RUMSEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Roger R. Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of that portion of the Referee's order which ordered it to pay claimant's counsel as a reasonable attorney's fee a sum of $600, this fee to be in addition to, and not out of, the compensation awarded claimant by the Referee's order.

The sole issue before the Board on review is the propriety of the Referee's award of attorney's fee payable directly by the employer and its carrier rather than out of compensation awarded claimant.

Claimant, at the time of the injury on September 17, 1976, was a 35-year-old truck driver. When claimant's truck collided with another automobile claimant was knocked out and suffered a variety of contusions and lacerations over his face and body. He was seen and treated by several doctors including Dr. Colleti and Dr. Fry.

Dr. Colleti and Dr. Fry have provided the major portion of claimant's medical treatment. Apparently, Dr. Colleti's report of August 14, 1978 which described claimant's work capabilities and the extent of his permanent disability was the basis for the Determination Order dated September 15, 1978. The Determination Order awarded claimant compensation for temporary total disability from September 17, 1976 through June 10, 1978 and 32° for 10% unscheduled low back disability.

After the issuance of the Determination Order, Dr. Fry advised the Workers' Compensation Department, on October 25, 1978, that Dr. Colleti was in effect "filling in" for him when he wrote the August 14, 1978 report and actually, in Dr. Fry's opinion, claimant was not at that time stable and did not become so until the middle of September 1978. The defendant-employer did not furnish claimant's counsel a copy of the October 25 report from Dr. Fry; claimant obtained a copy of it from Dr. Fry only a few days before the hearing.

The reports from the Division of Vocational Rehabilitation were in the possession of the carrier or its attorney long before the hearing but it does not appear that they were furnished to claimant prior to the hearing. A report from the Orthopaedic Consultants, dated December 28, 1978, in the possession of the defendant by January 9, 1979, 20 days before the hearing, and which indicated that claimant should be entitled to a 25% disability, was not furnished claimant until the day of the hearing.

The Referee found that the claim was not prematurely closed but that the time loss had been terminated at a date earlier than the medical evidence indicates was proper. He decided that claimant's compensation for temporary total disability should have been terminated on September 15, 1978 rather than June 10, 1978, based upon Dr. Fry's report of October 25, 1978.

Insofar as claimant's claims for penalties and attorney's fees because of wrongful refusal to reopen the claim, the Referee found that the defendant-employer not only withheld Dr. Fry's October 25, 1978 report which authorized additional compensation for temporary total disability but it also failed to furnish claimant copies of other medical reports to which he was entitled.

ORS 656.262(8) provides for penalties based upon a percentage of amounts then due only for unreasonable delay, unreasonable refusal to pay compensation or unreasonable delay in acceptance or denial of a claim. ORS 656.382(1) provides for an award of attorney's fees where the carrier refuses to pay compensation due under an order of the Referee, Board or court or otherwise unreasonably resists the payment of compensation.

The Referee found that under the circumstances of this case there was no basis for the assessment of penalties because the defendant-employer was entitled to rely on the Determination Order as to claimant's status even though subsequently Dr. Fry's report indicated that the earlier report was not accurate. However, he did find that the failure of the defendant-employer to provide the reports in question to claimant or to the Evaluation Division for reconsideration would amount to unreasonable resistance if willfully done. The defendant-employer claims the omission was done through inadvertence but the Referee found that even if that was so the acts of omission were inexcuseable. He found that there was really "no punishment to fit the crime" because of the limitations of the penalty statutes but he concluded that claimant's attorney should be paid an attorney's fee because, in his opinion, there were too many reports withheld too long by the defendant-employer. He construed these withholdings to constitute unreasonable resistance within the meaning of ORS 656.382(1) and awarded claimant a reasonable attorney's fee of $600.

He also increased claimant's award for permanent disability but, as aforesaid, this is not an issue on Board review.

The Board, on de novo review, finds that although the actions on the part of the defendant-employer in this case are indicative of poor claim processing, nevertheless, such cannot be construed as unreasonable resistance within the meaning of ORS 656.382(1).

The Referee cites the court's ruling in Morgan v. Stimson Lumber Company, 38 Or App 579, affirmed as modified 39 Or App 840, (1979), to support his finding that no penalty would lie then proceeded to reach a conclusion that the claimant's attorney was entitled to a reasonable attorney's fee pursuant to ORS 656.382(1). The Court in Morgan had before it the issues of the propriety of both penalties and attorney's fees awarded by the Referee and, in its opinion, held that ORS 656.262(8) did not give the Board the authority to assess penalties or attorney's fee for failure to provide claimant with requested documents [emphasis supplied].

In this case, the defendant-employer did not refuse to pay compensation due, did not unreasonably resist the payment of compensation, nor did it request the hearing which was held before the Referee. Therefore, the provisions of ORS 656.382 are not applicable.

The Board concludes that the Referee's order must be modified to the extent that the attorney's fee awarded to claimant's attorney shall come out of the additional compensation which he secured for claimant as a result of the hearing and not be paid directly by the defendant-employer and its carrier.

ORDER

The order of the Referee, dated April 6, 1979, is modified.

That portion of the Referee's order which granted claimant's attorney a $600 fee is reversed. Claimant's attorney is awarded as a reasonable attorney's fee for his services at the hearing before the Referee a sum equal to 25% of the additional compensation granted claimant by the Referee's order, payable out of the increased compensation as paid, not to exceed $3,000.

The Referee's order, in all other respects, is affirmed.

WCB CASE NO. 78-5375 October 22, 1979

FREIDA ABBOTT, CLAIMANT
Eldon M. Rosenthal, Claimant's Atty.
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

On October 4, 1979 the majority of the Board, after de novo review, affirmed and adopted the Opinion and Order of the Referee entered in the above entitled matter on May 8, 1979.

The claimant's attorney was awarded as a reasonable attorney's fee for his services in connection with Board review $400 to be paid by the Fund.

On October 15, 1979 the Board received from the claimant's attorney a request to reconsider the attorney's fee, stating that he felt that a reasonable fee would be $1,000.

The Board, after giving consideration to the request and the attorney's statements in support thereof, concludes that there is justification for the attorney's request and that the attorney's fee should be increased from $400 to $700. In all other respects the Order on Review entered in the above entitled matter on October 4, 1979 shall remain the same.

IT IS SO ORDERED.

SAIF CLAIM NO. NC 301579 October 23, 1979

STEPHEN C. DOOLEY, CLAIMANT
Allan H. Coons, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, then a 26-year-old pick-up and delivery driver for J & J Power Equipment, Inc., whose carrier was the State Accident Insurance Fund, injured his low back on April 23, 1971 while loading a large tractor-type lawn mower onto his truck. The injury was diagnosed as lumbosacral strain and claimant was given conservative treatment. The claim was initially closed on July 22, 1971 by a Determination Order which awarded claimant compensation for temporary total disability from April 23, 1971 to May 15, 1971 and for temporary partial disability from May 15 to June 8, 1971.

Later claimant came under the medical care of Dr. Degge, an orthopedic physician, who requested that the claim be reopened on September 9, 1971 to enable claimant to have treatment for his unstable low back. The claim was reopened and closed on March 9, 1972 by a Second Determination Order which awarded claimant additional compensation for temporary total disability from September 9, 1971 to February 5 1972 and 32° for 10% unscheduled low back disability.

On September 20, 1973 Dr. Degge again requested the claim be reopened, this time for surgery to stabilize claimant's low back. The Fund denied the request to reopen and claimant requested a hearing. As a result of the hearing the Fund was directed to reopen the claim and a two-level fusion L4 to the sacrum was performed on October 18, 1974. The fusion did not heal solidly and on September 9, 1975 a repair of the pseudoarthrosis was attempted. Claimant's condition was found to be medically stationary on September 16, 1976 and the claim was closed by a Third Determination Order on December 8, 1976 which awarded claimant additional compensation for temporary total disability from August 26, 1974 through September 16, 1976 and an additional 64° for 20% unscheduled low back disability.

Pursuant to a Stipulation approved on September 16, 1977 claimant was given an additional 20% for his unscheduled low back disability, giving him a total of 50% of the maximum; claimant was allowed to be paid the entire increased award in a lump sum to assist in the purchase of a business.

On July 25, 1978 the claimant began receiving psychiatric treatment from Dr. Henderson. Claimant had increasing problems with his back and a decompressive laminectomy at the level above the fusion was performed on January 16, 1979. Claimant's condition insofar as his back was concerned was declared to be medically stationary on April 3, 1979 and he was released to return to light to moderate work activity. He continued to receive psychiatric treatment.

On May 25, 1979 the Stipulation was approved whereby claimant's aggravation application submitted on October 2, 1978 was accepted and the claim was reopened for further medical care and treatment consisting of psychiatric consultation and treatment and orthopedic evaluation, surgery and treatment. Time loss was to continue after October 2, 1978 as warranted. Claimant had alleged he was entitled to retroactive time loss from July 25, 1978 to October 2, 1978 based on the evaluation and treatment claimant received from Dr. Henderson. The Stipulation stated that the issue of whether claimant was entitled to this additional period of retroactive time loss was to be held in abeyance and to be considered again initially by the Evaluation Division of the Workers' Compensation Department at such time as claimant's current orthopedic and psychiatric condition became medically stationary and further determination of claimant's disability was warranted.

On August 2, 1979 Dr. Henderson expressed his opinion that claimant's psychiatric condition was stationary and the Fund requested the Evaluation to make a determination with respect to claimant's condition at that time.

The Evaluation Division recommended that the claim be closed with compensation for temporary total disability to be paid from July 25, 1978 through September 12, 1979. It recommended that claimant be granted no additional compensation for permanent partial disability, stating that he had adequately been compensated for his loss of wage earning capacity by the previous awards which totalled 160° for 50% of the maximum allowed by statute for unscheduled disability.

The Board accepts the recommendation of the Evaluation Division.

ORDER

Claimant is awarded compensation for temporary total disability from July 25, 1978 through September 12, 1979, inclusively. This award is in addition to any awards claimant has previously received for his industrial injury sustained on April 23, 1971.

Claimant's attorney has already been provided a reasonable attorney's fee under the provisions of the Stipulation approved on May 25, 1979.

WCB CASE NO. 78-8654 October 24, 1979

JOHN A. AVDEEF, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Roger R. Warren, Defense Atty.
Cheney & Kelley, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the order of the Referee which affirmed Consolidated Freightways' denial of his claim for aggravation, affirmed Evergreen Helicopters' denial of his claim for a new injury; ordered Evergreen Helicopters carrier, Employers Insurance of Wausau, to precisely determine the amounts paid to claimant during this period of his employment; to compute the proper amount due claimant for compensation for temporary total disability and ordered a 25% penalty of any amounts due and owing and granted claimant's attorney $150 as a reasonable attorney's fee.

Claimant was employed as a driver for Consolidated Freightways and on November 8, 1974 he filed a claim for a low back injury from constant bouncing around in his truck. The diagnosis was sciatic nerve root compression syndrome, left. On November 5, 1974 claimant underwent a laminectomy with removal of a herniated disc, performed by Dr. Smith.

In April 1975 claimant went to work for Columbia Helicopters as a pilot and worked there only three months. He testified that leaning out of the side of the chopper hurt his back.

In 1977 claimant was in an authorized program of vocational rehabilitation in electronics but had difficulty sitting as a full time student.

From this injury claimant was awarded 128° for 40% unscheduled low back disability.

In August 1978 claimant went to work for Evergreen Helicopters, again as a pilot. Claimant contends that on September 29, 1978 his helicopter was in for its 100-hour maintenance service and claimant went down a steep slope to retrieve the doors of the helicopter that had previously been removed. Claimant slipped and sat down on something that was in the grass. Claimant picked up the doors and went back up the hill and told the mechanic, Mr. Miller, that he had fallen. Claimant continued working one more week and then he quit. Claimant testified he quit because of pain and also from dissatisfaction with his paycheck.

Just prior to this incident on September 29 claimant had been examined again by Dr. Coletti on August 4, 1978. At that time Dr. Coletti found his condition stable. He felt claimant could perform work not requiring lifting over 50 pounds, stooping or bending.

Claimant did not file his claim for a new industrial injury of September 29 until October 11, 1978. Sometime prior to November 2, 1978 claimant had seen Dr. Coletti and had x-rays taken, as is reported by Dr. Berkeley in his report of November 2. Dr. Berkeley found claimant's complaints were low backache, burning sensation between the buttocks, bilateral sciatica, pain and numbness in his heels. The diagnosis was lumbosacral sprain and physical therapy was recommended.

On November 22, 1978 claimant underwent a myelogram. The myelogram revealed scarring along the nerve roots, giving rise to claimant's clinical picture.

On November 8, 1978 a denial was issued by Employers Insurance of Wausau on behalf of Evergreen Helicopters denying responsibility of any incident as not arising out of and in the scope of claimant's employment.

On December 21, 1978 Consolidated Freightways issued its denial of claimant's claim for aggravation.

On January 24, 1979 Dr. Berkeley reported that claimant's present symptoms are from a new injury and not from a natural progression of his old injury. He felt claimant was still disabled and unable to work.

Employers' Insurance of Wausau voluntarily paid some compensation to claimant for temporary total disability around December 1978. A question arose as to payment being in the proper amount.

Claimant testified that after the September 29 incident he had a new symptom, numbness in the big toe and much greater severity of his original pain. Claimant further testified he quit this employment because his symptoms gradually progressed.

Mr. Miller, the mechanic for Evergreen, testified that claimant told him on September 29 that he had fallen. He personally, however, noticed nothing physically wrong. At some time, he didn't remember exactly when, claimant told him that this incident was not Evergreen's responsibility because he had a prior back injury.

The Referee found no evidence at all of any aggravation and affirmed Consolidated Freightways' denial. He found that the fact that claimant did not file a claim until October 11, 1978 played a role in his not finding any compensable injury occuring on September 29. He affirmed Evergreen Helicopter's denial. He further ordered Evergreen Helicopter, through its carrier, Employer's Insurance of Wausau, to precisely determine amounts paid to the claimant for temporary total disability under ORS 656.210 and to pay such amounts due and owing to claimant plus a penalty of 25% thereon.

The Board, on de novo review, disagrees with the conclusion reached by the Referee. The Board finds the evidence supports the conclusion that claimant suffered a new injury on September 29, 1978. Claimant told the mechanic at Evergreen he had fallen as the mechanic so testified; claimant saw Dr. Coletti sometime prior to November 21, 1979 and had x-rays taken. Dr. Berkeley, who had the full history of claimant's prior injury and subsequent surgery, opined that claimant's present symptoms were the result of his new injury sustained on September 29, 1978. Therefore, since there was no contradictory evidence in the record, the Board finds claimant did suffer a new injury on September 29 which is supported by the record.

The Board concurs with the Referee's finding that there was no proof claimant suffered an aggravation and would affirm Consolidated Freightways' denial.

With respect to the issue of the proper rate to be used to compute compensation for temporary total disability, the Board finds that claimant offered no proof, other than a statement at the hearing, to support his contention that he was paid improperly. Therefore, he failed to prove that his compensation rate for temporary total disability was incorrect.

ORDER

The claim is hereby remanded to Employer's Insurance of Wausau for acceptance and the payment of compensation as required by law until closure is authorized pursuant to ORS 656.268.

The denial issued by Consolidated Freightways on claimant's claim for aggravation is hereby affirmed.

Claimant's attorney is hereby granted, as a reasonable attorney's fee for his services both at the hearing and before the Board on review, the sum of $600, payable by the Employers Insurance of Wausau pursuant to ORS 656.386.

WCB CASE NO. 78-5233 October 24, 1979

CARL E. DOTSON, CLAIMANT
John C. DeWenter, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which granted him an award equal to 80° for 25% unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant had been employed by Champion International as a faller and bucker and on July 11, 1977 he strained his back cranking a chainsaw.

On October 7, 1977 Dr. Degge reported claimant for the past year had a history of cardiac arrhythmia for which he takes Digitalis and Quinadine. Upon physical exertion claimant experiences shortness of breath. Claimant's present complaints were back pain radiating into his left buttock. Dr. Degge diagnosed luxation of the lumbosacral facets and some osteoarthritis in the facets probably aggravated by the demands placed on his back as a logger. Claimant's treatment was conservative.

On October 31, 1977 Dr. Degge opined claimant could return to work but was in need of job placement into lighter work which would not place demands upon his back; claimant was limited in prolonged lifting, bending or twisting. He released claimant for modified work.

Claimant was enrolled at the Disability Prevention Center on February 24, 1978. The vocational teams' concensus was that claimant was precluded from logging and is now limited to medium work. Dr. Azavedo concluded that claimant's impairment was slight.

On June 30, 1978 the claim was closed by a Determination Order which granted him an award of 32° for 10% unscheduled disability.

A chart note in the record dated November 1977 indicates that the claimant was terminated because the employer felt he was unable to perform his work due to heart and lung problems. The employer feared that claimant would have a heart attack. This decision was ultimately reversed.

On April 24, 1978 Dr. Bower reported that Dr. Hawn, a cardiologist, felt claimant's heart condition was transient in nature related to myocarditis which resolved and claimant was able to work without permanent disability.

Claimant testified he quit work on the date of injury, July 11, but returned and worked a couple of weeks, finally quitting for good on October 17, 1977. Claimant testified he is to have heart valve repair surgery at the Veterans Hospital in March 1979.

After closure of the claim, vocational rehabilitation tried to assist claimant, but he said he was moving to the state of Washington. The claimant did not move and he was to contact his counselor again after his surgery.

Claimant testified his chief problems are his back and his breathing. Claimant is 50 years of age and, aside from his third grade education, he has had no formal education. He had taken a vocational course in body and fender repair.

The Referee found that claimant had not met his burden of proof that he was permanently and totally disabled. He further found the employer was not responsible for claimant's heart condition. The Referee commented about claimant suffering a serious heart condition, returning to work full time, then suffering a minor back injury, is a fact situation somewhat analogous to the fact situation in Weller v. Union Carbide Corp., 35 Or App 355.

The Board, on de novo review, concurs with the conclusion reached by the Referee, however, finds that the facts of this case do not bring it under the rule enunciated by the Court of Appeals in the Weller case (supra.).

ORDER

The order of the Referee, dated April 17, 1979, is affirmed.

WCB CASE NO. 78-9822 October 24, 1979

DONALD R. JACKSON, CLAIMANT
Allen, Stortz, Barlow, Fox & Susee, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests Board review of the Referee's order which awarded claimant 128° for 40% for unscheduled low back disability.

At the hearing before the Referee the issue of claimant's eligibility for vocational rehabilitation services was dismissed without prejudice to claimant in order to allow claimant to test the program. The sole issue before the Referee and now before the Board on appeal is extent of claimant's permanent disability.

Claimant was a 47-year-old back hoe operator who suffered a compensable injury to his back on September 27, 1977. Claimant was employed to dig a ditch in which concrete pipe was laid and claimant would frequently get off the back hoe and assist a laborer in placing a pipe which weighed approximately 200 pounds into the ditch. While lifting one of these pipes claimant lost his footing and strained his back. Claimant kept on working until his pain increased to the extent that he was unable to return to work as a heavy equipment operator. Claimant has been evaluated by a number of doctors all of whom suggested conservative treatment. Dr. Burr, an orthopedic surgeon, diagnosed chronic low back instability and felt that claimant was going to have to live with some discomfort. He did not recommend surgery and urged that claimant return to work within a week without limitations. This was in January 1978; claimant had not worked since November 1977.

In May 1978 claimant was examined by Dr. Butler, an orthopedist, who also felt surgery was not necessary and was of the opinion that claimant would be returned to his pre-injury status within a few weeks. The only limitation he placed upon claimant's activities was heavy lifting. Dr. Butler indicated that claimant's obesity was hindering his attempts at rehabilitation and that claimant needed to exercise to strengthen his back.

Dr. Hardiman examined claimant in September 1978 and felt that claimant's back sprain was chronic and had been stable for some time. He felt that claimant was likely to have some discomforts through his lifetime and concluded that claimant's disability was minimal.

The Referee found that prior to his industrial injury, claimant had never experienced problems with his back. Claimant often worked a full day in heavy construction trades and then continued working on the weekends doing vigorous work on his farm. He had installed a fence with hand tools and he had dug trenches and other types of similar work. Prior to his injury claimant was able to lift considerable weight and had no difficulty moving the 200-pound pipes at the time of his injury. The Referee found claimant was skilled in the operation on construction sites and that he also had skills in carpentry and had done some office work of an undisclosed type.

On October 5, 1978 the Fund asked Dr. Davies, claimant's treating physician, if he agreed with Dr. Hardiman's report that claimant's back sprain was chronic but that his condition had been stable for some time and disability was minimal. Dr. Davies replied that he did. However, on October 27, 1978, Dr. Davies advised the Fund that claimant should not return to his occupation as a construction worker.

The Referee found that claimant's back pain, according to claimant, varies from day to day and that he takes medication regularly. Claimant is unable to do the same type of work around the farm that he previously was able to do and he must hire other people to do these jobs which include back hoe trenching for installation of a septic tank, construction of a barn or storage shed, and installation of insulation in the barn. The latter task is difficult for claimant because of the discomfort caused by lifting above his shoulders.

The Referee found that claimant was completely forbidden from lifting articles from off the floor and that he keeps nothing in his cupboard below the counter in his home. He has limitations on walking, particularly on rough terrain, he cannot do any prolonged sitting and is required to shift from side to side in order to be comfortable.

The Referee was convinced that claimant's chronic low back pain rendered him unable to return to the heavy construction trade which was his primary occupation prior to the injury. The Referee found that it was understandable that claimant had believed that his condition was not chronic and that he would eventually be rehabilitated and that he would be restored to his pre-injury status. The claimant had good use of his body in areas not involving his back and that there were many sedentary occupations which he could perform either with his present skills or with some retraining. Claimant had mental resources which would be a strong asset in obtaining employment, however, he was no longer extremely vigorous and robust as he had been prior to his injury.

The Referee concluded, based on all the evidence, that claimant had suffered 40% loss of wage earning capacity due to the injury.

He noted that claimant's enrollment in an intensive job search program with the Field Services Division was not such an "authorized program of vocational rehabilitation" as would place claimant within the provisions of ORS 656.268(2), therefore, it was proper to rate claimant's extent of disability.

The Board, on de novo review, finds that the medical evidence does not support an award of 40% of the maximum. Claimant's physical disability is minimal. The only evidence to the contrary is the subjective complaints of the claimant and the testimony of two of claimant's friends. Claimant does have considerable disabling pain, according to the unrefutted lay testimony and this disabling pain precludes claimant from performing many of the tasks which he was previously able to do. Therefore, claimant must be compensated for some loss of wage earning capacity resulting from his industrial injury.

The Board concludes, after taking into consideration claimant's minimal impairment, his intelligence and education, his capability of working at jobs other than heavy labor, and his age, that claimant would be adequately compensated by an award of 96° which represents 30% of the maximum allowable by statute.

The Board agrees with the Referee that a job search program is not a vocational rehabilitation program as contemplated in ORS 656.268(2) and it was therefore proper to rate the extent of claimant's permanent disability.

ORDER

The order of the Referee, dated April 24, 1979, is modified.

Claimant is awarded 96° for 30% of a maximum of 320° unscheduled low back disability. This is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 79-6027 October 24, 1979
WCB CASE NO. 79-6516

WILLIAM VAN WINKLE, CLAIMANT
Coons & Anderson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on February 14, 1972 which was accepted and the claim was closed. Claimant' aggravation rights have expired.

Claimant requested that his claim be reopened on the grounds that his condition had worsened and on July 10, 1979 the Fund denied the request on the grounds that a medical report from Dr. Bert, dated May 25, 1979, indicated that a new incident had occurred on March 26, 1979 while claimant was working for Oceanway Lumber in Deadwood, Oregon.

Claimant requested a hearing on this denial and also requested a hearing on the refusal of the Fund to continue to furnish claimant medical care and treatment for conditions relating to his 1972 claim pursuant to the provisions of ORS 656.245. These two requests have been consolidated for hearing on November 13, 1979 before Referee John F. Baker.

On October 1, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and to remand the request for own motion relief to the Hearings Division for the purpose of establishing a record upon which the Referee will be able to make some recommendations to the Board. It was further requested that the request for own motion relief be held in connection with the hearing on WCB Case No. 79-6027 which relates to the denial by the Fund, dated July 10, 1979, and WCB Case No. 79-6516 which relates to the de facto denial by the Fund of claimant's request for further medical care and treatment pursuant to the provisions of ORS 656.245.

The request for own motion relief was supported by certain medical documents as well as correspondence exchanged between claimant's attorney and members of the Workers' Compensation Department and the Hearings Division of the Workers' Compensation Board; copies of all correspondence were furnished to the Fund's Legal Services in Eugene. On October 5, 1979 the Board also furnished copies of claimant's application for own motion relief and the documents attached thereto to the Fund's Salem Legal Services, stating that claimant had asked for an expedited hearing on all matters involved.

On October 16, 1979 the Fund's Salem office responded to the Board's letter, stating that it was not opposed to the Board remanding the matter to its Hearings Division to clarify the record. The response stated that the medical report of May 25, 1979 originally submitted in Claim No. C 354007 appeared to clearly indicate a new injury on March 26, 1979 but when a new claim was filed the statement on the Form 801 indicated a gradual onset of symptoms from October 1978 which apparently indicated there had been an aggravation of claimant's condition.

The Board, after giving full consideration to the documents submitted to it, concludes that it would be in the best interests of all parties to remand the request for own motion relief received by the claimant to its Hearings Division with instructions that said request be set for hearing at the same time that the issue of whether claimant suffered an aggravation of an old injury or sustained a new injury on March 26, 1979 is set.

Upon conclusion of the hearing, the Referee shall cause a transcript of the proceeding to be prepared and a copy submitted to the Board together with the Referee's recommendations with respect to claimant's request for own motion and the Referee shall also enter his own appropriate Opinion and Order with regard to the other issues.

Entered at Salem, Oregon and copies mailed to:

William Van Winkle, 13811 Stage Coach Rd., Swisshome, OR 97480
Coons & Anderson, Attorneys, 101 E. Broadway, Eugene, OR 97401
Oceanway Lumber, P.O. Box 111, Deadwood, OR 97430
Siuslaw Valley Veneer, P.O. Box 5, Swisshome, OR 97480
State Accident Insurance Fund, Legal Services, 400 SE High, Salem
OR 97312

WCB CASE NO. 78-8437 October 25, 1979
WCB CASE NO. 78-8438

FERRIL COLLINS, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly
& Barnett, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On April 17, 1979 the Referee entered his Opinion and Order in the above entitled matter. The Fund requested Board review and the claimant cross-requested Board review. At the present time, the Board has not reviewed this case, however, briefs have been received from both the Fund and the claimant.

On October 17, 1979 a motion to consider new evidence was received from claimant, by and through one of his attorneys. The motion requests that the Board consider new evidence in support of the Referee's Opinion and Order and remand the claim for the receipt of such evidence not obtainable at the time of the hearing, i.e., Orthopaedic Consultants report, dated September 19, 1979. The report was attached to the motion and made a part thereof. The motion was also supported by the affidavit signed by claimant's attorney.

The Board, after considering the affidavit in support of the motion, concludes that the report of the Orthopaedic Consultants dated September 19, 1979, which obviously was not available at the time of the hearing, should be made a part of the record in order to provide the Board with a complete record. Therefore, the above entitled matter should be remanded to Referee Ail with instructions to allow the report from the Orthopaedic Consultants, dated September 19, 1979, which was based upon an examination of claimant ordered by the Fund, to be introduced into the record.

It will not be necessary to convene a hearing. Referee Ail, after considering the report from the Orthopaedic Consultants, shall enter an amended Opinion and Order or re-enter his former Opinion and Order. Either or both parties shall have the right to appeal either the amended Opinion and Order or the republished Opinion and Order.

IT IS SO ORDERED.

WCB CASE NO. 78-7497 October 25, 1979

NANCY L. GRANQUIST, CLAIMANT
Arnold D. Southwell, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which reversed its denial dated September 30, 1978 of claimant's claim for an occupational disease involving the right arm and right shoulder and remanded that claim to it for acceptance and payment of compensation as provided by law until the claim was closed pursuant to ORS 656.268.

The issue is compensability of a claim for occupational disease.

Claimant was hired in May 1973 to do bookkeeping and clerical work. In July 1975 claimant terminated her employment. On May 2, 1978 claimant filed a claim of an occupational disease, contending that she had suffered an onset of right arm and right shoulder problem in July 1974. She stated on her claim that this was caused because: "As secretary and bookkeeper I was required to write out by hand numerous carbon copy forms; peg board accounting system using carbon or NCR paper; requiring heavy pressure by writing arm eight (8) hours per day". Claimant has sustained no time loss during her employment and she has paid her own medical bills.

During the time claimant worked for the employer the general work duties and physical acts required of claimant did not change, only the intensity of the work in July 1974. Claimant testified that in the summer of 1974 her work as bookkeeper did require to put more than the usual amount of strain on her right shoulder and that she was hurrying to get all of her work finished before going on vacation.

During this vacation she had occasional pain in the shoulder. After she returned to work she saw Dr. Donkle who diagnosed bursitis and possible synovitis of the shoulder and gave her some medication and heat treatment. The x-rays were negative. Claimant told Dr. Donkle she had a heavy work load including a great deal of posting and that after a long day she noticed increased symptoms in her right shoulder area.

Claimant terminated her employment with the employer in 1975 and worked for the Union Pacific from August 1975 to and including February 1977. She suffered no time loss during this employment. Union Pacific laid her off and thereafter claimant drew unemployment compensation for approximately a year.

Near the termination of the unemployment compensation payments claimant sought advice from Dr. Vessely about the possibility of relating her shoulder problem to an on-the-job injury occurring in 1974. Dr. Grimwood, claimant's family physician, had referred her to Dr. Vessely who suggested the possibility of an occupational disease. He found calcific tendinitis, right shoulder, chronic and said he felt that claimant had chronic tendinitis of the rotator cuff of the shoulder. His major concern was the cause of her shoulder pain and whether the work activity was involved. He found it interesting that claimant had had no trouble with her shoulder prior to July 1974 when she described the heavy activities which she was required to do. The claimant felt the unusually heavy activities were the cause of her present pain.

Dr. Vessely felt it would be worthwhile to obtain the records from the initial treating physician and expressed his opinion that it would be entirely possible for the work activities she described to bring on an onset of calcific tendinitis. However, at that time is was very difficult for him to be certain because he was dealing with the claimant in 1978 and the onset of her problems, according to claimant, was in 1974.

The panel of physicians at the Orthopaedic Consultants, in their report of August 30, 1978, diagnosed chronic subacromial bursitis, right shoulder, by history and functional overlay. They felt claimant's condition was really stationary but since she had not had any injection of novacaine or cortisone into the points of tenderness of the right shoulder they suggested it should be done by Dr. Vessely. They stated that the relationship of claimant's condition to her job was questionable.

On September 20, 1978 the Fund denied claimant's claim.

The Referee found that the claim was timely filed as an occupational disease. Dr. Vessely's opinion on causation was given to the claimant on March 1, 1978. He informed claimant that she was suffering from an occupational disease. Claimant's claim was filed on May 2, 1978.

The Referee found that despite the fact that claimant had suffered no time loss while working for the employer or when she worked for Union Pacific, the history of the case given by claimant and her witnesses and the opinion of Dr. Vessely on medical causation convinced him that claimant's right arm and shoulder problems were both medically and legally caused by her work. He quoted Dr. Vessely as stating, "My opinion is that it would be entirely possible for the work activity she described to bring on the onset of the calcific tendinitis" (underlining for emphasis). He felt that the use of the word "possible" did not preclude a finding of probability.

He found that claimant's testimony that she had no problems prior to July 1974 was unrefuted and the evidence established to his satisfaction that the job activities caused the occupational disease. He set aside the denial by the Fund and remanded the claim to it; he also awarded claimant's attorney a fee of $750 for prevailing on a rejected claim but found no basis for the assessment of penalties.

After de novo review, the Board finds that there is no medical evidence in the record to establish the medical causation factor which is necessary before the claim can be allowed. The only evidence relating the occupational disease to claimant's work activities is Dr. Vessely's report and although he specifically states in his opinion that it would be entirely "possible" for the work activities to bring on the onset of her problems, he continued on, stating that he felt that it would be worthwhile to obtain the records from the initial treating physician so that he could make a determination. Dr. Vessely never received those records.

The Referee apparently believes that Dr. Vessely's statement that it was possible for claimant's work activities to bring on the onset of calcific tendinitis has the same effect as if he had said it was probable from a medical standpoint that it caused claimant's problems. Probable and possible are not synonomous. The law states that in order for a claimant to be able to sustain a claim for injuries claimant must show some medical evidence that based on a reasonable medical probability the injury was caused by the work activity. Although medical causation is normally a question of fact for the trier of fact to determine, nevertheless, there still has to be some evidence in the record from which the trier of fact can make his decision.

The Orthopaedic Consultants' report indicates that whether the injury was related to claimant's job was a questionable one and that arguments could be made that it was and arguments could be made that it wasn't. This is a statement, not an opinion, but it does indicate that the panel of physicians who examined claimant at the Orthopaedic Consultants did not feel with any degree of medical probability that it was work related.

The Board concludes that the Referee has substituted his own judgment regarding the probability that the occupational disease was work related and in the absence of medical evidence to support such a finding, it cannot be made. The denial of claimant's claim by the Fund was a proper denial.

ORDER

The order of the Referee, dated March 26, 1979, is reversed.

The denial of the State Accident Insurance Fund, dated September 20, 1978, is approved.

WCB CASE NO. 78-1883 October 25, 1979

DOROTHY HIGGINS, CLAIMANT
Reiter, Bricker, Zakovics & Querin, Claimant's Attys.
Gearing, Landis & Aebi, Defense Attys.
Order

On April 20, 1979 the Referee entered his Opinion and Order in the above entitled matter and on May 16, 1979 the employer requested Board review of the Referee's Opinion and Order.

A transcript was furnished to the Board and to the parties and a schedule of filing briefs was forwarded to the parties which indicated all briefs were to be filed no later than October 15, 1979.

On July 13, 1979 the employer, by and through their attorney's moved the Board for an order to supplement the record on review to include an eight-page report from Dr. G. L. Swift, dated June 20, 1979, stating that said report was not available at the time of the hearing.

On September 26, 1979 the claimant, by and through his attorney, filed a memorandum in opposition to the employer's motion to supplement the record. The memorandum stated that the medical report was a summary of claimant's medical treatment from August 7, 1974 through June 14, 1979 and that all of the information contained thereon with the exception of a single paragraph on page seven which described an examination on June 14, 1979 would have been available to the carrier prior to the hearing. Furthermore, claimant's treating physician, Dr. Swift, would have been available to the carrier for deposition had it requested one.

The Board, after giving consideration to the motion and the memorandum in opposition thereto, finds there is no justification to supplement the record with the narrative report from Dr. Swift dated June 20, 1979. However, because of the passage of time, the Board believes that the schedule for the filing of briefs should be revised to allow the parties to file their respective briefs.

ORDER

The motion to supplement the record in the above entitled matter which was made by the employer is hereby denied.

The appellant-employer is granted 15 days from the date of this order within which to file his brief and the respondent-claimant is granted 15 days from the date he receives a copy of the appellant-employer's brief within which to respond. There will be no reply brief allowed.

WCB CASE NO. 78-377 October 25, 1979

JEWEL E. MURNANE, CLAIMANT
Keane, Harper, Pearlman & Copeland,
Claimant's Attys.
Tooze, Kerr, Peterson, Marshall
& Shenker, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of her claim for a pulmonary condition.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 7, 1979, is affirmed.

Board Member Phillips dissents as follows:

I respectfully dissent from the opinion of the majority of the Board.

Dr. Sample's opinion, in my mind, is the more persuasive as it is based upon tangible laboratory microscopic analysis. Unlike Dr. Tuhy, Dr. Sample reviewed the microscopic slides from claimant's lung biopsy which showed the presence of multinucleated giant cells and eosinophilis and based upon this discovery, both Dr. Sample and the pathologist, Dr. Specht, made a firm diagnosis of hypersensitivity pneumonitis.

This diagnosis is proven even further by Dr. Saddoris' and Dr. Sample's reporting that continuing exposure to the stimuli in hypersensitivity pneumonitis is not essential for the progression of this disease. This fits claimant's clinical picture. The diagnosis is further confirmed by the fact that treatment for hypersensitivity pneumonitis is steroid injections which alleviate the symptomatology, as they did in claimant's case.

Dr. Sample testified that there was no doubt whatsoever of claimant's diagnosis and her work exposure as being a material contributing factor to her disease. This opinion was not based on things being incidental, but was based on clear pathological objective clinical findings and of this, Dr. Sample was certain. Dr. Sample felt the dust particles at claimant's place of employment from the remodeling was just the type of antigen to cause claimant's condition and this was, in his opinion, far more than speculation even though the antigen had no name.

Dr. Tuhy, on the other hand, never saw the lung biopsy slides and just unequivocally disagrees with the pathologist's diagnosis. Further, Dr. Tuhy examined claimant when she was on the steroid treatment and never saw her when her symptoms were severe.

For the above reasons, I find the weight of the medical opinion evidence makes this claim compensable, and would so find, reversing the decision of the Referee.

WCB CASE NO. 78-7991 October 25, 1979

BERTHA WHEELER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Newhouse, Foss, Whitty & Roess,
Defense Attys.
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of the order of the Referee which granted claimant 128° for 40% unscheduled disability. Claimant cross-requests review contending the award granted was inadequate.

Claimant was employed as a laborer for Weyerhaeuser and on August 28, 1975 she was stacking lumber for grading inspection and strained her back.

Dr. Cox initially diagnosed lumbar strain and on September 10 Dr. Bert found complaints of low back, neck and left arm pain. He suspected a lumbar disc and possible cervical sprain. The treatment was conservative.

Dr. Serbu examined claimant and reported on October 24, 1975 that the neurological examination was negative and the doctor felt claimant's problem was anxiety reaction. He found nothing to substantiate her subjective symptoms and he felt that the best therapeutic aide was a return to work.

On December 23, 1975 Dr. Bert found claimant's condition medically stationary; claimant was precluded from her regular work but could return to light work on a trial basis.

Claimant returned to work for the employer on January 5, 1976 sweeping floors and was doing fine when the foreman had her shovel wet sawdust and she began to be symptomatic and went home. Claimant has not worked since.

Claimant returned to see Dr. Bert on January 5 and he found her condition stationary.

A Determination Order of March 15, 1976 granted claimant an award of 32° for 10% unscheduled disability.

Claimant's symptoms continued and progressed and she underwent physical therapy. On April 16, 1976 an Interim Order set aside the Determination Order as claimant was vocationally handicapped. Claimant commenced school to become a seamstress.

On June 2, 1976 a Determination Order granted claimant 48° for 15% unscheduled disability.

On July 11, 1978 Dr. Bert reported that on July 10 claimant came to see him again after an absence of 1-1/2 years. The diagnosis was SI joint degeneration, and he could not rule out the possibility claimant had psoriatic arthritis. Dr. Bert opined claimant had moderate impairment on the basis of continuing pain. Her condition was stationary with the pain level unchanged in 1-1/2 years.

The defendant's attorney wrote to Dr. Bert for a clarification of his July 11 letter. Dr. Bert responded that the etiology of psoriatic arthritis was not well known, but that he could state with certainty it was not trauma related. He did feel that claimant's current symptoms are the result of SI joint degeneration, and felt it was difficult to be able to state that a strain 1-1/2 years ago, which was medically stationary, had any relationship to claimant's current problems. There never was any neurological deficit and claimant was worse now than 1-1/2 years ago but it was difficult to relate it to trauma.

Claimant testified that she can only sit and stand for 30 minutes; she could walk one mile. Weyerhaeuser never responded to her request for light employment.

Claimant is 37 years old and has an 8th grade education with past work experience as a waitress, plywood work and work in sawmills.

The Referee found, considering claimant's age, education, training and experience and her preclusion from heavy work, that she was entitled to an award of 40% unscheduled disability for her loss of wage earning capacity.

The Board finds that the medical evidence indicates that claimant's present problems are a result of degeneration of SI joints and are not the residuals from her industrial injury. Based upon the medical reports, the Board finds claimant is precluded from all heavy labor occupations but is capable of gainful employment, although not well motivated to seek employment.

The Board concludes that claimant would be adequately compensated for the residuals of her industrial injury and her loss of wage earning capacity, by an award of 80° for 25% unscheduled disability.

ORDER

The order of the Referee, dated April 27, 1979, is modified.

Claimant is granted an award of 80° for 25% unscheduled disability. This award is in lieu of that award granted by the Referee in his order which, in all other respects, is affirmed.

WCB CASE NO. 78-3619 October 26, 1979

RICHARD D. MATTHEWS, CLAIMANT
Jack Ofelt, Jr., Claimant's Atty.
John L. Klor, Employer's Atty.
Stipulation And Order

IT IS HEREBY STIPULATED by and between Richard D. Matthews, Claimant, by and through his attorney, Jack Ofelt, Jr., and Rodda Paint Company, employer, by and through its insurer, EBI Companies, by and through John L. Klor of their attorneys, that claimant suffered an injury to his back on September 12, 1977 either as a result of occupational disease or accidental injury. Determination Orders issued on April 24, 1978 and May 17, 1978 awarding claimant no permanent partial disability. On May 25, 1979, Referee Nathan J. Ail, Referee, issued his Opinion and Order which awarded 20% unscheduled disability equal to 64 degrees for injury to claimant's back and additional temporary total disability from October 9, 1977 through June 6, 1978. The employer was dissatisfied with this Opinion and Order and filed a timely appeal.

IT IS HEREBY STIPULATED AND AGREED that the appeal of employer be compromised and settled subject to the Workers' Compensation Board approving claimant's waiver of $1,000, currently owing as a result of this Opinion and Order as a reduction of the amount of T.T.D. awarded. In consideration for this award, employer agrees to dismiss its appeal presently before the Board.

SETTLEMENT APPROVED AND EMPLOYER'S APPEAL TO THE WORKERS' COMPENSATION BOARD IS DISMISSED WITH PREJUDICE.

CLAIM NO. GC 49505 October 30, 1979

FRANKLIN D. BARNETTE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his back on November 21, 1966. The claim was closed on January 10, 1967 as a "medical-only". It was reopened on April 26, 1968 for chronic lumbar strain and again closed on April 18, 1969 with an award of compensation for temporary total disability from April 29, 1968 to November 1, 1968 and compensation for unscheduled disability equal to 10% loss of an arm by separation. The aggravation rights would commence to run on April 18, 1969.

The claim was again reopened on August 17, 1969 and a fusion was performed from L4 to the sacrum; on November 17, 1970 a re-fusion was performed and on March 20, 1972 a subsequent fusion.

A Determination Order, dated April 20, 1973, granted claimant additional compensation for temporary total disability and temporary partial disability and an additional award equal to 20% unscheduled disability for the low back.

The claim was reopened on June 3, 1977 and claimant was hospitalized for traction and a compression fracture of L1 was found. Claimant returned to light duty on September 10, 1977, however, on June 1, 1978 exploratory spinal surgery with decompressive fusion and removal of scar tissue was performed.

On January 8, 1979 claimant was referred by the Orthopaedic Consultants to the Pain Clinic but claimant did not respond to the apointment letter.

On September 10, 1979 Dr. Grewe reported that claimant had seen Dr. Logan a few weeks previously and had a local injection with benefits for several weeks thereafter. Dr. Grewe stated he had a note from Northwest Pain Center regarding claimant's application for admission. The claimant said he had not pursued this because he questioned the value of the treatment. Dr. Grewe told him that he thought it would be a good opportunity to make some gains in dealing with his residual pains. He stated that if claimant did not wish to go the Pain Clinic, then he felt that his condition could be considered as stationary.

Claimant denies any difficulty with his hernia repair and Dr. Grewe stated that when he saw claimant on June 4, 1979 he suggested that he be considered stationary as of June 2, 1979 which was one year following his laminectomy-decompression. He felt that claimant's status at the present time was one of maintenance and not of curative nature.

The Fund requested a closing evaluation and the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from June 3, 1977 through September 9, 1977 and from June 1, 1978 through June 2, 1979 and granted additional compensation equal to 15% unscheduled disability, giving claimant a total award for unscheduled disability equal to 45% loss of an arm by separation.

The Board concurs only in part with this recommendation.

The last report was Dr. Grewe's chart note, dated September 10, 1979, wherein he indicated that he had recommended claimant apply for admission at Northwest Pain Center. There is no evaluation of claimant's impairment or disability made by Dr. Grewe, therefore, the Board concludes that compensation for time loss be terminated as recommended but that any additional award for permanent partial disability be held in abeyance until one more effort is made to get claimant into the Pain Center.

When claimant enters the Pain Center, compensation for temporary total disability will then be payable.

If claimant goes to the Pain Center, the Board undoubtedly will have some up-to-date reports to consider. However, if claimant refuses again to go to the Pain Center, then the carrier shall submit evidence on claimant's present loss of earning capacity and a determination will be made with respect to claimant's extent of permanent partial disability.

ORDER

Claimant is awarded compensation for temporary total disability from June 3, 1977 through September 9, 1977 and from June 1, 1978 through June 2, 1979. Upon claimant's admission to the Northwest Pain Center, compensation for temporary total disability shall commence as of that date and continue until claimant's condition is found to be medically stationary at which time a determination will be made on claimant's extent of permanent partial disability.

WCB CASE NO. 78-5585 October 30, 1979

VASIL B. CAM, CLAIMANT
Dean C. Werst, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Wilson and Phillips.

The employer requests Board review of the Referee's order which increased claimant's award to 192° for 60% unscheduled disability, contending the increased award was excessive. The claimant cross-requests review by the Board of the Referee's order, contending that he was entitled to an award for permanent total disability.

Claimant was a 33-year-old set-up man when he sustained a compensable injury to his low back on November 23, 1976. Claimant was pushing a four-stick truck when the load started to slip and he injured his back trying to support the load and prevent it from falling on his leg and foot.

Dr. Duff, an orthopedic physician, first saw claimant on November 30, 1976 and has continued to be his treating physician. On December 17, 1976 Dr. Duff performed a lumbar laminectomy and disc excision. Claimant's recovery was excellent insofar as the sciatic nerve involvement but, according to Dr. Duff, claimant still had a persistently painful back with some limitation of motion which was aggravated by heavy physical exertion.

On August 15, 1977, at the request of the carrier, claimant was examined by Dr. Spady, an orthopedic surgeon. Claimant appeared to have considerable nerve irritation and nerve root tension; Dr. Spady also felt that there might be considerable functional overlay to claimant's pain response. He did not think claimant was a good candidate to return to the type of work he had previously been doing, stating that if he was not able to be trained for a light type work then his employment opportunities in the future would be very scarce.

Claimant signed a form on August 31, 1977 stating he did not want vocational assistance at that time. Claimant said he would wait and see what happened to his back. In September 1977 claimant was enrolled at the Callahan Center and upon release from the Center, Dr. Loeb, a psychologist, reported that the consensus opinion of the vocational team which evaluated claimant was that claimant should attempt a trial work period with his former employer.

In November 1977 claimant received some chiropractic treatment which Dr. Duff later reported only made claimant's back more painful. The claimant's employer was very eager to have claimant back at work and a representative of the employer's carrier went to the premises of the employer and took moving pictures of what was represented to him as the modified job which the employer was willing to offer claimant. The film was shown to Dr. Duff who, on March 24, 1978, reported to the carrier that he felt claimant was fully able to undertake the modified job outlined in the film and he released claimant for this work effective March 23, 1978. He felt that claimant's condition was medically stationary.

On March 22, 1978 Dr. Duff saw claimant who reported to him that he had no intention of returning to work for his former employer and that he was going to pursue his farming activities and also try some carpentry work with his brother. Dr. Duff said that claimant told him he was physically capable of returning to work and he was aware that his disability payments would cease at that time.

On May 31, 1978 Dr. Duff again examined claimant who had remained self-employed as a farmer. Claimant continued to have rather chronic symptoms of moderate severity of pain in the lower back but no significant radiation in the lower extremities. He was taking pain medication and was quite active on the farm. Dr. Duff reported claimant would get pain quite severely after about two hours sitting on a tractor or in a car and that he would continue to have chronic mild to moderate lower back disabity. He placed restrictions of no more than 25 pounds on a repetitive basis or 50 pounds at any time, no bending of the trunk more than two or three occasions per hour and no sitting or standing for more than 30 minutes in any one position at any one time.

Dr. Duff stated that claimant could not resume the same work or work the prolonged hours that he had been doing prior to his industrial injury; these restrictions were permanent and, in Dr. Duff's opinion, constituted a moderately severe disability in terms of claimant's future work activities.

On June 29, 1978 the claim was closed by a Determination Order which granted claimant compensation equal to 48° for 15% of the maximum allowable by statute for unscheduled disability.

In September 1978 claimant was involved in an automobile accident and was again seen by Dr. Duff who diagnosed acute cervical strain and aggravation of pre-existing lumbar disc disease. He later stated that claimant's back symptoms seemed to be settling back to their pre-injury level and that claimant could resume his usual activities.

The claimant is a 35-year-old man of Turkish descent. He speaks Turkish, Russian and English; the latter he does not speak fluently. He has had no formal education and the only English that he is able to write is his name, address and some numbers and names of furniture which he had learned while working on his job.

Prior to coming to the United States in 1965 claimant's only work experience was fishing. After his arrival in this country claimant worked for a plywood company and since 1966 was employed at Barker Manufacturing Company, the employer in this case. Claimant's primary job was making sample furniture which involved operating machines such as a shaper, table saw, band saw, drill and a router. The job required claimant to stand on his feet all day and to do substantial bending. After the injury claimant was offered the modified job mentioned previously but he declined to take it even though he was told that there would be a cot provided for him so that he would be able to lie down when he wished and that any lifting or physical labor would be done by others. Claimant stated that he declined the job primarily because he did not feel that he could perform all the tasks by himself and he was not the type of person who would lie on a cot during working hours.

Claimant contends that he is permanently and totally disabled, however, the Referee found that he was not. She did find that the medical evidence indicated that claimant was precluded from performing any work activity which required lifting, bending or prolonged sitting or standing and that Dr. Duff had described claimant's permanent impairment as moderately severe. Taking into consideration the physical impairment, and the limitations imposed as a result thereof, claimant's age, education, work background and training potential, the Referee concluded that he was entitled to more than 15% of the maximum to compensate him for his loss of wage earning capacity. She increased that award to 60%.

The Board, on de novo review, does not find that the limitations which Dr. Duff placed on claimant's work activities were so substantial as to justify the award granted by the Referee. The evidence also indicates that claimant does not, at all times, comply with these limitations. The evidence indicates that claimant was offered a modified job at the employer's and that his own treating physician, after viewing the video tape which showed the duties of the job which the employer had offered claimant, reported that claimant was fully able to do the job and he released claimant for that type of work effective March 23, 1978. However, the day before the release of claimant to do that modified job claimant informed his treating physician that he had no intention of returning to work for his employer and he was going to continue to farm and possibly do some carpentry work with his brother.

The evidence indicates that claimant did continue to work as a farmer for most of the time after he had been released by Dr. Duff. He also worked in June 1978 with his brother building cabinets. This work required the use of a table saw, band saw and a router and claimant was able to work five to six hours a day for three weeks before he found the work too heavy for him and caused him substantial back pain. The following month, claimant worked for his father doing upholstery work although he testified that his wife helped him with any lifting that was required and did the sewing. He also testified that he did not feel that he could have performed the work by himself but he did work five to five-and-a-half hours a day two or three days a week at that type of work. Claimant stated that he left the job because of the automobile accident in September 1978. Had it not been for the accident he would have still been doing that type of work.

The Board concludes that claimant has been precluded from a rather large segment of the labor market, however, in view of the medical evidence and the evidence of claimant's work activities after his injury and taking into consideration his disinclination to accept the modified job which the employer offered to him, concludes that claimant would be adequately compensated for his loss with an award equal to 40% of the maximum.

ORDER

The Referee's order, dated February 6, 1979, as amended on March 8, 1979, is modified.

Claimant is awarded 128° of a maximum of 320° for 40% unscheduled back disability. This award is in lieu of the award made by the Referee's order which in all other respects is affirmed.

SAIF CLAIM NO. D3544 October 30, 1979

JOSEPH R. DONALDSON, CLAIMANT
Anderson, Fulton, Lavis & Van Theil,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant has requested the Fund to reopen his claim for additional time loss benefits resulting from surgery performed on September 25, 1979.

Claimant had sustained a compensable injury to his left leg and upper back on January 28, 1974. His claim was first closed on March 27, 1974 and his aggravation rights have expired; therefore, the Fund referred claimant's request to the Board for reopening under its own motion jurisdiction.

Claimant presently has requested Board review of a Referee's order dated May 31, 1979, however, the only issue before the Board on review is extent of permanent disability. The surgery performed on September 25, 1979 was for the removal of a Harrington rod and is directly related to claimant's 1974 industrial injury. The Fund has no objection to claimant's request for own motion reopening.

The Board, after thorough consideration of the evidence before it, concludes that claimant's claim should be reopened as of September 24, 1979, the date claimant was admitted to the hospital, and until closed pursuant to ORS 656.278.

Claimant's attorney should be granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

IT IS SO ORDERED.

WCB CASE NO. 78-1383 October 30, 1979

MARGARET JOHNSON, CLAIMANT
Carney, Probst & Cornelius,
Claimant's Attys.
Keith D. Skelton, Defense Atty.
Order Awarding Attorney's Fees

On October 18, 1979 the Board issued its Order on Review in the above entitled matter which affirmed and adopted as its own the Opinion and Order of the Referee dated March 12, 1979. However, at that time the Board had not been provided with a copy of an attorney fee agreement between claimant and his attorney and, therefore, no attorney's fee was granted either at the Hearing level or Board review level.

On October 25, 1979 the Board received from claimant's attorney, Edward C. Olson, a copy of the attorney's fee agreement which had been signed on February 21, 1978 and is an acceptable attorney's fee agreement.

THEREFORE, the Board concludes that claimant shall be paid the $600 which the Referee ordered the employer/carrier to pay as a reasonable attorney's fee for his services at the hearing and, in addition, the claimant's attorney is awarded a sum of $250 as a reasonable attorney's fee for his services at Board review, also payable by the employer/carrier.

IT IS SO ORDERED.

SAIF CLAIM NO. GC 76726 October 30, 1979

KENNETH V. KNAPP, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right leg on June 7, 1967. The claim was last closed by a Board's Own Motion Determination which granted claimant an award for 15% loss of the right leg or a total award equal to 99° for 90% loss of the right leg. Claimant's claim was apparently first closed in 1969 and his aggravation rights have expired.

On March 12, 1979, Dr. Heusch requested claimant's claim be reopened for surgery of the patella. By the Board's Own Motion Order, dated May 8, 1979, the claim was reopened as of the date of surgery.

Surgery was performed by Dr. Heusch on June 1, 1979. Claimant's knee showed good progress and Dr. Heusch found his condition to be medically stationary on September 19, 1979.

On October 1, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional compensation for time loss from May 29, 1979, the date claimant was hospitalized for surgery, until September 19, 1979 with no additional compensation for permanent disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from May 29, 1979 through September 19, 1979, less time worked. This award is in addition to all previous awards claimant has been granted for his injury of June 7, 1967.

WCB CASE NO. 77-4695 October 30, 1979

RUSSELL LEWIS, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher & VavRosky, Defense Attys.
Order Denying Motion

On June 2, 1977 the Board issued its Own Motion Order directing Transwestern Express Company and its carrier, Transport Indemnity Company, to accept claimant's claim for a compensable injury suffered on April 12, 1968 and to pay claimant compensation commencing on January 17, 1977, the date claimant was hospitalized for surgery, and until the claim was closed pursuant to the provisions of ORS 656.278. The employer was given 30 days from the date of the order within which to appeal by requesting a hearing.

The employer requested a hearing and as a result thereof an Opinion and Order was entered on October 8, 1979 which directed the carrier to pay claimant compensation for temporary total disability from June 2, 1977, an additional percentage of that compensation as a penalty, also an additional percentage of the compensation paid claimant for the period January 17, 1977 through June 1, 1977 and directed it to pay claimant's attorney a reasonable attorney's fee.

On October 19, 1979 the employer requested Board review of the Referee's order.

On October 20, 1979 the Board received from the carrier a Motion for Stay of Compensation. The carrier, in support of this motion, contends that although compensation ordinarily would be payable pending appeal, pursuant to ORS 656.313, the circumstances of the present case require that said compensation not be ordered paid until disposition of the carrier's appeal to the Board because the issues determined by the Referee's order relate to an "own motion jurisdiction" case under ORS 656.278.

The Board issued its Own Motion Determination on August 16, 1977 which directed the carrier to pay claimant compensation for temporary total disability from January 17, 1977 through June 1, 1977 when it was determined that claimant's condition was medically stationary. The carrier contends that the Own Motion Determination sets the carrier's liability for that period only. The claimant contends that his case should be treated like any other open case and that he be paid compensation for temporary total disability until the date of the Own Motion Determination.

The gist of the carrier's contentions apparently is that a claim closed pursuant to ORS 656.278 is not treated in the same manner as a claim closed pursuant to ORS 656.268; that the normal and customary rules of closure do not apply to a case which has been reopened under the Board's own motion jurisdiction.

The Board, after due consideration, finds no statutory or judicial basis for making a distinction between claim closure pursuant to ORS 656.278 and ORS 656.268. The provisions of ORS 656.313 which provides that compensation shall not be stayed pending appeal are equally applicable to both types of closures.

THEREFORE, IT IS ORDERED that the employer and its carrier comply with the directives set forth in the Opinion and Order of the Referee dated October 8, 1979 and pay claimant the compensation therein ordered pending the disposition of the case after Board review.

Furthermore, if the compensation ordered paid to claimant by the Referee's order was not paid within 14 days after the carrier received the copy of the order the carrier shall be subject to assessment of penalties and the payment of attorney's fees.

SAIF CLAIM NO. DC 325052 October 30, 1979

BILL D. NICHOLSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on August 31, 1971 when he was involved in a log truck/automobile accident. He suffered a cerebral concussion and strains of the cervical and lumbar regions of the spine together with contusions of the left thigh. He was treated conservatively and released to work on November 16, 1971. The claim was first closed on March 20, 1972 with an award equal to 16° for 5% unscheduled low back disability.

On July 12, 1977 the Orthopaedic Consultants recommended that claimant undergo a spinal fusion. The Board issued its Own Motion Order, dated November 4, 1977, reopening claimant's claim on the date he was hospitalized for the recommended surgery.

Claimant underwent a laminectomy and fusion on January 28, 1979. He was treated subsequent to that surgery by Dr. Hoff who found claimant to be medically stationary on September 17, 1979. Dr. Hoff's September 25, 1979 report indicated claimant could return to work as of October 1, 1979. He found minimal residuals from the injury although claimant would probably suffer some recurrence of his problems when he increased his activities.

On October 4, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss from January 28, 1979 through September 30, 1979 and additional compensation for permanent disability equal to 48° for 15% unscheduled low back disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 28, 1979 through September 30, 1979, less time worked, and additional compensation equal to 48° for 15% unscheduled low back disability. These awards are in addition to any awards he has received in the past.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of November 4, 1977.

WCB CASE NO. 79-6300 October 30, 1979

LARRY. R. PAYN, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 4, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on December 20, 1973 to his knees. According to claimant's petition, his claim was originally determined to be a non-disabling injury.

The Fund denied responsibility for his knee condition on May 31, 1978; however, by Stipulation, approved on December 12, 1978 the claim was reopened for a bilateral knee condition.

The Determination Order, dated January 18, 1979, granted claimant compensation equal to 15° for 10% loss of the right leg and 7.5° for 5% loss of the left leg. Claimant has requested a hearing on this Determination Order and the matter is presently pending before the Hearings Division.

The Fund, cross-requested a hearing, contending that claimant's aggravation rights expired (WCB Case No. 79-6300). To protect his rights, claimant requested own motion relief pursuant to ORS 656.278.

The Board, on October 5, 1979, advised the Fund of claimant's request for own motion relief, indicating it would refer the matter to its Hearings Division to be consolidated with WCB Case No. 79-6300 and asked the Fund to state its position.

On October 15, 1979 the Fund indicated that the question of claimant's aggravation rights was involved in the hearing already pending and, therefore, it would not oppose a consolidated hearing. The Fund said that it did not oppose own motion reopening should this be found to be the proper way to proceed.

The Board, after considering all the evidence before it, concludes that it would be in the best interests of the parties involved to consolidate the two matters for hearing.

Therefore, claimant's request for own motion relief is remanded to the Hearings Division to be consolidated for hearing with WCB Case No. 79-6300. The Referee shall take evidence and determine whether or not claimant's aggravation rights have expired, and if so, if own motion relief should be granted, or, if claimant's aggravation rights have not expired, claimant's extent of disability.

The Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation on claimant's request for own motion relief. If claimant's aggravation rights have not expired the Referee shall also enter an Opinion and Order.

WCB CASE NO. 78-1055 October 30, 1979

MARGARET PUTNAM, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On June 19, 1978 claimant, by and through her attorney at that time, requested Board review of the Referee's Opinion and Order, dated May 2, 1978.

The Board has been advised by claimant's present attorney that there had been a hearing scheduled to determine different issues on the same claim before the Board on review. It was originally set for October 25, 1979 before Referee Ail. This hearing has been postponed and the Board is asked to remand the Request for Review to the Hearings Division, and more particularly to Referee Ail, so that all the issues relating to this claim can be heard at the same time.

The Board concludes that it would be in the best interests of all parties for the two proceedings to be heard on a consolidated basis.

THEREFORE, the issue upon which the Request for Review by claimant of the Referee's order, dated May 2, 1978, was based is hereby remanded to Referee Ail with instructions to join that issue, i.e., reopening for medical care and treatment, with the other issues now pending before him based upon a request for hearing filed by the claimant.

IT IS SO ORDERED.

SAIF CLAIM NO. C356792 October 31, 1979

VIRGIE MAY CROWDER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, an employee of Curry County, suffered a compensable injury on March 3, 1972. She was taken to the Rogue Valley Memorial Hospital in Medford. On March 8, 1972 Dr. Bolton diagnosed a communited fracture of the left clavical, fracture dislocation of the left hip, laceration of the left thigh and both knees and possible fracture of the right hand and the left ankle. Dr. Bolton performed an arthrotomy, left hip, and continued to treat claimant until July 16, 1973 when he reported that claimant's claim could be closed. He said he wanted to x-ray her hip in about eight months, which would be two years after the surgery, to be sure it did not have aseptic necrosis developing. With respect to her knee he could not prove chondromalacia but he was very suspicious that it might be causing her knee complaints.

On March 14, 1974 Dr. Bolton again examined claimant and found full range of motion of the left hip, full range of motion of the left knee and a good healing of the left clavical. He felt that no further treatment was indicated.

On April 19, 1974 a Determination Order closed the claim with an award of compensation for temporary total disability from March 3, 1972 through June 4, 1972 and temporary partial disability from June 5, 1972 through August 31, 1972 and 15° for 10% loss of the left leg.

On July 27, 1979 Dr. Bolton advised the Fund that although claimant's left hip had held up amazingly well since her 1972 injury, during the past weeks her pain had increased and she had at that time very severe degenerative arthritis of the left hip. He felt that there was no conservative treatment which would give her relief and recommended a total hip replacement procedure. He asked that the claim be reopened.

On August 28, 1979 Dr. Bolton performed a total left hip replacement.

On October 15, 1979 the Fund advised the Board that claimant had requested that her claim be reopened for the surgery performed by Dr. Bolton and because claimant's aggravation rights had expired it was referring the matter to the Board for consideration pursuant to ORS 656.278. The Fund furnished the Board copies of all relevant medicals and stated that it would not oppose the reopening of the claim.

The Board, after reviewing all of the documents furnished to it by the Fund, including the original claim and all of Dr. Bolton's reports, concludes that the claim should be reopened with compensation for temporary total disability to commence on August 28, 1979, the date claimant was admitted to the hospital for the surgery performed by Dr. Bolton, and until the claim is closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. DC 239846 October 31, 1979

WARREN H. DONOVAN, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 9, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim pursuant to ORS 656.278. Claimant sustained a compensable injury on April 9, 1970 while working for Readymix Sand and Gravel. The claim was first closed on July 28, 1971 with an award of compensation equal to 27° for partial loss of the left foot. Since that time, claimant has received additional awards making a total of 127.5° for 85% loss of the left leg. Claimant's aggravation rights have expired.

Attached to claimant's petition were numerous medical reports in support of his position. Dr. Donald A. Smith's report of March 2, 1979 indicated that claimant saw him with complaints of pain so severe that he was ready for an amputation. Dr. Smith, with the complete concurrence of Dr. Moor, gave claimant an injection which afforded him substantial relief. The doctor felt that removal of the fat pad with the neuroma in it would relieve claimant of his symptoms and he recommended that claimant's claim be reopened for this simple surgical procedure.

The Fund authorized him to do this and the surgery was performed on April 18, 1979. Claimant had drainage problems and another procedure was done on June 18, 1979. On July 24, 1979 Dr. Smith indicated claimant was doing quite well and the wound should be completely healed within the next week or two.

On October 15, 1979 the Board advised the Fund of claimant's petition and requested it to inform the Board of its position within 20 days. On October 18, 1979 the Fund responded, stating it would not oppose the reopening of claimant's claim. It attached several documents indicating that claimant's foot was still draining in September 1979 and he would need to be in a cast for a period of time until the problem could be taken care of.

The Board, after thoroughly considering the evidence before it, concludes that claimant's claim for an injury sustained on April 9, 1970 should be reopened at this time for further compensation and treatment.

ORDER

Claimant's claim for an injury sustained on April 9, 1970 is hereby remanded to the State Accident Insurance Fund to be reopened as of April 17, 1979, the date claimant was admitted to the hospital for surgery, and until the claim is closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 79-331 October 31, 1979

PONCIANO GURULE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant 128° for 40% unscheduled low back disability.

Claimant is 39 years old, he has an eighth grade education, however, he is unable to either read or write. He commenced working at manual labor at the age of 16 and when he came to Oregon in 1976 he worked as a choker setter. On May 22, 1978 a carriage broke loose and a log struck claimant in the chest causing multiple injuries, including pain in the neck, back, shoulders and leg. Claimant was taken to the hospital where x-rays revealed no evidence of any fractures and Dr. Holst placed claimant in traction and kept him in bed for approximately 10 days before he was discharged from the hospital.

Upon referral by Dr. Holst, Dr. Woolpert examined claimant and diagnosed a back strain on June 20, 1978. Dr. Woolpert continued to treat claimant without finding any significant disability. Claimant has not worked since the accident although Dr. Woolpert, on August 8, 1978, proposed to release claimant for work as of August 21. On August 20, 1978 Dr. Woolpert stated that claimant showed no significant improvement from the time he was first examined by him but that he would like to give claimant some intensive treatment with some physical therapy, traction and hospitalize him for a week to determine whether any improvement can be made. He found some functional aspect. Claimant was hospitalized three days for traction.

Dr. Woolpert found no significant bone or discogenic disorder and referred claimant to Dr. Anderson who felt that in order to clarify the situation clinically a myelogram should be performed. The neurological examination was normal.

Claimant was examined by the Orthopaedic Consultants on October 30, 1978 and they found claimant had lumbar strain by history and there was marked functional overlay but no objective evidence of radiculopathy. It was their opinion, after examining claimant, that his case was stationary and the claim should be closed. They recommended against a myelogram but felt that claimant could return to the same occupation with limitations on lifting or bending. The loss of function with regard to the back due to the industrial injury was mild. They recommended that a psychiatric examination be done, however, none was done.

On December 1, 1978 Dr. Woolpert stated that he agreed with the analysis of claimant's problems made by the Orthopaedic Consultants, and recommended against a myelogram. He felt that the difficulty would be in getting claimant back to his regular occupation as a logger; that it would be almost impossible for him to do such type of work with the limitations imposed. He found that the claimant's condition was stationary and that the claim should be closed. He also favored job placement or any aide which could assist claimant in finding other types of employment which would not require heavy lifting or repetitive bending.

On December 8, 1978 a Determination Order granted claimant compensation for temporary total disability from May 22, 1978 through October 30, 1978 only.

The Orthopaedic Consultants' recommendation that claimant have a psychological evaluation was not followed so claimant's attorney sent him to Dr. Luther.

On January 29, 1979 Dr. Luther stated that claimant was not malingering but was fearful that he would be unable to return to his work. He suggested retraining. Dr. Luther diagnosed a hysterical neurosis, conversion type, and stated that because of claimant's lack of education and sophistication, he probably was not treatable in the usual psychiatric sense. He rated his impairment, using the guidelines of the AMA, as 20-30% of the whole man.

Dr. Holland reported on April 2, 1979, that claimant's psychiatric problem of a passive-agressive personality disorder, with hysterical features, was not causally related to the job injury of May 22, 1978 but it was interfering with claimant's rehabilitation. He felt that the injury did not cause any psychiatric impairment of a permanent nature.

The Referee found, after listening to the testimony of claimant and his wife and taking into consideration the medical evidence, that claimant has suffered substantial disability. He was unable to do any of the jobs which he previously had been able to do, he was in need of retraining and the May 22, 1978 injury has caused claimant to lose 40% of his future earning capacity. He stated that the award which he granted claimant was intended to reflect the obvious moderate degree of permanent partial disability resulting from the job injury. Because of the opinion expressed by Dr. Holland only the physical aspects of disability were considered by the Referee in assessing claimant's loss of earning capacity.

The Board, on de novo review, finds that claimant has not suffered a loss of wage earning capacity which would entitle him to an award equal to 40% of the maximum allowable by statute for unscheduled disability, although he has suffered some loss of wage earning capacity as a result of his injury.

The medical evidence indicates claimant's impairment was mild with few objective medical findings upon examination. The Orthopaedic Consultants found claimant was able to return to his regular occupation with limitations on repetitive lifting and bending. Claimant has undergone no surgical procedure and is not well motivated.

The Board concludes that claimant would be adequately compensated for his loss of wage earning capacity resulting from the industrial injury of May 22, 1978 by an award of 80° which represents 25% of the maximum allowable by statute for his unscheduled disability.

ORDER

The order of the Referee, dated April 30, 1979, is modified.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled low back disability. This award is in lieu of the award granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 78-7719 October 31, 1979

In the Matter of the Compensation of
The Beneficiaries of
JOSEPH J. HERINCKX, DECEASED
Brink, Moore, Brink & Peterson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

JOSEPH J. HERINCKX, Deceased)
[Request for Review by Claimant]) ORDER ON REVIEW

Reviewed by Board Members Wilson and McCallister.

The beneficiaries, hereinafter referred to as claimant, request review by the Board of the order of the Referee which affirmed the State Accident Insurance Fund's denial of responsibility for claimant's hospitalization, medical treatment and subsequent demise.

The deceased workman had been employed by Forest Grove Lumber Company as a planer trimmerman and gradually developed a hernia around December 15, 1977.

On December 19, 1977 Mr. Herinckx underwent a herniorraphy at Tuality Hospital. After this surgery claimant developed urinary retention problems but was released from the hospital and the problem became serious. The workman was readmitted for insertion of a catheter then released. On January 2, 1978 the workman was readmitted to Tuality Hospital and underwent a transurethral prostatectomy performed by Dr. Schwiebinger. Claimant was discharged and developed breathing problems.

On January 12, 1978 claimant was hospitalized at St. Vincent Hospital where he remained for two months until his death on March 16, 1978. The death certificate indicates the deceased died from pulmonary emboli, lung abcesses and chronic obstructive lung disease.

On April 4, 1978 Dr. Schwiebinger reported that the urinary retention problem was related to the hernia surgery.

The Fund's medical consultant, Dr. Much, opined that the deceased's lung disease was in no way related to the hernia or prostrate surgery.

Dr. Dennis, a surgeon, opined on May 30, 1978, that the surgeries exacerbated claimant's chronic obstructive lung disease.

On August 22, 1978, after reviewing all of the medical information of record, Dr. Tuhy reported that the presence of pulmonary emboli was suspected at both Tuality and St. Vincent Hospitals. A lung scan taken at Tuality showed defects. On January 19 claimant developed acute respiratory insufficiency and an emboli was suspected again. A profusion lung scan was again abnormal and a pulmonary angiogram showed no emboli. Mr. Herinckx soon developed serious difficulties first with basal pneumonia which worsened his respiratory problems and he then developed bleeding from ulcers which became serious and necessitated surgery. The pneumonia persisted and was complicated by bilateral lung abcesses despite attentive medical management. On March 16 he went into shock then respiratory arrest and cardiac arrhythmias which did not respond to treatment. Dr. Tuhy opined that the pulmonary emboli developed after his admission to St. Vincent Hospital and what happened with Mr. Herinckx was a common terminal event in patients with chronic obstructive pulmonary disease. What was found at autopsy, in Dr. Tuhy's opinion, need not have arose as a complication of any surgery.

On September 11, 1978 the Fund issued its denial.

On October 30, 1978 a Determination Order granted temporary total disability compensation from December 17, 1977 through March 16, 1978 only.

The Tuality Hospital records indicate that it was known before the hernia repair surgery that claimant had very severe pulmonary emphysema. The nurses' reports indicate wheezing, coughing up of large amounts of thick mucous and breathing was labored.

Dr. Morita, an internist and the treating physician at St. Vincent, testified at the hearing that Mr. Herinckx was admitted to St Vincent for suspicion of pulmonary emboli and a ventilation scan only showed lung disease but no clots. The patient was wheezing; he then developed increasing respiratory distress with fatiguing, and was put in intensive care. Mr. Herinckx then developed bleeding from an ulcer and gastritis caused by the naso-gastric tube that was used. He subsequently died from a pulmonary emboli caused by prolonged bedrest and lack of movement, developed lung abcesses and malnutrition. Dr. Morita testified that this was a common death in people with chronic lung disease.

The doctor further testified that the Tuality Hospital records indicate Mr. Herinckx had episodes there of wheezing and respiratory distress. The anesthesia given was not good for him in his condition, plus medicating him with valium made him drowsy and less apt to take deep breaths and he was unable to clear his secretions. Based on a reasonable medical probability, Dr. Morita testified he felt claimant's lengthy bedrest, the medication given and the surgeries performed, contributed to the aggravation of the patient's lung disease and his eventual demise.

Dr. Ironside, a pulmonary disease specialist, testified at the hearing that he was called in as a consultant at St. Vincent Hospital. Dr. Herinckx was in great respiratory distress and unable to breathe. He felt Dr. Morita had correctly treated him by anticoagulants, but he then developed bleeding and the anticoagulants had to be stopped.

Dr. Ironside felt that the Tuality Hospital records showed proof that the patient had chronic lung disease for which he was not provided any treatment. The doctor felt that the anesthesia administered to him adversely affected his condition.

Dr. Ironside testified that complications of pulmonary problems are hypoxemia, ventilatory failure, thromboembolism and atelectasis and claimant had them all. Dr. Ironside opined, based on a reasonable medical probability, Mr. Herinckx's surgeries with anesthetics and the post-operative medications administered to him, aggravated his underlying chronic obstructive pulmonary disease.

The Referee found that the medical differences in the record could not be solved by the Hearings Division and, therefore, the claimant had failed in her burden of proving compensability and he affirmed the Fund's denial.

The Board, on de novo review, disagrees with the Referee's conclusion. The Board finds that the issue is not whether an emboli was present upon admission or before admission to St.Vincent Hospital. The issue is whether claimant's underlying disease was in any way aggravated by the treatment for claimant's compensable hernia and his subsequent prostrate surgeries and did these in any way lead to his demise. The Board finds that the testimony of both Dr. Ironside and Dr. Morita indicated very clearly and logically that the hernia surgery started the chain of events which ultimately caused Mr. Herinckx's death and without the surgery for hernia repair these events would not have been set in motion.

The Board concludes that the preponderance of medical evidence indicates the compensable hernia surgery and subsequent bedrest, anesthesias and medications administered all aggravated Mr. Herinckx's underlying chronic obstructive pulmonary disease setting in motion a chain of events which led to his demise. The claim is compensable.

ORDER

The order of the Referee, dated May 17, 1979, is reversed.

This claim is hereby remanded to the State Accident Insurance Fund for acceptance and the payment of compensation and survivor's benefits as provided by law.

Claimant's attorney is hereby granted as and for a reasonable attorney's fee at Hearing and Board review levels, the sum of $2,000, payable by the Fund.

WCB CASE NO. 78-5597 October 31, 1979

VICTOR D. JOHNSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
G. Howard Cliff, Defense Atty.
Request for Review by Claimant
Cross-request by the Employer

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which awarded claimant 144° for 45% unscheduled disability. The claimant contends that he is entitled to a greater award for his disability. The employer cross-requests review by the Board, stating that the award made by the Referee was excessive.

Claimant was a 55-year-old baker at the time he suffered a compensable injury to his low back on or about August 16, 1975 while lifting some heavy metal screens used in baking bread. Claimant has worked as a baker for the defendant-employer since 1969 and has been a baker for approximately 33 years.

Claimant received conservative treatment from Dr. Recknor, a chiropractor, and was examined by Dr. Howard Davis who suspected claimant had a herniated disc and thought surgery might be necessary in the future.

Dr. Vessely examined claimant on January 28, 1976 and diagnosed a herniated disc with sciatic nerve involvement superimposed on chronic degenerative changes at multiple levels. Claimant was not a good surgical candidate. Claimant was in need of work modification on bending and lifting which aggravated his back.

Claimant's condition stabilized and he returned to work on the night shift at the defendant-employer's in February 1976. Claimant described the work on the night shift as "harder work" than that which he had performed prior to his injury. In March 1977 claimant couldn't tolerate the pain any longer and quit.

On July 16, 1976 Dr. Vessely found upon examination atrophy of the muscles of both thighs and the calf of the right leg. Claimant was medically stationary with 5% impairment.

On October 4, 1976 a Determination Order awarded claimant 48° for 15% unscheduled low back disability and 7.5° for 5% loss of his right leg.

On November 18, 1976 Dr. Raaf, a neurosurgeon, commenced treating claimant. Claimant was hospitalized on March 6, 1977 and, following a myelogram, Dr. Raaf performed back surgery at the L4-5 level. His post-operative diagnosis was "high bony ridge between L4 and L5". By April 1977 claimant still complained of low back and right leg pain and right leg numbness.

Claimant was enrolled at the Callahan Center in October 1977 at the suggestion of Dr. Raaf. At the Center claimant's problems were diagnosed as chronic lumbosacral strain, mildly-moderate, according to the findings upon examination, and moderately severe by history. Claimant's post-operative status laminectomy L4-5 bilaterally was noted with residuals of previous nerve root compression; namely, weakness of the right leg and absent right ankle jerk, and some chance of improvement in the muscle weakness over a prolonged period of time. At the time of the examination there was no clinical evidence of nerve root compression residual. There were clinical findings of residual nerve irritation, mild, to the right lower extremity, and to a lesser degree to the left lower extremity. Dr. Mason found marked degenerative disc and lumbar osteoarthritis at multiple levels. He noted moderately severe emotional overlay.

Claimant felt he was permanently and totally disabled. However, based on his examination, Dr. Mason felt there was no organic physical basis for the claimant's contentions. He did recommend that claimant not return to work as a baker. Dr. Mason stated: "In my experience bakers with this type of 'worn out back' can never successfully return to work at baking in a large bakery". He felt claimant should be able to tolerate light work. His physical disability was moderate from all causes including age, degenerative arthritis, chronic low back strain and status post-operative laminectomy. A job change was recommended but specific limitations on claimant's work activities were deferred. Claimant was obese and Dr. Mason recommended a psychological evaluation. The concensus of the vocational team was that claimant was vocationally handicapped. Dr. Raaf concurred with Dr. Mason's opinion.

Vocational Rehabilitation placed claimant in a sales school from January 1978 to April 1978 when he graduated. Claimant did quite well in school.

Dr. Raaf re-examined claimant on May 18, 1978 and concluded that there was a large functional element present. He estimated the impairment of function as mildly moderate finding that claimant had fairly marked osteoarthritis of the spine and that the impairment of function due to the industrial injury was mild. Dr. Raaf was of the impression that claimant lacked motivation to return to work. Claimant was convinced he was permanently and totally disabled and had applied for Social Security disability.

On July 12, 1978 the claim was again closed by a Second Determination Order which awarded claimant an additional 32° for 10% unscheduled low back disability for a total award of 25% unscheduled disability.

In November 1978 Dr. Butler, an orthopedic physician, examined claimant and felt he had a 10% impairment.

Claimant has a 10th grade education and in 1965 he studied for the ministry while living in Texas. Claimant has been ordained as a minister; he has also worked as a salesman working in a jewelry store, polishing and repairing jewelry. Claimant has looked for employment in retail jewelry sales and was interviewed in California for a wholesale jewelry sales job but has not heard from them on that prospect. Prior to the hearing claimant was advised about three bakery sales jobs and said he was planning to follow through on these leads. He had an appointment for February 9, 1979 with the Division of Vocational Rehabilitation placement service.

Since August of 1975 claimant has been very active in a church which is forming. Claimant estimated he spent 22 hours a week in church work for which he was not paid. It is claimant's ultimate hope that he may become an active minister.

Claimant complains of intermittent low back and hip pain and standing and bending bother him. His right leg is numb from above the right knee down to his foot. He has difficulty sleeping and takes Tylenol and aspirin at night. He has lost 32 pounds and his present weight is 194. Claimant is not, at the present time, under active medical care.

The Referee found as a result of the industrial injury claimant cannot engage in heavy work and can no longer be employed as a baker, a job he pursued most of his adult life. Claimant is further precluded from any job requiring heavy physical labor. The Referee concluded claimant is entitled to an award of 45% to adequately compensate him for his loss of wage earning capacity.

The Board, on de novo review, disagrees with the conclusion reached by the Referee and finds that claimant has successfully completed an authorized program of vocational rehabilitation and did so with high marks. The Board further finds that claimant lacks motivation to return to work and the medical evidence indicates his impairment is mild to moderate. The evidence also indicates claimant tends to exaggerate his problems.

The Board concludes, that claimant is precluded from his regular occupation or any heavy physical labor jobs but is capable of returning to some type of gainful employment for which he has now been trained. Claimant would be adequatedy compensated for his loss of wage earning capacity, in the Board's opinion, by an award of 35% unscheduled disability.

ORDER

The order of the Referee, dated February 28, 1979, is modified.

Claimant is hereby granted an award of 112° for 35% unscheduled disability. This award is in lieu of that granted by the Referee's order which in all other respects is affirmed.

SAIF CLAIM NO. FA 872730 October 31, 1979

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant had suffered a compensable injury on July 25, 1961 while unloading trucks and lifting freight during his employment by Big C Stores whose carrier was the State Industrial Accident Commission, predecessor to the State Accident Insurance Fund. The injury was diagnosed as acute intervertebral disc problem and claimant received conservative treatment until the claim was first closed by final order dated August 16, 1961 whereby claimant was awarded compensation for temporary total disability from July 25, 1961 to August 1, 1961.

The claim was reopened on May 24, 1962 and additional compensation for temporary total disability was paid as well as compensation for permanent partial disability equal to 15% loss function of an arm for unscheduled disability by an order dated January 9, 1963.

In 1969 claimant had back surgery and in 1974 a right peroneal nerve decompression was performed because of pain and weakness in the leg. Claimant's claim was closed by a Board's Own Motion Order, dated August 11, 1978, which granted claimant compensation for temporary total disability and permanent partial disability for 10% loss of the right foot.

On August 15, 1977 claimant was hospitalized for traction and two weeks later a second laminectomy was performed with removal of large disc fragments. At that time claimant was employed by Portland Distributing Company whose carrier was Employee Benefits Insurance. Claimant filed a claim with that employer and its carrier which was denied on the grounds that it was an aggravation of the 1961 injury. Claimant requested a hearing and on March 22, 1978 a Referee's Opinion and Order set aside the denial and remanded the claim to EBI to be accepted and for the payment of compensation as provided by law.

A request for review was filed by EBI and the Board entered its Order on Review on May 30, 1979 which reversed the Referee's order and remanded the August 15, 1977 claim to the Fund as an aggravation of the 1961 injury. At the present time the Fund has requested judicial review of the Board's order and the claimant has cross-requested judicial review. The Fund has also requested claim closure.

The Evaluation Division of the Workers' Compensation Department found that claimant, who is now 45 years old, has undergone at least four myelograms and has had two laminectomies. He has residual decreased range of motion, chronic back pain and a slight right foot drop.

Dr. Nag reported on November 10, 1978 that claimant needed a job change, he released claimant to work which would not require heavy lifting, bending, or prolonged driving and sitting. On November 17, 1978 Dr. Rosenbaum declared claimant's condition to be medically stationary and agreed with the job restrictions recommended by Dr. Nag. Dr. Rosenbaum and Dr. Nag both found claimant had residual right leg weakness consistent with old peroneal nerve injury.

The Evaluation Division concluded that claimant's condition was medically stationary on November 17, 1978, the date of Dr. Rosenbaum's report. It also stated that claimant had been actively involved in a vocational rehabilitation program since November 1, 1978 and was no longer receiving any curative medical treatment. The Evaluation recommendation was that the claim be closed with additional compensation for temporary total disability from August 15, 1977 through November 17, 1978, less time worked, and additional award for permanent partial disability equal to 30% loss function of an arm for the unscheduled disability.

The Board requested the Evaluation Division to obtain more current medical reports.

On September 24, 1979 the Evaluation Division informed the Board that a comprehensive closing evaluation of claimant by the Orthopaedic Consultants dated August 17, 1979 had been received and reviewed by it. The physicians at Orthopaedic Consultants found claimant's condition was medically stationary and that the claim should be closed. They found that claimant could return to the same occupation with limitations or to some other occupation for which he is being trained and rated the loss function due to his industrial injury as moderate.

Based upon this additional report, Evaluation recommended that the claim be closed with additional compensation for temporary total disability and permanent partial disability as previously recommended.

The Board concurs in part with the recommendations of the Evaluation Division. The Board finds that claimant is entitled to receive additional compensation for temporary total disability from August 15, 1977 through the date of this order, less time worked.

However, the Board feels that because of the pendency in the Court of Appeals of the issue of which carrier is responsible for claimant's present condition, it would be premature at this time to award any compensation for permanent partial disability.

ORDER

Claimant is awarded compensation for temporary total disability from August 15, 1977 through the date of this order, less time worked. An award of compensation for permanent partial disability, if any is made, shall be deferred until a determination has been made by the Court of Appeals on the issue of which carrier is responsible for claimant's present condition.

WCB CASE NO. 78-5340 October 31, 1979

DAVID S. POTTER, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which reduced the Determination Order, dated June 26, 1978, which had granted claimant 80° for 25% unscheduled low back disability to 64° for 20% unscheduled low back disability. Claimant contends he is entitled to a greater award for his unscheduled disability.

Claimant, a 50-year-old log stacker operator, suffered a compensable injury to his low back on May 6, 1977 when his stacker hit a hole causing claimant to twist his back. The injury was originally diagnosed as sciatica by Dr. Darnell. Claimant was off work for approximately 15 months and hospitalized in June 1977 and again in August 1977. On June 26, 1977 Dr. Sirounian diagnosed a "probable L5-S1 herniated disc on the right". He recommended conservative treatment. On June 29, 1977 Dr. Darnell noted that claimant had a herniated disc L5-S1 and that he might require periodic treatment for years.

On August 2, 1977 Dr. Pasquesi examined claimant and diagnosed lumbosacral strain with some sciatic manifestations superimposed on considerable degenerative changes at L4. Dr. Pasquesi said claimant was most eager to return to work and the doctor felt it was reasonable for the claimant to return to work. At that time claimant had no permanent impairment. Dr. Darnell concurred.

The claimant was hospitalized on August 26, 1977. A myelogram was performed which showed spinal ridges at L3-4 but no compression of the nerve roots.

On November 1, 1977 Dr. Coletti restricted claimant from work. He stated: "I do believe he has a very mild low grade disc disease and a lumbosacral sprain. I would think at this time he should be able to return to work in the not too distant future".

On October 25, 1977 claimant sustained a myocardial infarction and after this he was advised to restrict his physical activity.

On December 6, 1977 claimant was examined by a panel of physicians at the Orthopaedic Consultants. They noted complaints of back pain, pain in the right buttocks, right thigh and foot. They diagnosed "Chronic lumbar strain with subjective symptoms of the right sciatic neuritis; Polycystic kidney disease with hypertension . . ." They felt his condition was not stationary and he was not ready to return to work. They recommended physical therapy, exercise, weight reduction and consideration of a support for the back. However, claimant's orthopedic care was to be coordinated with care for his coronary condition and treatment for the back to be undertaken only after stabilization of the coronary condition. On January 30, 1978 Dr. Coletti concurred.

Dr. Darnell reported on February 10, 1978 that claimant was on a light physical therapy schedule and the doctors were hesitant to operate due to claimant's coronary problems. Dr. Darnell felt claimant would never be able to work with his back pain and heart trouble.

On March 9, 1978 Dr. Darnell reported claimant's condition was medically stationary and on March 3, 1978 claimant was precluded from his regular occupation. Claimant could only do work where he could sit for a while, get up and walk around, do some stretching exercises and repeat that cycle.

In the meantime, on June 26, 1978, a Determination Order awarded claimant compensation for temporary total disability and 80° for 25% unscheduled low back disability.

The employer submitted a job description to Dr. Darnell for a truck driving job and on July 18, 1978 the doctor reported claimant's heart condition was not stable and claimant could try this job.

Claimant testified and his attorney argued, that claimant was desperate to return to work so when he was re-examined by the Orthopaedic Consultants he did his best to convince them he was 100% well.

The Orthopaedic Consultants re-examined claimant on July 24, 1978 and reported claimant denied any symptoms whatsoever. They read the job description and felt claimant could do that job with no limitations. They felt the Determination Order's award was more than adequate.

The deposition of Dr. Kimberley indicated that the panel of physicians had been somewhat skeptical of claimant's description of his condition and his ability to do his work. The panel had found some impairment based on the job description despite the lack of objective findings of any disability.

Dr. Darnell reported that claimant's back still bothered him and he still had pain when driving the truck. However, the pain was no worse than it would be if claimant wasn't working and that claimant would prefer to work. Dr. Darnell also stated that he felt claimant had some impairment regarding his back but he seemed to be handling his job fairly well and was quite happy with it and wished to remain doing it.

Claimant has a 10th grade education with all past working experience in heavy labor occupations. Claimant is back working full time as a truck driver.

The Referee, after considering the totality of the evidence, concluded that the award granted by the Determination Order of June 28, 1978 was excessive based on all the evidence. Claimant had returned to work as a log truck driver after his claim had been closed by the Determination Order and he was presently putting in 8-1/2 to 9-1/2 hours per shift.

The Referee concluded that the medical evidence and the testimony of claimant justified an award of 20% unscheduled low back disability.

The Board, on de novo review, finds that Dr. Darnell, who was claimant's treating physician, did indicate claimant had some permanent back impairment, although he did not challenge the rating of the Orthopaedic Consultants nor did he indicate that claimant had serious permanent residuals of his injury. The physicians at Orthopaedic Consultants in their report found virtually no physical impairment but nevertheless rated an impairment based on their knowledge of claimant's history and their skepticism concerning his reporting of the subjective symptoms.

The defendant-employer in its brief urges the Board to affirm the Referee's order; it makes no contention that the award granted by the Referee was excessive.

ORDER

The order of the Referee, dated March 30, 1979, is affirmed.

SAIF CLAIM NO. YC 306439 October 31, 1979

FRED C. STEINHAUSER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left knee on May 28, 1971. An arthrotomy was performed the the removal of loose bodies and the area of chondromalacia was trimmed. Claimant's claim was initially closed by a Determination Order, dated July 17, 1972, which granted him compensation equal to 22.5° for 15% loss of the left leg. Additional awards have given claimant a total of 60° for 40% loss of the left leg.

By a Board's Own Motion Order, dated May 11, 1979, claimant's claim was reopened for surgery performed by Dr. Slocum on March 29, 1979. The surgery, a Maquet type tibial tubercle osteotomy, gave claimant substantial relief from his complaints and Dr. Slocum, on July 11, 1979, indicated claimant needed no further active treatment, just occasional care from time to time in the future. Claimant was able to return to regular work on June 4, 1979.

The Fund, on September 20, 1979, requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department, recommended claimant be granted additional compensation for time loss from March 28, 1979 through July 11, 1979, less time worked, with no additional compensation for permanent disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 28, 1979 through July 11, 1979, less time worked. This award is in addition to any other awards claimant has been granted in the past.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of May 11, 1979.

WCB CASE NO. 78-9383 October 31, 1979

GEORGE TARVER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 78-3488 October 8, 1979

LEON F. GROSS, CLAIMANT
Milo Pope, Claimant's Atty.
Lindsay, Nahstoll, Hart, Neil
& Weigler, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order approving a Determination Order, dated June 23, 1978, which had increased claimant's award of compensation to 75% for 50% loss of the right leg. Claimant contends that he is permanently and totally disabled.

At the time of the injury on June 21, 1976, claimant was 52 years old, he has an eighth grade education and his work background commencing in 1941 consists primarily of manual labor. For 15 years prior to his industrial injury claimant worked in the asphalt paving business.

On the date of the injury, claimant was working as a laborer for the employer on a highway paving machine. Claimant had finished assisting in the repair of a broken part of the paver when the driver started the machine and the front wheel ran over claimant's right foot. In order to free his foot, the machine had to be backed up which caused the wheel to twist and gouge into the top of claimant's foot.

Claimant was taken to the Grand Ronde Hospital in La Grande and two days later transferred to St. Anthony's Hospital where Dr. Corbett and Dr. Easton repaired the fracture of the right foot and applied a screw and short leg cast. Claimant's recovery was not good; the swelling and various problems which were encountered during claimant's care required five changes of the cast over a period of five months. On February 10, 1977 the bone screw was removed; all of the surface tissues had healed but claimant continued to have a great deal of pain.

Claimant was referred to Dr. Grewe, a neurosurgeon, who performed a right lumbar paravertebral sympathetic block on March 31, 1977. Dr. Grewe felt that claimant had sufficient improvement in his causalgic pain and in the rather profound sympathetic distrophy changes which would warrant a permanent sympathectomy which he performed the following day. He felt that the extreme amount of pain and swelling which claimant had with every attempted increased activity would now be relieved to a certain extent by these procedures but a fair amount of time would be required for maximum recovery even under the most favorable circumstances.

On May 10, 1977 claimant was seen by Dr. Grewe who found claimant's medial ankle joint was still quite tender, especially along the anterior aspect and he still had a tremor which developed when he tried to turn his ankle immediately. Claimant had a limitation in the range of dorsiflexion of the ankle but Dr. Grewe felt that his trophic changes were less pronounced. He felt that claimant needed physical therapy for his right ankle and stated he would like to have claimant referred back to Dr. Donald Smith in Pendleton. The sympathectomy scar was well healed and although claimant still had some pain in the distribution of his genital femoral nerve along the inside of his thigh and groin, for the most part he had made a fairly good recovery and his neuritic discomfort should subside spontaneously.

Claimant complained to Dr. Smith of discomfort and swelling with pain in his ankle and foot. He believed that after he received physical therapy or stretching he had felt something pop in the ankle and since that time he has been much worse. Dr. Smith discontinued the physical therapy but thought claimant was overfocusing on his injury and he recommended that claimant avoid using a brace which claimant had persisted in using. He also suggested that claimant go to the Callahan Center for a psychological consultation.

Claimant saw Dr. Grewe on August 2, 1977; at that time he was in a quandry regarding his national life insurance health coverage for his family which would run out at the end of the following month if claimant was unable to return to work. Dr. Grewe was of the opinion that there was no apparent hope that claimant would be able to return to work. He suggested that a work coordinator try to resolve claimant's employment prospects and insurance problems, however, later claimant refused vocational assistance.

On January 10, 1978 Dr. Smith reported that claimant continued to have substantial difficulty with his ankle and that he was to be seen by Dr. Grewe and Dr. Logan in February. On February 3, 1978 Dr. Grewe examined claimant and found that in spite of all of the medical attention claimant had received he was still hung up on the dilemma about his pension and union benefits. He felt claimant's condition should be considered stationary and that he should be evaluated for possible vocational rehabilitation. Claimant appeared to be reluctant to jeopardize his union pension, however, Dr. Grewe felt that the details of a settlement needed to be worked out because of claimant's preoccupation with the aspects of his illness.

Claimant was still having circulatory problems and Dr. Grewe prescribed medication to relieve this problem. He noticed that claimant was wearing a foot drop type brace which helped claimant's gait. Claimant had a tendency to externally rotate the foot when he walked to avoid pushing off with the toe. He suggested additional gait training might be of value.

Later, Dr. Grewe suggested possibly a fusion of the ankle and reported that claimant had complaints referrable to his low back and right hip area. He stated: "He walks with the foot everted-mildly circumductive gait. I think is done to avoid pressure on the ankle and toe". Dr. Grewe's opinion was that further treatment should be held in abeyance until claimant's retirement problems had been fully worked out. He again reported that claimant's condition was stationary unless Dr. Smith found to the contrary.

On May 11, 1978 Dr. Smith stated that it might be necessary to fuse the ankle or perform a total joint replacement but it should be deferred for a few months at least. He recommended that the claim be closed. Claimant still had considerable tenderness in the ankle and some in the posterior medial portion of the joint. Circulation of the foot appeared to be better; the foot was no longer cold or sweaty as it was prior to surgery.

On May 23, 1978 the claim was closed by a Determination Order which awarded claimant compensation for temporary total disability from June 22, 1976 through April 24, 1978 and 47.25° for 35% loss of the right foot.

Dr. Grewe saw claimant on June 20, 1978 and claimant told him that he had been denied his pension and had been granted only a 35% award for his industrial injury, but he had gained Social Security disability benefits. At that time claimant told Dr. Grewe that he was trying to appeal the Determination Order, stating that he was unable to even work around his house or mow his lawn because of the severity of the pain in his right ankle and foot and the impairment in his hip even when he used the foot drop brace.

Dr. Grewe stated that he was unable to argue with claimant's reasoning and thought that, in essence, claimant was totally disabled, whether it was strictly physical or a combination of psychological and physical factors. He did not feel that claimant, in his present frame of mind, could either be rehabilitated or hired to a gainful employment position.

Claimant requested a reconsideration of the Determination Order and on June 23, 1978 an Order on Reconsideration was entered whereby claimant's award was increased to 75° for 50% loss of the right foot; there was no change with respect to the compensation awarded by the original Determination Order for temporary total disability.

The Referee found that although Dr. Grewe, in October 1978, emphasized basic stress in claimant's right lumbar area and the right hip, secondary to claimant's abnormal gait imposed by his muscle weakness in the right lower extremity and the need for a foot brace and circumduction foot everted gait, he felt that the need for the foot brace and the cause of claimant's abnormal gait were based upon claimant's being allowed to supervise his own recovery.

The Referee also found that claimant had refused to go to Callahan Center and to receive any vocational assistance. He has refused any type of employment except returning to his former job on the paving crew. Claimant's union and Social Security found him eligible for a pension, however, that, in the opinion of the Referee, did not satisfy the Worker's Compensation Act. The fact remained that claimant has resisted all attempts to rehabilitate him and he has not established that he is willing to seek regular gainful employment, therefore, he has not satisfied the requirements of ORS 656.206(3) and cannot be considered as permanently and totally disabled.

The Referee found that although it was understandable that claimant should worry and be pre-occupied concerning his union benefits and his private insurance and that he was somewhat confused because of the conflicts in regulations among the various agencies from whom he is attempting to obtain financial security, nevertheless, the defendant-employer's argument that claimant is simply desirous of retiring is more persuasive. Even if it were not, the Referee found that claimant was not permanently and totally disabled under the ruling set forth by the Court in Corlay v. Weyerhaeuser, 35 Or App 449.

The Referee felt that claimant's disability was in the scheduled area and that the schedule set forth by the statute was the standard for injuries which are less than permanent total. He affirmed the award of 50% of the maximum for loss function of a leg.

The Board, on de novo review, agrees that claimant has been adequately compensated for the loss function of his right leg, however, contrary to the Referee's opinion, the Board is persuaded by Dr. Grewe's unrefuted opinion that claimant's abnormal gait has caused claimant some physical distress in his right lumbar area and in his right hip and, therefore, claimant has both scheduled and unscheduled disability.

Had claimant, in this case, met all of the requirements of ORS 656.206(3), it is possible that with his scheduled and unscheduled disabilities he might have been found to be permanently and totally disabled under the provisions of ORS 656.206(1) but, as the Referee found, claimant has failed to establish that he is willing to seek regular gainful employment and/or that he has made reasonable efforts to obtain such employment.

The Board feels that claimant's loss of wage earning capacity which is directly attributable to the unscheduled disability, is not substantial and that an award of compensation equal to 48° for 15% unscheduled back and hip disability would adequately compensate claimant for this loss.

ORDER

The order of the Referee, dated February 20, 1979, is modified.

Claimant is awarded 48° of a maximum of 320° for 15% unscheduled back and hip disability. This award is in addition to the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to 25% of the additional compensation granted claimant by this award, payable out of said compensation as paid, not to exceed a maximum of $3,000.

WCB CASE NO. 78-8993 October 8, 1979

HAROLD RAIKES, CLAIMANT
Starr & Vinson, Claimant's Attys.
Samuel Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which found claimant to be permanently and totally disabled as of November 6, 1978, the date of the last Determination Order.

Claimant, at the time of his injury, was a 59-year-old rural real estate salesman who suffered injuries to his left arm, shoulder and neck on September 27, 1973 while he was walking on rough terrain, tripped and fell down a creek bank.

Dr. Camerer, a chiropractic physician, saw claimant on November 5, 1973 and diagnosed an acute traumatic cervical and thoracic myofascitis, subluxation of C1 and T4. He gave claimant some chiropractic treatment and, on November 6, 1973, released claimant for modified employment. On February 18, 1974 Dr. Camerer suggested that claimant be given a neurological examination.

On March 12, 1974 Dr. Campagna, a neurosurgeon, examined claimant and it was his impression that claimant suffered a severe nerve root compression C6, left, secondary to protruded C5-C6 disc, left. He suggested a myelogram which was done on March 14, 1974. The following day, Dr. Campagna performed back surgery for the removal of protruded cervical disc, C6-C7, left and hemi-laminectomy.

On June 15, 1974 Dr. Campagna released claimant to return to his regular work. On July 31, 1974 Dr. Campagna reported that claimant had returned to work and was tolerating it well, although he still had left arm weakness and numbness

of the left thumb and index finger. Claimant also had pain in his elbow and neck; the neck motion was limited to 50% of normal. He found that claimant's condition was stationary with moderate disability of neck and left arm.

On September 3, 1974 a Determination Order awarded claimant compensation equal to 96° for 30% unscheduled neck and upper back disability and 38.4° for 20% loss of the left arm.

On December 23, 1975 Dr. Campagna again examined claimant who was complaining of headaches, neck pain radiating between the shoulder blades and numbness and tingling in the left arm. Dr. Campagna diagnosed severe cervical spondylosis. On January 28, 1976 Dr. Campagna performed an anterior cervical osteophyte removal and uncinectomy at C5-6. X-rays taken later showed cervical spondylosis at the other levels.

On June 1, 1976 Dr. Campagna released claimant for work but by June 14 claimant was complaining of neck pain and pain in the upper back and left shoulder and arm. At that time claimant was working part time. Dr. Campagna stated that his condition was stationary and that the disability of the neck was moderate.

On August 20, 1976 a Second Determination Order granted claimant an additional 32° for 10% unscheduled neck and upper back disability.

Dr. Campagna examined claimant on March 28, 1977 for complaints of swelling, tenderness and discoloration of his left hand, left wrist and pain and numbness in the left hand, neck and mid-back. Claimant also had visual disturbance, pain and blurring. The diagnoses were gout, cerebrovascular insufficiency, and cystic lesion in the cerebellar region. Claimant had a CAT scan which was normal.

On March 6, 1979 Dr. Lynch examined claimant and found numbness sensation in the top of the hand and wrist which might be on a neurological basis. He also found some evidence to suggest a mild carpal tunnel syndrome and reason to suspect torn or degenerative medial meniscus left knee. An arthrogram revealed no problem in the lateral meniscus but the medial meniscus showed degenerative alterations in the posterior and middle one-third and there was moderate posterior extension of the knee joint along the medial aspect.

After a myelogram was performed, Dr. Campagna did a decompression laminectomy C4-C5 on April 24, 1977. Claimant was discharged from the hospital on April 26, 1977.

On April 28, 1978 Dr. Campagna advised the Social Security Administration that claimant was not capable of sustaining gainful employment. On May 26, 1977 claimant retired.

On August 19, 1977 the Fund advised claimant that it had received billings with regard to claimant's recent hospitalization in April (the third back surgery performed by Dr. Campagna) and, based upon an investigation of the circumstances surrounding such hospitalization, it was the Fund's opinion that it should not be responsible for the hospitalization or surgery. The Fund made a formal denial of claimant's claim for benefits.

On November 16, 1977 claimant was examined by the Orthopaedic Consultants who reported the Fund was responsible for claimant's 1977 surgery. On January 13, 1978 Dr. Campagna also related the need for surgery to claimant's industrial injury.

On November 6, 1978 a Third Determination Order, pursuant to a stipulation of the parties of September 20, 1978, granted claimant compensation for temporary total disability from March 28, 1977 through September 12, 1978 but no additional award for permanent partial disability.

Mr. Stipek, a vocational rehabilitation counselor, reported he found 12 jobs claimant could perform. However, at the hearing, after hearing claimant testify, Mr. Stipek found claimant was unemployable.

Claimant testified at hearing that he has tried everything to relieve himself of pain from prayer to yoga. He presently has constant neck pain into his left temple and left eye. He suffers from headaches of varying intensity always. He also has right leg and right hip pain, left shoulder and arm problems, a cold type sensation of his neck, collar bone area is hot, has very little feeling in his hand, cannot raise his arms, suffers from poor concentration and has no patience with people.

Claimant's employer testified at the hearing that claimant terminated in July 1976. His job entailed a lot of typing, making of phone calls, a lot of driving and climbing over fences.

The Referee found that claimant could not be regularly and gainfully employed and would be disabled without the related conditions he suffers from, i.e., arthritis, gout, high blood pressure and carpal tunnel syndrome.

He concluded claimant was permanently and totally disabled as of November 6, 1978, the date of the last Determination Order.

The Board, on de novo review, concurs with the conclusion reached by the Referee.

ORDER

The order of the Referee, dated April 20, 1979, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee at Board review the sum of $200, payable by the State Accident Insurance Fund pursuant to ORS 656.382(2).

WCB CASE NO. 78-9898 November 1, 1979

DONALD S. CLINE, CLAIMANT
Welch, Brunn, Green & Caruso,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which sustained the employer's denial of responsibility for any medical expenses incurred by claimant subsequent to April 30, 1978, but granted claimant additional compensation equal to 7.5° for 5% loss of the left leg.

On appeal claimant contends that the Referee should have set aside the December 7, 1978 denial and remanded the claim to the Evaluation Division of the Workers' Compensation Department for an evaluation of permanent impairment.

Claimant, 23 years old, injured his left knee on June 21, 1976 while working as a choke-setter for the employer. This injury led to a medial meniscectomy being performed on August 3, 1976. As a result of this injury stress placed on the right knee caused it to become disabled and a medial meniscectomy was performed on it on January 27, 1977.

On April 14, 1977 Dr. Coletti declared claimant medically stationary. A Determination Order, dated July 8, 1977 closed his claim with an award of 7.5° for 5% loss function of the left leg and 22.5° for 15% loss of the right leg.

Vocational rehabilitation was authorized and after termination of his program the claim was again closed by a Second Determination Order dated January 13, 1978 which did not increase claimant's compensation for permanent partial disability. A Stipulated Order, dated July 3, 1978, increased claimant's award for his left leg disability to 22.5° for 15% loss of the left leg and 52.5° for 35% loss of the right leg.

On September 1, 1978 claimant was hospitalized by Dr. Boyden. The summary of the event stated that claimant had a suspected internal derangement of the left knee following slipping on a log in the woods several days prior to his admission.

Dr. Boyden, in his September 13, 1978 report, stated that the claimant reported that on August 30, 1978 his left knee doubled under him and dislocated.

On September 11 and again on September 13, 1978 claimant was examined by Dr. Coletti. He reported on October 12, 1978 that claimant had no material change in his knees, but he did have increased symptoms and claimant felt that his work aggravated his knees. Dr. Coletti had previously advised the Fund that claimant would have difficulty working on uneven ground and recommended vocational rehabilitation. He stated claimant has recurrent chondromalacia from his previous problem.

An arthrogram was performed on September 21, 1978 to rule out a further cartilage tear in the left knee. It was normal.

On October 27, 1978 claimant was examined at the Orthopaedic Consultants by Dr. Jones and Dr. Bigland, both orthopedic surgeons, and Dr. Brown, a neurologist. Their opinion was that claimant was stationary from an orthopedic point of view and that further surgery was not indicated at that time. They suggested a second psychological examination. They opined that claimant's condition had not materially worsened since July 1978. They felt the results which might be obtained through vocational rehabilitation were questionable because claimant had stated that he would not accept a lower wage status than he previously enjoyed as a logger and that if Vocational Rehabilitation cannot guarantee such wage status then he would return to logging. They felt that the 35% impairment award for the right leg was adequate but that the 15% impairment award for the left leg was low.

On December 7, 1978 the State Accident Insurance Fund denied further responsibility for claimant's left leg due to a subsequent intervening injury and also denied reopening the claim on the basis of aggravation. The letter of denial stated that the increased symptoms for which claimant sought treatment on or after August 30, 1978 was due to an intervening injury resulting from a fall at home while cutting firewood.

Claimant testified that he was cutting wood on August 30, 1978 when his left leg gave way under stress and that it was so painful that he had to be driven to Dr. Boyden's office. Two days later claimant was hospitalized as a inpatient. The Fund contends that this constitutes an intervening event; claimant contends that it is the natural result of the left knee instability resulting from his compensable injury of June 21, 1976.

Claimant, relying upon the report of the Orthopaedic Consultants, also contends he is entitled to an increased award for his left knee disability.

The Referee found many doubts as to what had actually occurred on August 30, 1978. He concluded that because there was no medical evidence of any knee instability prior to August 30, 1978 claimant's left knee did not dislocate and pop back on that date. Claimant was examined by Dr. Coletti twice in September 1978 but made no reference to any event which had occurred on August 30, 1978. Dr. Coletti had reported that there was no material change in claimant's knees although claimant reported increased symptoms aggravated in claimant's opinion by work.

The Referee found that claimant obviously had severe symptoms when he saw Dr. Boyden on August 30, 1978 but which had apparently subsided completely by the time he saw Dr. Coletti in September. However, with respect to those symptoms the Referee could not determine what happened, when it happened or how it happened and, therefore, concluded claimant had failed to meet his burden of proving that his condition had worsened materially since the last award of compensation to the extent that curative treatment was required. He held that the "first portion of defendant's denial must be sustained."

He further concluded that, based upon the report from the Orthopaedic Consultants, the award of 22.5° for 15% loss of the left leg was not adequate, therefore, he increased it 7.5° or 5% for a total award of 20% loss of the left leg.

The Board, on de novo review, agrees with the Referee's conclusion that the Fund's denial should be affirmed. There is conflicting evidence as to what, if anything, occurred on August 30, 1978. Even giving a liberal interpretation to the evidence and viewing that evidence in a light most favorable to claimant, the Board cannot find that claimant has met his burden of proof that his left knee condition had worsened since his last award of compensation, in the Stipulated Order dated July 3, 1978. Finding no aggravation, the Board concludes that the Referee erred in awarding claimant an additional award of compensation equal to 7.5° for 5% loss of the left leg and reverses that award.

ORDER

The order of the Referee, dated May 18, 1979, is modified.

That portion of the Referee's order which sustained the Fund's December 7, 1978 denial is affirmed.

The remainder of the Referee's order is reversed.

WCB CASE NO. 78-7578 November 1, 1979

ANNA CUNNINGHAN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which denied claimant's claim for additional compensation for temporary total disability from January 17, 1978 through November 20, 1978.

Claimant, a 56-year-old cook, suffered an injury on December 27, 1975 when she was struck in the back by a fellow-employee. The following day Dr. Mang, a chiropractic physician, diagnosed a cervical and mid-dorsal strain. He found her to be medically stationary on February 4, 1976, however, when claimant attempted to return to work she aggravated her back and on May 31, 1977 Dr. Mang found claimant's condition unstable.

Dr. Adams, an orthopedic physician who examined claimant on June 23, 1976, stated that claimant might have a carpal tunnel syndrome on the right but he could not attribute that to claimant's being hit in the shoulder blades. He felt that a neurological evaluation was indicated.

On October 4, 1977 Dr. Schostal, a neurologist, found claimant's claim that her right carpal tunnel compression was related to the industrial accident was without sound neurological foundation. He believed claimant was having numerous symptoms that were predominantly functional and that claimant should start to make arrangements for returning to gainful employment. Dr. Schostal advised claimant that she did have a right carpal tunnel compression but that it was not work-related. He told her that she should have it repaired but it would be her own responsibility. He found claimant's symptoms of neck pain to be grossly exaggerated and predominantly functional.

On November 16, 1977 Dr. Luce, an orthopedic physician, examined claimant on referral from Dr. Mang. Dr. Luce found thoracic strain by history and degenerative disc disorder C5-6 and C6-7. He found some irritation at C2, left, secondary to muscle spasms and anxiety tension state, mild to moderate. He felt the only way the role of trauma could be established was to have a detailed report based on all the facts dating from the first examination the morning after the injury to the present time. He recommended manipulative therapy.

Dr. Mang reported on January 17, 1978 that he had read the reports of Dr. Schostal and Dr. Luce and stated that there was general physical examination findings on the neck. He also found that motions were limited due to pain in the cervico-thoracic junction down to the eighth thoracic nerve. He stated there was some chronic cervical and thoracic pain which had not been alleviated by chiropractic care and that Dr. Schostal and Dr. Luce did not offer any type correction for such conditions. He said that if Dr. Schostal and Dr. Luce determined that claimant was able to work he would also release her to work even though she still continued to have chronic pain in the cervical and thoracic areas which were related to the December 27, 1975 injury. Dr. Luce, on January 18, 1978, advised the Fund that in view of lack of information requested at the time of his November 1977 examination he would have to agree that the claimant was not eligible for continued benefits.

On July 11, 1978 claimant was examined by Dr. Wilson, a neurologist, and Dr. Abele and Dr. Holm, both orthopedic surgeons, at the Orthopaedic Consultants, whose opinion was that claimant's condition was stationary and that claim should be closed after the patient has psychologic evaluation. They felt that chiropractic manipulations should be substituted with postural exercise programing and that claimant could return to the same occupation with limitations or to some other occupation. They felt she would need vocational assistance. They found claimant's total loss of function of the back and of the neck due to the injury to be minimal. They felt claimant's primary problem at the time of the examination was a psychological problem with very few objective findings and many hysterical features characterized by over-exaggerations, inconsistencies and refusals.

On November 20, 1978 a Determination Order awarded claimant compensation for temporary total disability from December 27, 1975 through January 17, 1978, less time worked.

Claimant was given a psychiatric examination by Dr. Holland, a psychiatrist, in October 1978. He found claimant had experienced severe psychological deprivations as well as multiple emotional traumatic events during her life. Dr. Holland found claimant was experiencing a hysterical conversion reaction with multiple psychophysiological complaints which had been reinforced by chiropractic treatment of a poorly defined injury. He felt claimant's disability was the result of her high predisposition to physiological morbidity as well as the chiropractic interventions. He found claimant's psychiatric condition to be stable and that it would not become worse without treatment; it was highly speculative whether it could be improved with treatment.

Claimant was examined by Dr. Bert on November 29, 1978 who diagnosed cervical spondylosis, mild to moderate degenerative arthritis, lumbar spine. He felt that with the degree of cervical spondylosis that claimant had she did have some permanent impairment and would not be able to work as a waitress, cook or nurse's aide. There were some types of light work that she could do but such work could not involve lifting, stooping or bending or keeping her head in a fixed position. On January 4, 1979, Dr. Bert reported that claimant was restricted from prolonged riding in a car, heavy lifting, frequent stooping or bending; he also stated that he had no objection to her continuing to see Dr. Mang so long as his treatment was gentle and restricted to heat, massage and homopathic treatment rather than forceful manipulations.

Dr. Bert reported on January 18, 1979 that in his opinion claimant was left with some residual from her injury and her deteriorated spine. He felt that at that time claimant was medically stationary.

On March 1, 1979 Dr Bert advised the Fund that he could not say if there had been subsequent intervening occurence which would have caused changes in claimant's neck after she had been seen by the other orthopedists and Dr. Luce without being able to review her old x-rays.

The Fund asked Dr. Bert whether the changes he found on the x-rays, if any, would be the basis of any temporary total disability after January 17 if there was any. He replied that he felt the changes found on her x-rays certainly would represent a basis for her impairment and would account for her disability that persisted. On April 5, 1979 Dr. Bert advised claimant's counsel that after reading Dr.

Luce's report and seeing the x-rays most recently taken of claimant's neck, he did not feel that there were any significant changes and if there were any they were not drastic in nature. All of the x-ray findings that he had seen demonstrated degenerative arthritis, disc space narrowing and cervical spondylosis.

Dr. Bert did not see the x-rays of 1976 but he saw their interpretation by Dr. Luce and found them consistent with the x-rays he had seen. In his opinion the findings suggested by the x-rays pre-existed the traumatic injury of December 1975 and he would have to assume that her present pain was an aggravation of that pre-existing condition. He felt that a material worsening of the neck occurred by aggravation and that since it has persisted for over two years, it would be reasonable to say that there is a degree of permanency. He could not state with any certainty that there was any x-ray evidence that would suggest that there has been any intervening trauma since June 1976.

The Referee found that claimant had been paid temporary total disability from the date of her accident to January 17, 1978, the date that Dr. Mang stated that if Dr. Schostal and Dr. Luce agreed that claimant could return to work he would release her to return to work. Claimant contends that her back pain persisted and would not allow her to continue with restaurant work. She states she has had no particular change in her condition since she was last seen by Dr. Mang in April 1978.

The Referee, relying upon the Court's ruling in Jackson v. SAIF, 7 Or App 109 (1971), which stated that temporary total disability compensation is payable until a claimant returns to work, is released by the claimant's doctor to return to regular work, or a determination is made that claimant's condition is medically stationary, found that Dr. Mang, on January 17, 1978, released claimant to return to work. Furthermore, the physicians at the Orthopaedic Consultants in July 1978 recommended the claim be closed after a psychological evaluation which was subsequently made by Dr. Holland and resulted in his finding that her psychiatric condition was stable.

The Referee found that once a claimant has been released to return to work the burden is upon claimant to establish inability to work by further medical reports in order to establish claimant's right to additional compensation for temporary total disability.

The Referee concluded that claimant had failed to do this and also that the comment made by the physicians at Orthopaedic Consultants in July 1978 that claimant be given a psychological evaluation was not sufficient to establish a new period for payment of compensation for temporary total disability.

The Board, on de novo review, disagrees with the conclusion reached by the Referee. The Court in Jackson set forth three categories one of which must be met before payment of compensation for temporary total disability can be terminated. Between the period of January 17, 1978 and November 20, 1978, the date of the Determination Order, claimant did not return to work, her attending physician, Dr. Mang, did not authorize her to return to regular work and the claim was not closed by a Determination Order until November 20, 1978. After the Fund had submitted its request for claim closure in January 1978 it received a letter from the Evaluation Division of the Workers' Compensation Department dated May 22, 1978 which stated, "None of the medical reports submitted indicate that the worker has achieved maximum improvement even though they do indicate that she can work. Please resolve".

The Orthopaedic Consultants said claimant could return to work but with limitations.

Dr. Bert, in his last report dated April 5, 1979, stated the following opinion:

"I do not feel that Mrs. Cunningham [claimant] can now, or in January of 1978, return to her work as a waitress, cook or nurse's aide because this would require bending, stooping and use of her neck which would cause her discomfort. I feel that she is still precluded from doing this".

The Board concludes that there is no evidence to support the termination of payment of compensation for temporary total disability to claimant on January 17 and there is evidence that she was entitled to continue to receive compensation for temporary total disability until her claim was closed by the Determination Order dated November 20, 1978.

Under the circumstances the Board feels there is no basis for the assessment of penalties, however, the Fund shall pay claimant's attorney a reasonable attorney's fee for his services both before the Referee at hearing and at Board review.

ORDER

The order of the Referee, dated May 31, 1979, is reversed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both at the Hearings level and at Board review the sum of $850, payable by the State Accident Insurance Fund.

SAIF CLAIM NO. C344304 November 1, 1979

DOROTHY E. CURTIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 26, 1979 the claimant requested that the Fund reopen her claim for an injury sustained on September 22, 1971 while working for the Lake Oswego School District. The claim was initially closed on August 31, 1972 and claimant's aggravation rights have expired. The Fund, therefore, referred the matter to the Board, along with supporting medical documents, for consideration under its own motion jurisdiction.

Dr. Lynch, who performed surgery on claimant in 1977 for the same problem, indicated that claimant had elected to try hospitalization and pelvic tractions, x-rays, muscle relaxants, etc. He felt there might be a need for a myelogram if these treatments did not help. Claimant was admitted to Sacred Heart Medical Center in late July 1979 and a myelogram was carried out on July 24. Claimant's condition did not respond to treatment very well; on August 20, 1979 she was still complaining of a considerable amount of pain. Dr. Lynch felt she probably had some sciatic nerve root injury and probably a fifth lumbar nerve root secondary to her protruded intervertebral disc.

On September 17, 1979 Dr. Lynch indicated claimant would be having differential nerve root blocks which would lead to dorsal rhizotomy of the appropriate nerve root. Based on the result of this test, a laminectomy was performed on September 27, 1979. Claimant's condition has responded quite well, although she is still under the care of Dr. Lynch.

The Fund, in its letter of October 18, 1979, indicated it had no objection to reopening claimant's claim for further treatment. However, it felt there was some question relating to claimant's entitlement to time loss benefits inasmuch as she has not worked since the date of her original injury.

The Board, after full consideration of the evidence before it, concludes that claimant's current problems are directly related to her 1971 industrial injury and her claim should be reopened. It finds that claimant is entitled to time loss from the date she was hospitalized in July 1979; even though she was not actually working, this hospitalization prevented her from working.

ORDER

Claimant's claim for an industrial injury sustained on September 22, 1971 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation commencing on the date claimant was admitted to Sacred Heart Medical Center in late July 1977, and until her claim is closed pursuant to ORS 656.278.

WCB CASE NO. 77-7170 November 1, 1979

GORDON J. DOUGHERTY, CLAIMANT
Fulop, Gross & Dunn, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Order Approving Application

On October 15, 1979 claimant requested the Board to authorize payment to him by Liberty Mutual Insurance Company of 100% of the increased compensation for permanent partial disability awarded claimant by the Opinion and Order of Referee Gemmell, dated September 19, 1979. A copy of the application by claimant, including Exhibit "A", is attached hereto.

The Board, after considering the application and Exhibit "A", concludes that the application by claimant for payment to him of the increased compensation for permanent partial disability in a lump sum payment should be authorized.

SAIF CLAIM NO. YC 447696 November 1, 1979

DORIS R. SCHWARTZ, CLAIMANT
Goode, Goode, Decker, Beckham
& Nelson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 5, 1979 claimant, by and through her attorney, apparently requested the Board to reopen her claim for an injury sustained on June 21, 1973. Claimant's claim was initially closed on November 30, 1973 and her aggravation rights have expired. The Board has no record of receiving this March 5, 1979 request but after several letters and phone calls it received a copy of the request on July 20, 1979. The petition indicated that the Fund was aware of claimant's "aggravation" and had authorized further medical treatment; this is substantiated by a letter of the Fund dated January 31, 1977.

Attached to claimant's petition were medical reports from Dr. K. Clair Anderson indicating claimant was suffering from chronic back pain and recommending bedrest and exercises. A report from Dr. Schaeffer, a chiropractor, dated February 28, 1979, indicated claimant was completely disabled and unable to return to her previous occupation.

The Board, on July 24, 1979, requested the Fund to advise it of its position with respect to claimant's request for own motion relief. On July 26 the Fund responded, stating it was making arrangements for claimant to be examined by the Orthopaedic Consultants and it would advise of its position as soon as possible.

The Board received the report from the Orthopaedic Consultants on October 19, 1979. This report indicated that claimant's condition was stationary and the case should remain closed. They felt claimant was retired and would not return to any gainful occupation, although she probably could perform light work. They found her impairment at that time to be in the mildly moderate category. Due to the injury, it was mild. Based on this report, the Fund said it would oppose reopening of claimant's claim.

The Board, after thorough consideration of the medical evidence before it, concludes that claimant's claim should not be reopened at this time. Any treatment that she needs can be provided under the provisions of ORS 656.245.

ORDER

Claimant's request for own motion relief for an injury sustained on June 21, 1973 is hereby denied.

WCB CASE NO. 78-5040 November 1, 1979

CHARLES L. SHIELDS, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 160° for 50% unscheduled neck, shoulder and psychological disability. Claimant contends he is permanently and totally disabled.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated May 3, 1979, is affirmed.

Board Member Phillips dissents as follows:

I accept the recitation of facts in the order of the Referee and concur in his opinion that " . . . this case must be analyzed in terms of claimant's condition at injury, prior to the deterioration of the non-injury related conditions". However, the deterioration of the claimant's psychological condition, which has been medically determined to be causally related, must be considered in any measurement of loss of earning capacity.

The Referee finds that we have here an " . . . essentially one-armed worker who cannot do fine or heavy work. On top of that he has a psychological component to his condition that is permanently disabling and enhances the physical effects of his injury." In addition to those problems, of course, we have a claimant in "catch 22". There is no hope for work without retraining and no hope for improvement of the psychological problem without resolving the vocational problem and no prospects of resolving the retraining problem.

I believe the claimant is and will remain unemployable primarily as a result of his injury superimposed upon other impairments which existed at the time of the injury.

I find the claimant permanently and totally disabled within the meaning of ORS 656.206.

WCB CASE NO. 77-6373 November 1, 1979

GENEVA TAYLOR, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On September 22, 1978 the Board entered its Order on Review in the above entitled matter which affirmed the Referee's order dated April 12, 1978. That order directed the Fund to pay 10% penalties on all compensation for temporary total disability due and owing claimant from September 13, 1977 until November 22, 1977, but stated that the Fund had properly paid claimant compensation for temporary total disability and the penalties assessed by the Referee's order dated September 13, 1977. The Fund was directed to pay claimant's attorney $300 as a reasonable attorney's fee for unreasonable delay by the Fund in making payments for temporary total disability ordered by the Referee's order of September 13, 1977.

The Fund requested judicial review of the Board's order.

On May 29, 1979 the Court of Appeals reversed the Board's order and remanded the matter to the Board for the entry of an order requiring payment of the full amount of compensation for temporary total disability for the period beginning June 18, 1976 until closure of the claim, with a credit for $524.19 which the Fund paid on November 8, 1977 and for other amounts paid since then. The Court also directed the Board to require the Fund to pay claimant additional compensation in the amount equal to 25% of all the compensation owed but not paid to claimant since the last order in which such penalties were assessed and to pay claimant's attorney a reasonable attorney's fee based upon the Fund's unreasonable resistance to making the payments for temporary total disability.

On October 1, 1979 the Board received the Judgment and Mandate from the Court of Appeals and, in conformity therewith, issues the following order.

ORDER

The order of the Workers' Compensation Board, entered on September 22, 1978, which affirmed the Referee's order dated April 12, 1978, is reversed.

The State Accident Insurance Fund is directed to pay to claimant compensation for temporary total disability from June 18, 1976 until the claim is closed pursuant to ORS 656.268, with credit allowed the Fund for $524.19 which it paid claimant on November 8, 1977 and for such other amounts that it has paid to claimant since that date.

The State Accident Insurance Fund is directed to pay claimant additional compensation in an amount equal to 25% of all the compensation owed but not paid to claimant since the last order which such penalties were assessed. (The Referee's Opinion and Order, dated April 12, 1978.)

The State Accident Insurance Fund is directed to pay claimant's attorney as a reasonable attorney's fee the sum of $1,000 pursuant to the provisions of ORS 656.382(1) because of the Fund's unreasonable resistance in paying compensation for temporary total disability to which claimant was entitled.

WCB CASE NO. 78-10,021 November 2, 1979

JACK NICHOLAS, CLAIMANT
James P. O'Neal, Claimant's Atty.
Velure & Heysell, Defense Attys.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which granted him an award of 64° for 20% unscheduled neck and left shoulder disability. Claimant contends that the award granted was inadequate and the employer cross-requests review contending the award is excessive.

Claimant was employed on the greenchain by Roseburg Lumber Company and had been so employed for four months when on August 17, 1977 he strained his neck and middle back.

Two days later claimant saw Dr. Falk, a chiropractor, who diagnosed cervical strain/sprain and left shoulder strain. He took claimant off work for one week.

On September 20, 1977 Dr. Falk released claimant to return to work for two hours a day. Claimant was therafter referred to Dr. Mundall who examined him on September 27. Dr. Mundall diagnosed mild left cervical strain with no radiculopathy. Dr. Mundall released claimant for modified work on October 10, 1977; thereafter, claimant was referred to Dr. Woolpert.

On January 19, 1978 Dr. Woolpert reported that claimant, upon examination, had full range of motion of the cervical spine with no restrictions at all, and no muscle spasms. X-rays taken showed no abnormality. The only advice he had for claimant was to increase his activities. Dr. Woolpert felt it might be difficult to get claimant back to work.

On February 7, 1978 Dr. Mundall reported that claimant had asked him to release him for light duty work only; the doctor agreed that claimant should not return to work on the greenchain.

On March 2, 1978 Dr. Mundall reported that upon examination of February 29 claimant had no pain or limitation of movement of his neck. Dr. Mundall wrote to the employer requesting that claimant be given light work with no excessive lifting or pulling over 35 pounds and no work on the greenchain. The doctor felt claimant was improving and in a couple months could probably return to his normal job. He found no objective evidence of permanent disability or impairment.

On March 17, 1978 Dr. Woolpert reported that claimant still had complaints despite normal findings upon examination. Dr. Woolpert felt claimant should have job placement and his disability was mild. On October 31, 1978 Dr. Woolpert found claimant's condition medically stationary.

A Determination Order of December 1, 1978 granted claimant compensation for time loss only.

Claimant testified he returned to work twice; the first time he was put back on the greenchain and his arm froze up. The second time he was off-bearing on the splicer for eight days and his "arm acted up".

Claimant is 25 years old and has a 10th grade education with experience as a farm laborer, logger, tree planter, and supervising tree planting. Claimant hasn't sought any employment and testified he doesn't know how to go about looking for light work when all his past experience has been in heavy labor.

The Referee found, based upon the evidence, that claimant had no job skills prior to this injury other than general heavy labor. He further found that claimant did overstate his difficulties but nevertheless has lost the ability to do vigorous work. He granted claimant an award of 20% for his loss of wage earning capacity.

The Board, on de novo review, finds the Referee's award was excessive. The medical reports reveal very few, if any, objective clinical findings. Nevertheless, Dr. Woolpert rated claimant's impairment as mild and precluded him from returning to his regular occupation. Therefore, the Board concludes claimant would be adequately compensated for his loss of wage earning capacity by an award of 10% for 32°. Claimant is urged to contact Field Services Division for their assitance in job placement.

ORDER

The order of the Referee, dated June 5, 1979, is modified.

Claimant is hereby granted an award for 32° for 10% unscheduled neck and left shoulder disability. This award is in lieu of that granted by the Referee in his order, which in all other respects is affirmed.

WCB CASE NO. 78-919 November 5, 1979
WCB CASE NO. 79-2136

JOSEPH T. CARDWELL, CLAIMANT
Bloom, Ruben, Marandas & Sly,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Lindsay, Nahstoll, Hart, Neil
& Weigler, Insurer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which sustained the denial of claimant's claim for aggravation of a 1975 injury (WCB Case No. 78-919) and affirmed the Determination Order of March 30, 1978 which did not award claimant any permanent disability (WCB Case No. 79-2136). Claimant's request for a hearing on the denial and his request for a hearing on the adequacy of the Determination Order had been consolidated for a hearing.

Claimant, a 23-year-old laborer, suffered a compensable injury to his low back on October 17, 1975 while he was prying with a crowbar. The injury was diagnosed as an acute lumbosacral strain and claimant received conservative treatment and was released to return to work on October 27, 1975. At the time of this injury claimant was working for Fentron Highway Products, whose carrier was Argonaut Insurance Company. After claimant returned to work he re-injured his back on November 6, 1975. Both injuries were handled under the same claim number and closed by a Determination Order, dated May 13, 1976, whereby claimant was awarded compensation for temporary total disability from October 20, 1975 through October 26, 1975. Claimant contended that he lost time from work as a result of the second incident.

The evidence indicated that during the next two years claimant worked for various employers. In April 1977 claimant commenced working for Publishers Paper Company and worked for them until December 16, 1977 when he injured his right thumb while feeding the planer.

On December 27, 1977 claimant, while at home, started to removed his vest from a closet prior to going to work. He dropped the vest and when he bent over to pick it up he felt excruciating low back pain which radiated down his left leg. Claimant testified the pain was so severe that he was unable to control his legs and dropped to the floor. On the same day he saw his family physician who diagnosed an acute lumbar strain. It is claimant's contention that this event constituted an aggravation of his October 17, 1975 injury. The defendant contends that it is a subsequent intervening non-industrial accident.

The Referee stated the fundamental rule that a worker suffers an aggravation if the symptoms have been relatively continuous but suffers a new injury if they have not. Both claimant and his wife testified that claimant continued to have symptoms from time to time following the closure of his 1975 claim and the medical evidence revealed that at least on one occasion claimant became symptomatic while moving a refrigerator. The medical records indicate that claimant had a low back injury in 1974 and he has a congenital anomaly of the lumbosacral spine. Either, or both, could be the underlying cause of the symptomatic periods claimant testifies he has had, however, the medical evidence does not indicate relatively continuous course of symptoms and treatment following the 1975 injury.

The Referee concluded that claimant's symptoms were far from being continuous from 1975 and 1977 and that the symptomatic periods between those dates were either of such short duration or of such minimal severity that they were not noticeable. This finding is supported by the testimony of claimant's friend, Steven J. Davis, who stated that he was unaware of any problems claimant had between late 1975 and December 27, 1977.

Therefore, the Referee, without considering whether or not there was medical support for claimant's contention of aggravation and acting purely on a legal basis, concluded that it was not possible to construe the incident of December 27, 1977 as an aggravation of the 1975 injury. He found it to be a new injury and inasmuch as it was not work-related it was not compensable.

With respect to the injury claimant sustained to his right thumb on December 16, 1978, claimant immediately saw his family physician in the emergency room, was given some treatment and released to return to work on December 27, 1978. Claimant testified that if his hand is in a certain position or when he picks up a two-by-four or stickers, his right thumb feels as though it was sprained and sometimes this causes him to drop the lumber which he is handling.

The Referee found that there was no medical evidence to support claimant's testimony but it was not difficult to believe; however, permanent disability awards can only be granted if the disability is permanent and he found no medical evidence that claimant's present symptoms will not disappear in time. He concluded that claimant had failed to sustain his burden of proof and affirmed the Determination Order.

The Board, on de novo review, agrees that claimant has failed to prove that the incident of December 27, 1977 was an aggravation of his October 17, 1975 industrial injury. The medical evidence in the record simply does not support a finding of aggravation. The medical records do not reveal a relatively continuous course of symptoms and treatment following the 1975 injury.

The burden is always upon the claimant to prove by a preponderance of the evidence, both medical and lay, that he is entitled to relief which he requests. In this case, claimant simply did not meet that burden, therefore, the denial of his claim of aggravation was properly denied.

With respect to the right thumb injury, the Referee correctly states that permanent disability awards can only be granted if the disability is permanent. There is no medical evidence that claimant's current condition will not be fully resolved in the future.

Therefore, the Board concludes that the medical evidence supports a finding that claimant had sustained no disability, either temporary or permanent as a result of the injury to his thumb on December 16, 1978.

ORDER

The order of the Referee, dated April 10, 1979, is affirmed.

WCB CASE NO. 78-9939 November 6, 1979

OTIS ABERNATHY, CLAIMANT
Welch, Brunn & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

An Opinion and Order was entered in the above entitled matter on May 15, 1979 which remanded the claim to TLM Contractors, Inc., to be accepted for the payment of compensation, as provided by law. On June 14, 1979 the State Accident Insurance Fund requested Board review. A transcript was ordered and furnished the parties and the Fund filed its appellant's brief on October 5, 1979 and the claimant filed his response thereto on October 23, 1979. The Fund filed its reply brief on October 29, 1979.

On October 29, 1979 the Board received from claimant, by and through his attorney, a Motion to Supplement the Record. The affidavit in support of said motion states that after the entry of the Referee's order, the Evaluation Division issued a Determination Order dated October 16, 1979 awarding claimant compensation for temporary total disability, temporary partial disability and permanent partial disability. A copy of the Determination Order was attached to the motion.

The Board, after considering claimant's motion and the affidavit in support thereof and noting the entry of the Determination Order, dated October 16, 1979, finds no basis for approving said motion, therefore, it should be denied.

WCB CASE NO. 78-7441 November 6, 1979

NORA E. ALLRED, CLAIMANT
Gordon H. Price, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which approved the August 28, 1978 denial by the Fund of claimant's claim for congestive heart failure and emotional fatigue. The Fund also raised the issue of untimely filing of the claim, however, the Referee found that claimant's claim had been timely filed.

At the time of the hearing, claimant was 54 years old, she has a high school education and has completed a business course in the state of New York. In 1944 claimant sought to join the WACS but was turned down because of a heart murmur. Since that time claimant married and raised a family and then returned to the work force doing various types of work, including clerking, real estate sales and brokerage work. She then returned to school and eventually obtained a liberal arts teacher's certificate and in 1971 became a teacher's aide at the Colton public schools, the defendant-employer.

Claimant testified that her seven years of teaching involved specialized teaching of children with learning and behavioral problems. She felt her stress began with a special teaching program at which an individual teacher should have been limited to four hours, in claimant's opinion, but at which she taught for 10 hours. Claimant had additional duties such as supervising recess, lunch hours and the loading of the school bus.

Claimant contends that she had only limited disciplinary authority. This caused her problems because it interfered with the preparation of her courses and seldom had the desired results. She testified that during late 1977 she had one class with five high school boys whose behavior rendered them not acceptable in any area high school; that they would walk out of the classroom, steal, ignore assignments and even use drugs. Claimant stated that one time she broke down in this class but she did not become hysterical, finally recovering her composure.

Claimant testified that during the earlier part of 1977 she had noticed she became very tired and would lose her temper more easily than normal. The last day of the 1976-1977 school year, June 9, 1977, a consultant, who was reviewing disciplinary problems, advised claimant that she was not competently handling her class. She said this caused her to suffer a severe emotional upset although she sought no treatment and had recovered by the time she reached home that night. The next evening, after dinner, she became violently ill and was taken to the Silverton Hospital. Upon admission, the only abnormal finding was low potassium level and claimant was given some medication to bring this to the normal level. Claimant was also referred to Dr. Brown for a neurological workup. Her EEG was normal and the significance of the mildly abnormal brain scan was not clear to Dr. Brown. He found no neurological disease or indication of an intracerebral involvement. Claimant was discharged from the hospital five days later and spent a quiet summer although she was not teaching.

On August 23, 1977 the claimant was again hospitalized with a diagnosis of possible cerebral dysfunction. She was discharged the following day and the EEG showed only some slowing in the parietal area. Dr. Brown took a second brain scan and another EEG both of which were normal.

Claimant returned to teaching almost immediately because there were conferences which had to be held prior to the opening of school.

Dr. Dobbes, claimant's treating physician, in a letter addressed to the Social Security Administration, recommended disability retirement due to the fact that claimant was really not able to function in any sort of a job. In that letter he stated that claimant had been seen Dr. Intile, an internist, who concurred with his diagnosis. However, on July 27, 1978, Dr. Intile advised the Fund, "With my clinical suspicions I would have no way of being able to say that the claimant's congestive heart failure and emotional fatigue were related to her employment. I did not then, nor do I now, consider her symptomatology to have been a compensible [sic] work-related disability".

On August 9, 1978 Dr. Dobbes advised the Fund that he had told claimant to quit work because he felt she was emotionally fatigued from attempting to continue to teach while suffering from congestive heart failure; that the combination of congestive heart failure and the attempt to maintain adequate teaching standards contributed to her emotional fatigue.

On August 28, 1978 the Fund denied claimant's claim, stating that it did not find that claimant's condition was the result, nor did it arise out of, her employment with Colton School District #53. The Fund also stated it had been prejudiced by claimant's untimely filing.

The Referee found that claimant's basic contention was that teaching stress and anxiety created her heart condition, that she had no such stress at home or away from the job. He found although claimant was a very persuasive person that the medical evidence supporting her contention was not. Despite Dr. Dobbes uncorroborated statement in his letter of March 14, 1978 that Dr. Intile concurred with his diagnosis, the Referee found such unresolved conflict in the medical evidence that he had to conclude claimant had not borne her burden of proof.

With respect to the claim that the Fund had been prejudiced because of claimant's late reporting, the Referee found that it was not until 1978 when claimant first contacted OSEA and later PERS that she was told to file a claim. Dr. Dobbes never suggested to claimant that she file a claim. When claimant did contact the Fund in February 1978 she was advised that congestive heart failure and emotional fatigue were not covered under the Workers' Compensation Act. The Referee concluded there was no basis for finding that claimant's claim had been untimely filed.

The Board, on de novo review, agrees with the conclusions reached by the Referee. The preponderance of the medical evidence does not support a finding of causal relationship between claimant's congestive heart failure and emotional fatigue and her employment.

ORDER

The order of the Referee, dated May 3, 1979, is affirmed.

WCB CASE NO. 78-8524 November 6, 1979

DONALD BIDNEY, CLAIMANT
Walter T. Aho, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks review by the Board of the order of the Referee which granted claimant an award of 64° for 20% unscheduled back disability. The Fund contends the award is excessive.

Claimant was employed by Avison Lumber Company as a lumber grader and the first injury occurred on October 6, 1975 while turning lumber and he injured his back.

On February 25, 1976 claimant suffered his second injury while grading lumber and he felt pressure in his right upper back.

Claimant sought medical attention from Dr. Butt, a chiropractor, on January 9, 1976. The diagnosis was lumbosacral sprain with suspected disc derangement of L5 and spondylolisthesis, L5-S1. Dr. Butt released claimant for modified work as of January 27, 1976.

On March 3, 1976 Dr. Butt reported claimant returned to his regular job on February 25, 1976 and was asymptomatic and medically stationary with no permanent impairment.

On March 4, 1976 Dr. Gambee examined claimant and felt he had a very serious back problem. Claimant was so heavy the doctor couldn't detect muscle spasms even if they were there. Dr. Gambee felt claimant would require a fusion if he didn't lose weight.

On March 26, 1976 Dr. Butt reported claimant was 50% recovered; claimant was not working and was not medically stationary. Claimant could no longer be a lumber grader and Dr. Butt recommended vocational rehabilitation.

On May 4, 1976 the claimant was examined by Dr. Becker. He diagnosed chronic lumbosacral strain symptoms with mild to moderate degenerative disc disease of the lumbar spine. Claimant was urged to lose weight.

On June 4, 1976 claimant underwent a psycholgocial examination. Testing indicated an average I.Q. The diagnosis was hysterical neurosis. It was felt claimant needed treatment for this condition or there would be no improvement in his physical condition.

On August 11, 1976 Dr. Butt released claimant for restricted work with limitations of no lifting or bending from the waist nor was he to be on his feet for long periods of time.

Claimant was placed in an authorized program of vocational rehabilitation in November 1976 at Clackamas Community College in machine shop technology. Claimant did well and graduated in September 1978 with a grade point average of 3.65.

On October 13, 1978 a Determination Order granted him 64° for 20% unscheduled disability.

On October 16, 1978 claimant got a job with Proto Tool. His job was that of production grinder and he testified he was able to do the job without difficulty. However, claimant quit this job to look for another job that would afford him a chance to get his journeyman's machinist card. Thus, at the hearing, he was unemployed.

The Referee found claimant is now precluded from any industrial occupation which requires lifting, twisting, pulling and bending. The Referee concluded claimant was entitled to an additional award of 20% unscheduled disability to compensate for his loss of wage earning capacity.

The Board, on de novo review, finds there is no justification for the award granted by the Referee. Claimant has had no hospitalizations, no surgeries, takes no medication, and has been retrained and now has a good job skill.

The Board concludes that the award which was granted by the Determination Order adequately compensates this claimant for his loss of wage earning capacity.

The Board also takes notice that the Referee, in granting claimant's attorney 25% of the compensation granted by his order, indicated the sum was not to exceed $2,000. This should read "not to exceed $3,000".

ORDER

The order of the Referee, dated April 13, 1979, is reversed.

The Determination Order, dated October 13, 1978, is hereby reinstated in its entirety.

WCB CASE NO. 77-2951 November 6, 1979

DENNIS E. BRANDTNER, CLAIMANT
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Claimant's Attys.
Rankin, McMurray, Osburn & Gallagher, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which approved the defendant-employer's denial dated April 27, 1977.

The issues are the compensability of the stroke suffered by claimant on or about February 14, 1976 and the timeliness of claimant's claim.

Claimant, 51 years old at the time, suffered a stroke on or about February 14, 1976. On February 10, 1976, about 10:00 a.m., claimant, while operating a boring mill, released a suspended control box he had been holding at arm's length. The box swung back and hit his head on the right side. Claimant testified that his knees buckled. A fellow-employee testified that he glanced around and saw claimant staggering and apparently incoherent.

Claimant continued working and that afternoon, while pulling on a wrench, claimant's left arm went numb. Claimant finished that day and also the following three days of that work week, but did not return to work after February 13, 1976, a Friday.

After finishing dinner on February 13, claimant testified that he was lying on the davenport watching T.V. and felt his left arm and leg become numb and his tongue felt as though it was swelling. That night he was admitted to Woodland Park Hospital and underwent a brain scan, electroencephalogram and a cerebral arteriogram by Dr. Holman and Dr. Cruickshank. These tests revealed a complete blockage of the right internal carotid artery and mild irregularities in the left internal carotid artery. Dr. Cruickshank's final diagnosis was an internal carotid thrombosis on the right.

Approximately 14 months passed before claimant called the State Accident Insurance Fund and was advised by it to file a claim. Claimant filed his Form 801 on April 25, 1977.

The April 27, 1977 denial was issued based on the fact that there was no relationship established between claimant's work and his alleged industrial injury and his claim was not timely filed.

Dr. Cruickshank, a neurosurgeon who treated claimant after his stroke, opined in July 1977 that there was no reasonable medical probability that the blow described by the claimant aggravated or accelerated his medical condition which resulted in his present disability.

Dr. Yatsu, professor and chairman of the Department of Neurology at the University of Oregon Health Sciences Center, opined in March 1978 that the history of the injury and subsequent events supported a probable relationship between the thrombolic episode and sustained head trauma.

Dr. Friedman, a diagnostic radiologist, in June 1978 reported that the changes he found were consistent with typical atherosclerotic plaquing. Further, he felt that trauma did not cause the conditions he saw or the angiograms.

Dr. Dow, a neurologist, testified he was positive that claimant's stroke was not work-connected but was brought on by atherosclerosis. He further had reviewed the studies and articles cited by Dr. Yatsu, but still found no relationship between claimant's described blow to the head and his stroke. Dr. Friedman testified at the hearing that in his opinion the trauma of February 10, 1976 was not responsible for the total blockage of claimant's right internal carotid artery.

Dr. Yatsu was deposed before and after the hearing. Prior to the hearing he did not review the angiograms. After reviewing them and Drs. Dow and Friedman's testimony, he still was of the opinion that there was a relationship between the incident at work and the claimant's subsequent stroke.

The Referee found that the claim was not timely filed, relying upon the provisions of ORS 656.265.

The Referee was more persuaded by the opinions expressed by Drs. Cruickshank, Dow and Friedman and concluded that claimant had failed to sustain his burden of proving a work-related stroke.

The Board, on de novo review, finds that although claimant did not file his claim until April 25, 1977, the employer had knowledge of the injury. There is no dispute that the co-worker, Mr. Mullins, knew that claimant had been hit in the head and, furthermore, the maintenance foreman and supervisor of the employer was aware that claimant had been hit in the head as was claimant's foreman. Such knowledge is imputed to the employer and prevents the raising of a defense of timeliness to the filing of the claim. ORS 656.265(4)(a).

With respect to the merits of the case, the Board concurs in the findings and conclusions reached by the Referee. All of the doctors agreed that claimant's problems resulted from arteriosclerotic condition and were not related with the exception of Dr. Yatsu. Despite Dr. Yatsu's unquestioned qualifications, the Board, like the Referee, is more persuaded by the medical opinions expressed by the other doctors and agrees that claimant failed by a preponderance of the medical evidence to prove that the stroke suffered on February 14, 1976 was work-related.

ORDER

The order of the Referee, dated January 17, 1979, is affirmed.

WCB CASE NO. 79-3312 November 6, 1979

CATHERINE DOCKEN, CLAIMANT
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On August 27, 1979 the Referee entered his Opinion and Order in the above entitled matter. On September 21, 1979 the State Accident Insurance Fund requested Board review of the Referee's order.

A transcript has been requested and upon receipt thereof both parties will be notified of the schedule for filing briefs and will be furnished a copy of the transcript.

On October 3, 1979 the Fund, by and through one of its attorneys, moved the Board to set aside the Referee's award of compensation made in the above entitled matter and remand the case to him for consideration of a medical report and an employment report, copies attached to the motion, which allegedly were not and could have been available at the hearing. In the alternative, the Fund asks the Board to supplement the record for its review by admitting the attached reports and considering them as part of the review.

On October 16, 1979 the Board received a response to the Fund's motion from the attorney for the carrier. It stated that the evidence referred to in the Fund's motion was not new evidence but had been considered by the Referee in making his evaluation of claimant's permanent disability. The employer opposed remanding the matter to the Referee or to take additional evidence at Board level.

At the present time, there is no way the Board can determine whether the information referred to in the Fund's motion was considered by the Referee. A transcript of the proceedings has been ordered but has not been received.

THEREFORE, the motion filed by the Fund in the above entitled matter which was received by the Board on October 3, 1979 should be denied.

WCB CASE NO. 77-7797 November 6, 1979

ROBERT R. LEWANSKI, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order Setting Aside Order

On October 9, 1979 the Board issued its Order on Review in the above entitled matter which affirmed and adopted as its own the Opinion and Order of the Referee, dated February 28, 1979. The Referee had concluded that claimant failed to establish good cause for filing his request for hearing subsequent to the 60th day after the denial, therefore, the request for hearing was not timely filed. The relief requested by claimant was denied.

On November 1, 1979 the Board received a personal letter from the claimant requesting the Board to reconsider its Order on Review. Claimant had been represented by counsel at the hearing but represented himself on Board review, having terminated the services of his former attorney.

Claimant has only until November 8, 1979 within which to request a judicial review by the Court of Appeals of the Board's Order on Review, therefore, the Board concludes that because claimant is not, at the present time, represented by an attorney and because of proximity of the final date for filing a request for judicial review, the Order on Review dated October 9, 1979 should be set aside and held for naught to allow the Board adequate time to reconsider the matter. Upon reconsideration the Board should issue either an Amended Order on Review or republish its former Order on Review. The date of that order should be considered as the commencement date from which the parties have a right to seek judicial review.

WCB CASE NO. 78-1307 November 6, 1979

LEON WHITE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Bruce A. Bottini, Defense Atty.
Order

On June 20, 1979 a Referee issued his Opinion and Order in the above entitled matter finding claimant to be entitled to permanent and total disability based on the "odd-lot" doctrine. On July 18, 1979 the carrier requested Board review and subsequently the claimant cross-requested review by the Board. On September 11, 1979 a copy of the transcript of the hearing was mailed to each party and a schedule for filing of briefs was also furnished to the parties which stated that the final date for the filing of all briefs would be October 30, 1979.

On October 12, 1979 the Board received from the carrier, by and through its attorney, a motion for the Board to consider newly discovered relevant and demonstrative evidence which could not reasonably have been discovered and produced at the hearing which was held on April 3, 1979. The motion recites that the demonstrative evidence sought to be introduced indicates that claimant's stated impairment and restriction to the medical examiners and to the Referee was not only inaccurate but also untrue to the extent that if the motion is denied a hearing would be requested pursuant to ORS 656.283(1) or the defendant would follow the procedure provided by ORS 656.206(5). The motion further stated that the evidence sought to be introduced was not available at the time of the hearing due to circumstances beyond the control of the employer or its carrier but, if received, would require a finding which totally contradicted the evidence produced by claimant at the hearing and upon which the award for permanent total disability was based.

On October 24, 1979 the Board received a response to the motion from claimant's attorney which opposed the receipt of the alleged newly discovered evidence. The response indicated that claimant's disability must be determined as of the date of the hearing and if the films existed at that time the employer or its carrier had the option of offering them, however, if they were not secured until after the hearing then they would not be relevant to the record.

The Board, after considering the motion and the response thereto, finds that the employer and its carrier have a remedy under the provisions of ORS 656.283 if they feel that claimant's condition has improved since the date the record was closed. They also have a right to have claimant's award for permanent total disability reviewed pursuant to ORS 656.206(5).

The Board concludes that the motion should be dismissed, however, because the time for filing of briefs has now expired, the final date for the filing of briefs should be extended to December 15, 1979.

WCB CASE NO. 78-1308 November

SAIF CLAIM NO. C344304 November 7, 1979

DOROTHY E. CURTIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On November 1, 1979 an Own Motion Order was issued which remanded claimant's claim to the Fund for acceptance and payment of compensation to which claimant was entitled. It has been brought to the Board's attention that an error on page two should be corrected. In the first paragraph under the "Order" portion, "July 1977" should be changed to read "July 1979".

WCB CASE NO. 78-8587 November 8, 1979

THEODORE E. KREBS, CLAIMANT
Eschsteadt, Bolland & Engle,
Claimant's Attys.
Bruce A. Bottini, Employer's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by S.R. Smith

Reviewed by Board Members Wilson and Phillips.

The employer, S. R. Smith Company, and its carrier, Industrial Indemnity, requested the Board to review that portion of the Referee's order which found claimant to be medically stationary on December 18, 1978 and awarded claimant 80° for 25% unscheduled low back disability.

On April 19, 1976 claimant, a 29-year-old greenhouse worker, sustained a compensable injury to his low back lifting flats and cartons of plants on to a truck. At the time claimant was employed by OKI Nursery, whose carrier was U.S. Fidelity & Guaranty. After the injury, Dr. Cadwell, an osteopathic physician, diagnosed a lumbosacral strain. Claimant received two or three treatments from Dr. Cadwell and after three days returned to his regular job. Dr. Cadwell placed a limitation of 30 pounds lifting the first week and after that claimant was able to work in his normal fashion.

Claimant did not see Dr. Cadwell again until April 21, 1978. He had left his employment at OKI Nursery and was working for S.R. Smith Company, whose carrier was Industrial Indemnity, and had been for approximately a year-and-a-half prior to April 14, 1978 when he injured his back. This injury occurred while he and a co-worker were loading a truck with diving boards and claimant felt a sharp pain in his low back. Since that date claimant has been unable to work. Again Dr. Cadwell diagnosed a lumbosacral strain. He originally thought, as he had in the first incident, that there might be an inguinial hernia problem, but in both instances that was ruled out.

On June 15, 1978 the April 14, 1978 injury was closed by a Determination Order which awarded claimant compensation for temporary total disability from April 19 through May 9, 1978.

On October 9, 1978 Dr. Pasquesi examined claimant relative to determining whether claimant's present status was the result of the injury sustained on April 14, 1978. Dr. Pasquesi found that claimant had had back problems on and off since 1974; that he had filed at least one previous industrial claim and was not awarded any compensation for permanent partial disability. He stated that inasmuch as claimant was 32 years old and had no objective findings he felt that claimant probably had a chronic condition which would be exacerbated even in the future. He thought that claimant had probably aggravated a previous pre-existing condition; his diagnosis was a degenerative disc disease or lower lumbar instability.

The Referee found that claimant did a considerable amount of medium to heavy laboring activities while employed by S.R. Smith Company which included loading at least one truck a day and part of each load would consist of heavy diving boards. There was a dispute on how much each diving board weighed. Claimant estimated 300 pounds, while a witness in behalf of the employer, S.R. Smith, testified that they weighed approximately 180 pounds. It is not disputed that it took two men to do the lifting. Claimant testified that although he had had some back problems he was able to do the work required of him and that prior to 1978 any symptomatology he had was restricted to the low back area. After the April 1978 incident he also had pain in the upper back and chest and commenced wearing a brace. Dr. Pasquesi, in his report, had stated that claimant should not engage in work requiring repetitive bending, stooping, twisting or lifting more than 50 pounds at any single time. Dr. Cadwell, claimant's treating osteopathic physician, reported that claimant should have retraining and if he continued to work where he had to lift more than 20 or 30 pounds he would probably continue to aggravate his back condition which would require him to miss time from work.

Dr. Cadwell reported on March 9, 1979 that claimant had "probably reached a stationary status, whatever that might be" as of December 18, 1978. Claimant contended that was the date that he became medically stationary.

The Referee concluded that claimant had sustained a new industrial injury on April 14, 1978 and further concluded that claimant was medically stationary effective December 18, 1978 based upon Dr. Cadwell's report.

The parties stipulated that the Referee could establish the date claimant became medically stationary and also determine the extent of permanent partial disability. Based on claimant's testimony of constant low back and leg ache, restricted walking and bending, inability to do yard work and other household duties, the Referee concluded that claimant had lost a large measure of the use of his back as the result of the industrial injury.

The Referee cited Hawes v. SAIF, 6 Or App 136, and Muller v. Sears Roebuck & Co., 13 Or App 10. In each case the Court of Appeals had held that a workman who had lost the use of his back but was intelligent and retrainable, would have disability equal to 25% of the maximum available. The Referee found that although this claimant had not been evaluated for retraining he did have a high school GED and appeared to be of at least average intelligence. The "light job" offered to him by S.R. Smith Company was not undertaken because claimant had attempted that work prior to terminating his employment and had been unable to perform the duties required.

The Referee, based upon the awards given in the cases cited above, concluded claimant was entitled to an award equal to 25% of the maximum for unscheduled disability.

The Board, on de novo review, finds that the Referee was correct in finding claimant to be medically stationary as of December 8, 1978. However, the Board does not approve of using awards granted in other cases as a basis for determining a claimant's disability. Granted, the circumstances might be very similar, perhaps even identical, nevertheless, each individual case must be judged on its own merits, taking into consideration that individual's personality, physical condition, abilities and other pertinent circumstances.

In the instant case the medical evidence does not justify, in the opinion of the Board, an award equal to 25% of the maximum for the loss of wage earning capacity that claimant has suffered as a result of his industrial injury of April 1978. Claimant would be adequately compensated for that loss by an award equal to 15% of the maximum and the award granted claimant should be accordingly reduced.

ORDER

The order of the Referee, dated May 8, 1979, is modified.

Claimant is awarded 48° of a maximum of 320° for 15% unscheduled low back disability. This award is in lieu of the award of permanent partial disability granted claimant by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-7815 November 8, 1979

GREGORIO D. OLIVEROS, CLAIMANT
Richard M. Rogers, Claimant's Atty.
Cavanaugh & Pearce, Defense Attys.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 78-8281 November 13, 1979

DOUGLAS ARCHIBALD, CLAIMANT
Ransom, Rogers & Blackman, Claimant's Attys.
SAIF, Legal Services, 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 awarded him compensation equal to 64° for 20% unscheduled disability. Claimant contends that he is permanently and totally disabled under the "odd-lot" doctrine.

Claimant was a 49-year-old security guard for the Port of Portland when he suffered a compensable injury on November 30, 1977. Claimant fell about five feet into a ditch, landing on his left side. He was taken to the emergency room at Good Samaritan Hospital where x-rays were taken and he was then released by his family doctor. Claimant returned to work but did not improve and was seen by Dr. Post, an orthopedic physician, in February 1978. X-rays of the lumbar spine indicated no abnormalities. Dr. Post's diagnosis was lumbar strain and he recommended claimant have physical therapy. Claimant still did not improve; his walking requirements on the job had been doubled.

Claimant was again examined by Dr. Post in March 1978 but no neurological deficits were found. There was considerable muscle tautness in the lumbar area and claimant was advised to take a 3-week leave of absence.

Dr. Parsons did a myelogram in June 1978 which was normal. This operation had been delayed because claimant had been having chest pains. Claimant was first seen at the University of Oregon Health Sciences Center but later transfer to the Veteran's Hospital where he had a coronary arteriogram. Claimant was discharged from the Veteran's Hospital with instructions to take nitroglycerin as needed. Claimant had had previous anginal pains in 1971.

Claimant's condition continued to show little improvement, he had low back pain with radiation into the right thigh and occasionally into the calf. In June 1978 Dr. Post found lumbar symptoms and some atrophy in the right thigh. He thought there might be an L4 root problem, however, the myelogram had been normal and nothing indicated the need for surgery. Dr. Post reported on July 14, 1978 that claimant was stationary with moderate permanent impairment. He stated claimant wished to try to return to his previous occupation, but that he should avoid any repetitive bending, incidental lifting of more than 25 pounds or heavy physical activity. He released claimant to return to work as of July 23, 1978. In the absence of any specific indication for surgery, Dr. Post felt there was no medical treatment appropriate at that time.

On July 21, 1978 the employer advised the claimant that it was unable to have him return to his present position with the restrictions placed upon him by Dr. Post.

On August 21, 1978 Dr. Post advised the Fund that he had seen claimant and claimant had decided against returning to his previous occupation. Claimant apparently talked to some representative at his job and also someone from the Fund who suggested that if he did return to work in excess of the medical recommendations he would be "taking all the responsibility on myself." He also told Dr. Post that he was still having acute discomfort in his back and leg. An examination revealed no change from Dr. Post's previous evaluation and he had no specific recommendations for treatment.

On September 5, 1978 a Determination Order awarded claimant compensation for temporary total disability from March 7 through July 22, 1978, less time worked, and compensation equal to 32° for 10% unscheduled low back disability.

On September 6, 1978 the employer advised the claimant that he was terminated as of September 1, 1978 because he was unable to give the employer an "unconditional return to work" slip from his doctor by that date.

On September 6, 1978 Dr. Post again wrote the Fund, stating he had little to add to his earlier letters. There had been no changes on examination of claimant and the restrictions placed upon claimant had been detailed in his letter of July 14, 1978 and he saw no reason to change such restrictions. He said that the amount of permanent impairment

which he stated claimant had in his letter to the Fund dated July 14 remained unchanged.

On October 9, 1978 claimant was examined at the Orthopaedic Consultants by Dr. Robinson and Dr. Gripekoven, both orthopedic surgeons, and Dr. Brown, a neurologist. The diagnoses made were (1) chronic lumbar sprain, (2) no radiculopathy, (3) seizure disorder pre-existing and old, (4) attacks of angina by history and unrelated to his injury and pre-existing the injury. It was their opinion that claimant's condition was stationary and that the claim could be closed. They felt that claimant could not return to his former occupation because of the requirements of the job. Also, the non-industrial seizure history could play a part in claimant not being able to do this job. They did feel that claimant could do other work and they recommended vocational assistance. They felt claimant did not need a psychological or psychiatric examination. They opined that the total loss of function of the back due to the injury was mild. They noted no objective findings or evidence of disability relating to the right knee.

The Referee found that the medical evidence was convincing that claimant could perform work of some nature, the non-medical evidence was convincing that claimant could do non-heavy physical work and there was no psychological information. He found that although Dr. Post found claimant's disability to be moderate his medical reports did not support that conclusion. He did consider the fact that claimant had nonindustrial conditions including seizures and angina, however, such conditions are under control and he concluded that claimant had failed to establish that he fell within the "odd-lot" doctrine. However, he did find that claimant's disability was greater than that for which he had been awarded by the Determination Order, dated September 5, 1978 and he increased it from 32° to 64°.

The Board, on de novo review, is more persuaded by the medical opinions expressed by Dr. Post than by any of the other medical reports or opinions. In his report, dated July 14, 1978, Dr. Post explained in great detail his opinion of claimant's disability and when claimant became medically stationary. His subsequent reports have not deviated from the conclusions expressed in that letter; to the contrary, he has advised the Fund after each examination of claimant subsequent to July 14, 1978 that he has found no reason to change his earlier statements.

Claimant, in his brief to the Board, referred to many pre-existing physical and emotional disabilities. The Board does not find that these pre-existing disabilities considered together with claimant's present problems relating to his industrial injury of November 30, 1977 are sufficient to make claimant a permanently and totally disabled person as defined by ORS 656.206(1). Nevertheless, based upon the medical evidence, and especially that of Dr. Post which indicates that claimant can only do light type work, the Board concludes that to adequately compensate claimant for his loss of wage earning capacity he should be awarded compensation equal to 96° for 30% of the maximum allowable for unscheduled back disability.

ORDER

The order of the Referee, dated April 10, 1979, is modified.

Claimant is awarded 96° of a maximum of 320° for 30% unscheduled back disability. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 77-4506 November 13, 1979
WCB CASE NO. 78-7787

CHARLES E. BAY, SR., CLAIMANT
Tom Hanlon, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Own Motion Order

On July 27, 1977 claimant, by and through his attorney, requested the Board to reopen his claim for industrial injuries suffered on February 22, 1966 while he was in the employ of Crown Zellerbach whose carrier at that time was the State Industrial Accident Commission, predecessor to the State Accident Insurance Fund. Claimant had also filed a claim against Crown Zellerbach for an alleged injury suffered on May 5, 1977 which was denied by Crown Zellerbach, at that time a self-insurer, on the grounds that the injury was an aggravation of an old injury.

At that time the Board did not have sufficient evidence to determine whether claimant's present condition was a result of the 1977 injury which had been denied by Crown Zellerbach, or was an aggravation of the 1966 injury. Therefore, it referred the request for own motion relief to the Hearings Division with instructions to set it for hearing on a consolidated basis with claimant's request for a hearing on the propriety of the denial of the 1977 injury by Crown Zellerbach. Upon conclusion of the hearing the Referee was instructed that if it was found that claimant's present condition was an aggravation of the February 22, 1966 injury and represented a worsening thereof since the last award or arrangement of compensation for said injury, a transcript of the proceeding was to be prepared and submitted to the Board together with the Referee's recommendations on the request for own motion relief. If the Referee found that claimant's condition was not an aggravation of the 1966 injury a determination was to be made by the Referee on the propriety of the denial of the May 5, 1977 claim and a final and appealable order entered.

On June 28, 1979 a hearing was held before Referee Gayle Gemmell. On October 19, 1979 Referee Gemmell advised the Board that she had issued an Opinion and Order in the above entitled matter on October 24, 1979 which set aside the denial by Crown Zellerbach dated July 8, 1977 and remanded claimant's claim to it to be accepted as a claim for an occupational disease and for the payment of compensation as provided by law.

Referee Gemmell found no aggravation and her recommendation to the Board was that it not exercise its own motion jurisdiction and reopen claimant's claim for the February 22, 1976 industrial injury.

The Board concurs in the Referee's recommendation that the claimant's claim for industrial injuries suffered on February 22, 1976 should not be reopened at this time.

ORDER

The claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for industrial injuries suffered on February 22, 1966 is hereby denied.

WCB CASE NO. 78-4764 November 13, 1979

KATHERINE BOWLEY, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Charles Paulson, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

The claimant seeks review by the Board of the order of the Referee which affirmed the employer's denial of claimant's claim.

Claimant was employed by Roth's IGA as a checker and filed a claim on March 30, 1978 for mental stress. On April 27, 1978 the employer issued its denial.

Claimant testified that she had gone into the office and made a $50 draw on her salary. On January 19, 1978 she alleges she was on her way to lunch and a supervisor, Mr. Jensen, called her over and told her to shut up and listen to him and yelled at her in front of customers and co-workers that she owed the store $50. She testified this embarrassed her and disgraced her and she felt caused people to think she stole $50 from the store.

She testified she became quite upset but continued working for one month, gave her two weeks notice and resigned. She was so upset she had her husband quit his job and the family moved back to Texas.

Two witnesses testified for claimant. One was a co-worker who saw the conversation taking place but overhead nothing. One co-worker said that there were rumors going around about claimant having taken the $50 and testified that claimant was shakey and cried a lot.

Mr. Jensen, the supervisor, testified that he and Mr. Kendall, another key man, were talking in the front of the store discussing claimant's draw. Claimant walked by on her way to lunch and joined the conversation. Mr. Jensen testified he did not yell at claimant. He testified after lunch he approached claimant and asked her what was the matter. She responded that she did not want to discuss it. The next day claimant wanted to talk about it and told him that people had overheard the conversation and she was embarrassed. He testified he then offered to talk to anyone who thought claimant was accused of stealing money, but claimant said it was all straightened out. He further testified that claimant cried a lot at work both before and after the incident, but always refused to discuss it.

Mr. Kendall also testified that no one yelled at claimant that day.

The medical evidence indicates that claimant saw Dr. Kirchner on March 20, 1978 and gave a history of the incident and told him she felt she couldn't work. The doctor reported he had been very patient with claimant on several occasions when she had become very emotional and distraught.

On July 27, 1978 Dr. Buchanan, an internist, reported claimant complained of biparietal headaches which were steady and occasionally accompanied by nausea. His physical examination of her was entirely normal.

Dr. Throop reported on August 10, 1978 no history of the claimed incident. He reported that claimant's headaches were emotionally induced and that she gave a history of these headaches of two years duration.

The Referee found that the case of Weller v. Union Carbide Corp., 35 Or App 355, is controlling. Claimant may very well have been upset, however, she missed no time from work until she resigned. He affirmed the employer's denial.

The Board, on de novo review, concurs with the conclusion reached by the Referee, and finds that claimant failed to carry her burden of proof from lack of evidence.

ORDER

The order of the Referee, dated June 1, 1979, is affirmed.

WCB CASE NO. 78-5585 November 13, 1979

VASIL B. CAM, CLAIMANT
West & Werst, Claimant's Attys.
Petition for Payment of Lump
Sum Attorneys Fees

Pursuant to Administrative Rules, Chapter 438, Division 47, Rule 47.080, Claimant Vasil B. Cam, by and through his attorneys, request that the attorneys' fees payable herein be computed and paid directly to claimant's attorneys in lump sum when the award is final.

I, Vasil B. Cam, being the claimant herein consent to having my attorneys, Craig O. West and Dean C. Werst, paid directly and in lump sum when the award is final.

IT IS SO ORDERED this 13th day of November, 1979.

WCB CASE NO. 79-2586 November 13, 1979

WILLIAM J. CHILCOTE, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On September 26, 1979 an Opinion and Order was entered in the above entitled matter. On October 26, 1979 the claimant, by and through his attorney, requested Board review of the Referee's order. October 26, 1979 was the 30th day following the entry of the Referee's Opinion and Order.

ORS 656.295(2) provides that requests for review shall be mailed to the Board and copies of the request shall be mailed to all parties to the proceeding before the Referee.

The State Accident Insurance Fund, on November 5, 1979, filed a Motion to Dismiss the claimant's request for review, stating that it had not received its copy of the request for review until October 29, 1979 which was 33 days following the Referee's order.

As indicated above the statute requires only that the Request for Review be mailed within 30 days and in this case the Request for Review was timely mailed to the Board and the necessary parties, therefore, the motion to dismiss should be denied.

SAIF CLAIM NO. HC 52208 November 13, 1979

ROBERT E. HEWITT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right eye on December 13, 1966. The claim was accepted and closed on August 12, 1969 with an award equal to 3% loss of visual acuity in the right eye. Claimant's aggravation rights have expired.

On January 19, 1979 Dr. Robinson advised the Fund that he had examined claimant whose visual acuity of his right eye had gradually diminished to a point of optimum correction of 20/40 to 20/60 and was accompanied by a monocular diplopia because of the irregular nature of the cataract of the right eye. He recommended that the cataract be removed and that the claim be reopened for such surgery.

On March 7, 1979 the State Accident Insurance Fund forwarded the request to the Board, stating that it would not oppose reopening of the claim under the Board's own motion jurisdiction if the Board felt the medical opinion expressed by Dr. Robinson justified it.

The surgery suggested by Dr. Robinson was performed on March 9, 1979. It was complicated by wound leakage requiring additional wound closure.

On March 19, 1979 the Board issued its Own Motion Order remanding claimant's claim for the December 13, 1966 injury to the Fund to be accepted for payment of compensation commencing on the date claimant was hospitalized for the surgery recommended by Dr. Robinson and until closed pursuant to ORS 656.278.

Dr. Robinson now reports that claimant's condition is stationary and he is aphakic (has no lens in the eye).

A closing evaluation was requested and the Evaluation committee of the Workers' Compensation Department recommended to the Board that the claim be closed with an additional award of temporary total disability from March 8, 1979, the date claimant was admitted to the hospital, through April 9, 1979, less time worked, and an additional award equal to 47% loss of vision in the right eye.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from March 8, 1979 through April 9, 1979, less time worked, and compensation equal to 47% loss of vision in the right eye. These awards are in addition to all previous awards received by claimant as a result of his December 13, 1966 industrial injury.

SAIF CLAIM NO. GC 35513 November 13, 1979

STEVEN DALE KASER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on February 19, 1972 which required back surgery at the L4-5 interspace. The claim was accepted and closed and claimant's aggravation rights have expired. In 1974 claimant had a protruded disc at the L3-4 interspace.

In 1979 claimant submitted medical reports to the State Accident Insurance Fund indicating a myelogram and laminectomy had been done in May 1979 and requested the Fund to reopen his claim for aggravation of his 1974 industrial injury. The Fund denied this request on June 21, 1979, contending that claimant's present condition was the result of the 1972 injury.

Subsequently, claimant requested own motion relief relating to the February 1972 injury. The Fund did not oppose reopening claimant's claim for the 1972 injury and the Board, after considering the evidence presented to it, especially Dr. William Smith's report of June 1, 1979 which directly related claimant's present condition to the 1972 injury, concludes that the claim should be reopened as of May 1, 1979, the date the myelogram was performed.

On August 9, 1979 an Own Motion Order remanded the claim to the Fund for acceptance and payment of compensation, as provided by law, commencing May 1, 1979, and until closed pursuant to ORS 656.278.

On May 1, 1979 a second surgical procedure for the removal of a recurrent L4-5 disc was performed and claimant's treating physician released him from medical care on September 24, 1979.

The Fund requested a closing evaluation and the Evaluation Division of the Workers' Compensation Department recommended that claimant be awarded compensation for temporary total disability from May 1, 1979 through May 20, 1979 and temporary partial disability from May 21, 1979 through September 24, 1979 and additional compensation equal to 32° for 10% unscheduled disability and 6.75° for 5% loss of the left foot resulting from injury to his low back. Such awards were in lieu of and not in addition to the award granted by the Determination Order dated June 30, 1972 whereby claimant received 16° for 5% unscheduled back disability.

The Board is informed that claimant, who is at the present time 31 years old and a college graduate, is now limited as a result of his two back surgeries to lifting no more than 25 pounds and has a slight neurological deficit in his left foot. Claimant prior to his injury had operated well drilling equipment and at the present time he is successfully engaged in selling such type of equipment. Using its present criteria, the Evaluation Division placed his present loss of wage earning capacity at 10%. This apparently, was the basis for their recommendation for the unscheduled disability.

The Board agrees with the recommended awards of compensation for temporary total disability and temporary partial disability. However, based upon the medical evidence, the Board concludes that claimant has lost a substantial amount of his wage earning capacity because he is now excluded from a large portion of the general labor market.

To compensate claimant for this loss of wage earning capacity, an award of compensation equal to 80° for 25% of the maximum allowable by statute for unscheduled disability should be granted to claimant.

ORDER

Claimant is awarded compensation for temporary total disability from May 1, 1979 through May 20, 1979 and for temporary partial disability from May 21, 1979 through September 24, 1979. Claimant is also awarded compensation equal to 6.75° for 5% loss of his left foot and to 80° for 25% unscheduled back disability. These awards are in lieu of all previous awards claimant had received for his February 19, 1972 industrial injury.

WCB CASE NO. 78-9994 November 13, 1979

ROBERT K. KEEFER, CLAIMANT
Gatti, Ward & Gatti, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Scott Wetzel Services

Reviewed by Board Members Phillips and McCallister.

The City of Salem, through its service representative, Scott Wetzel, appeals the Referee's order which found that the claimant suffers from an occupational disease and remanded the claim to the direct responsibility employer, City of Salem, for acceptance and payment of benefits until the claim is closed pursuant to ORS 656.268. The Referee further directed the responsible employer, City of Salem, to reimburse the State Accident Insurance Fund for all amounts incurred and paid on or after October 18, 1978 relating to the occupational disease to claimant's right wrist. The Referee, in addition to that, awarded a sum of $900 attorney's fees to be paid by the direct responsibility employer. The appellant contends, on appeal, that the claimant, in fact, does not suffer from an occupational disease but suffers instead from aggravation of either a 1972 or 1974 injury.

The City of Salem was provided Workers' Compensation coverage from the State Accident Insurance Fund until June 30, 1978. After that date, the City of Salem was self-insured using Scott Wetzel as a service representative.

Claimant, now 59 years old, sustained an injury to his right wrist in 1942 when he was involved in a motor vehicle accident. He testified that from 1942 until 1972 he had no further difficulty with the wrist. He began employment with the City of Salem in 1947 as a police officer. He continued working as a police officer until 1960 when he began work with the City of Salem water department. He did construction type work with the Water Department until 1963 when he commenced reading meters. Claimant described reading the meters as requiring the use of a 3-foot long handle with a hook on the end to raise the metal lid covering the meters. This hook was also used to flip the caps up on the meters so they could be read. Further, he testified there was considerable resistance in lifting the lids during winter when they were frozen and also during the summer when sand and vegetation washed in, making it difficult to lift the lids.

On August 17, 1971 claimant had x-rays taken of the right wrist. They revealed evidence of arthritis in the wrist and a bony growth of the styloid component of the radius of the wrist. Dr. McCallum reported the wrist was painful and in his opinion there was plenty of reason for traumatic arthritis. He prescribed physical therapy and a splint for the claimant. He opined on August 24, 1971 claimant should have a fusion of the right wrist.

On September 13, 1971 the claimant was seen by Dr. Embick who diagnosed a sprain superimposed on old degenerative changes between the scaphoid and the radius.

On September 21, 1972 claimant slipped and fell injuring his right wrist. He returned to Dr. Embick who advised him that he should have the wrist fused. The claimant testified that the wrist was in a cast for four weeks and after the cast was removed the wrist continued to be painful.

On February 2, 1974 claimant suffered a second slip and fall injury. He testified that he fell and he put his right hand back in order to break his fall. He heard a snapping sound from his wrist. Claimant missed four days of work. He said the pain continued to increase and he began to experience loss of motion and increasing stiffness. Dr. Boals diagnosed this injury as a sprain of the right wrist.

On February 20, 1974 x-rays were again taken and interpreted by Dr. Achterman, who interpreted the first x-rays taken in 1971. He reported that the comparison of the current radiographs of the right wrist to those of the past revealed virtually no change, though there appeared to be further narrowing of the radiocarpal space as compared to previous studies. He found no radiographic evidence of any recent trauma.

On October 25, 1978 Dr. Boyd reported that the claimant suffered marked degenerative arthritis in the right wrist, symptomatic in reference to his work and in need of a right wrist fusion. He recommended reopening of the claimant's claim based on aggravation of a pre-existing condition over the last 17 years while working for the City of Salem Water Department.

On November 28, 1978 the City of Salem, through its service representative, Scott Wetzel, denied the request for reopening. Their denial was based on the fact that their investigation did not reveal that the claimant's present complaints were the result of any specific incident while employed by the City of Salem but were, in fact, due to the natural progression of the pre-existing condition. This opinion was based on Dr. Boyd's medical report dated October 25, 1978 to the Fund requesting reopening of the claim. They advised claimant that any claim for this condition should be directed to the State Accident Insurance Fund.

On December 19, 1978, the Fund denied claimant's claim for aggravation of his February 1974 injury. The basis of its denial was that claimant's present condition was not the result of that injury, but rather an occupational disease.

The Referee found, after reviewing all of the evidence, that in his opinion Dr. Boyd had been describing an occupational disease in his medical reports. The Referee further found that the claimant's repetitive acts of removing the meter covers and lifting caps from the dial were acts to which an employee would not ordinarily be subjected or exposed other than during a period of regular or actual employment. He further found that the injuries in 1972 and 1974 were not injuries that were aggravated in the sense contemplated by ORS 656.273. Rather he found they were minor incidences which contributed, along with other falls, and the daily lifting of meter covers and caps, to the development of an occupational disease. He found that this condition disabled him partially on October 18, 1978 and totally on November 15, 1978. Therefore, based on all the evidence, he set aside the denial of the direct responsibility employer, the City of Salem, and remanded the claim back to it for acceptance and payment of benefits. The Referee further stated that the Fund had paid time loss to the date of the denial but did not find that that was an accurate representation. He did find that both the Fund and the City of Salem, as a self-insurer, acted reasonably and that there is no basis for awarding penalties.

The Board, on de novo review, concurs with the conclusions reached by the Referee in determining that the City of Salem, as a self-insured, is responsible for claimant's occupational disease. The Board concludes much as the Referee did that the claimant did not suffer an aggravation of either the 1972 or 1974 injuries but in fact due to the repetitive movements required by his job he suffered an occupational disease. Dr. Boyd's descriptions, together with his medical reports, supports this conclusion.

However, the Board finds that the record indicates the Fund has never paid claimant any compensation. The Referee, in his order, directed the City of Salem, as a self-insured, to reimburse the Fund for any amounts which it had paid on or after October 18, 1978 relating to the occupational disease. Inasmuch as the Fund has paid no money, that portion is meaningless and can be disregarded.

ORDER

The order of the Referee, dated March 26, 1979, is affirmed.

SAIF CLAIM NO. FC 183362 November 13, 1979

GEORGE S. KRUEGER, CLAIMANT
Nepom & Rose, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 8, 1978 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 on April 17, 1969. Claimant's claim had been closed on April 15, 1970 and his aggravation rights have expired.

The Board advised the Fund on May 22, 1978 of claimant's request and (the Fund had already received a copy of that request and the attached medical reports in support thereof) asked the Fund to advise the Board of its position within 20 days. On June 22, 1978 the Fund responded, stating it opposed reopening of claimant's claim based upon the report from the Rehabilitation Institute of Oregon, dated May 3, 1976; also, stating that the matter was presently in litigation (WCB Case No. 75-1351).

The claimant had supported his request for own motion relief by a report from Dr. Burnham dated December 13, 1977 and Dr. Gritzka dated March 24, 1978.

The Board, after further consideration of the evidence presented to it by both the claimant and the Fund, found a conflict in the medical evidence and felt it was in the best interests of the parties to refer claimant's request for own motion relief to its Hearings Division to set for hearing before a Referee. The Referee was to determine whether the claimant's present condition was causally related to his April 17, 1969 injury, and, if so, represented a worsening since the date of the last award or arrangement of compensation which claimant had received for that 1969 injury. The Referee was requested, upon conclusion of the hearing, to cause a transcript of the proceedings to be prepared and submitted to the Board with the Referee's recommendation on claimant's request for own motion relief. This was done by order of the Board dated July 14, 1978.

On September 19, 1979, pursuant to the aforesaid order by the Board, a hearing was held before Referee Gemmell and, as a result thereof, Referee Gemmell issued her Own Motion Recommendation, a copy of which is attached hereto and, by this reference, made a part of this order, which recommended that the Board exercise its own motion jurisdiction and reopen claimant's claim for his April 17, 1969 industrial injury.

The Board, after reviewing the transcript of the proceedings and the own motion recommendation, concurs in said recommendation.

The Board further notes that in his March 24, 1978 report, Dr. Gritzka stated that when he examined claimant on March 17, 1978 claimant was having back trouble and, in answer to certain specific questions directed to Dr. Gritzka by claimant's attorney, stated that claimant was in need of further care and treatment at the present time and should have another myelogram and at the same time have entracencal and paradural steroid injections. He also felt that claimant would be a suitable candidate for treatment at the Northwest Pain Center in order to help him cope with his chronic recurring back pain.

The Board concludes that claimant's claim should be reopened when claimant enters the Pain Center or is hospitalized for other treatment and that claimant should receive compensation for temporary total disability from that date and until his claim is again closed pursuant to the provisions of ORS 656.278, less time worked.

The Board further concludes that claimant's attorney should be granted as a reasonable attorney's fee for her services a sum equal to 25% of the compensation claimant shall receive for temporary total disability, payable out of such compensation as paid to a maximum of $750 and 25% of any permanent partial disability claimant may ultimately receive, payable out of that compensation as paid, not to exceed a total fee of $3,000.

IT IS SO ORDERED.

WCB CASE NO. 78-6527 November 13, 1979

CARMEN G. MARTINEZ, CLAIMANT
Wendell Gronso, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order which awarded claimant 256° for 80% unscheduled disability; this award represents an increase of 160° over the total of the previous awards granted claimant by Determination Orders.

Claimant was an agricultural farm laborer when she slipped and fell injuring her low back on August 7, 1974. The injury was diagnosed as a lumbar strain; claimant had a degenerating disc at the L5-S1 levels. A lumbar laminectomy with removal of the degenerative disc was performed on September 30, 1975. After claimant had recovered from surgery, during which period of time some functional overlay was indicated, the claim was closed by a Determination Order, dated December 27, 1976, which granted claimant compensation equal to 48° for 15% unscheduled low back disability.

On November 10, 1976 the claim was reopened because of chronic back problems and on October 28, 1977 a repeat lumbar laminectomy was performed with exploration of L4-5 and L5-S1. On July 26, 1979 the claim was closed by a Second Determination Order which granted an additional award of compensation equal to 32° for 10% unscheduled low back disability, giving claimant a total of 80° for 25% of the maximum.

At the time of the hearing, claimant was complaining of chronic low back pain and limitation of motion of her low back which affected her ability to perform activities which required prolonged sitting, standing or doing heavy work.

Claimant has given up heavy work and does not do yard work, however, she is able to perform light household duties, to cook and to shop at the grocery store if she takes sufficient rest breaks. At the present time claimant is using a back support.

The physicians at Orthopaedic Consultants rated claimant's loss of function of her back as moderate. One of claimant's treating physicians, Dr. Johnson, concurred with the findings and conclusions of the panel at Orthopaedic Consultants.

Claimant is 32 years old, she has a formal 3rd grade education which she obtained in Mexico. Claimant was born in Mexico and came to the United States when she was ten. After 22 years living in the United States claimant still has difficulty reading, writing and communicating using the English language. She has made no attempt to go to school to increase her ability to speak, write or communicate in English, nor has she made any attempt to acquire a GED nor to be retrained. Apparently her family obligations were the material factor in her failure to obtain further schooling or to be retrained.

Claimant's primary occupation has been working in the fields although she has had some experience as a laborer in canneries. Prior to her first surgery, claimant attempted to return to field work but was unable to do such duties on a regular basis because of her back condition. Since that time claimant has not worked nor has she looked for work.

Prior to her injury, claimant earned at least $2,640 a year. She worked regularly 6 days a week as a seasonal worker for 5-1/2 months per year earning $20 a day. Since the injury claimant has no apparent income other than benefits paid under the Workers' Compensation system.

The Referee found that the collective medical evidence indicated that claimant was unable to return to field work and was now limited to light or sedentary work. He found that the lay evidence as well as the medical evidence tended to support claimant's testimony about her symptoms and limitations.

The Referee concluded that claimant had not proven that she was permanently and totally disabled. The medical factors, when considered with the non-medical factors, were

not sufficient to prevent claimant's return to regular employment. The medical evidence did not indicate her physical condition, alone, was so severe as to warrant an award of permanent total disability, therefore, claimant's level of motivation becomes a factor to be considered in determining claimant's inability to return to the general labor market. He found claimant had made no attempts to obtain further schooling or to obtain any type of retraining and had made no substantial effort to look for light work which she would be capable of doing. Claimant's own testimony indicated that her basis for not looking for work or attempting to obtain further schooling or training was her desire to raise her children who remained at home. These family obligations amounted to a partial voluntary retirement.

The Referee concluded, however, that claimant was entitled to an increased award of compensation. Both the lay testimony and the medical evidence support a finding that the residual affects of her industrial injury prevented her from returning to jobs which required heavy physical labor which was primarily the type of work she had done prior to the injury. Taking into consideration claimant's age, education, mental attitude, training and experience, the Referee concluded that claimant's ability to sell her job skills in the general market, which prior to her injury had been limited, was further diminished by her injury and that she was entitled to an award equal to 80% of the maximum.

The Board, on de novo review, finds that no one has ever attempted to help claimant, either in a program of vocational rehabilitation or to place claimant in an on-the-job training program. The evidence indicates that claimant's husband is the main bread-winner in the family; he earns good wages and is able to support the family. Claimant, however, was making a substantial contribution to the family income by her seasonal work in the fields prior to her injury. Obviously, she can no longer do that type of work although there is some type of work for which she might be trained if, through the assistance of the Field Services Division of the Workers' Compensation Department, claimant was placed in some type of on-the-job program which involved employment within her physical and mental capabilities.

The Board concludes that claimant has suffered a substantial loss of wage earning capacity, however, the physicians at the Orthopaedic Consultants, after examining claimant, rated her impairment in the moderate category and the evidence indicates claimant has made no attempt to look for work, therefore, the Board feels that claimant would be adequately compensated for the loss of wage earning capacity she has suffered as the result of her industrial injury by an award equal to 70% of the maximum allowable by statute for unscheduled disability.

ORDER

The order of the Referee, dated May 31, 1979, is modified.

Claimant is awarded 224° of a maximum of 320° for 70% unscheduled low back disability. This award is in lieu of all previous awards which claimant has received for her August 7, 1974 industrial injury including the award made by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 79-284 November 13, 1979

LEONARD MAXWELL, CLAIMANT
Welch, Brunn & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the order of the Referee which affirmed the Fund's denial of responsibility for claimant's alleged industrial injury.

Claimant had been employed for 45 years as a body and fender man and had sustained a prior injury in 1971 to both wrists.

Claimant was employed by Tigard Auto Body and alleges that sometime around March 15, 1978 he tripped and fell, catching himself with both hands and injuring his wrists. Claimant continued to work thinking his problems would resolve; however, he testified the pain slowly increased. Claimant didn't file a claim until June 19, 1978.

The first medical treatment was given on March 4, 1978 at Keizer Hospital by Dr. Higgins. He diagnosed degenerative joint disease of both wrists and felt claimant's condition was not stationary.

Dr. Fagan first treated claimant on May 26, 1978 and claimant gave a history of the accident.

The Fund issued its denial of compensability on December 15, 1978.

On May 15, 1979 Dr. Fagan reported that claimant's industrial injury occurred in February 1978 instead of March 15, 1978. He felt claimant did have an injury aggravating arthritic changes of his wrists. The doctor felt the arthritic changes were related to his employment and aggravated by the injury.

Claimant is now back to work full time. Claimant testified at the time of the injury he informed his foreman of what occurred. Claimant's foreman testified he did not remember any discussion but felt claimant was a truthful person.

Cross-examination at hearing revealed that claimant had in the past filed five other claims.

The Referee found that despite the testimony concerning claimant's veracity, he found it impossible to believe claimant was injured in the manner claimed. He did feel that claimant's difficulties with his wrists may be related to his 1971 injury and that he would be entitled to further medical care from that injury under the provisions of ORS 656.245.

The Referee affirmed the Fund's denial.

The Board, on de novo review, concurs with the Referee that claimant has not carried his burden of proof in establishing he had sustained a compensable injury as alleged.

The Board further finds that although the Fund failed to pay time loss after the 14th day that it had knowledge of the injury, claimant did not lose any time from work. However, the Fund's failure to accept or deny this claim within 60 days is unreasonable resistance and refusal to properly process the claim pursuant to statute. The Board concludes that the Fund must pay the medical bills accrued by claimant and assess a penalty of 25% of those outstanding medical bills to the date of its denial.

ORDER

The order of the Referee, dated June 15, 1979, is modified.

The Fund is hereby ordered to pay all outstanding medical bills accrued by claimant up to the date of its denial, and is assessed a penalty in the amount of 25% of those bills for its unreasonable resistance to processing the claim.

Claimant's attorney is hereby granted as a reasonable attorney's fee the sum of $100, payable by the Fund.

SAIF CLAIM NO. FA 872730 November 13, 1979

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

An Own Motion Determination was entered in the above entitled matter on October 31, 1979 which was based, in part, upon an advisory rating furnished to the Board by the Evaluation Division of the Workers' Compensation Department.

At that time, the Evaluation Division recommended claimant be paid compensation for temporary total disability for a certain period of time as stated in the Own Motion Determination and also recommended an additional award for permanent partial disability equal to 30% loss function of an arm for the unscheduled disability.

The Board felt that because the issue of which carrier was responsible for claimant's present condition was at that time pending in the Court of Appeals that it would be premature to award claimant compensation for permanent partial disability.

On November 1, 1979 claimant, by and through his attorney, filed a Motion for Reconsideration and to set aside the Own Motion Determination. The grounds for the motion were that claimant had never been found to be medically stationary except by the physicians at Orthopaedic Consultants and that that report had never been sent to Dr. Nag, claimant's treating physician, for his concurrence or disagreement.

The Board, after giving full consideration to the advisory recommendations made by the Evaluation Division and to the Motion to Reconsider, concludes that although the Own Motion Determination should not be set aside as requested by claimant, it should be amended to include the compensation for permanent partial disability recommended by the Evaluation Division.

THEREFORE, the Own Motion Determination, dated October 31, 1979, should be amended by deleting from page three thereof the fourth paragraph and inserting in lieu thereof the following paragraph:

"Claimant is awarded compensation for temporary total disability from August 15, 1977 through the date of this order, less time worked, and an award of compensation for permanent partial disability equal to 30% loss function of an arm for unscheduled disability."

In all other respects, the Own Motion Determination, dated October 31, 1979, should be reaffirmed and republished.

CLAIM NO. 8W-10-3321 November 13, 1979

JOHN A. OLSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his lower back on November 8, 1971 while working for Tradewell Stores, Inc., whose carrier was Farmers Insurance Group. The claim was accepted and closed by a Determination Order, dated December 5, 1972, whereby claimant was awarded 48° for 15% unscheduled low back disability. Claimant did not request a hearing on the adequacy of the Determination Order and his aggravation rights have now expired.

In 1979 claimant requested the Board to reopen his claim pursuant to their own motion jurisdiction, stating that he was receiving treatment from Dr. Goodwin, an orthopedic physician. On July 24, 1979 the Board informed claimant that it would be necessary to furnish the Board with a current medical report establishing that his condition had worsened since the last claim closure and that the worsening was attributable to the original injury of 1971.

On September 17, 1979 the claimant furnished the Board with a report from Dr. Goodwin which stated that he had seen claimant in 1976 at which time claimant was complaining of a recurrent pain in his lower back which Dr. Goodwin felt to be directly related to his 1971 injury and that he saw him again on September 12, 1978 and, based upon his last examination of claimant, it was his opinion that claimant had worsened since his claim was closed in 1972 and that the worsened condition was directly related to his previous industrial injury.

Dr. Goodwin said that claimant had retired but that his retirement was primarily related to his lung problems and not to his back problem. He felt that claimant was a candidate for a repeat laminectomy and operative intervention.

He further stated that claimant had been seen by the physicians at Orthopaedic Consultants on February 8, 1979 who indicated that claimant did need further treatment and that consideration should be given to myelographic studies.

However, after this examination by the physicians at Orthopaedic Consultants, claimant had further problems with his heart, including a coronary bypass and, therefore, no other diagnostic or other operative procedures were instituted or even considered nor was it felt that he was a physical candidate for such diagnostic studies or surgery at that time.

On October 3, 1979 the Board advised Farmers Insurance Group, the carrier for the employer, of claimant's request for own motion relief and asked it to state its position with respect thereto within 20 days.

On October 11, 1979 the carrier responded, stating that inasmuch as the claimant's aggravation rights had expired and claimant was in a state of retirement and had been for several years it did not feel there was evidence of time loss benefits to be reopened.

The Board, after giving full consideration to the medical reports from Dr. Goodwin and the consultation report from the medical panel of the Orthopaedic Consultants, concludes that there is not sufficient current medical evidence to justify an award of compensation for temporary total disability, however, the medical evidence does support a finding that claimant's condition has worsened since December 5, 1972, the date of the last award or arrangement of compensation.

Therefore, the Board concludes that because of this worsening which, according to the unrefuted testimony of Dr. Goodwin, is directly attributable to the 1971 industrial injury, claimant should be given an increased award of 48° for 15% unscheduled low back disability.

ORDER

The claimant is awarded 48° of a maximum of 320° for 15% unscheduled low back disability. This award is in addition to the award received by claimant by the Determination Order dated December 5, 1972.

WCB CASE NO. 78-10,221 November 13, 1979

RICHARD O'NEIL, CLAIMANT
Heysell & Velure, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks review by the Board of that portion of the order of the Referee which reversed its denial and remanded claimant's aggravation claim to it with compensation for temporary total disability commencing December 12, 1978 and an attorney's fee of $750 payable by the Fund. The Referee also affirmed the award granted by the Determination Order of November 1, 1978.

Claimant was employed by Harry and David as a mechanic and on January 3, 1978 he raised up and hit a metal bar with his forehead. Claimant sought medical attention from Dr. Affley who diagnosed contusion of the forehead on January 4. The injury did not require stitches.

Claimant was examined by Dr. Saez on January 13, 1978 with complaints of neck pain and stiffness, intermittent headaches, lightheadedness and blurred vision on occasion. Dr. Saez diagnosed cervical sprain and probable mild concussion. X-rays were normal and physical therapy was commenced.

In late April 1978 claimant felt his condition was worsening so Dr. Saez hospitalized claimant in June 1978 and he underwent a myelogram on June 2 which was normal.

On June 26, 1978 Dr. Saez diagnosed chronic cervical strain superimposed upon psychogenic overlay. He found claimant's symptoms were profuse. The doctor reported claimant did not want to return to his regular occupation even if he got better. His physical disability was rated as mild, subjectively it was severe.

In October 1978 Dr. Saez recommended vocational rehabilitation.

A Determination Order of November 1, 1978 granted claimant an award of 16° for 5% unscheduled disability.

Claimant testified on December 12, 1978 that he picked up a piece of wood at home and slipped in the mud and fell, experiencing severe neck pain. Claimant was hospitalized from December 13 through December 21, 1978.

On February 2, 1979 the Fund issued its denial of claimant's claim of aggravation on the ground that claimant suffered an intervening injury.

On December 13, 1978 Dr. Saez reported the history of the December 12 incident and that claimant now had right leg numbness and the leg collapses. He felt this incident was an aggravation and not a new injury.

Dr. Saez reported in January 1979 that there was a discrepancy between the apparent severity of claimant's subjective complaints and the relatively mild objective medical findings. He felt claimant's concussion had caused no permanent impairment and that his low back complaints were not related to the January 1978 industrial injury. On January 11, 1979 Dr. Saez recommended vocational rehabilitation and reported claimant should now avoid lifting over 50 pounds, repetitive neck turning, or overhead work, vibratory stress, etc. Treatment was now only palliative.

The evidence indicates that the Fund paid claimant compensation until it issued its denial.

The Referee found claimant's contention that his claim was prematurely closed was not supported by the record. He further found that Dr. Saez found claimant suffered an aggravation of his January 1978 injury and not a new injury on December 12, 1978.

The Referee concluded claimant's claim for aggravation must be accepted by the Fund and ordered compensation for temporary total disability to commence on December 12, 1978.

The Board, on de novo review, finds claimant suffered an intervening injury on December 12, 1978. The medical reports reveal that prior to December 12 claimant was doing well, in fact, his condition was medically stationary. The injury of December 12 was severe enough to cause hospitalization and was in and of itself, an intervening traumatic incident, which even produced some new symptomatology.

The Board concludes that the denial issued by the Fund must be upheld.

ORDER

The order of the Referee, dated June 6, 1979, is modified.

The Fund's denial, dated February 2, 1979, is hereby affirmed.

The remainder of the order of the Referee is affirmed.

WCB CASE NO. 78-6536 November 13, 1979

JACK C. PETERSON, CLAIMANT
Litchfield, MacPherson & Carstens,
Claimant's Attys.
SAIF, Legal Services, 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 additional compensation equal to 144°, giving claimant a total award of 208° for 65% unscheduled low back disability. Claimant contends that he is entitled to an award for permanent total disability or, in the alternative, a greater award for permanent partial disability.

Claimant, a 57-year-old self-employed plumber, injured his low back on May 28, 1975 while lifting and securing a pump. As a self-employed plumber, claimant was insured by the State Accident Insurance Fund.

The injury was diagnosed as an acute lumbosacral strain and claimant was initially treated by Dr. Hayter with muscle relaxants. Claimant's condition worsened and he was referred to Dr. Scheinberg, an orthopedic surgeon, who treated claimant conservatively for seven months and released him for work on January 12, 1976. In his closing report, Dr. Scheinberg stated that claimant had some residuals and that he should avoid heavy lifting and bending.

The claim was first closed by a Determination Order dated March 16, 1976 which awarded claimant compensation for temporary total disability and compensation equal to 16° for 5% unscheduled low back disability.

In January 1977 claimant saw Dr. Scheinberg, complaining of low back pain which had commenced six months prior. Dr. Scheinberg referred claimant to Dr. Buza, a neurosurgeon, who performed a lumbar laminectomy L5, S1 on February 10, 1977. Claimant's post-operative recovery was uneventful except for complaints of continued low back pain and muscle weakness.

On October 3, 1977 claimant was examined by Dr. Pasquesi, an orthopedic surgeon, who felt claimant probably would have to do work of a predominantly sedentary nature, both because of his pre-existing short right leg and his back condition. He rated claimant's total combined impairment at 14% of the whole man, said claimant was medically stationary and recommended claim closure. Both Dr. Buza and Dr. Scheinberg concurred with Dr. Pasquesi.

On May 8, 1978 a Second Determination Order awarded claimant additional compensation for temporary total disability and an additional award of compensation equal to 48° for 15% low back disability, giving claimant a total of 64° for 20% unscheduled low back disability.

Dr. Scheinberg saw claimant on December 14, 1978; at that time claimant was complaining of continued back pain but was not certain what caused it. He said that if he turned rapidly he had pain and he also experienced mild episodes of pain approximately every other day. Severe episodes required him to be off his feet for at least a week. It was Dr. Scheinberg's impression that claimant's condition was such that he was completely disabled from his normal work activity or from anything other than sedentary activities. He felt that it represented more than 14% of the whole man, if one took into consideration claimant's disability in relation to his normal work activity.

Dr. Scheinberg's deposition was taken on May 30, 1979 and at that time he stated that he felt claimant's pain was real and that his shortened right leg, caused by a fracture during childhood, contributed in part to claimant's pain. He felt that claimant could not continue to work as a plumber, that he could not repeatedly lift over 10 pounds and that he could not do any type of work which required excessive back motion or squatting. Claimant could do a job which allowed him to sit 90% of the time and gave him an opportunity to stretch once in awhile, but that claimant was not a "reliable walker" and he could not be employed as a truck driver nor as a taxi cab driver. In expressing his opinion of claimant's disability, Dr. Scheinberg did not take into consideration claimant's heart problem which had commenced with an attack approximately 15 years prior to the date of the hearing and had not interferred with claimant's ability to run his business as a plumber.

The Referee found that claimant was complaining of severely limited capacity to bend, squat, stretch and reach; he also had difficulty turning his body, lifting, walking, sitting, driving and standing. All of claimant's complaints were corroborated by his son's testimony. Claimant has a 9th grade education but has no formal business or clerical training. He has worked as a plumber since approximately 1950. He has also been a truck driver and has done some hard rock mining and operated heavy equipment. For a short period of time he was a time keeper. He started his own plumbing business about 15 years prior to the injury and continued to run it until the injury. Claimant had stated that he probably could teach plumbing but there was no teaching job available.

The Referee found claimant was credible and well motivated but that he had failed to prove that he was permanently and totally disabled. Despite claimant's heart condition and the short right leg, both unrelated to the industrial injury, the Referee felt that with the residuals from the industrial injury claimant could perform certain jobs on a regular and gainful basis, but a substantial portion of the labor market was fore-closed to him. Therefore, he increased the award of 20% to 65% of the maximum to adequately compensate claimant for his loss of wage earning capacity.

The Board, on de novo review, finds that if it were possible to rely solely on lay testimony, it would not be difficult to find that claimant was permanently and totally disabled, however, the medical evidence does not support a finding of permanent total disability. The medical evidence does reveal that claimant has lost more than 65% of his wage earning capacity as a result of the industrial injury. Dr. Scheinberg stated that claimant was completely disabled for any work except sedentary activity. Claimant is now 57 years old, he has a 9th grade education and no other formal training.

As a result of his industrial injury, claimant has had to give up his plumbing business which he had operated for 15 years. If claimant is unable to operate his own plumbing business, it is quite obvious that he could not seek employment as a plumber; this is further borne out by Dr. Scheinberg's statement in his deposition that claimant cannot work as a plumber nor can he do repetitive lifting of more than 10 pounds nor do any type of work which required excessive back motion and squatting. The only other work which claimant apparently has done consists of working as a truck driver, doing some hard rock mining and operating heavy equipment. All of those vocations require claimant to do more, from a physical standpoint, than Dr. Scheinberg has allowed claimant to do.

Claimant sought vocational rehabilitation in 1978 but after taking a number of tests, he was terminated by the Vocational Rehabilitation services because of his physical problems.

The Board agrees, based upon the medical evidence, with the Referee's conclusion that claimant has failed to prove that he is permanently and totally disabled. The Board, after considering the residuals resulting from the industrial injury, the limitations placed upon claimant's work activities by the doctors who have treated him, his education, work background, age, and poor potential for retraining, concludes that claimant has lost 80% of his wage earning capacity as a result of the industrial injury and that the Referee's award should be increased accordingly.

ORDER

The order of the Referee, dated June 20, 1979, is modified.

Claimant is awarded 256° out of a maximum of 320° for 80% unscheduled low back disability. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this order, not to exceed $3,000.

WCB CASE NO. 78-8121 November 13, 1979

VERNON A. SCHEESE, CLAIMANT
Rick W. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the order of the Referee which granted claimant an award of 320° for 100% unscheduled low back disability.

Claimant was employed as a laborer for Balmer Logging Company and on August 22, 1977 sustained a compensable low back injury. While cutting logs he "pulled something" in his back.

Claimant did not seek medical treatment until September 23, 1977. The initial diagnosis was sacroiliac strain. Treatment was conservative.

Claimant then came under the care of Dr. Hunt who, on February 9, 1978, reported he believed claimant had osteoarthritis or degenerative arthritis aggravated by the industrial injury. On March 2, 1978 Dr. Hunt released claimant for limited work. He was not to lift over 35 pounds and to restrict bending forward from the waist. On April 7, 1978 Dr. Hunt diagnosed ankylosing spondylitis. Treatment was conservative. By June 1, 1978 claimant's condition was stable.

By August 1978 claimant had complaints of sharp pain into his legs and groin area. Dr. Hunt diagnosed exacerbation of the ankylosing spondylitis mild to moderate trochantaric bursitis of both hips.

On August 16, 1978 Dr. Hunt restricted claimant's activities to no repetitive lifting over 20-30 pounds, no prolonged standing, stooping or any sitting over 30-40 minutes without a change of position. Dr. Hunt reported claimant was capable of performing light work, in fact, felt working would be good for him.

On August 31, 1978 Dr. Hunt found claimant's condition medically stationary and he recommended vocational retraining.

A Determination Order of September 27, 1978 granted claimant 32° for 10% unscheduled disability.

Dr. Hunt referred claimant to Dr. Schoepflin who examined him on February 22, 1979. Dr. Schoepflin advised claimant that he had an underlying genetic predisposition to the development of arthritis. It was Dr. Schoepflin's belief that claimant would have developed the symptoms ultimately even without the August 1977 injury. However, this injury had made claimant's arthritis symptomatic earlier than would have been the case had he not had the injury. He told claimant he should be able to earn a living the remainder of his life but would definitely have to earn it at an occupation not requiring heavy lifting, frequent bending, or any overhead work.

Claimant had prior injuries, including an industrial injury in the 1950's to his head and ribs, fractured ribs in 1970 and third degree burns over 55% of his body in 1959.

Claimant has not worked nor looked for any employment since this industrial injury. Claimant is 47 years old and has a sixth grade education with past work experience in logging, dairy farming, planting trees, building fire trails, survey crew work, mill work, culvert work and construction. Claimant also attended mechanics school.

Claimant's present complaints include constant low back pain and pain in both hips, radiating down the backs of both legs, headaches and throbbing of both wrists.

The Referee found claimant was precluded from performing any of the jobs in his past work experience. The Referee concluded claimant's loss of future earning capacity was 100% or 320°.

The Board, on de novo review, finds the award granted by the Referee excessive. The evidence indicates claimant is capable of performing light work. Claimant has not shown he is motivated to return to any type of work nor has he attempted to reduce his disability through vocational rehabilitation.

Therefore, the Board concludes claimant would be adequately compensated for his loss of wage earning capacity by an award of 160° for 50% unscheduled disability.

ORDER

The order of the Referee, dated March 28, 1979, is modified.

Claimant is hereby granted an award of 160° for 50% unscheduled disability. This award is in lieu of that granted by the Referee's order, which in all other respects is affirmed.

CLAIM NO. KB 167249 November 13, 1979

HELEN M. SMITH, CLAIMANT
Yturri, Rose & Burnham, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a supervisor for the State Employment Division in Ontario, Oregon, sustained a compensable injury to her back and legs on December 7, 1965 as a result of an automobile accident which occurred during claimant's employment. Claimant lost no time from work but remained under continuous medical care and the claim was closed as non-disabling by an order dated March 10, 1966.

Dr. Baranco, an orthopedic physician, continued to treat claimant for chronic myofibrositis with radiculitis and eventually recommended a myelogram to determine, if possible, claimant's low back problems. This was done in October 1976. The State Accident Insurance Fund denied responsibility for the low back problems on December 20, 1976. Claimant requested a hearing and as a result thereof a Referee's order, dated April 20, 1978, granted a motion to dismiss because claimant had not timely appealed the Determination Order nor timely exercised her aggravation rights.

Claimant appealed the Referee's order and the Board initially issued its Order on Review, dated October 16, 1978, requiring the Fund to pay all claimant's medical bills relating to the 1965 mid and upper back injury. This Order on Review was amended on December 5, 1978 to also include the lower back.

On April 26, 1979 claimant, by and through her attorney, requested the Board to reopen her claim, stating that she had continually had problems with her back since the December 7, 1965 injury. Dr. Baranco reported that claimant had been hospitalized for a myelogram performed on September 27, 1978 and that she was scheduled for surgery on October 6, 1978.

On May 17, 1979 the Fund advised the Board that it would not oppose the reopening of claimant's claim. An Own Motion Order was entered on May 25, 1979 reopening the claim as of September 27, 1978 and for the payment of compensation until the claim was closed pursuant to ORS 656.278.

The surgery performed by Dr. Baranco on October 6 consisted of a hemilaminectomy and wide decompression L4, L5, removal of degenerative protruded IV disc on the left side and removal of bony overgrowth and scarring on the right. Claimant was able to return to her former job but was advised to avoid stressful activities. She was seen by Dr. Baranco on August 28, 1979 who at that time felt no further treatment was necessary and that supportive care with adequate medication would be sufficient.

The Fund requested that the claim be closed and the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be granted compensation for temporary total disability from September 27, 1978 through November 14, 1978 and temporary partial disability from November 15, 1978 through August 28, 1979 and an award equal to 10% unscheduled low back disability.

The Board concurs in the recommendations.

ORDER

Claimant is granted compensation for temporary total disability from September 27, 1978 through August 28, 1979, less time worked and an award equal to 10% unscheduled low back disability. These awards are in addition to any previous awards claimant may have received as a result of her December 7, 1965 industrial injury.

Claimant's attorney has already been awarded a reasonable attorney's fee for the temporary total disability award by the Own Motion Order of May 25, 1979. Claimant's attorney is hereby granted an additional attorney's fee equal to 25% of the compensation for permanent partial disability granted by this order; the total attorney's fee shall not exceed $3,000.

SAIF CLAIM NO. A850947 November 13, 1979

LEROY E. VAUGHAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his left eye on March 10, 1961 when a piece of steel penetrated the eye while claimant was working for Inter-City Crushing Company. The carrier involved was the State Industrial Accident Commission, predecessor of the Fund, and the claim was accepted and closed by a final order dated March 30, 1962 whereby claimant was awarded compensation for permanent partial disability equal to 67.5° for 67.5% loss vision of the left eye. Claimant's aggravation rights have expired.

On September 17 claimant had requested the Fund to reopen his claim based upon Dr. Benson's statement to him that he had a detached retina in the left eye and that corrective surgery would be required. This surgery was performed by Dr. Benson on September 19, 1979.

On October 19, 1979 Dr. Frank W. Johnson, an ophthalmologist, advised the Fund that in September 1979 it was found that the left eye had no light perception whatsoever because of a retinal detachment. Because of the lapse of 18 years between the original injury and the time of the examination, Dr. Johnson found it difficult to specifically state that the detachment was the result of any surgery or injury to the left eye, but considering other factors he felt it reasonable to assume that it was a delayed secondary effect of the industrial injury and the cataract extraction which had been done on November 9, 1961 by Dr. McCallum.

On October 26, 1979 the Fund advised the Board of claimant's request to reopen his claim and, because claimant's aggravation rights had expired, it referred the matter to the Board to consider under its own motion jurisdiction. The Fund stated it was not opposed to reopening the claim if the Board found it justified.

The Board concludes that the claim should be reopened on September 18, 1979, the date claimant entered the Merle West Medical Center in Klamath Falls preparatory to the surgery performed by Dr. Benson the following day, and until the claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 77-6159 November 15, 1979

PHILLIP COOK, CLAIMANT
David R. Vandenberg, Jr., Claimant's Atty.
Luvaas, Cobb, Richards & Fraser,
Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the order of the Referee which granted claimant an award of permanent total disability commencing February 15, 1979, the date of the hearing.

Claimant, 28 years old,was employed by Sigel-Tonkin Chevrolet Company as a lube man. On January 13, 1975 a hydraulic jack broke striking claimant between the shoulder blades and in the lower back, pinning him between the jack handle and the automobile.

X-rays were taken which revealed claimant had spondylosis and spondylolisthesis L4-5. Dr. Potter reported on January 16, 1975 that the neurological examination was normal. He recommended a fusion since claimant did heavy work.

On March 3, 1975 claimant had complaints of neck pain and Dr. Potter diagnosed probable herniated nucleus pulposa C5-6.

On March 17, 1975 Dr. Tennyson examined claimant who had complaints of low back pain, tingling and numbness both legs, neck and upper back pain, and left shoulder and arm pain. The diagnosis was Grade II spondylolisthesis L5-S1, with no nerve root compression and asymptomatic left thoracic outlet compression.

Claimant was hospitalized and had a myelogram on April 23, 1975 and on April 28 Dr. Potter performed a Gill procedure, foraminotomy bilaterally, and fusion of L4-5-S1.

Subsequently, claimant was placed in a body cast and commenced convalescing. On May 28, 1976 Dr. Potter reported claimant could have a back-to-work slip with limitations of no excessive bending, stooping or lifting over 20 pounds. Dr. Potter recommended vocational rehabilitation as claimant could not return to his regular occupation.

On July 9, 1976 Dr. Potter declared claimant to be medically stationary.

Claimant returned to see Dr. Potter on June 16, 1977 complaining that his condition had worsened and the doctor diagnosed non-union of L5-S1 fusion. On July 14, 1977 Dr. Potter reported claimant declined a re-fusion, and was applying for social security.

A Determination Order of September 14, 1977 granted claimant an award of 80° for 25% unscheduled disability.

On May 15, 1978 Dr. Potter reported claimant was capable of working eight hours a day, five days a week at light employment.

Claimant has a sixth grade education with two years at Rogue Community College in automotive technology and, testified that he was to become a full-fledged mechanic one week after this industrial injury.

Claimant further testified that he still hunts and goes fishing. He has sought employment but when the would-be employer learned of his back injury he was not hired. Claimant, at the time of hearing, was on welfare.

A vocational rehabilitation counselor, Mr. Dickey, testified that in his opinion claimant was quite work oriented but he was unable to find claimant a job. Claimant kept saying his condition was worsening. Mr. Dickey testified that the biggest problem in finding light work for him was the area of Klamath Falls with few opportunities available. Mr. Dickey felt that if claimant would have the re-fusion then he would change his opinion about the lack of work.

Dr. Balme, who saw claimant twice, once on September 12, 1977 and last on April 25, 1978, testified that claimant was capable of work with the physical restrictions placed on him. He stated that all of the physical restrictions placed on him were based on subjective complaints and that objectively there were no restrictions. Dr. Balme felt that the findings do not corroborate the pain that claimant complains of and he thought there was a possibility of malingering.

The Referee found that claimant's claim was not prematurely closed as his treating physician had declared him to be medically stationary. He further found, in his opinion, claimant was motivated for return to his regular job or to be retrained. He concluded that the record demonstrates claimant had a serious back injury and with the physical restrictions placed on him and his lack of training and education and the vocational counselor's inability to place claimant that he is permanently and totally disabled.

The Board, on de novo review, finds that the evidence of record all indicates claimant is capable of light gainful employment. Claimant is young, 28, and has in the past shown that he was retrainable and capable of learning some occupation.

Therefore, the Board concludes, based on claimant's physical disability and the physical restrictions placed on him that he is entitled to an award of 192° for 60% unscheduled disability to compensate him for his loss of wage earning capacity.

ORDER

The order of the Referee, dated March 21, 1979, is modified.

Claimant is hereby granted an award of 192° for 60% unscheduled disability. This award is in lieu of that granted by the order of the Referee, which in all other respects is affirmed.

WCB CASE NO. 79-2082 November 15, 1979

VIOLET DUGGER, CLAIMANT
Allen & Vick, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the order of the Referee which granted claimant an award of 64° for 20% unscheduled disability and an award of 15° for 10% loss of the left arm. The employer contends claimant is not entitled to any award for unscheduled disability nor should she be granted any award on her left arm.

Claimant cross-requests review by the Board contending she is entitled to a greater award of unscheduled disability equal to 40% and scheduled disability equal to 20%.

Claimant was employed at Flavorland Foods as a belt worker and on July 25, 1978 she missed a step and fell forward landing on her hands and knees injuring her upper back.

Claimant came under the care of Dr. Whitmire, a chiropractor, who released her for regular work on September 11, 1978 on a trial basis. Claimant returned to her regular job and worked two days and was placed on call.

On December 21, 1978 claimant was examined by the Orthopaedic Consultants. They reported claimant had had conservative care and that Dr. Whitmire had diagnosed traumatic dorsal and lumbar sprain with muscle spasms, myositis and radiculitis. The physicians diagnosed chronic cervical strain and sprain right wrist. They found her condition medically stationary and claimant could return to the same occupation but they found it reasonable to impose a 10-15 pound lifting limitation. They rated wrist and neck disability as minimal based on subjective complaints.

On January 17, 1978 Dr. Whitmire concurred with them.

A Determination Order of February 27, 1979 granted claimant time loss only.

Before the cannery called claimant to return to work she got a job as a counter girl in a donut shop, waiting on customers and cashiering. This employer knew of her injury so claimant was not required to lift the 40-pound milk containers, mop floors or drain the coke tank. Claimant, at the time of the hearing, had had this job for two months and had missed no time from work. She was working 17-1/2 hours per week.

Claimant testified she was unable to return to her job at the cannery as bending her neck downward was painful and she could not now lift the 30 to 40 pound waste buckets. Claimant has an 8th grade education with past working experience as a waitress, a bartender and working in a laundry.

The Referee found claimant is now precluded from her regular occupation and granted her an award of 64° for 20% unscheduled disability for her loss of wage earning capacity. He further found she was entitled to an award of 15° for 10% loss of use of her left arm.

The Board, on de novo review, finds that the medical evidence indicates minimal disability to claimant's neck and minimal disability to her left wrist. The Board concludes claimant would be adequately compensated for her loss of wage earning capacity by an award of 10%. The Board further concludes that the award granted by the Referee of 10% loss of use of the left arm is sufficient.

ORDER

The order of the Referee, dated July 5, 1979, is modified.

Claimant is hereby granted an award of 32° for 10% unscheduled neck disability. This award is in lieu of the unscheduled award granted by the Referee's order, which in all other respects is affirmed.

WCB CASE NO. 78-1383 November 16, 1979

MARGARET JOHNSON, CLAIMANT
Carney, Probst & Cornelius,
Claimant's Attys.
Keith D. Skelton, Employer's Atty.
Order Denying Motion

On October 18, 1979 the Board issued its Order on Review in the above entitled matter which affirmed and adopted as its own the Opinion and Order of the Referee, dated March 12, 1979.

On November 7, 1979 the Board received from the employer and its carrier, by and through their attorney, a Motion for Reconsideration of the Board's order.

The affidavit in support of the motion recites that the Opinion and Order of the Referee failed to take into consideration claimant's obesity and her failure to follow the recommendation of her doctors with reference to diets; furthermore, that the reports of the doctors were vacillating on the issue of causation and because it was a rejected claim claimant must establish the impropriety of the denial by a preponderance of the evidence.

The Board affirmed and adopted the Opinion and Order of the Referee which dealt extensively with the question of claimant's obesity.

The issue before the Referee and before the Board was compensability, not extent of disability. Both Dr. Seufert and Dr. Eckhardt unequivocally related claimant's back problems to her employment. The opinion of the panel of doctors from the Orthopaedic Consultants was qualified on the question of causation. The Referee correctly found that claimant had sustained the burden of proving a compensable injury.

The Board concludes that the employer/carrier has failed to show any justification for reconsidering the Order on Review entered in the above entitled matter on October 18, 1979, therefore, that the motion should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-3035 November 16, 1979

JAMES G. MORRIS, CLAIMANT
Samuel Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the April 14, 1978 Determination Order whereby he was granted compensation equal to 224° for 70% unscheduled left shoulder disability. Claimant contends he is permanently and totally disabled.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated June 1, 1979, is affirmed.

WCB CASE NO. 78-7105 November 19, 1979

J. CLIFFORD BALES, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Rankin, McMurray, Osburn, Gallagher
& VavRosky, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer and its carrier seek Board review of the Referee's order which awarded claimant an additional 96° giving him a total of 112° of a maximum of 320° for unscheduled low back disability.

Claimant, at the time a 27-year-old production supervisor in a mobile home plant, suffered a compensable injury to his low back on April 19, 1976 while pulling a sidewall off a table. Claimant experienced low back and left leg pain and was seen by Dr. Moreno who diagnosed an acute low back strain, left side.

Dr. Moreno referred claimant to Dr. Boyd, an orthopedic surgeon, who examined claimant and reported on August 3, 1976 that the conservative treatment which claimant had initially received had proved unsuccessful, claimant was given a lumbosacral corset which improved his symptomatology somewhat and allowed him to work with some fatigue pain coming on at the end of the day. Claimant told Dr. Boyd that he had been released from his work because he wore the corset. He told Dr. Boyd that he was approached about signing a release in reference to back pain so that he could continue employment. Dr. Boyd recommended continued use of the corset and restricted claimant's lifting to between 30 and 40 pounds, felt he could continue in employment with minimal time loss. On October 22, 1976 Dr. Boyd felt that claimant would require referral to Vocational Rehabilitation in the near future.

Referral to the Vocational Rehabilitation Division was recommended on December 7, 1976 at about the same time that Dr. Boyd referred claimant to Dr. Buza, a neurosurgeon, for evaluation and consideration for surgery. On February 16, 1977 claimant was found ineligible for vocational rehabilitation because he was scheduled to undergo back surgery in the early part of March and would not be able to undertake any program for several weeks. His file was de-activated but claimant was encouraged to re-contact the agency when he was physically able to be involved in the program. Formal notice was given to claimant of withdrawal of referral on February 18, 1977.

On March 10, 1977 Dr. Buza performed a partial lumbar laminectomy at L4-5 on the left.

On July 1, 1977 claimant received another notice of referral for vocational rehabilitation. It was found that claimant lacked skills and aptitudes to seek a job through direct placement with his current disability and that a course in drafting would be well within the limitations placed upon claimant as a result of his industrial injury which prohibit repetitive lifting, bending and twisting. On January 9, 1978 it was reported that claimant was not keeping contact with the agency on a regular basis as he had agreed when his vocational rehabilitation program was set up in August 1977. Finally, after unsuccessful attempts to contact claimant, contact was made with his wife who reported that claimant was in the hospital undergoing tests for his back problem. She reported that he had dropped out of school in October and that he would be home the following day. It appears that claimant did not withdraw from his classes at Chemeketa Community College and he received an "F" in ten hours of study. The program was interrupted and the previous rehabilitation plan canceled.

On January 10, 1978 Dr. Buza performed a myelgram which indicated some improvement in the claimant's spine in the area of L4-5. On January 17, 1978 claimant was notified of possible termination in an authorized vocational program which stated that if he was medically stationary a claim would be submitted for closure pursuant to ORS 656.268 but if he was not medically stationary his time loss benefits would continue after his program had been terminated. It also informed claimant that if after two weeks from the date of the notice he still was unable to proceed with a program, they would make a final termination.

On January 30, 1978 a final termination notice was furnished claimant based upon claimant's physical inability to participate in the program at that time. It also advised claimant that if his doctor determined in the future that he was physically able it was his responsibility to contact his counselor and apply for reinstatement.

On September 1, 1978 the carrier advised claimant that although they had accepted his claim for the injury and paid compensation from April 19, 1976 they now felt that he was able to return to his regular employment with the employer and that he suffered no current disability as a result of the April 1976 injury that would prevent him from returning to his regular employment. For those reasons they advised claimant that they were issuing the partial denial and terminating any further payment to him for time loss. On September 17, 1978 the carrier withdrew its denial and reinstated payment of compensation for time loss. Subsequently, this was reduced to a formal stipulation which was signed by all parties on October 31, 1978 and approved by the Referee on February 9, 1979.

On September 7, 1978 Dr. Buza reported on a closing examination of claimant, stating that his condition appeared to be quite stable although he had not improved and was essentially unchanged from his previous complaints. He still had leg pain whenever he attempted to do anything and he also had back pain when bending, twisting or turning. He said that claimant had some residuals but the claim could be closed.

On October 10, 1978 a Determination Order awarded claimant compensation for temporary total disability from April 22, 1976 through April 25, 1976 and from August 3, 1976 through September 7, 1978 and 16° for 5% unscheduled low back disability.

Dr. Martens, an orthopedic surgeon, reported on November 21, 1978 that he had examined claimant and found him to be medically stationary. He stated claimant required no additional diagnostic testing or treatment and he had some residuals involving the L5 nerve root on the left which would prevent him from engaging in an occupation which required bending, lifting over 25 pounds, twisting, prolonged standing, walking, sitting or stooping. Claimant had a permanent ileostomy for multiple polyposis of the colon and he maintains good management of the ileostomy.

At the present time claimant is employed through the CETA program as a workshop teacher's assistant at Maclaren School. The only heavy lifting he is required to do is to occasionally lift a 4' by 8' sheet of plywood. He is able to alternate sitting and standing as his comfort requires and although he is receiving better wages than he was at the time of his industrial injury the job will not last beyond the summer and claimant at time of hearing was applying for a comparable permanent job.

Surveillance films were shown by the employer and its carrier which endeavored to prove that claimant was able to do many activities which he stated that he was unable to do. The Referee found that the films did not show claimant was severely disabled but neither did the lay or medical evidence. However, the Referee did find claimant had some significant disability because the testimony, including the films, indicated that claimant does not have an ability to engage in heavy type of work on a sustained basis.

The Referee concluded that the industrial injury eliminated claimant's performing any heavy work and that his prior work background which consisted primarily of rough carpentry which required heavy lifting and considerable bending and the job as a production supervisor which claimant held at the time he was injured, represent a type of employment to which claimant can no longer return.

The Referee found no reason to disbelieve the claimant nor the witnesses who testified in his behalf, although he was somewhat suspect of the witnesses testifying in behalf of the carrier. Based upon claimant's testimony and the objective medical evidence, he concluded that the claimant, even though he had a high school education, would not be physically capable of doing the work in which he is experienced based upon his past employment. Claimant's age and his general learning ability are in his favor, however, he will not be able to do certain types of work and should be compensated for the diminution of his wage earning capacity which resulted from his injury. He felt that claimant had lost 35% of his wage earning capacity as a result of the industrial injury and increased his award from 16° to 112° which represents 35% of the maximum allowed for unscheduled disability.

The Board, on de novo review, feels that the matter of placing claimant in a vocational rehabilitation program has been very poorly handled and, in fact, the entire processing of this claim is a good example of how it should not be done. However, based upon the medical evidence and taking into consideration claimant's youth and potential for retraining, the Board believes that the award made by the Referee is not justified.

The Board concludes that claimant would be adequately compensated for the loss of wage earning capacity resulting from his April 1976 industrial injury by an award of 80° which represents 25% of the maximum.

ORDER

The order of the Referee, dated March 7, 1979, is modified.

On September 1, 1978 the carrier advised claimant that although they had accepted his claim for the injury and paid compensation from April 19, 1976 they now felt that he was able to return to his regular employment with the employer and that he suffered no current disability as a result of the April 1976 injury that would prevent him from returning to his regular employment. For those reasons they advised claimant that they were issuing the partial denial and terminating any further payment to him for time loss. On September 17, 1978 the carrier withdrew its denial and reinstated payment of compensation for time loss. Subsequently, this was reduced to a formal stipulation which was signed by all parties on October 31, 1978 and approved by the Referee on February 9, 1979.

On September 7, 1978 Dr. Buza reported on a closing examination of claimant, stating that his condition appeared to be quite stable although he had not improved and was essentially unchanged from his previous complaints. He still had leg pain whenever he attempted to do anything and he also had back pain when bending, twisting or turning. He said that claimant had some residuals but the claim could be closed.

On October 10, 1978 a Determination Order awarded claimant compensation for temporary total disability from April 22, 1976 through April 25, 1976 and from August 3, 1976 through September 7, 1978 and 16° for 5% unscheduled low back disability.

Dr. Martens, an orthopedic surgeon, reported on November 21, 1978 that he had examined claimant and found him to be medically stationary. He stated claimant required no additional diagnostic testing or treatment and he had some residuals involving the L5 nerve root on the left which would prevent him from engaging in an occupation which required bending, lifting over 25 pounds, twisting, prolonged standing, walking, sitting or stooping. Claimant had a permanent ileostomy for multiple polyposis of the colon and he maintains good management of the ileostomy.

At the present time claimant is employed through the CETA program as a workshop teacher's assistant at MacLaren School. The only heavy lifting he is required to do is to occasionally lift a 4' by 8' sheet of plywood. He is able to alternate sitting and standing as his comfort requires and although he is receiving better wages than he was at the time of his industrial injury the job will not last beyond the summer and claimant at time of hearing was applying for a comparable permanent job.

Surveillance films were shown by the employer and its carrier which endeavored to prove that claimant was able to do many activities which he stated that he was unable to do. The Referee found that the films did not show claimant was severely disabled but neither did the lay or medical evidence. However, the Referee did find claimant had some significant disability because the testimony, including the films, indicated that claimant does not have an ability to engage in heavy type of work on a sustained basis.

The Referee concluded that the industrial injury eliminated claimant's performing any heavy work and that his prior work background which consisted primarily of rough carpentry which required heavy lifting and considerable bending and the job as a production supervisor which claimant held at the time he was injured, represent a type of employment to which claimant can no longer return.

The Referee found no reason to disbelieve the claimant nor the witnesses who testified in his behalf, although he was somewhat suspect of the witnesses testifying in behalf of the carrier. Based upon claimant's testimony and the objective medical evidence, he concluded that the claimant, even though he had a high school education, would not be physically capable of doing the work in which he is experienced based upon his past employment. Claimant's age and his general learning ability are in his favor, however, he will not be able to do certain types of work and should be compensated for the diminution of his wage earning capacity which resulted from his injury. He felt that claimant had lost 35% of his wage earning capacity as a result of the industrial injury and increased his award from 16° to 112° which represents 35% of the maximum allowed for unscheduled disability.

The Board, on de novo review, feels that the matter of placing claimant in a vocational rehabilitation program has been very poorly handled and, in fact, the entire processing of this claim is a good example of how it should not be done. However, based upon the medical evidence and taking into consideration claimant's youth and potential for retraining, the Board believes that the award made by the Referee is not justified.

The Board concludes that claimant would be adequately compensated for the loss of wage earning capacity resulting from his April 1976 industrial injury by an award of 80° which represents 25% of the maximum.

ORDER

The order of the Referee, dated March 7, 1979, is modified.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled low back disability. This award is in lieu of all previous awards claimant's has received for his April 19, 1976 injury including the award made by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-1555 November 19, 1979

CLEMMENT F. FLYNN, CLAIMANT
Velure & Heysell, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of that portion of the Referee's order which directed it to pay claimant compensation equal to 32° for 10% unscheduled neck disability and 48° for 15% unscheduled low back disability.

Claimant, a 37-year-old land appraiser for Jackson County, suffered two compensable injuries. The first injury occurred on January 2, 1976 when claimant slipped on an icy sidewalk; this injury was diagnosed as a lumbar strain.

He was seen by Dr. McIntosh, an orthopedic physician, on January 10, 1976 who admitted him to the hospital for traction. Dr. McIntosh continued to treat claimant and reported on February 6, 1976 that he had advised claimant to continue to try to work but to get as much rest as possible and apply heat to his low back. Later, he ordered a lumbosacral support for claimant, told claimant to remain off work and to receive physical therapy three times a week for two weeks.

On December 10, 1976 a Determination Order closed claimant's claim for the January 2, 1976 injury with an award of compensation for temporary total disability from January 10 through June 28, 1976 less time worked.

In October 1976 prior to the issuance of this Determination Order claimant suffered his second injury. He was driving a truck which hit a rock and bounced claimant causing him to strike his head on the roof of the truck. This aggravated his back problems. After this incident he was released to return to work on June 10, 1977 by Dr. McIntosh who opined he had minimal disability.

On January 26, 1978 a Second Determination Order granted claimant additional compensation for temporary total disability.

On May 25, 1978 the claimant was examined by Dr. Campagna, a neurosurgeon, on referral from Dr. McIntosh. X-rays of the lumbar spine were normal, except for the calcification of the aorta; the x-rays of the cervical spine were normal as were the x-rays of the chest.

It was Dr. Campagna's impression that claimant had a protruded lumbar disc suspect, secondary to the accident of January 2, 1976, post-traumatic aggravation of a cervical spondylosis secondary to a motor vehicle accident in October 1976 and calcification of the aorta.

On September 25, 1978 Dr. Campagna advised the Fund that claimant's neck and low back conditions were stationary and the claim could be closed. He found mild disability of the neck and low back as a result of the accident of 1976 (in this report Dr. Campagna made no distinction between the incident occurring in January and the later incident in October).

On January 2, 1979 Dr. Campagna advised the Fund that claimant should have no difficulty performing duties of his former job, an outline of which had been furnished to Dr. Campagna.

On February 22, 1979 claimant was examined by Dr. Short and Dr. Kimberley, both orthopedic surgeons, and Dr. Brown, a neurologist, at the Orthopaedic Consultants. Their report indicated claimant had an injury on "May 5, 1976" when he slipped on an icy sidewalk and experienced a sharp pain in his low back (the Form 801 filed by claimant shows that the incident occurred on January 2, 1976). After a short period of hospitalization, claimant had returned to work. On October 25, 1976 as a result of his truck striking a large rock he was thrown upwards and struck his head and also aggravated his low back. They felt that claimant's symptoms were aggravated by a float trip in August 1978 and made diagnoses of chronic low back sprain with leg symptoms, by history; chronic cervical strain, by history; chronic recurring dislocation, left shoulder with muscle atrophy, not related to the injury; and anxiety tension state. They believed claimant's condition was stationary and no further treatment was recommended. They stated claimant could continue with his same occupation without any limitations but he should have a comprehensive psychological examination, at least for documentation. They also suggested some counseling might benefit claimant. They rated claimant's total loss of function of the lower back and cervical spine, as a result of the injury, as minimal.

The claimant has a high school education, attended California State for two years, majoring in business. He also spent two years at Southern Oregon State College majoring in psychology, however, he has no degree. His background consists of hardware deliveryman, four years in the Marines and working as a surveyor. Claimant is a certified real property appraiser.

The Referee found that claimant's complaints were corroborated by testimony of three additional witnesses and that claimant's supervisor's testimony of observations of claimant indicated less corroboration. He felt that there was less than a friendly relationship between claimant and the employer.

The Referee concluded that although claimant had considerably more formal education than the average workman with the type of residuals which he had as a result of his industrial injury and though he was qualified as a real property appraiser, nevertheless, he had suffered a permanent loss of wage earning capacity because he was precluded from some jobs in the general industrial labor market. He granted claimant an award of compensation equal to 32° for 10% unscheduled disability for his neck injury and 48° for 15% unscheduled disability for his low back injury.

The Board, on de novo review, finds the medical evidence does not support an award equal to 25% of the maximum for unscheduled disability. Claimant's loss of wage earning capacity has been diminished by the residuals from his industrial injury but only by 15%.

The normal factors taken into consideration in determining loss of earning capacity in this case are, for the most part, favorable to claimant. He has a high school education, he has had two years of college in California and two years of college in Oregon. He has missed very little time from work. He is a qualified real estate appraiser and, according to Dr. Campagna's report, can return to that type of work without any restrictions. His work does not require physical work to any great degree and the evidence indicates that claimant has a lot of aches and pains and self-imposed limitations which are not justified by the medical evidence.

The physicians at Orthopaedic Consultants found that claimant's loss of function in the neck and back both were minimal.

Although claimant contends that as a result of his industrial injury he is unable to return to school the evidence indicates he is able to go sailing every weekend which requires a drive of 45 minutes to an hour each way and he does this whenever he desires to do so.

The Board concludes that the award granted by the Referee should be reduced from 25% to 15% of the maximum and claimant should be granted compensation equal to 48° for 15% unscheduled disability for his neck and back injuries.

ORDER

The order of the Referee, dated May 31, 1979, is modified.

Claimant is awarded 48° of a maximum of 320° for 15% unscheduled neck and low back disability. This award is in lieu of the award for permanent partial disability granted claimant by the Referee's order which, in all other respects, is affirmed.

SAIF CLAIM NO. FC 338006 November 19, 1979

JAMES W. GRAHAM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant was injured on November 10, 1971 while employed by Clackamas County Public Works Department, insured by the State Accident Insurance Fund. The claimant fell approximately 10 to 12 feet, suffering a comminuted fracture of the right os calcis. Claimant was treated conservatively by Dr. Cook. Claimant was released to return to regular work on April 17, 1972. In June 28, 1972 Dr. Schlim reported that he found no tenderness of the os calcis and it appeared to be normal. He found no limitations of motion of the foot or ankle. He reported that when claimant rose on the balls of his feet he was able to retain this position for only a short period of time because of discomfort in the foot. He felt that claimant's condition was stationary and his claim could be closed.

The claim was first closed by a Determination Order, issued on July 13, 1972, which granted the claimant an award for temporary total disability and award of permanent partial disability equal to 6.75° for 5% of the right foot. Claimant's aggravation rights have now expired.

The claimant continued to work at his regular occupation and was seen by Dr. John R. Hazel who, on September 28, 1978, reported that claimant was complaining of subtalar ankylosis and foot strain of the right ankle secondary to the industrial injury. He felt that the claimant would require a subtalar osteotomy and and arthrodesis to relieve the rather profound varus configuration of the hindfoot and the painful partial ankylosis. He asked that the claim be reopened for further treatment; he felt that claimant's symptoms were directly related to the injury sustained on November 1971.

On November 8, 1978 the Board's Own Motion Order was issued remanding the claim to the carrier for acceptance and for payment of temporary total disability commencing June 27, 1978.

Claimant was hospitalized from May 16, 1979 to May 21, 1979 by Dr. John Hazel. During this period of hospitalization a subtalar wedge osteotomy was performed to correct the varus and bony arthrodesis. After the surgery, claimant continued to be treated and released for work in August of 1979. Dr. Hazel reported, on October 15, 1979, that he found the claimant medically stationary and that he lacked about 15° of plantar flexion of the right side as contrasted to his left side. He found essentially no inversion or eversion of the patellar joint.

On October 25, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on November 2, 1979, recommended that the claimant be granted an award of compensation for additional temporary total disability from May 16, 1979 through August 19, 1979 and an additional award for permanent partial disability equal to 13.5° for 10% of the right foot.

The Board concurs.

ORDER

Claimant is granted compensation for temporary total disability from May 16, 1979 through August 19, 1979, less time worked, and compensation equal to 13.5° for 10% loss function of the right foot. These awards are in addition to any previous awards claimant may have been granted for his November 10, 1971 industrial injury.

WCB CASE NO. 78-4388 November 19, 1979

LEON F. GROSS, CLAIMANT
Milo Pope, Claimant's Atty.
Lindsay, Nahstoll, Hart, Neil
& Weigler, Employer's Attys.
Amended Order On Review

The Board entered its Order on Review in the above entitled matter on November 8, 1979 but inadvertently dated said order October 8, 1979.

THEREFORE, the Order on Review is amended by substituting the month "November" for the month "October" as indicated on page 6 of the Order on Review.

CLAIM NO. C291837 November 19, 1979

JAMES LAVIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on March 3, 1971 when a piece of metal struck him in the right eye. At the time of the injury claimant was employed by Keystone Machine Works whose carrier was the Fund. The claim was accepted and closed by a Determination Order, dated January 19, 1972, whereby claimant was awarded compensation for temporary total disability only. Claimant requested a hearing and, prior to the hearing, a stipulation was approved whereby claimant was awarded 5% loss of the right eye equal to 5°. Claimant's aggravation rights have expired.

On May 10, 1973 Dr. Christensen, who had treated claimant in 1970, diagnosed retinal detachment, right eye, post-traumatic. On the same day, he performed eye surgery. Claimant had been treated by Dr. Unruh in 1970 and he saw him again in 1973. Dr. Unruh released claimant from his care on October 19, 1973. The claim was closed by a Second Determination Order, dated January 17, 1974, and claimant was awarded additional time loss from May 10, 1973 to June 11, 1973 and an additional 5° for 5% loss of vision of the right eye.

On September 19, 1979 Dr. Christensen advised the Fund that he had again seen claimant and, upon examination, found an elevated detached retina above the site of the previous injury for which claimant had been treated in 1971. In his opinion there was a causal relationship between the present detachment and the original injury. On September 18, 1979 claimant was admitted to the Good Samaritan Hospital for a corneal transplant performed by Dr. Christensen.

On November 1, 1979 the Fund advised the Board that claimant had requested his claim be reopened for the medical treatment he had received and for time loss benefits. Since claimant's aggravation rights had expired the Fund referred the matter to the Board to be considered under its Own Motion jurisdiction. It furnished the Board copies of all the medical reports and the Determination Orders relating to this case and stated it would not oppose said reopening.

The Board, after considering all of the medical documents, concludes that claimant's claim for his March 3, 1971 industrial injury should be opened as of the date the last surgery was performed, September 18, 1979, and that claimant shall receive compensation as provided by law, until the claim is again closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-8993 November 19, 1979

HAROLD RAIKES, CLAIMANT
Starr & Vinson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

The Board entered its Order on Review in the above entitled matter on November 8, 1979 but inadvertently dated said order October 8, 1979.

THEREFORE, the Order on Review is amended by substituting the month "November" for the month "October" as indicated on page 6 of the Order on Review.

SAIF CLAIM NO. C28273 November 19, 1979

THEODORE D. RAZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a broken left hip on July 11, 1966. His claim was accepted and closed by a Determination Order, dated December 20, 1968, which awarded claimant compensation equal to 5.5° for 5% loss use of the left leg. The claim was reopened for further surgery and was closed on October 13, 1968 by a Determination Order which granted claimant an additional award of 16.5°, giving claimant a total of 22° for 20% loss use of the left leg. Claimant requested a hearing. An Opinion and Order entered by a hearing officer on April 3, 1970 granted claimant an additional 11° disability for the left leg, which increased the total award to 33° or 30° loss use of the left leg. This was the date of the last award or arrangement of compensation received by claimant for this industrial injury.

On September 18, 1979 Dr. Adlhoch advised the Fund that claimant had been his patient since the original injury on July 11, 1966 and after claimant returned to work and his claim had been closed he developed pain and limitation of motion in the hip and the recent x-rays revealed rather severe degenerative changes in the joint with aseptic necrosis of a portion of the femoral head. He stated that claimant had asked him to write to the Fund and request that it reopen his claim. In Dr. Adlhoch's opinion the changes in claimant's hip were directly related to the injury of 1966 and had progressed to the point where he would require a total hip arthroplasty. He stated that he had scheduled claimant for this surgery in approximately six months. Dr. Gambee concurred in Dr. Adlhoch's opinion.

Because the claimant's aggravation rights have expired, the Fund forwarded the medicals to the Board for their consideration pursuant to their own motion jurisdiction. The Fund stated it was not opposed to reopening the claim for the recommended surgery.

The Board, after giving consideration to the reports from Dr. Adlhoch and Dr. Gambee and reviewing the past medical history of the claimant, concludes that the claim should be reopened as of the date claimant was hospitalized for the surgery proposed by Dr. Adlhoch and until his claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. C192037 November 19, 1979

MITCHELL A. ROSE, CLAIMANT
Starr & Vinson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 16, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury to his low back sustained on May 9, 1969. The claim had originally been closed on December 17, 1971 and then reopened and again closed by a Second Determination Order, dated July 1, 1976. Claimant's aggravation rights have now expired.

On May 18, 1979, the Board advised the claimant that additional current medical reports supporting the contentions that the condition resulting from this injury has worsened since the last closure of the claim were needed. The Board was provided with a report of Dr. William Smith, dated September 1979, stating that claimant was unable to work because of intermittent low back pain with occasional radiation into both upper legs. It was the doctor's opinion that a repeat myelogram should be done to assess the status of the spinal canal above the L4-5, S1 fusion site.

On October 19, 1979 the Board advised the Fund of claimant's request and asked it to advise the Board of its position.

On November 1, 1979 the Board received two packets of documents containing medical reports regarding this claim. One packet was from the claimant's attorney and the other was from the State Accident Insurance Fund.

Dr. Smith reported on September 10, 1979 that it was his opinion that there were no surgical measures to be undertaken.

Dr. Baier, on October 1, 1979, reported his opinion that the claimant's distress was permanent and was not likely to be improved by any further therapy or surgery.

On November 1, 1979 the Fund, with the attached, exhibits, reported that it was their position that the claim for own motion consideration should be denied because the medical evidence did not support the claimant's contention that his condition has worsened since the last closure.

The Board, after thoroughly considering the evidence before it, finds it is not sufficient to warrant a reopening of claimant's claim at this time. The request by the claimant for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-10,231 November 21, 1979

PAULINE R. ANDERSON, CLAIMANT
Don G. Swink, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of the order of the Referee which remanded claimant's claim for compensability to it for acceptance and the payment of compensation as provided by law and an attorney's fee to claimant's attorney in the sum of $800 payable by the employer. He also granted a penalty in the amount of 25% of the amount accrued from the 60th day until the date of its denial be paid to the claimant.

Claimant was employed by Northwest Hospital Service (Blue Cross) as an appeals coordinator. On August 18, 1978 around 3 p.m., she went to the restroom, entered the stall, closed and thought she latched the door. Claimant testified it took some force to lock the door. As claimant was preparing to sit down the door swung open and struck her, startling her, causing her to twist to get out of the way; in doing so, she dislocated her left knee.

Claimant testified she was unable to move and began to holler for help. Help came, an ambulance was summoned and claimant was taken to the hospital. There her patella was relocated and she was provided with a left knee splint.

Claimant testified she missed one week of work, and returned to work on crutches for the next two weeks. She is now fully recovered.

Claimant filed her claim and it was signed by the employer on August 22, 1978. On November 1, 1978 a denial was issued on the ground that the injury did not arise out of her employment.

The Referee found the cases of Otto v. Noak Chevrolet, 36 Or App 149, and In the Matter of the Compensation of Treva Anderson were not on point.

The Referee concluded claimant's injury arose out of her employment as stepping out of the way of a moving door was reasonably incidental to office employment. He remanded the claim to the employer for acceptance.

The Referee also found that the employer had knowledge of the injury on the day it happened, August 18, 1977, but failed to either accept or deny the claim within 60 days. No issue of claimant's entitlement to temporary total disability arose therefore it was assumed that, as the claim was initially deferred, compensation was properly paid. The Referee concluded claimant was entitled to receive from the employer a penalty of 25% of the compensation for temporary total disability accrued after the 60th day the denial was due.

The Board, on de novo review, concurs with the conclusions reached by the Referee.

ORDER

The order of the Referee, dated May 25, 1979, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review, the sum of $250, payable by the employer.

WCB CASE NO. 78-10,013 November 21, 1979

GERALD E. JONES, CLAIMANT
Edward E. Daniels, Claimant's Atty.
David O. Horne, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which affirmed the Determination Order of December 11, 1978.

Claimant was employed by Willamette Industries as a millwright electrician and on March 16, 1976 he slipped and fell, striking his left knee on the catwalk.

The initial diagnosis was soft tissue injury. X-rays revealed a fracture of the patella and the leg was casted. On April 26, 1976 Dr. Ellison released claimant for work.

On May 19, 1976 Dr. Danner diagnosed synovitis. On May 20 claimant returned to see Dr. Ellison with pain and swelling of the left knee. In August 1976 Dr. Ellison recommended claimant have an arthrogram.

On September 2, 1976 claimant was hospitalized and Dr. Ellison performed a medial meniscectomy.

A Determination Order of January 11, 1977 granted claimant 15° for 10% loss of the left leg.

On April 19, 1977 Dr. Ellison reported claimant was having episodes of knee locking. He referred claimant to Dr. James.

Dr. James reported on July 19, 1977 that claimant's complaints were weakness and giving way of the knee, snapping and occasionally grinding. Upon examination hopping and squatting brought on pain. X-rays showed a slight lateral patellar tilt. The maximum area of discomfort involved the medial retinaculum over the medial femoral condylar region.

On November 9, 1977 claimant was hospitalized and Dr. James performed an arthroscopy, chondrectomy medial facet, excision of the condylar ridge medially, and lateral retinacular release.

On January 3, 1978 Dr. James released claimant for modified work.

Dr. James performed a final examination on May 15, 1978. The doctor reported claimant came in on that day because he had had an accident with a tractor that rolled over him. Claimant said he was doing well before this accident.

On September 22, 1978 Dr. James reported claimant had chondromalacia of the left patella and mild atrophy with minimal swelling. Claimant's condition was medically stationary.

Dr. James, in October 1978, reported that permanent impairment would relate to discomfort which would continue whenever claimant overextends the knee with prolonged standing, walking or weightbearing.

A Second Determination Order was mailed on December 11, 1978 granting claimant an additional award of 15° for 10% for a total of 20% loss of the left leg.

Dr. Ellison reported on October 28, 1976 that claimant called him and requested a release to work as he had a job possibility. In November 1976 claimant went to work for Wah Chang as a maintenance planner/scheduler.

Examination of November 4, 1976 found claimant's condition medically stationary with full range of motion except for 10° flexion and with good quadriceps strength. His disability was felt to be minimal.

Claimant testified that his job now with Wah Chang is 50% desk work. He testified that his present difficulties are pain, weakness, cannot crawl, walking on uneven terrain which makes him fall, cold weather which makes his leg stiff and too much activity which causes his knee to swell.

The Referee found there was no question that claimant suffered permanent loss of function of his left leg, but the evidence indicates the loss of function is accurately determined by the Determination Order which he affirmed.

The Board, on de novo review, concurs with the conclusion reached by the Referee.

ORDER

The order of the Referee, dated May 31, 1979, is affirmed.

WCB CASE NO. 78-2439 November 21, 1979

JOHN JUNGWIRTH, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On September 28, 1979 the Referee, William J. Foster, entered his Opinion and Order in the above entitled matter. Under date of October 8, 1979 claimant, by and through his attorney, requested the Referee to reconsider his Opinion and Order.

On October 10, 1979 the Referee entered an order suspending his previous Opinion and Order; however, on October 9, 1979, the Fund had requested Board review of the Referee's order thereby divesting the Referee of any jurisdiction.

On October 16, 1979 the Referee acknowledged that he did not have jurisdiction and, on October 24, 1979, the claimant, by and through his attorney, filed a motion with the Board asking for an order of remand, pursuant to the provisions of ORS 656.295, to allow the Referee to make a clear and complete record and issue an amended Opinion and Order containing facts and conclusions relating to all of the issues presented at the hearing.

The Board, after due consideration, concludes that there is no reason for another hearing to be held. Referee Foster has heard all of the evidence relating to the issues, the basis for the request for remand was that his Opinion and Order did not contain findings and conclusions with respect to all of these issues.

THEREFORE, the Board, pursuant to the provisions of ORS 656.295(5), hereby remands the above entitled matter to its Hearings Division, specifically to Referee William J. Foster, with instructions to reconsider the record made before him at the hearing held on September 5, 1979 and enter an amended Opinion and Order which clearly recites his findings and conclusions on all issues presented by both parties.

This Amended Opinion and Order shall be appealable pursuant to the provisions of ORS 656.289 and 656.295.

IT IS SO ORDERED.

WCB CASE NO. 78-23 November 21, 1979

ROGER D. McCOMMON, SR., CLAIMANT
Green & Griswold, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of that portion of the Referee's order which found claimant's claim was prematurely closed and that claimant was entitled to additional compensation for temporary total disability from June 2, 1977 to May 3, 1978. The Referee found that the Determination Order, dated July 13, 1977, should be reissued effective May 3, 1978 which would be the date claimant's aggravation rights commenced.

The claimant cross-requests review of the Referee's order which, in addition to the above findings, found that the award for permanent partial disability made by the Determination Order of July 13, 1977 was adequate and that the refusal to provide claimant with vocational rehabilitation services was not arbitrary and capricious.

Claimant, a 41 year old lineman, injured his back, neck, ribs and hip when he fell from a step ladder on January 10, 1976. X-rays indicated an undisplaced fracture, left, 6th rib. Claimant also had muscle spasms of the neck and hip. Initially, conservative treatment was furnished claimant; in August 1976 he was admitted to the Portland Pain Center. In October 1976 and March 1977 he was examined by Dr. Pasquesi. Claimant was examined by Dr. Danielson in June 1977 and on July 13, 1977 the claim was closed by a Determination Order. Claimant was granted compensation for temporary total disability from January 12, 1976 through June 2, 1977, less time worked, and compensation equal to 80° for 25% unscheduled neck and shoulder disability.

The issues before the Referee had been whether or not Field Services Division's decision not to refer claimant for vocational rehabilitation should be reversed; whether or not claimant's condition was medically stationary on July 13, 1977; or, in the alternative, the extent of claimant's permanent disability resulting from the January 10, 1976 injury.

Referral of claimant for vocational rehabilitation was denied on the grounds that claimant had experience in many fields and that there were many positions in said fields of employment that claimant could hold with his present physical limitations and which were at or above his economic pre-injury level of employment.

Dr. Stiger, Dr. Pasquesi, Dr. Danielson and Dr. Yospe, a clinical psychologist, all recommended retraining. There is no medical evidence that claimant is physically able to return to his former work as a lineman; he attempted to do so for about three months in 1978 but was physically unable to do the work required.

The Referee found that OAR 436-61-060 (2) authorized him to reverse or modify a vocational rehabilitation decision only if substantial rights of a party had been prejudiced because the agency's decision either: (1) violates a statute or rule, (2) exceeds the statutory authority of the agent, (3) was made upon unlawful procedures, or (4) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted discretion. In this case, claimant relies on subsection(4).

The Referee found that there was a difference of opinion as to whether or not claimant was in need of vocational rehabilitation but that was not sufficient. He stated he could only reverse the decision made by the Field Services Division if he found such decison was arbitrary,capricious or constituted abuse of discretion and he was unable to do that considering the information which it had available at the time it made its decision.

Claimant contended he was entitled to compensation for temporary total disability from July 12, 1977 to May 3, 1978 less seven or eight days during which he attempted to work. The Referee found that because compensation for temporary total disability was terminated on June 2, 1977, the date claimant was exanined by Dr. Danielson at the request of Dr. Pasquesi, that date was probably more appropriate. Dr. Danielson did not indicate whether or not claimant's condition was medically stationary. He merely stated that he recommended claimant be given vocational rehabilitation training in the area which he desired, namely, hotel management. He further commented that claimant was not capable of returning to work as a lineman or to any work activity which required frequent bending, stooping, tugging, extending his head, looking up in his line of work or working overhead.

On July 5, 1977, Dr. Stiger was furnished a copy of Dr. Danielson's report and asked for his comments. He made no statement as to whether or not claimant's condition was medically stationary. Dr. Pasquesi did not find claimant's condition to be medically stationary when he examined him in March 1977. The Referee found that the record was totally devoid of any evidence on the issue of whether or not claimant's condition had ever become medically stationary. Claimant alleges he returned to work on May 3, 1978. The Referee concluded that this activity would terminate his eligibility for compensation for temporary total disability.

The Referee concluded that claimant's claim had been prematurely closed on July 13, 1977 and that he was entitled to additional compensation from June 2, 1977 to May 3, 1978. He further concluded that the Determination Order should be re-issued with a new date so that claimant would have a different date from which his aggravation rights would commence.

On the issue of the adequacy of the award for permanent partial disability, the Referee found that, based on the evidence presented, it appeared claimant, who was at the time of the hearing 43 years old and had completed a year or more of college and whose intelligence was in the higher end of the average range, had adequately been compensated for his loss of wage earning capacity. Claimant did not have the strength or stamina to return to his work as a lineman but there were many jobs, in the opinion of the Referee, which required less physical effort and which claimant was physically capable of doing based upon his work background. He, therefore, affirmed the award of 80° which represented 25% of the maximum allowable by statute for unscheduled disability.

The Board, on de novo review, affirms the Referee's order insofar as it relates to the finding that there was no arbitrary, capricious or abuse of discretion nor any unwarranted exercise of discretion in the refusal by the Field Services Division of the Workers' Compensation Department to refer claimant for vocational rehabilitation. It also agrees with the Referee's conclusion that the award of compensation for permanent partial disability adequately compensated claimant for his loss of wage earning capacity. The evidence indicates that claimant returned to work on May 3, 1978, therefore, he falls within one of the three categories set forth in Jackson v. SAIF, 7 Or App 109, and as of that date his claim should have been closed. There was no evidence that claimant has not been able to work as a result of his industrial injury since May 3, 1978 and, therefore, he could be considered medically stationary as of that date.

However, the Board concludes that this matter could be more precisely and clearly handled by setting aside the Determination Order of July 13, 1977 in its entirety and issuing a new Determination Order dated May 3, 1978 which awards claimant compensation for temporary total disability from June 2, 1977 to May 3, 1978 and compensation equal to 80° for 25% unscheduled neck and right shoulder disability. This will automatically start the aggravation rights of claimant to run as of May 3, 1978.

ORDER

The order of the Referee, dated April 10, 1979, is modified.

The Determination Order, dated July 13, 1977, is hereby set aside in its entirety. A Determination Order, shall be entered as of May 3, 1978, wherein claimant is granted compensation for temporary total disability from June 2, 1977 to May 3, 1978 and compensation equal to 80° for 25% unscheduled neck and right shoulder disability.

The remainder of the Referee's order, insofar as it is not in conflict with the above, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee pursuant to ORS 656.382(2), a reasonable attorney's fee in the sum of $400, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-8265 November 21, 1979

DONALD PINSON, CLAIMANT
Lively & Wiswall, Claimant's Attys.
J.W. McCracken, Employer's Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of the order of the Referee which granted claimant an additional award of 96° for 30% unscheduled disability for a total award of 112° for 35%.

Claimant, 51 years of age, was employed by Weyerhaeuser pulling on the greenchain. On December 19, 1977 he suffered a compensable right upper arm injury lifting lumber.

Dr. Wiltse initially diagnosed right shoulder strain. Claimant was subsequently hospitalized and on April 27, 1978 underwent surgery for a resection of the outer end of the clavical.

Dr. McHolick released claimant for light work on June 5, 1978 and to his regular job on June 19, 1978.

Claimant returned to work and was placed on a job involving work on the log storage pond. He found he could handle this job; however, he was subsequently bumped from this job by another worker with more seniority and was returned to the greenchain. Claimant could not handle the greenchain work and was forced to quit.

On November 2', 1978 Dr. McHolick reported that claimant had had problems with bursitis of his shoulders for several years. Claimant also had degenerative arthritis of the acromioclavicular joints. Upon examination the left acromioclavicular joint was quite enlarged but claimant had full range of motion. The doctor felt claimant had possible rheumatoid arthritis and his regular job, working on the greenchain, was probably too heavy for him. Dr. McHolick did not feel claimant had any significant disability.

A Determination Order of November 24, 1978 granted claimant 16° for 5% unscheduled disability to the right shoulder.

On November 27, 1978 Dr. McHolick reported that claimant could be gainfully employed other than pulling on the greenchain and was to restrict his lifting.

Dr. Cassell examined claimant and reported on March 20, 1979 no objective findings and felt claimant's pain arose probably from fibrositis.

Claimant has an eighth grade education and is presently drawing unemployment compensation.

The Referee found, considering claimant's age, education, and work experience and his inability to return to his regular occupation he is entitled to an award of 35% for his loss of wage earning capacity.

The Board, on de novo review, finds that although claimant is unable to perform work on the greenchain he was capable of doing pond work. Claimant's impairment from this industrial injury is not significant as reported by his treating physician but he is precluded from heavy lifting. There are many jobs claimant is capable of performing.

The Board concludes that the award granted by the Referee was excessive for this industrial injury and feels an award of 25% would be adequate compensation.

ORDER

The order of the Referee, dated July 12, 1979, is modified.

Claimant is hereby granted an award of 80° for 25% unscheduled disability. This award is in lieu of all prior awards made to claimant as a result of his injury of December 19, 1977. The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-7098 November 21, 1979

MARK D. WEEMS, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund requests Board review of the Referee's order which directed it to pay claimant compensation for temporary total disability in the amount, and for the period, that he would have been paid had there been no suspension of compensation because of his failure to keep his appointment with Dr. Anderson. The order also awarded claimant's counsel an attorney's fee of $700, payable by the Fund.

Claimant was a 23-year-old roofer who sustained an injury to his low back on November 28, 1977 when he fell from a roof.

On May 23, 1978 the Fund mailed claimant a "Notice of Appointment" for him with Dr. Anderson for Monday, July 10, 1978, at 8:15 a.m. This "Notice" included in part:

> "....regulations of the Workers' Compensation Department now require us to notify you that your attendance for this examinaiton is mandatory. Failure to submit yourself for the examination could result in the suspension of your compensation benefits. If you are unable to make this appointment, please notify us prior to the appointment so that we can reschedule your appointment.

Claimant did not keep his scheduled appointment with Dr. Anderson and on July 25 a claim representative of the Fund wrote to the Compliance Division of the Workers' Compensation Department, stating it was the Fund's opinion that claimant's reasons for missing his appointment were inadequate. The Fund requested authorization to suspend payment of claimant's compensation from the date of the first appointment, July 10, 1978, until the date of his next scheduled appointment which was August 25, 1978.

On August 2, 1978 the Compliance Division of the Workers' Compensation Department advised claimant it had been notified that he had failed to keep his scheduled appointment and that the reasons he gave for missing the appointment were inadequate. Claimant was told that the Workers' Compensation Department was authorizing the suspension of compensation for temporary total disability as requested by the Fund.

The claims represenative of the Fund who had first written Compliance of claimant's failure to make the scheduled appointment with Dr. Anderson, had recorded an earlier telephone conversation with claimant during which he explained that he had missed the appointment on July 10 because he had to go to court and also because he had gone to The Dalles for job interviews. He stated that his girlfriend had noritied Dr. Anderson's office on the morning of July 10 that claimant would not be there. However, later in this conversation with claimant which took place on July 20, 1978, claimant stated that he had actually had not gone to court; he also said that he had not had a job interview in The Dalles but had only heard from someone that there might be work available in The Dalles and he went to see if that were true.

Claimant testified that either the Saturday or Friday before July 10 he had received a letter from his girlfriend's sister concerning a possibility of obtaining work as a mechanic in a shop owned by Mr. Spears. The sister's boyfriend was employed at the shop and the owner had agreed to keep the mechanics job open until he had interviewed a referral from the sister's boyfriend. The home in which the sister and her boyfriend lived had a telephone, however, instead of calling claimant, the sister wrote to claiment and he received the letter either on July 7 or July 8. There was no definite time set for an interview between the employer and claimant.

Claimant testified that although he had been working as a roofer at the time he was injured, he had in the past performed mechanical maintenance and had three years of small engine repair experience while in the army. He further testified that he asked his girlfriend to call Dr. Anderson's office about 8:00 and tell them that he would not be able to make the appointment because he had a job interview in The Dalles.

The sister's boyfriend testified that immediately after claimant received the letter he had called him about the work possibility. He said he told claimant that he worked on a percentage and made good money and that there was quite a bit of competition for the job. Claimant told him that he would try to get there as soon as he possibly could. When asked why he could not have kept the appointment with Dr. Anderson at 8:15 and then driven to The Dalles, approximately 120 miles from Salem, claimant replied that he needed the work and he wanted to get there ahead of all the other possible applicants. Claimant stated that he left Salem early enough to enable him to pick up the sister's boyfriend and drive to work in The Dalles at 7:30 a.m..

The owner, Mr. Spears, testified that claimant's mechanical knowledge and experience were adequate but that the job required some heavy lifting and he and claimant agreed that the job would not be appropriate for claimant because of the claimant's back injury.

The Referee found that claimant and the witnesses appearing in his behalf were credible. With respect to the reference made by the claim representative for the Fund concerning the telephone conversation she had with claimant, the Referee found that claimant had no recollection of making any comment that he had to go to court. With respect to the comment by the claim representative that during a conversation claimant stated he had not had a job interview in The Dalles but had only heard from somebody there might be a possiblity of work in The Dalles, the Referee found the record clearly supported that this was an error and, in fact, claimant had a specific job opening for which he drove to The Dalles to make application for.

The Referee concluded that claimant had a legitimate reason to miss the appointment with Dr. Anderson and had made an attempt, by asking his girlfriend to promptly call the doctor's office Monday morning, July 10, and say the he could not keep the appointment. He was also persuaded that the claims representative of the Fund acted under misapprehension in concluding that claimant was merely looking for general employment in The Dalles rather than following up a specific job opportunity.

Therefore, in the Referee's opinion, claimant did not "refuse to submit" or "obstruct" the examination by Dr. Anderson and the circumstances of this case are not such that fall within the category of action warranting suspension of compensation as defined by ORS 656.325. The Referee found that the compensation for temporary total disibility was improperly suspended and ordered the Fund to pay such compensation to claimant.

After de novo review, the majority of the Board finds that the evidence clearly indicates in this case that claimant was irresponsible and should have kept his appointment on Monday morning, July 10, 1978, with Dr. Anderson. Claimant had been advised not only of the appointment but of the consequences should he fail to keep the appointment.

There must be some accountability on the part of claimant for his failure, however, the evidence shows that at the time of the appointment with Dr. Anderson on July 10, 1978 claimant was not medically stationary nor had he been released by an doctor to return to work but, in fact, was still under medical treatment. Claimant could have called the employer in The Dalles and made an appointment for the day following his medical appointment. His statement that there was heavy competition for the job is not a sufficient excuse in the opinion of the majority of the Board.

The majority of the Board does not feel that the test of "reasonableness" is applicable, however, assuming arguendo that there was such a test, the majority of the Board concludes that claimant's actions were, in fact, not reasonable.

The majority of the Board concludes that the Referee's order should be reversed in its entirety.

ORDER

The order of the Referee, dated April 27, 1979, is reversed.

Board Member Phillips dessents as follows:

I respectfully dissent from the majority opinion of the Board and would affirm the order of the Referee.

In my opinion claimant has a valid excuse for his failure to keep his appointment with Dr. Anderson as he had a specific job opportunity interview out of town on that day.

ORS 656.325 (1) states that upon request from the Fund or the direct responsibility employer that a worker submit himself for a medical examination at a time and place convenient for the worker. The statute goes on to say that "If the worker refuses to submit to any such examination, or obstructs the same, his rights to compensation shall be suspended....". In no way did claimant, as is required by this statute, "refuse to submit" or "obstruct" the examination.

The whole intent of the Workers' Compensation system is to return an injured worker, as soon as possible, back into the labor market in a suitable and gainful occupation.

In this circumstance the claimant is required to make a judgment as to whether it is more important to submit to a physical examination at that particular time or to follow up on a lead toward possible employment when he had received no employment assistance from the agency.

I believe the claimant must be permitted to seek employment as the opportunities are presented and in this instance his priorities were correct and would, therefore, affirm the conclusion of the Referee.

SAIF CLAIM NO. C444778 November 27, 1979

CRAIG E. ATWELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury on June 14, 1973 while driving a logging truck for Clyde Rose Logging Company whose carrier was the Fund. The brakes on the truck failed and claimant was forced to jump from the truck which caused him to sustain compound fractures of the left ankle and left wrist and skinning his forehead. He was hospitalized by Dr. Cook, an orthopedic physician, who cared for the compound wounds and casted his left wrist after reduction. Later claimant had a fusion procedure performed on the left ankle and remained in a cast for approximately six months. He returned to work after a layoff of ten months and is presently driving a truck. The claim was first closed by a Determination Order, dated August 23, 1974, whereby claimant was awarded 101.25° for 75% loss of the left foot. It was later reopened and a Second Determination Order closed it on March 2, 1977 with an additional award of 7.5° for 5% loss of the left forearm. On August 1, 1977 a stipulation was approved which awarded claimant additional compensation equal to 6.75° for the left foot and 15° for the left forearm.

Dr. Cook, on October 29, 1979, noted that claimant was having increased pain in his ankle and that it was now evident claimant had an established pseudoarthrosis. He stated that he would perform a bone graft to this area and at the same time try to get some angular movement in claimant's valgus and posterior angulation.

On October 30, 1979 the claimant requested the Fund to reopen his claim; in his letter of request he referred to Dr. Cook's report of the previous day.

On November 16, 1979 the Fund advised the Board that it had received the request from claimant and because claimant's aggravation rights have expired it was referring the matter to the Board to consider under its own motion jurisdiction. All of the relevant documents were forwarded to the Board and the Fund indicated it would not oppose the reopening of the claim if the Board found it justified.

The date the stipulation was approved, August 1, 1977, was the date of the last award or arrangement of compensation granted claimant. Dr. Cook's chart note of October 29, 1979 supports a finding that claimant's condition resulted from the industrial injury of 1973 and represented a worsening thereof since August 1, 1977. In his request to reopen the claim, claimant stated that the last day he had worked was October 25, 1979, therefore, the Board concludes that the claim should be reopened as of that date for the payment of compensation, as provided by law, and for whatever surgery may be required to improve claimant's present condition.

ORDER

Claimant's claim for an industrial injury sustained on June 14, 1973 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on October 25, 1979 and until his claim is closed pursuant to the provisions of ORS 656.278, less time worked.

WCB CASE NO. 79-601 November 27, 1979

SCOTT C. DENNEY, CLAIMANT
Claud A. Ingram, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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.

SAIF CLAIM NO. C150403 November 27, 1979

JAMES J. FRAZIER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his left leg on September 30, 1968. At the time claimant was working for Burelbach Industries Corporation whose carrier was the State Compensation Department. The injury was diagnosed as a torn anterior cruciate ligament and possible tear of the medial meniscus. Surgery was performed.

On November 13, 1968 claimant's claim was denied for the reason that the injury was found not to have arisen out of and in the scope of claimant's employment. However, on March 4, 1969, a Stipulation was approved whereby the State Compensation Department agreed to accept claimant's claim for the injuries arising out of the September 30, 1968 incident and provide claimant with all benefits to which he was entitled by law and claimant agreed to withdraw his request for hearing on the denial.

On May 5, 1969 Dr. Spady felt that claimant's condition was stationary and that the claim could be closed. On May 16, 1969 the claim was closed by a Determination Order which awarded claimant 15% loss of the left leg. This was the last award or arrangement of compensation received by claimant. His aggravation rights have expired.

On September 19, 1979 Dr. Spady advised the Fund that claimant had been having increasingly painful symptoms in the incisional area of the knee surgery and evaluation by his personal physician indicated a foreign body in the distal region of the wound. X-rays taken on September 19, 1979 indicated the location of the foreign bodies and Dr. Spady requested that the claim be reopened for removal of such foreign body.

On October 30, 1979 Dr. Spady advised the Fund that the surgery had been performed and on that date the sutures had been removed. He felt that the wound was completely healed and claimant was able to return to work insofar as his knee injury was concerned. Claimant had suffered a coronary at that point and his own doctor was not allowing him to return to work immediately but as far as the knee was concerned Dr. Spady felt that he could return and there would be no impairment of function.

On November 8, 1979 the Fund furnished the Board Dr. Spady's request that claimant's claim be reopened and all of the other medical documentation commencing with the original claim which was filed by claimant on October 11, 1968. The Fund stated that it would not oppose reopening the claim for the payment of additional time loss benefits if the Board wished to do so under its own motion jurisdiction.

The Board, after due consideration, concludes that claimant is entitled to additional time loss from the date he entered the hospital for the surgery performed by Dr. Spady on September 20, 1979 and until his claim is again closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-4915 November 27, 1979

GREGORY T. JORDAN, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks review by the Board of the order of the Referee which remanded claimant's claim for injuries to his cervical and low back to it for acceptance as a compensable injury and granted claimant an award of 52.5° for 35% loss of the right leg and 52.5° for 35% loss of the left leg.

Claimant, 19 years of age, commenced working for Deitrich Logging Company on October 10, 1977 as a choker setter. This job required him to be quite active and he began to have considerable difficulty with his knees. Because of the condition of his knees claimant quit this employment on December 14, 1977.

Claimant had prior knee problems when he was a runner in school and was treated by Dr. Woolpert in 1975.

Claimant again sought medical care from Dr. Woolpert who diagnosed chondromalacia of the patella bilateral. Dr. Woolpert felt that claimant's job aggravated this condition and he needed a job change. He was released to restricted work on January 13, 1978.

On March 3, 1978 Dr. Woolpert reported claimant's pain and discomfort of his knees was about the same as prior to aggravation.

A Determination Order of April 4, 1978 granted claimant compensation for temporary total disability only.

Claimant was referred to Vocational Rehabilitation for retraining and was placed in an authorized program in forestry technology.

On July 31, 1978 claimant commenced treating with Dr. Tracy, a chiropractor, who diagnosed lumbosacral subluxation with cervical subluxation.

On September 5, 1978 Dr. Woolpert reported he examined claimant for back complaints with vague onset of symptoms. Dr. Woolpert, upon examination, found excellent range of back motion. He could not relate these complaints to claimant's work as claimant had never mentioned his back while being treated for his knees. Dr. Woolpert found the examination entirely normal.

On October 30, 1978 the Fund denied any cervical or low back condition being compensably related to claimant's injury.

On November 8, 1978 Dr. Wagner, a chiropractor, examined claimant. The diagnosis was bilateral sacroiliac strain with myofascitis. The doctor felt the strain was being complicated by claimant's chondromalacia, which was putting undue stress on the entire spine.

Claimant testified that the problems he is experiencing are the same as in 1975. If he sits very long his legs go numb and squatting causes his knees to pop.

The Referee found claimant developed cervical and low back difficulties arising out of his employment and remanded those conditions to the employer for acceptance. He further found that claimant had lost 35% function in both of his legs, and granted an award reflecting that finding.

The Board, on de novo review, finds that the evidence indicates Dr. Woolpert found claimant's knees had returned to pre-aggravation status and, therefore, from his occupation he has sustained no loss of function that can be related. Further, the Board finds that claimant's back problems did not arise out of his employment nor were the problems caused by the injury-incurred aggravation of claimant's knees. Dr. Woolpert had treated the knee conditions from 1975 throughout this injury and his opinion carries the greatest weight. He could find no relationship between the back and the knees as claimant never made any complaints to him.

The Board concludes that the Referee's order must be reversed in its entirety and affirms the Determination Order of April 4, 1978. The partial denial, dated October 30, 1978, is affirmed.

ORDER

The order of the Referee, dated June 5, 1979, is reversed.

The Determination Order, dated April 4, 1978, is affirmed.

The partial denial of October 30, 1978 is affirmed.

WCB CASE NO. 78-5805 November 27, 1979

AHMAD NOOR KOJAH, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order Dismissing Claimant's Cross-Request

On September 7, 1979 an Opinion and Order was entered in the above entitled matter. On October 2, 1979 the defendant requested Board review of the Referee's order. On October 17, 1979 claimant cross-requested Board review.

ORS 656.289 and 656.295 provide the procedure for seeking review by the Board of a Referee's order. Subsection (3) of ORS 656.289 provides:

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

In this case the 30 days expired on October 7, 1979, however, inasmuch as claimant did not request Board review until October 2, 1979 claimant was entitled to 10 days from that date within which to file a cross-request for review. Claimant's time within which to file a cross-request for review expired on October 12, 1979.

On October 24, 1979 the employer, by and through his attorney, filed a motion to dismiss claimant's cross-request for Board review on the grounds that it had not been timely filed and was therefore barred by ORS 656.289(3).

The Board concludes that under the circumstances as recited above the motion is well taken and should be granted.

ORDER

Claimant's cross-request for Board review of the above entitled matter, dated October 17, 1979, is hereby dismissed. The defendant's request for Board review was timely filed and shall stand.

SAIF CLAIM NO. FA 872730 November 27, 1979

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order Setting Aside Amended
Own Motion Determination

On November 13, 1979 an Amended Own Motion Determination was entered in the above entitled matter which awarded claimant, in addition to the compensation he had been awarded for temporary total disability by an Own Motion Determination dated October 31, 1979, an award of compensation for permanent partial disability equal to 30% loss function of an arm for unscheduled disability. In all other respects the Own Motion Determination dated October 31, 1979 was reaffirmed and republished.

Subsequently, the Board was informed by a report from Dr. Nag that as of November 8, 1979 claimant was still temporarily and totally disabled from engaging in his former regular work. Dr. Nag had not released claimant to return to work and he was unable to determine how much further time loss claimant would suffer. The report indicated he was still treating claimant and his condition was not medically stationary.

Based upon this information and also a copy of a check from the Fund payable to claimant which indicated that it was for payment of time loss from November 1, 1979 to November 14, 1979, the Board concludes that the Amended Own Motion Determination dated November 13, 1979 should be set aside and held for naught. Claimant's claim for his injury sustained on July 25, 1961 should be considered to be in an open status and that the State Accident Insurance Fund should continue to pay claimant compensation for temporary total disability until claimant's claim is closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. C139608 November 27, 1979

CHARLES T. SCHROEDER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on August 7, 1968 when he fell from a ladder and fractured his pelvis and left elbow. Claimant was hospitalized by Dr. Joe B. Davis who reported on December 11, 1968 that claimant's principal residuals would be related to his elbow and that he was making satisfactory progress.

The claim was closed by a Determination Order, dated March 6, 1969, which awarded claimant compensation for permanent partial disability equal to 10% loss of the left arm. Claimant requested a hearing and, after a hearing, Referee Fitzgerald, by an Opinion and Order entered on May 1, 1970, awarded claimant compensation for permanent partial disability equal to 40° for partial loss of the left arm. This award was in lieu of, not in addition to, the award made by the Determination Order of March 6, 1969 which, in all other respects, was affirmed by the Referee. That was the date of the last award or arrangement of compensation granted claimant. Claimant's aggravation rights have expired.

On July 12, 1979 claimant requested that the Fund reopen his claim, stating that his condition was getting worse and he would like to be seen by Dr. Davis and possibly have an operation on his elbow.

At the request of the Fund claimant was examined on September 17, 1979 by Drs. Boyden, Gripekoven and Rosenbaum at the Orthopaedic Consultants. X-rays revealed the presence of three bony bodies posterior to the left olecranon and the three physicians recommended that claimant have an arthrogram of the left elbow. If the bony fragments noted were interarticular they thought claimant might benefit from an excision of said bodies, however, if they were in the substance of the tricep tendon, they recommended no surgery. They recommended claimant continue the same occupation, i.e. a painter for the Multnomah County School District No. 1, but with some limitations of lifting. They stated he could do other types of work and did not require vocational assistance or psychological or psychiatric examination or referral to the Callahan Center or the Pain Center.

On October 22, 1979 the Fund advised claimant that they were authorizing a left elbow arthrogram to determine if surgery was necessary and stated that claimant should present this letter of authorization to Dr. Davis who would subsequently submit a report of his findings and recommendations to it.

Claimant was seen by Dr. Fitch, an orthopedic surgeon, on October 31, 1979. Dr. Fitch is a former colleague of Dr. Davis and had participated in claimant's care at the time of the 1968 injury. Dr. Fitch recommended that claimant undergo an arthrotomy of the elbow joint and removal of the ossicles in the posterior portion of the elbow joint. Claimant was scheduled for this surgery on November 15, 1979 at Providence Medical Center.

On November 19, 1979 the Fund forwarded all the information it had with respect to claimant's claim to the Board because claimant's aggravation rights had expired and it thought the Board might wish to consider the matter under its own motion jurisdiction. The Fund did not oppose the reopening of the claim.

Based upon Dr. Fitch's letter of November 6, 1979 which related to his examination of claimant on October 31, 1979, the Board concludes that the claim should be reopened as of the date claimant entered Providence Medical Center for the surgery recommended by Dr. Fitch and that he should receive compensation, as provided by law, commencing on the date he is hospitalized and continue to receive such compensation until the claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. C190401 November 27, 1979

GEORGE E. SCOTT, JR., CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right eye on July 11, 1969 when he was hit in the eye by an egg. At the time of the incident claimant was employed by the Washington County School District No. 48 as a school bus driver and had stopped at an intersection. The claim was accepted and closed and claimant's aggravation rights have expired.

On August 23, 1978 Dr. Tanner reported that he had seen claimant on June 21 and found a retinal detachment. He referred claimant to Dr. Klein and both doctors felt claimant's eye condition was the result of his industrial injury in 1969. Claimant underwent a repair of the retinal detachment on January 12, 1979 which was successful. On June 5, 1979 Dr. Waldman indicated no further treatment would be necessary. He stated he was not certain how claimant's eye developed such a condition.

Claimant requested the Fund to reopen his claim but because claimant's aggravation rights had expired, the Fund forwarded the medical reports which it had been furnished by claimant to the Board for their consideration and determination under own motion jurisdiction.

On July 31, 1979 the Board remanded claimant's claim to the Fund to be accepted and for the payment of compensation, as provided by law, commencing on January 12, 1979, the date of the surgery, and until the claim was closed pursuant to ORS 656.278.

On August 17, 1979 the Fund mailed a speed letter to claimant asking him to provide the days he was unable to work due to the eye surgery. Claimant responded promptly, stating he had lost time from January 12 through January 26, 1979 only.

On August 17, 1979 Dr. Tanner submitted his final report with a brief explanation of the surgical procedure performed by him on January 12, 1979. He stated that he had last seen claimant on February 27, 1979 and that the eye looked to be virtually cured of the detachment. He stated he had seen no evidence of clinical residual from the detachment or the surgery.

The Fund requested a closing evaluation and the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be allowed compensation for temporary total only from January 12 through January 26, 1979, the date claimant informed the Fund that he was last unable to work.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from January 12, 1979 through January 26, 1979.

CLAIM NO. E 42 CC86484 RG November 27, 1979

HARLEY L. SHORT, CLAIMANT
David A. Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Richard W. Butler, Employer's Atty.
Own Motion Determination

On January 11, 1968 claimant sustained a compensable injury to his hip and right leg when he was struck by a jitney. Claimant was employed by Unisphere, Inc., whose carrier was Aetna Life & Casualty. The injury was diagnosed as an acute lumbosacral strain and the claim was accepted and later closed by a Determination Order on May 7, 1976 with an award of 32° for 10% unscheduled disability.

The claim was reopened when claimant underwent back surgery in March 1969 and closed on March 26, 1970 by a Determination Order which granted claimant an additional 48°. In October 1971 claimant's symptoms increased and he had instability in the area of his prior back surgery.

Claimant had a back fusion, L4-L5, on November 12, 1971 and in October 1972 Dr. Degge reported claimant's condition was medically stationary and he rated his symptoms as mild to moderate. Dr. Degge reported claimant should be retrained for employment which did not place heavy demands on his back.

A Third Determination Order was issued on November 7, 1972 which granted claimant an additional 32°, giving claimant at that time a total of 112° for 35% unscheduled back disability.

Dr. Degge examined claimant on February 3, 1973 for back pain which radiated down claimant's right leg. As a result of the examination, Dr. Degge recommended the claim be reopened for temporary treatment. On June 19, 1973 claimant's claim was again found to be stationary and the claim was closed on August 4, 1973 by the Fourth Determination Order which awarded claimant no additional compensation for permanent partial disability. The claimant requested a hearing on the adequacy of this Determination Order and, after a hearing, it was affirmed by a Referee's Opinion and Order dated January 4, 1974. A Board's Order on Review, dated August 9, 1974, reversed the Referee's order and awarded claimant additional compensation equal to 48° for 15% unscheduled disability. As of the date of the Order on Review, claimant had been awarded compensation equal to 50% of the maximum allowable by law for his unscheduled disability.

On February 27, 1975 claimant slipped and fell while working as a court security officer for the Lane County Sheriff's Office. He filed a claim with the Fund for a new injury which was initially accepted as a non-disabling claim. Subsequently, the Fund denied the claim on the grounds that it was an aggravation of claimant's 1968 injury. Claimant appealed this denial and Aetna was joined as a party because it contended that claimant had not suffered an aggravation of the 1968 injury but had sustained a new injury. The issue was resolved by the Oregon Court of Appeals which held that the February 27, 1975 injury was an aggravation of the 1968 injury.

Claimant continued to receive conservative treatment until December 1975 when he was admitted to the hospital on December 14 for a myelogram which was essentially normal. Claimant was discharged on December 16 and the evidence indicates this was the last definitive treatment claimant received for his low back complaints and pain in his right leg.

On October 26, 1976 the Board issued an Own Motion Order remanding the claim to Aetna to be accepted and for the payment of compensation, as provided by law, commencing March 12, 1976 and until the claim was closed pursuant to ORS 656.278, less time worked.

On October 3, 1979 claimant was examined by Dr. Donald T. Smith who found little evidence to support any change in claimant's condition which he said was medically stationary. He felt no further evaluation or treatment was indicated or would be of benefit to claimant.

The employer and its carrier requested a closing evaluation and the Evaluation Committee of the Workers' Compensation Department recommended that the Board award claimant compensation for temporary total disability from March 16, 1976, pursuant to the Board's Own Motion Order, through October 3, 1979, the date of Dr. Smith's report, but no additional award for permanent partial disability.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from March 16, 1976 through October 3, 1979, less time worked.

WCB CASE NO. 78-8333 November 29, 1979

ALAN D. ACKERMAN, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the March 13, 1978 Determination Order which granted compensation for time loss only and affirmed the Fund's denial of claimant's knee injury sustained on December 22, 1977.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated June 26, 1979, is affirmed.

Board Member Phillips dissents as follows:

I respectfully dissent from the majority opinion of the Board and would reverse the order of the Referee.

The evidence indicates that after claimant's industrial injury of December 22, 1977 his problems were progressively worsening. Claimant and six witnesses testified to these problems. Claimant went to work at Seabrook Cannery as a pallet stacker and because of his continuing symptomatology with his right leg he was forced to quit this employment on July 26, 1978.

The witnesses testified that claimant's right knee swelled, had popping and grinding noises. In fact, during the month of claim closure, March 1978, claimant was observed walking on crutches. From December 1977 through July 1978 claimant was observed limping, using a cane, using crutches; claimant complained of pain upon any activity; claimant would at times soak the knee and wrap it, and on several occasions claimant's knee collapsed.

The incident of August 8, 1978, by claimant's own testimony occurred when he jumped 6 inches off the ground to hit a volleyball. Claimant felt no significant change in his symptoms after this incident; he still had the same pain, swelling, grinding and popping of the knee.

The testimony about claimant's continuing and worsening symptoms was uncontradicted. Dr. Steele, who treated claimant after the August 1978 incident, reported regarding claimant's problems at that time, and the relationship to his industrial injury, was a decision which had to be based "upon an evaluation of the clinical history of the events that occurred in December, the events that occurred during the six months and the events that occurred in August". In so doing it is obvious that claimant's condition was not medically stationary and was in fact worsening.

Dr. Brayce, by a report of April 6, 1979, felt that the December 22, 1977 industrial injury was one of the major contributing factors to claimant's recurrent symptomatology.

I find that this case is on point with the Court of Appeals, holdings in Calder v. Hughes, 23 Or App 66 (1975) and Smith v. Ed's Pancake House, 27 Or App 361 (1976) wherein it held that even though claimant may have a second period of disability which is precipitated by activity or exertion, such a period of disability is the result of claimant's original compensable injury where there has been a continuation of symptoms after the original injury. For this and the above reasons, I find claimant has proven an aggravation of his injury of December 1977 and would reverse the order of the Referee.

WCB CASE NO. 78-5005 November 29, 1979

SUSAN A. BOWERS, CLAIMANT
Henry M. Silberblatt, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Remand

On May 4, 1979 the Board entered its Order on Review in the above entitled matter which reversed the Order of Dismissal entered by the Presiding Referee on December 6, 1978 and remanded to its Hearings Division claimant's request for hearing on the propriety of the denial by the Fund on November 3, 1977 of her claim for an injury to her right knee and right wrist which occurred on July 19, 1977 to be set down for hearing.

On May 11, 1979 the State Accident Insurance Fund petitioned for judicial review of the Board's order. On September 10, 1979 the Board's order was affirmed without opinion and on November 2, 1979 the Board received the Judgment and Mandate from the Court of Appeals instructing it to take proceedings necessary pursuant to the Opinion and Order of the court.

ORDER

The Order on Review, entered in the above entitled matter by the Workers' Compensation Board on May 4, 1979 is hereby reaffirmed and republished and, more specifically, the Hearings Division of the Workers' Compensation Board is directed to set as expeditiously as possible claimant's request for hearing on the propriety of the Fund's denial dated November 3, 1977 of claimant's claim for an injury to her right knee and right wrist which occurred on July 19, 1977 while claimant was in the employ of the Fraternal Order of the Eagles, Aerie No. 4.

SAIF CLAIM NO. C384145 November 29, 1979

ROBERT BULLIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order.

Claimant suffered a compensable injury to his right small toe on July 31, 1972. Claimant was splitting wood when he crushed the toe. The injury was diagnosed as an open fracture distal phalanx right little toe. Claimant was seen by Dr. Fry who found his condition to be medically stationary and so reported on November 20, 1972. The claim was closed by a Determination Order dated December 8, 1972 which awarded claimant compensation for temporary total disability from the date of the injury to September 20, 1972 but no award for permanent partial disability.

On August 21, 1979 claimant requested the Fund to reopen his claim, stating he had been having trouble with his toe and when he was seen by Dr. Anderson on May 24, 1979 for another claim he had asked him to examine the toe and see what could be done about it. It was Dr. Anderson's recommendation that the toe be removed and he suggested that claimant request the reopening of his claim. Claimant's request was accompanied by a report from Dr. Anderson, dated May 24, 1979, which was made for an industrial injury sustained on March 1, 1979 and related to claimant's back; however, Dr. Anderson did note at the conclusion of this report that claimant had a residual deformity of the right foot which was related to a 1972 injury and that it was likely from his present findings that claimant would possibly have further care and an amputation of the toe might be feasible.

On October 31, 1979 Dr. Harding, a surgeon, advised the Fund that he had examined claimant on October 25, 1979 and found there was a nonunion of the right fifth toe through the distal phalanx causing inversion and enlargement of the tip which was tender when bumped. He recommended amputation

through the area of nonunion which would eliminate claimant's problem. He recommended the surgery on an elective basis but because this was the time of year when claimant was not required to do heavy duty work it would be better for him to have the operation at the present time to enable him to return to work sooner.

On November 7, 1979 the Fund forwarded the request from claimant to the Board together with all of the materials relating to the 1972 injury which it had in its file. Inasmuch as claimant's aggravation rights had expired, the Fund stated that it would not oppose the reopening of the claim for the recommended surgery if the Board chose to exercise its own motion jurisdiction and reopen the claim.

The Board feels that the medical evidence justifies a reopening of the claim for the proposed surgery. Therefore, claimant's claim for an industrial injury sustained on July 31, 1972 should be referred to the Fund to be accepted and for the payment of compensation to commence on the date claimant enters the hospital for the surgery proposed by Dr. Harding and until the claim is again closed pursuant to ORS 656.278, less time worked.

IT IS SO ORDERED.

WCB CASE NO. 78-9392 November 29, 1979

DONALD G. FISHER, CLAIMANT
Richard A. Carlson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which granted him 256° for 80% unscheduled disability, an increase of 144° over and above the total of the awards granted claimant by the Determination Order, dated January 16, 1978, and the Second Determination Order, dated November 16, 1978.

Claimant, at the time of his injury, was a 52-year-old feeder operator who injured his lower back while pulling a rock out of the jaw of a rock crusher which he was feeding. The injury was diagnosed as an acute lower back strain. The injury occurred on January 4, 1977 and the following day claimant was seen by Dr. Moore, a chiropractic physician, who prescribed chiropractic manipulation and physiotherapy.

On January 14, 1977 claimant was hospitalized by Dr. Lautenbach to whom he had been referred by Dr. Howard, a chiropractic physician, who had also treated claimant. Claimant was placed in pelvic traction with heat on the back and given muscle relaxants and analgesics. An orthopedic consultation with Dr. Teal, on January 19, 1977, was followed by a lumbar myelogram which indicated no significant abnormality in the lumbar subarachnoid space. Claimant was discharged from the hospital on January 28, 1977.

Dr. Lautenbach continued to treat claimant conservatively and hospitalized him between February 26, 1977 and March 8, 1977 because of claimant's complaints of lower back pain with radiation to the left leg.

In March 1977 claimant came under the care of Dr. McKillop who advised the Fund on March 28, 1977 that he was to be considered as claimant's treating physician. On April 11, 1977 Dr. McKillop placed claimant in Good Samaritan Hospital. On April 18, 1977 Dr. Mason, a neurosurgeon to whom claimant had been referred by Dr. McKillop, reported that claimant probably had nerve root irritation secondary to lumbar spondylosis or herniated intervertebral disc.

On May 12, 1977 a lumbar laminectomy L4-5 bilateral was performed by Dr. Mason. Post-operatively, claimant did well and there were no complications; claimant was discharged from the hospital approximately 10 days after the surgery and was in satisfactory condition.

Dr. McKillop reported on September 1, 1977 that claimant had been examined by him and that claimant had reached a stationary level and that no further treatment was recommended. He stated that he could see no likelihood that claimant would ever return to his previous work as an operator of a rock crusher; that he would not be able to go back to any heavy, strenuous work which required repeated lifting and bending. Dr. McKillop felt that because of claimant's 7th grade education and limited vocational background he would not be a good candidate for vocational retraining and suggested the claim be closed in the near future. He found claimant had permanent partial disability to a moderate degree superimposed upon his degenerative joint disease. He suggested that claimant obtain, if possible, some lighter sedentary job.

The Field Services Division of the Workers' Compensation Department closed its file on claimant because neither placement action nor referral to the Vocational Rehabilitation Division appeared to be feasible inasmuch as claimant, in their opinion, had marketable skills.

On January 16, 1978 the first Determination Order awarded claimant 64° for 20% unscheduled low back disability.

On January 24, 1978 Dr. Stevens examined claimant. He appeared somewhat skeptical that claimant had residual radiculopathy but felt that the situation was such that an EMG would be quite helpful. At that time claimant was wearing a back brace part of the time but he did not have it on when Dr. Stevens examined him. Dr. Stevens thought that the back brace might be a satisfactory approach to his back pain. He also felt that claimant did not have the capability to be retrained either mentally or because of his age. He believed sending claimant to the Pain Center because of his narcotics problem would be worth considering.

Dr. Fax examined claimant on June 17, 1978 and felt that claimant might have spinal stenosis. He advised claimant that if he did have spinal stenosis a decompressive total laminectomy would possibly give him some relief. Prior to the surgery Dr. Fax recommended a myelogram. One was taken and Dr. Stolzberg expressed his opinion that claimant's gait impairment was not due to claimant's weakness but to pain and other functional factors and unless the weakness and atrophy become progressive he did not believe that further surgical management should be considered at that time.

On July 20, 1978 a Stipulated Order was approved which stated that claimant was not, at that time, medically stationary and that the carrier would pay claimant compensation for temporary total disability from June 9, 1978 until such time as claimant becomes medically stationary.

On August 17, 1978 Dr. Fax, in a chart note, indicated that he had nothing more to offer claimant; he felt that the carrier would probably need to purchase an electronic counter stimulator for him and that he would need to continue receiving traction treatment. He felt that any closing examination should be by the treating orthopedist, Dr. McKillop.

On August 25, 1978 claimant was examined by Dr. Noall and Dr. Staver, both orthopedic surgeons, and Dr. Rich, a neurologist, at the Orthopaedic Consultants. It was their opinion that claimant's condition was medically stationary and that his claim could be closed. They recommended no further treatment. Claimant could not return to his same occupation even with limitations, however, he could return to other occupations limited to light or sedentary work. They believed he might benefit from job assistance and recommended a psychological examination for documentation of the functional problem which they perceived during their examination of claimant. They rated the impairment of the low back at the time of the examination and as due to the injury to be in the moderate category.

Dr. Saunders stated he was in total agreement with the final diagnoses made by the panel of physicians at Orthopaedic Consultants. He stated that claimant's symptoms have far exceeded objective findings but that the patient has a real

disease. Dr. Fax and Dr. McKillop also agreed with the findings made by the three physicians at the Orthopaedic Consultants. However, Dr. McKillop noted in his concurrence that claimant had been admitted to Good Samaritan Hospital on September 25, 1978 because of acute exacerbation of his back and leg pain and had been seen by Dr. Mason. An electromyelogram was done and claimant appeared to be somewhat better and should be allowed to return home on September 27. Dr. McKillop felt that the claim might then be closed.

On October 13, 1978 Dr. Maltby, a psychiatrist, interviewed claimant and concluded that claimant had " . . . Conversion (Compensation) Neurosis aggravating and prolonging a back strain and the usual sequelae of back surgery." His diagnosis was based on a lack of objective physical findings in the presence of other findings typical of functional illness which originally were discovered by the physicians at the Orthopaedic Consultants. Dr. Maltby felt that claimant has a subconscious psychological need to become disabled and has a lack of concern about his disability; he felt there was a secondary gain present in the form of compensation payments which were very close to claimant's take-home pay. In his opinion, claimant was not motivated for rehabilitation, but he did concede that there was almost no chance that claimant would be able to return to any form of heavy labor and that claimant had no skills and very little education.

Both Dr. McKillop and Dr. Saunders agreed with Dr. Maltby's findings and conclusions. However, Dr. McKillop stated that claimant has degenerative arthritis and his industrial injury aggravated it to a certain extent. He felt there was probably no medication likely to help and that the claim should be closed as soon as possible. He said it was doubtful claimant would return to any type of work.

On November 16, 1978 the Second Determination Order granted claimant additional compensation for temporary total disability and an additional award of compensation equal to 48° for 15% unscheduled low back disability, giving claimant a total of 112° for 35% of the maximum allowable by statute for unscheduled disability.

On January 30, 1979 Dr. Stolzberg saw claimant who was complaining about back and leg problems. He stated that he believed claimant had a chronic, traumatic, post-operative back syndrome. He did not think that this was a condition that further surgery would help. In his opinion what happens in the future is largely up to claimant himself. He needs to lose weight and he needs to begin exercising to return to a physical condition which will enable him to undertake useful activities without relapses of increased pain after such activities.

Claimant, at the time of the hearing, was 55 years old although he appeared older, he has a ninth grade education and has had no special training. He had worked eight months on the rock crusher prior to his injury and his previous work background consisted of working in lumber yards as a manager, foreman, truck driver and yardman. Practically all of his work has required some physical labor and claimant has never held down a desk job nor done any other sedentary type of employment.

The Referee found that the clear weight of the medical evidence supported a conclusion that claimant was physically unable to return to any previous employment regardless of functional overlay. His work in the future would be limited to sedentary and perhaps some light type employment. Considering his age and education, the Referee found it would be most difficult for claimant to become regularly employed, however, claimant's motivation left much to be desired and there was medical evidence that claimant could improve his physical condition by weight loss and through exercise. He concluded that claimant had lost most of his wage earning capacity as a result of his industrial injury but he had failed to prove that he is permanently and totally disabled.

He found claimant was entitled to be compensated for his loss of wage earning capacity by an award equal to 80% of the maximum allowable by the statute for unscheduled permanent partial disability. At the time of the hearing claimant had received 112°, the Referee increased that award by 144° giving claimant a total of 256° which represents 80%.

The Board, on de novo review, agrees with the findings and conclusions reached by the Referee.

ORDER

The order of the Referee, dated May 8, 1979, is affirmed.

WCB CASE NO. 79-710 November 29, 1979

THOMAS LEATON, CLAIMANT
John DeWenter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which ordered it to pay claimant the sum of $360.00 per month from August 5, 1973 to the date of the hearing and $360.00 per month for similar services performed by claimant's wife that will be required in the future. An attorney's fee was assessed equal to $900 and also a fee equal to 25% of the increased compensation up to $2,000. Claimant cross-appeals, contending the amount granted him per month was not adequate.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated May 15, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the Fund.

Board Member McCallister dissents as follows:

The facts in this case clearly establish that claimant's wife does do some extra laundry, housework, and has had to take over the running of the family affairs. Likewise, the evidence is clear that she works 25-30 plus hours per week during which time claimant is left at home alone. It is obvious claimant's wife would like to remain at home to care for claimant if she were paid to do so. Claimant's wife is not a nurse nor is she a licensed homemaker. The evidence indicates that claimant would be better off in some sort of structured day care facility. Johnnye Schlich's testimony as to the needs of claimant is of little assistance. Her opinion as to the needs of claimant, she admitted, would have to be modified based on the testimony she heard at the hearing. The evidence indicates claimant is able to dress himself, handle buttons, zippers and ties his shoes. Claimant has difficulty remembering to eat or perform certain personal hygiene activities. However, he can remain at home for long periods of time unsupervised and performs various activities. It is the opinoin of this writer that claimant's wife does do additional household work, but that it is not any different from her normal household work. The wife's duties are not those that a hired nurse would have to do. Therefore, I would reverse the Referee's order.

WCB CASE NO. 77-7797 November 29, 1979

ROBERT R. LEWANSKI, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order On Review

On October 9, 1979 the Board issued its Order on Review in the above entitled matter affirming and adopting the Opinion and Order of the Referee, dated February 28, 1979. The Referee had concluded that claimant failed to establish good cause for filing his request for hearing subsequent to the 60th day after the denial and denied the relief requested by claimant because of the untimely request.

On November 1, 1979 the Board received a letter from claimant requesting it to reconsider its Order on Review. Claimant had been represented by counsel at the hearing but represented himself on Board review. Inasmuch as claimant had only until November 8 within which to petition judicial review by the Court of Appeals of the Board's order, the Board concluded that this order should be set aside and held for naught to allow the Board adequate time to reconsider the matter.

An order setting aside the Order on Review pending reconsideration was entered on November 6, 1979; said order stated that after reconsideration the Board would either issue an amended Order on Review or republish its former Order on Review and the date of said order would be the commencement date from which the parties would have a right to seek judicial review.

The Board has again reviewed the entire matter and concludes that there is no merit in claimant's request to reconsider its Order on Review. Therefore, the Board's Order on Review, dated October 9, 1979, should be reaffirmed and republished with appeal rights to run from the date of this order.

IT IS SO ORDERED.

WCB CASE NO. 78-5414 November 29, 1979

CLEO OLP, CLAIMANT
Welch, Brunn, Green, & Caruso,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund seeks review by the Board of the order of the Referee which reversed its partial denial and remanded claimant's claim for right shoulder disability to it for acceptance and granted claimant's attorney $500 attorney's fee payable by the Fund.

Claimant was employed as a motel maid by Portage Inn Motel and alleged on March 26, 1976 she injured her left leg and right shoulder when she fell in the motel bathroom. Her claim was originally accepted as a non-disabling injury.

Claimant testified 14 days later she slipped and fell onto her back in the same room.

The initial examination revealed a bruise on the upper left thigh with claimant complaining of pain into the left hip and down to her toes.

On April 16, 1976 Dr. D'Souza diagnosed contusion of the left upper thigh. Claimant gave a history of falling injuring her leg and elbow.

In April the following year a chart note in evidence indicates three weeks ago claimant developed pain in the right trapezius muscle. The doctor felt claimant might have myofascitis.

A chart note, dated May 4, 1977, indicates claimant's complaints were pain in the neck radiating to her ear and over the chest. Claimant said she fell landing on her back.

On July 19, 1977 Dr. Schwartz examined and reported neck, right shoulder, arm and chest pain for five months. Claimant told him she fell twice at the motel over a year ago and fell once in a bathtub and injured her stenoclavicular joint but after several days she got over the pain, however, seven months later the pain increased. The diagnosis was myofascitis right arm.

On April 18, 1978 Dr. Heusch diagnosed chronic adhesive capsulitis right glenohumeral joint. On April 26 claimant gave Dr. Heusch the history of the bathtub incident.

On June 2, 1978 the Fund issued its partial denial denying responsibility for the shoulder problem.

Dr. Heusch reported on February 19, 1979 that the history given to him by claimant was quite straightforward about her injuring her shoulder on March 26, 1976. Medically speaking, it was very feasible and probable that the fall caused the shoulder injury.

The Referee found Dr. Heusch's opinion was uncontradicted in the record and the claimant had established a prima facie case and carried her burden of proving the right shoulder condition was related to the March 26, 1976 industrial injury. He remanded the claim for acceptance.

The majority of the Board, on de novo review, would reverse the Referee's order. No mention is made in the medical reports of any right shoulder complaints until some 13 months after the industrial injury. Further, the initial diagnosis was only contusion to the upper thigh.

Therefore, the majority of the Board concludes claimant did not carry her burden of proof. Dr. Heusch's opinion does not carry much weight since he had not examined the claimant until two years after this injury and would be purely speculation on his part.

ORDER

The order of the Referee, dated June 25, 1979, is reversed.

The Fund's denial, dated June 2, 1978, is affirmed.

Chairman M. Keith Wilson dissents as follows:

The Opinion and Order of the Referee should be affirmed and adopted by the Board.

The Referee's statement summarizes both the legal and medical questions involved in this case, and is as follows:

> "Defendant's [Fund] letter of partial denial appears to have issued without any medical documentation. The Report of Injury and the subsequent medical reports are not as complete and precise as might be desired; however, they are sufficient to establish a prima facie case, which, being unrebutted, establishes claimant's burden of proving the compensability of the foregoing condition."

I cannot agree that the unrebutted medical opinion of Dr. Heusch can be brushed aside as being "purely speculative". This is the only medical evidence in the record which deals with causation of the claimant's shoulder problem, and is entitled to full weight in the absence of contrary evidence. The lay testimony also stands unrebutted, is believable and entitled to full weight.

The burden of the claimant in this case was to establish the compensability of her shoulder condition by a preponderance of the evidence. Since no contrary evidence, either lay or medical, was introduced by the Fund, it is clear that her burden has been met.

WCB CASE NO. 78-1310 November 29, 1979

MAXINE E. SHAW, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the order of the Referee which granted claimant compensation for permanent total disability effective September 25, 1978.

Claimant, 60 years of age at the time of the hearing, was employed by Portland Laundry Company as a dry cleaner/presser. Claimant had been employed in this occupation for some 30 years. On December 5, 1977 she filed a claim for phlebitis of both legs from standing on her feet for years. Claimant had prior problems of phlebitis of the left leg in 1957.

On November 1, 1977 claimant had a right lower venogram and some varicosities were noted on the medial aspect of the mid-calf.

On December 5, 1977 Dr. Field diagnosed phlebitis; claimant's condition was medically stationary but claimant was precluded from her regular occupation.

Dr. Field's report of December 22 indicated claimant came to his office on September 21, 1977 with a painful and swollen right leg. He hospitalized her in late October and treated her with anticoagulants and hot packs and released her with elastic stockings. He opined that claimant's condition was related to her work.

Claimant was examined by the Orthopaedic Consultants on January 7, 1978. They diagnosed thrombophlebitis right thigh and left leg by history, varicose veins bilaterally, and chronic obesity. The physicians felt there was no evidence of a neurological or orthopedic condition to be found. They recommended claimant be examined by a vascular surgeon.

Dr. Hampton, an internist, examined claimant on January 13, 1978. He reported that with the exception of obesity and varicose veins the examination was normal. In his opinion claimant had had three episodes of phlebitis in the past but had none at that time. Claimant did have venous insufficiency of both legs which was symptomatic and which was aggravated by her obesity. He felt that standing or sitting for prolonged periods would have an adverse affect also.

On February 10, 1978 Dr. Field concurred with Dr. Hampton's report and on February 28 he concurred with the report of the Orthopaedic Consultants.

On March 7, 1978 Dr. Field indicated claimant was now fully ambulatory. Claimant could be employed in a job not requiring standing on her feet for long periods of time.

In May 1978 Dr. Field reported claimant's condition was now stable.

Claimant was enrolled at the Disability Prevention Center in July 1978. Dr. Azavedo reported that while so enrolled claimant had no phlebitis and was medically stationary.

Dr. Ellerby became claimant's treating physician in July 1978 as Dr. Field retired in June. In August 1978 he recommended vocational rehabilitation for her. In September he reported claimant had a prominent hiatal hernia. Claimant told him she saw the vocational people and no retraining was mentioned. Dr. Ellerby urged her to lose weight.

On February 14, 1979 Dr. Ellerby wrote the carrier that claimant's phlebitis had not worsened and was stationary but claimant did now have a problem of bursitis right shoulder.

On May 18, 1979 claimant had a left leg venogram which showed no evidence of phlebitis, but only varicose veins.

Dr. Ellerby was deposed and he testified that claimant did now have some permanent limitations from her phlebitis. She could not stand for prolonged periods of time and was precluded from her regular occupation. He further testified claimant's condition had not worsened and that he had urged, as had other doctors, that claimant lose weight. Her obesity was aggravating her condition. He felt claimant should be retrained for light work.

Claimant's employer for the last 20 years testified at the hearing. He said he had a seamstress right now working for him who was not working out. Claimant had been a seamstress in the past and had done some of this work while employed by him. He testified this job was sitting and standing and running a sewing machine. He would make allowances for claimant's problem.

Claimant testified she had tried housekeeping and babysitting, neither of which she could do. She also did volunteer work for Loaves and Fishes for two months, 1-1/2 hours per day, three days per week, but couldn't stand getting in and out of a car. Claimant also testified she went to Hawaii for a week in November 1978. She has not sought any employment.

The Referee found claimant had not proven any aggravation of her condition and, therefore, the carrier had properly processed the claim. He further found claimant could not be gainfully employed and granted her a permanent total disability award.

The Board, on de novo review, finds that the medical evidence indicates claimant is capable of performing light employment. However, the Board finds that the claimant is precluded from a large portion of the labor market considering the physical limitations arising from her claim, and in view of her age, education and past work experience, her loss of wage earning capacity is substantial. Claimant, however, has sought no employment or retraining assistance. The Board concludes that claimant would be adequately compensated by an award of 240° for 70% unscheduled disability.

ORDER

The order of the Referee, dated June 27, 1979, is modified.

Claimant is hereby granted an award of 240° for 70% unscheduled disability. This award is in lieu of the award granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 78-9406 November 29, 1979

CINDY L. THOUVENEL, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the order of the Referee which affirmed the State Accident Insurance Fund's denial of compensability of her claim.

Claimant was employed by Douglas Community Hospital as a housekeeper and she alleges on September 25, 1978 at around 2:00 p.m. (her shift commenced at 7:00 a.m.) she tried to lift the mattress frame on a bed so she could clean underneath it and heard a snap in her back. She testified she became weak and dizzy. She made her way out into the hallway and grabbed onto a handrail. The claimant testified a nurse came over to her and she told the nurse she was dizzy and had hurt her back and had pain into the right leg. Another nurse came along, a wheelchair was provided and a nurse wheeled claimant to the emergency room.

Mrs. Tarrant, an LPN, testified that she was coming down the hall and saw claimant holding onto the handrail and she looked shakey and white. Mrs. Tarrant testified claimant told her she was dizzy and had been home ill the day before.

Another nurse, Mrs. Withers, an RN, testified that she was also present and heard claimant say she had been off with the flu.

Mrs. Dill, another RN, testified she was the one who brought the wheelchair and took claimant to the emergency room. When she first saw claimant she was slumped over half kneeling on the floor. She testified she left claimant in the emergency room but returned later to see her and claimant told her she had had x-rays and that her back hurt.

Mrs. O'Neal, the LPN who worked in the emergency room, testified that when she saw claimant she was hunched over and said nothing at all to her. Mrs. O'Neal got the history from Mrs. Dill. She testified the first person in the emergency room to talk to claimant was the doctor.

The claimant's husband testified claimant had not been ill the day before; that he called in for her and said she would not be in for personal reasons.

The initial examination in the emergency room was performed by Dr. Davis and he reported a back examination revealed tenderness over the L5-S1 junction and over L1 and 2. Claimant had moderate amount of muscle spasms and his diagnosis was low back strain.

Another medical report has no doctor's signature and diagnosis was acute lumbar strain on the right. Claimant had tenderness in the paravertebral musculature and straight leg raising was positive.

In October 1978 claimant commenced treating with Dr. Woolpert and she gave him the history of the episode at work on September 25, 1978.

The Fund paid claimant compensation for temporary total disability until it issued its denial of compensability on November 17, 1978.

The Referee found that he had difficulty with claimant's credibility and felt she had therefore failed in her burden of proving a compensable injury arising out of her employment and affirmed the Fund's denial. He found no basis for assessing penalties or attorney's fees.

The Board, on de novo review, would reverse the Referee's conclusion. The Board finds that the evidence indicates claimant worked seven hours before this incident with no sign of any difficulty. The evidence further indicates that

when found in the hallway claimant was obviously in distress. Upon examination in the emergency room Dr. Davis found objective clinical evidence, muscle spasms, upon which to base his diagnosis.

The Board concludes claimant has carried her burden of proof and the Fund's denial must be reversed.

ORDER

The order of the Referee, dated June 12, 1979, is reversed.

Claimant's claim is hereby remanded to the Fund for acceptance and the payment of compensation as required by law until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at the hearing and at Board review, the sum of $1,000, payable by the Fund.

WCB CASE NO. 78-4829 November 30, 1979

DOROTHY M. HORNER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Keith D. Skelton, Employer's Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Opinion and Order on Reconsideration of the Referee which granted claimant an award of 144° for 45% unscheduled disability.

Claimant, now 40 years of age, was employed by Lebanon Community Hospital as a nurse assistant and on March 2, 1976 she injured her back pulling a patient up in bed. Along with back pain claimant began having right leg pain.

Dr. Seddon, on March 18, 1976, diagnosed possible right deep thrombophlebitis. Dr. Lohr diagnosed back strain with muscle spasms. Dr. Lohr wanted claimant to try returning to to work on April 2, 1976.

Claimant was examined by Dr. Melgard who reported on May 14, 1976 that he felt claimant had a probable pars interarticularis defect. He subsequently ordered a lumbosacral corset for her. X-rays at that time revealed a unilateral spondylosis.

Dr. Anderson found claimant's condition medically stationary on August 11, 1976 with physical impairment related to pain but there was no evidence of nerve damage.

Claimant was enrolled at the Disability Prevention Division on October 8, 1976 and Dr. Van Osdel reported that claimant's complaints were almost constant backache and numbness with tingling down both legs. The diagnosis was strain, chronic lumbar muscles and ligaments superimposed on pars defect at L5.

Dr. Means performed a psychological evaluation which revealed claimant had an average IQ with very high interest in the clerical field which she qualifies for. The vocational team's concensus was that claimant be referred to vocational rehabilitation for retraining.

Dr. Van Osdel, in his discharge report, indicated claimant could not return to her regular job. She was capable of performing medium work with limitations of no lifting over 50 pounds, not repetitively over 20 pounds, no repetitive bending, stooping or twisting.

On January 17, 1977 Dr. Lohr reported claimant was medically stationary.

In January 1977 Vocational Rehabilitation sent claimant to school in an authorized program to learn general office skills and claimant obtained her GED. Claimant testified she needed more schooling as the one year she had was not enough for her deficiencies. Claimant was quite weak in spelling and flunked filing. However, Vocational Rehabilitation would not grant her further training. Schooling ended in March 1978.

A Determination Order of June 14, 1978 granted claimant compensation for temporary total disability through May 14, 1978 and an award of 48° for 15% unscheduled disability.

Claimant has a 10th grade education from California schools with past work experience weighing cotton trailers, farm labor and nurses' aide.

Since school claimant has applied for only one receptionist job which she did not get. She has her name in with the employment office. Claimant sells Avon products but only earns about $80 a month.

The Referee found claimant had already limited work alternatives prior to this injury and has now been further diminished job prospective wise by the injury and granted her an award of 144° for 45% unscheduled disability.

The Board, on de novo review, finds that the evidence of record indicates claimant has had no hospitalization, no surgeries and takes no pain medication. Claimant is, however, precluded from her regular occupation or any occupation that requires the use of her back.

The Board finds claimant would be adequately compensated for her loss of wage earning capacity by an award of 112° for 35% unscheduled disability.

The Board finds a complete failure on the part of Vocational Rehabilitation Division and the Field Services Division to properly place and direct this claimant in a program. Claimant was and is well motivated to pursue an appropriate program that would assist her in becoming regularly and gainfully employed.

The Board requests that the Field Services Division contact this claimant and make an effort to assist her in job placement services or whatever retraining is necessary to restore her to a position of gainful employment.

ORDER

The Opinion and Order on Reconsideration of the Referee, dated May 30, 1979, is modified.

Claimant is hereby granted compensation equal to 112° for 35% unscheduled disability. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 77-7872 November 30, 1979

WILLIAM HURD, CLAIMANT
Allan H. Coons, Claimant's Atty.
Velure & Heysell, Employer's Attys.
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which remanded to it claimant's claim to be accepted and for the payment of compensation from November 9, 1977 until closure is authorized pursuant to ORS 656.268. The claimant cross-requested Board review contending that his attorney's fee should be allowed in the amount set by the Referee but should be paid directly by the carrier rather than withheld from the claimant's compensation; also, penalties equal to 25% of the time loss accrued between November 9, 1977 and September 11, 1978 should be paid by the carrier for unreasonable delay in paying compensation.

Claimant, 51 years of age at the time of the injury, was general manager for the employer. He suffered a compensable injury on August 24, 1974 when steel panels fell on him and injured his head, chest and left knee. He was taken to the emergency room and on the following day, Dr. Hoover found no rib fractures or any damage to the heart or lungs. He referred claimant to Dr. Schroeder, an orthopedic physician, who was claimant's principal treating physician from October 16, 1974 to August 27, 1976. Later, Dr. Schroeder referred claimant to Dr. Golden, a neurosurgeon, who became claimant's treating physician after September 1976.

An arthrogram performed on October 30, 1974 revealed extensive tear of the left medial meniscus. A medial meniscectomy was done on December 15, 1974. Claimant returned to work three days later but continued to have knee problems with activity. On June 3, 1975 Dr. Schroeder found a probable aggravation of a pre-existing chronic arthritic condition involving the medial compartment of the knee. He felt that claimant was medically stationary as of June 3, 1975.

Claimant returned to work on February 16, 1975 and on August 8, 1975 the first Determination Order awarded claimant compensation for temporary total disability from August 25, 1974 through June 3, 1975, less time worked, and 15° for 10% loss of the left leg.

Claimant was examined again by Dr. Schroeder in October 1975. At that time he was complaining of acute pain in the region of the left lateral neck, left shoulder and over the left posterior rhomboid area. Evidence indicated he had been doing some heavy lifting and apparently had aggravated his condition. Dr. Schroeder believed that it was an acute muscular injury involving the cervical dorsal area; an aggravation of the pre-existing condition because it appeared that claimant never completely recovered from his industrial injury. He anticipated additional residual disability in the future.

On June 7, 1976 claimant appeared at the emergency room of a hospital with severe left anterior chest pains in the region of the third and fourth intercostal spaces. Dr. Schroeder examined him on June 16 and concluded that claimant had sustained a tear of the left medial meniscus as well as disruption of the left costochondral junction of the third and fourth ribs as a result of his August 25, 1974 injury. He believed that the discomfort in the left anterior chest, left neck, left shoulder, left posterior chest and, to some extent, the left arm were probably related to the August 25, 1974 injury. Most of the residuals were secondary to muscular irritation but he anticipated continued chronic permanent residual disability. He rated the impairment of the cervical spine and associated structures and the left shoulder as mild. He rated the left dorsal paraspinal region and the left anterior chest as mild to moderate and the left upper extremity and the left lower extremity as mild. He found claimant had two problem areas: (1) the left knee, and (2) the neck, shoulder, left anterior chest and left arm.

On August 12, 1976 a Stipulated Order provided that the claim for unscheduled disability in the cervical spine, left shoulder, left dorsal paraspinal region and left anterior chest would be accepted and claimant was allowed additional compensation for temporary total disability and compensation equal to 80° for 25% unscheduled disability.

In the fall of 1976 Dr. Schroeder referred claimant to Dr. Golden. He had concluded at that time that time loss should be paid from August 24, 1976 to November 17, 1976 but deferred to Dr. Golden to make the final date determination.

Between August 1977 and September 1978 Dr. Schroeder and claimant were engaged as partners in the operation of a zoo; claimant was the supervisor.

On September 22, 1976 Dr. Golden performed a myelogram which indicated a disc herniation at C4-5 and an osteophytic spurring at C6-7. Back surgery was performed. Dr. Golden found claimant had an arthritic condition throughout his cervical spine. On April 1, 1977 Dr. Golden released claimant to work at the zoo. At that time claimant was complaining of headaches, pain in the left side of the neck, radiating into the subscapular region of the shoulder. Dr. Golden found that claimant was exhibiting symptoms which were chronic but not disabling and he considered claimant's condition to be stable and claimant to be able to return to some gainful employment.

On May 17, 1977 claimant was examined at the Orthopaedic Consultants. The diagnosis was post-cervical laminectomy with discectomy at C4-5 and residual symptoms at C5, chronic cervical strain, left parascapular muscle strain. Claimant's condition was considered stationary and it was felt that he could pursue his previous occupation with limitations on bending, lifting and over-stressful use of his arm. However, other occupations were recommended. They rated the impairment of the neck, left shoulder and arm in the mildly-moderate middle range due to the injury and the knee as mild middle range due to the injury.

Claimant was again seen by Dr. Golden on November 30, 1977. His condition had improved, however, another myelogram was performed because claimant was complaining of pain sensations and tingling in the last two digits of the left hand and pain with neck movement. These symptoms were different from previous ones. Dr. Golden stated on August 25, 1978 that claimant was not stationary and could not return to work involving manual type labor. Dr. Golden felt that between September 1976 and April 1977 claimant was disabled from returning to his regular work. On April 12, 1977 Dr. Golden felt he could return to his regular work but that he should not do any heavy lifting.

On November 9, 1977 Dr. Golden again examined claimant after he had been working intermittently for several weeks. At that time Dr. Golden felt that claimant again had a recurrence of his symptomatology and that from November 1977 until July 6, 1978 claimant had not been able to obtain regular employment. It was his opinion that claimant had been continuously disabled since November 9, 1977 although he was demonstrating some improvement and was still under his medical care.

It was stipulated that there had been a continuing discussion between the claimant and the employer as to whether or not claimant was entitled to additional compensation for temporary total disability over and above that awarded by the Determination Order. It was also stipulated that no compensation for temporary total disability had been paid beyond the date stated on the Determination Order except pursuant to the stipulation whereby temporary total disability compensation was paid from September 11 through November 8, 1978.

The Referee found that Dr. Golden's report clearly indicated that claimant was not medically stable but had been continuously disabled since November 9, 1977 although the examination at the Orthopaedic Consultants on May 17, 1977 indicated claimant's condition was medically stationary. The Referee found that Dr. Golden's deposition which was taken in November 1978 indicated that claimant should not return to work involving manual labor and he placed restrictions on prolonged sitting and standing and other limitations of movement.

The Referee concluded that the medical evidence of Dr. Golden sufficiently established claimant's contention that his claim should have been reopened as of November 9, 1977 and remain open until closed pursuant to ORS 656.268.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee insofar as they appl, to claimant's request for additional compensation for temporary total disability. The unrebutted testimony and reports of Dr. Golden, Dr. Hockey, Dr. Myers and Dr. Becker clearly establish that claimant has not been medically stationary since November 9, 1977. The employer produced no evidence in support of its position but only asked that the time loss, as previously awarded, be affirmed.

In claimant's cross-request for Board review, claimant stated that the carrier has refused to properly process his claim, has paid no compensation for time loss except for that short period of time pursuant to the stipulation previously referred to and that time loss was paid for the primary purpose of allowing the testimony of Drs. Schroeder and Golden to be taken. Furthermore, the carrier has not at any time entered a written acceptance or denial of the claim and as a result claimant has had to retain an attorney to proceed with his claim.

The Board concludes that the carrier's actions constitute unreasonable refusal to pay compensation and also failure to accept or deny claimant's claim within 60 days after knowledge of said claim. The Referee did not see fit to assess penalties or award attorney's fees payable by the carrier in his order; however, the Board finds that there is justification for assessing penalties based upon the failure of the carrier to properly process claimant's claim.

The Board further concludes that the attorney's fee which the Referee awarded on a percentage basis to be paid out of the compensation granted claimant should not be paid out of the compensation awarded claimant but should be paid to claimant's attorney by the carrier.

ORDER

The order of the Referee, dated April 23, 1979, is modified.

The employer and its carrier are directed to pay claimant additional compensation equal to 25% of the temporary total disability to claimant from November 9, 1977 to the date of the hearing, November 9, 1978, pursuant to the provisions of ORS 656.262(8).

Claimant's attorney shall be awarded as a reasonable attorney's fee for his services both before the Referee at the hearing and on Board review the sum of $2,250, payable by the employer and its carrier. This attorney's fee is in lieu of the award of attorney's fees granted by the Referee's order which in all other respects not in conflict with this order is affirmed.

WCB CASE NO. 78-1308 November 30, 1979

ARCHIE WHITMAN, CLAIMANT
Robert S. Gardner, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

On May 24, 1979 an Order on Review was entered in the above entitled matter which affirmed the order of the Referee, dated October 26, 1978.

The Referee's Opinion and Order granted claimant an award for permanent total disability as of the date of his order and specified that the award was ". . . in lieu of any previous award of permanent disability . . .".

Claimant had received compensation for permanent partial disability equal to $8,000 prior to the Referee's Opinion and Order; therefore, the wording of the Referee's order converted the "paid out" amount into an overpayment.

Both the Fund and claimant have requested that the Board reconsider its Order on Review and modify the Referee's Opinion and Order of October 26, 1978 by deleting from it the last sentence of the third paragraph of page 18 thereof and substituting the following:

> "This award supersedes any permanent partial disability award earlier granted and to the extent any such award has not been paid out of said award is cancelled as of the date of the Referee's Opinion and Order. Defendant shall not have any right to recover any payments, in fact, made on said award before the date of said Opinion and Order."

The Board, upon reconsideration, concludes that the Referee's Opinion and Order, dated October 26, 1978, should be corrected as stated above and its Order on Review, dated May 24, 1979, should affirm that order as corrected. In all other respects the Order on Review is reaffirmed and republished.

IT IS SO ORDERED.

WCB CASE NO. 78-4285 November 30, 1979

HOWARD L. WILSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips, and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's heart claim to it for acceptance and payment of compensation to which he was entitled.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated May 2, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the Fund.

Chairman Wilson dissents as follows:

I respectfully dissent from the majority holding of the Board and find that the Opinion and Order of the Referee should be reversed and the denial of the State Accident Insurance Fund of responsibility for the myocardial infarction suffered by claimant, should be upheld. The opinion of Dr. Kloster persuades me that the claimant's myocardial infarction was the result of natural progression of atheriosclerosis and that the work activity and stress connected therewith was not a material contributing cause. The temporal relationship between any job stress and the infarction is too remote, in my opinion, to establish medical causation.

SAIF CLAIM NO. TC 24692 December 5, 1979

VELTON L. BRIDGES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on June 8, 1966 while sitting in a shovel cab where the tracks fell off a boulder, jerking him forward injuring his neck and left shoulder. This claim was first closed by a Determination Order, dated May 21, 1968, which awarded no permanent disability. A Stipulation was entered on January 8, 1969 for further medical care and treatment with the claim to remain open until the condition again was determined to be medically stationary. A Second Determination Order dated October 16, 1969 granted claimant an award of 29° partial loss of the left arm and 10° for unscheduled disability as compared to the loss of the arm by separation. Claimant's aggravation rights have now expired.

Claimant had sustained a back injury in 1953 and had received continuing medical care for it on an intermittent basis until the time of the 1966 injury. He received periodic injections of xylocaine and hydrocortone for his chronic left shoulder pain. Claimant underwent a facet rhizotomy in January 1973 and subsequently had a sympathectomy for the control of his back and leg pain. The injections that claimant received, he reported, were helpful and made it possible for him to continue operating his restaurant.

On January 23, 1979 the claimant underwent a neer type acromioplasty which was performed by Dr. Edkhardt.

Claimant, after this surgery, returned to his business of operating or managing a backhoe business. He basically does supervisory work digging sewer pipe lines.

On October 29, 1979 Dr. Lawrence Noall reported that claimant was stationary. He estimated that claimant's disability in his left shoulder was in the mild category and did not feel that any further treatment was indicated.

On November 5, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on November 26, 1979, recommended that the claimant be granted compensation for temporary total disability from January 22, 1979 through October 29, 1979, less time worked, and an award of compensation equal to 32° for 10% unscheduled disability of the left shoulder in addition to that previously granted.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 22, 1979 through October 29, 1979, less time worked, and compensation equal to 32° for 10% unscheduled left shoulder disability. These awards are in addition to any awards claimant has previously been granted.

WCB CASE NO. 77-7751 December 5, 1979

WALTER BROWN, CLAIMANT
Pozzi, Wilson, Kahn, Atchison
& O'Leary, Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Own Motion Order

On February 2, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen the claim for an industrial injury sustained on September 19, 1967. At the time of the injury claimant was employed by Balzer Machinery Company whose carrier was Industrial Indemnity Company. This claim was accepted and ultimately closed with an award equal to 320° for unscheduled disability. Brown vs. Balzer Machinery Company, 20 Or App 144.

On July 29, 1974 claimant suffered another compensable injury while employed by the ABC Roofing Company, whose carrier was the State Accident Insurance Fund. This claim was first closed on May 10, 1976 with an award of 48° for 15% unscheduled neck disability. Later the claim was reopened and again closed by a Determination Order, dated April 19, 1978, which granted claimant no additional compensation for permanent partial disability. Claimant requested a hearing on the adequacy of the Second Determination Order (WCB Case No. 77-7751).

Claimant's petition for own motion relief requested the Board to determine whether he was entitled to compensation for permanent total disability for his injury of September 19, 1967 or for his injury of July 29, 1974 or for a combination of the two injuries. Claimant requested that his request for own motion relief and his appeal from the Determination Order of April 19, 1978 be heard on a consolidated basis.

On March 23, 1979 Industrial Indemnity Company responded to claimant's petition for own motion relief, stating that claimant's condition was the result of a new independent injury sustained in 1974 and, therefore, the responsibility of the Fund. It opposed being joined as a party to any hearing on the merits of claimant's request for own motion relief.

The Board concluded that it would be in the interest of all parties concerned to consolidate for hearing the issues of claimant's entitlement to own motion relief and the adequacy of the Determination Order of April 19, 1978. Therefore, it referred claimant's request for own motion relief to its Hearings Division with instructions to take evidence and determine if claimant was entitled to further benefits under the Workers' Compensation Law and, if so, is the entitlement based upon the 1967 injury or the 1974 injury or both injuries.

The Referee was instructed to furnish the Board with a transcript of the proceedings together with the Referee's recommendation on claimant's request for own motion relief and further instructed that if the evidence indicates that claimant's present condition was the result of his July 29, 1974 injury with no relationship to the previous injury on September 19, 1967 to enter an appropriate order pursuant to ORS 656.289. This order was entered on April 9, 1979.

On August 9, 1979 a hearing was held before Referee Gayle Gemmell who, based upon the evidence received at the hearing, found that claimant's present condition was the result of his July 24, 1974 injury and, according to the Board's directions, entered an Opinion and Order to that affect. Referee Gemmell, based upon the reasons set forth in her Opinion and Order, recommended that the Board not exercise its own motion jurisdiction with regard to claimant's injury of September 19, 1967.

The Board, having given consideration to the transcript of the proceedings and the reasons which the Referee has set forth in her Opinion and Order, adopts the recommendation of the Referee with respect to claimant's request to exercise its own motion jurisdiction and reopen the September 19, 1967 claim.

ORDER

Claimant's petition to the Board to invoke its own motion jurisdiction pursuant to ORS 656.278 and reopen claimant's claim for an industrial injury sustained on September 19, 1967 is hereby denied.

SAIF CLAIM NO. NC 282160 December 5, 1979

MARVIN D. CHAPMAN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 20, 1979 the Board entered its Own Motion Order in the above entitled matter which found the medical evidence was insufficient to support a reopening of claimant's claim for an industrial injury sustained on December 18, 1970 and denied claimant's request for own motion relief. Subsequently, a Motion to Reconsider was submitted on behalf of claimant which was denied because again there was insufficient medical support for the request.

On October 25, 1979 the Board received from claimant, by and through his attorney, another Motion for Reconsideration. In support of this motion were medical reports, one of which was a report from Dr. Edward Rosenbaum, dated July 10, 1975, which stated: " . . . if his two disc operations . . were related to his industrial accident, then it would be my opinion that the discs and the surgery they required, with the complications that ensued, would be aggravating factors in his condition of rheumatoid spondylitis."

Apparently, this July 10, 1975 report from Dr. Rosenbaum had never been submitted to the Board. There have been other reports from Dr. Rosenbaum, including one dated June 13, 1979 in which he indicated that claimant was suffering an aggravation of his condition and that his claim should be reopened.

The Fund was advised of the Motion for Reconsideration and the supportive medical evidence. On November 20, 1979 it advised the Board that reconsideration was not warranted at the time as no new evidence had been submitted and it would oppose any own motion action on the basis that such action would constitute a review of the Board's Own Motion Order to which claimant had no right according to ORS 656.278(3).

The Board, after reading the July 10, 1975 report from Dr. Rosenbaum, a report which it had never seen previously, concludes that there has been established a relationship between claimant's present condition and his industrial injury of December 18, 1970 and that the present condition represents a worsening thereof.

Insofar as the Fund's objection on the grounds that claimant has no right to ask the Board to reconsider its Own Motion Order, the Board concludes that it is not reconsidering its former motion but is, based upon new medical evidence, issuing a new Own Motion Order pursuant to ORS 656.278. The exercise of own motion jurisdiction is discretionary with the Board.

ORDER

Claimant's claim for an industrial injury sustained on December 18, 1970 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on June 13, 1979, the date claimant was examined by Dr. Rosenbaum, and until the claim is closed pursuant to the provisions of ORS 656.278. The State Accident Insurance Fund is also directed to provide claimant with appropriate retraining in some field of employment which does not require prolonged walking, standing, stooping or lifting.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this matter a sum equal to 25% of such compensation as claimant may receive for temporary total disability as a result of this order, payable out of compensation as paid, not to exceed a maximum of $750.

WCB CASE NO. 78-5805 December 5, 1979

AHMAD NOOR KOJAH, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Amended Order

On November 27, 1979 the Board entered its Order Dismissing Claimant's Cross-Request for Board Review. It has been brought to the Board's attention that an error on page one should be corrected. In the last paragraph, line two, the word "claimant" should be changed to read "defendant".

The order, in all other respects, is affirmd.

IT IS SO ORDERED.

CLAIM NO. 484784 December 5, 1979

CLARENCE LOVING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant was a 22-year-old chokerman working for Booth Kelly Lumber Company whose workers' compensation coverage was furnished by State Industrial Accident Commission, the predecessor of the State Accident Insurance Fund, when he suffered a broken left leg on January 1, 1934. The claim was accepted, closed and claimant's aggravation rights have expired.

On March 30, 1979 claimant was seen by Dr. Streitz, an orthopedic surgeon, complaining of swelling and pain in his left knee. He advised Dr. Streitz that he had injured himself 45 years previously when he had caught his left knee between two logs. Following the 1934 injury claimant had surgery which was performed by Dr. Ross in Eugene. Two years later he returned to his same occupation and continued to work at that occupation until 1972 when he retired because he was unable to get in and out of the cab of his shovel machine. In 1975 he saw Dr. Baker who drained the knee and gave claimant a shot of Cortisone. Since that time he has had to have the knee drained quite frequently.

Dr. Streitz requested that the Fund authorize him to perform a knee fusion which would give claimant a more functional leg although he would have no knee motion. It was his opinion that claimant's problems at the present time were directly related to his 1934 industrial injury and obviously represented a worsening of that condition.

The Fund authorized the surgery and paid Dr. Streitz's bill when it was submitted. Subsequently, claimant requested that the Fund pay him time loss benefits.

On November 28, 1979 the Fund advised the Board of claimant's request and stated that inasmuch as claimant's aggravation rights had expired it was referring the matter to the Board to consider under its own motion jurisdiction. The Fund stated it would not oppose a reopening of the claim if the Board saw justification therefor.

Based upon the medical reports which the Fund furnished the Board which indicate that on June 4, 1979 Dr. Streitz performed a total knee arthroplasty and plain, regular sized Coventry type anametric knee and pre-surgery chart notes from Dr. Streitz's office, concludes that claimant's claim should be reopened as of the date Dr. Streitz performed the surgery.

ORDER

Claimant's claim for an industrial injury suffered on January 1, 1934 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on June 4, 1979 and until the claim is closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 77-5864 December 5, 1979

RAMON D. MATA, CLAIMANT
William G. Purdy, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 4, 1978 the Board entered an Own Motion Determination in the above entitled matter which granted claimant an award of compensation for temporary total disability from October 25, 1977 through April 24, 1978.

On February 22, 1979 claimant, by and through his attorney, requested the Board to reconsider its Own Motion Determination. This request, as subsequently amended, stated that the hearing on the above entitled matter which had been held before Referee William J. Foster on January 4, 1978 was limited to the issue of claimant's rights to receive reimbursement for acupuncture treatment. The claimant and the Fund had agreed, by and through their respective attorneys, that the issue of claimant's right to receive additional compensation as a result of his aggravation claim was intended to be reserved by the parties until a later date. The request, as amended, contained a statement to the effect that the Fund agreed that the stipulation entered into at the time of the hearing intended to reserve for further hearing the issue of compensability of claimant's claim for aggravation.

It appearing to the Board that both parties at their stipulation at the hearing intended that the claimant's request for a hearing on the propriety of the denial of his claim for aggravation should not be dismissed but merely deferred until a later date, remanded the above entitled matter to its Hearings Division pursuant to ORS 656.295(5). The Order of Remand instructed the Hearings Division to set the matter down for hearing before Referee Foster to take evidence and make a determination on the compensability of claimant's claim for aggravation.

On September 11, 1979 a hearing was held before Referee Foster on this issue and on November 21, 1979 his Opinion and Order was entered which found claimant had filed a valid aggravation claim which should be accepted by the State Accident Insurance Fund for the payment of compensation, as provided by law, until the claim was closed pursuant to the provisions of ORS 656.268.

Referee Foster furnished the Board a transcript of the proceedings at the hearing on September 11, 1979 and also his recommendation that the Board set aside its Own Motion Determination entered on August 4, 1978 inasmuch as claimant's claim for aggravation had been found to be valid.

The Board, after giving full consideration to the transcript of the proceedings, Referee Foster's Opinion and Order and his recommendation, concludes that its Own Motion Determination entered on August 4, 1978 in the above entitled matter should be set aside and held for naught.

IT IS SO ORDERED.

WCB CASE NO. 77-7505 December 5, 1979

MARY MORRIS, CLAIMANT
George Jenks, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Own Motion Order

Claimant had filed a claim for an alleged industrial injury sustained on June 20, 1977 while she was an employee of Portland Adventist Medical Center, whose carrier was Liberty Mutual Insurance Company. The carrier denied the claim on November 11, 1977, stating that claimant's most recent complaints and symptomatologies represented an aggravation of a 1968 industrial injury which claimant had sustained while employed by Mt. St. Joseph's Nursing Home, whose carrier was the State Accident Insurance Fund.

Claimant requested a hearing on the denial and, on July 31, 1978, she advised the Board of the denial of the 1977 injury and requested the Board to reopen her 1968 claim pursuant to ORS 656.278 and to refer this request for hearing on a consolidated basis with her previous request on the denial. Claimant also asked the Board to join both Liberty Mutual and the Fund as parties defendant to enable the Referee to determine whether claimant's present condition represented an aggravation of her 1968 injury and that her claim for said injury should be reopened pursuant to the Board's own motion jurisdiction.

On August 29, 1978 the Board, by an order, referred the claimant's request for own motion relief to its Hearings Division with instructions to set the request down for hearing on a consolidated basis with claimant's request for hearing on the denial by Liberty Mutual. Upon conclusion of the hearing, the Referee was instructed to furnish the Board with a transcript of the proceedings and a copy of the Referee's recommendation relating to claimant's request for own motion relief on the 1968 injury. The Referee was also instructed, if necessary, to prepare an appropriate Opinion and Order on the issue of the denial of claimant's 1977 claim.

The hearing was held on August 7, 1979 before Referee Albert L. Menashe and on September 21, 1979 Referee Menashe furnished the Board with a transcript of the proceedings and his findings and recommendations with respect to claimant's request for own motion relief.

The Referee found that claimant's current symptomatology and condition which was diagnosed as a cervical strain was related to her employment at Portland Adventist Medical Center between January 1976 and September 1977 and was not the consequence of her 1968 injury. Accordingly, he recommended the Board decline to grant claimant's request to the Board to reopen her claim for the industrial injury sustained in 1968 while in the employ of Mt. St. Joseph's Nursing Home.

The Referee also entered his Opinion and Order on September 21, 1979 setting aside the denial by Liberty Mutual Insurance Company, dated November 11, 1977, of claimant's claim for an injury sustained on June 20, 1977 and remanded said claim to the carrier for acceptance and for the payment of compensation as provided by law until the claim was closed pursuant to ORS 656.268.

The Board, after reading the transcript of the proceedings, the Referee's findings and recommendations and also the reasons therefor which he had set forth in his Opinion and Order, concurs in the Referee's recommendation.

ORDER

The claimant's petition to the Board to exercise its own motion jurisdiction pursuant to ORS 656.298 and reopen claimant's claim for industrial injuries sustained in July 1968 while in the employ of Mt. St. Joseph's Nursing Home is hereby denied.

SAIF CLAIM NO. FC 263027 December 5, 1979

LAWRENCE G. THOMPSON, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant a 29-year-old cutter in a foam rubber fabrication plant, suffered a compensable injury to his low back on January 22, 1970 when he fell from some machinery. The claim was accepted on a "medical-only" basis and Dr. Gambee treated claimant. Claimant's condition worsened and it was necessary for Dr. Gambee to perform a two-level fusion L5-S1 on December 2, 1970. Claimant returned to work driving a long-haul truck in July 1972 and his condition was declared to be medically stationary by Dr. Gambee in September 1972. The claim was closed by a Determination Order dated October 6, 1972 which awarded claimant 64° for 20% unscheduled low back disability.

Claimant requested a hearing on the adequacy of the Determination Order and an Interim Order was entered which remanded the claim to the carrier for referral of claimant to the Disability Prevention Division for evaluation regarding his potential for retraining.

While claimant was at the Disability Prevention Center it was ascertained that claimant had a 12th grade education although he had no diploma because his education had been completed while he was in one of the Oregon prisons. It was also determined that claimant had been a truck driver for most of his working life and that his intelligence measured in the bright-normal range. Based upon these determinations claimant was referred to Vocational Rehabilitation, however, he was not completely cooperative and, in fact, was rather demanding that he be retrained. Claimant failed to keep several appointments which were arranged to work out a vocational rehabilitation program and as a result of his failed attempt at retraining the Referee questioned claimant's motivation to return to work. The Referee also noted that Dr. May, a clinical psychologist, had reported that claimant appeared interested only in a large settlement. As a result of the hearing, the Referee awarded claimant an additional 32° for 10% unscheduled disability for his low back disability. Claimant appealed and pursuant to a stipulation approved on October 2, 1973 claimant received an additional 16° for 5% giving claimant a total of 112° for 35% of the maximum for his low back disability.

Claimant returned to work for a different employer in May 1974 and sustained a new injury on May 30, 1975 to his back. The claimant was hospitalized first in July and again in November 1975. A myelogram was performed which was normal and in December 1975 claimant committed himself to Dammasch Hospital for severe emotional stress.

Claimant was referred to the Pain Center but was initially hostile regarding the program and after one week was discharged for lack of interest. His condition was declared to be medically stationary on June 24, 1976 and claimant was referred to vocational rehabilitation on July 1, 1976. This referral was terminated on December 3, 1976 and his claim was closed by a Determination Order dated May 30, 1975 which awarded claimant no compensation.

On June 6, 1978 Dr. Clarke took over the medical care of claimant and was of the opinion that claimant's problems were related to an unstable joint directly above the fusion. He suggested that the January 22, 1970 claim be reopened. On July 18, 1978 Dr. Clarke fused the L4-5 level. A stipulation approved August 28, 1978 opened the 1970 claim with compensation for temporary total disability to commence on the date prior to the surgery performed by Dr. Clarke.

On February 5, 1979 Dr. Clarke reported that the fusion was solid but nevertheless claimant was having increased pain. He recommended another referral to the Pain Center. He stated claimant was sent to Callahan Center on May 18, 1979. Claimant was absent frequently during his tenure at the Center and was finally discharged on September 13, 1979 for failure to actively participate in the program or to make any attempt to rehabilitate himself. During the period of time claimant was at the Center it was determined that he was capable of doing light work and that his limitations with respect to lifting were 20 pounds.

On October 8, 1979 Dr. Clarke declared claimant's condition to be medically stationary, that he had a solid fusion but was still complaining.

In October 1979 the Fund requested a closing evaluation and the Evaluation Division of the Workers' Compensation Department recommended that the Board close claimant's claim with an additional award for temporary total disability from July 17, 1978, pursuant to the stipulation, dated August 28, 1978, through October 8, 1979, but grant no additional compensation for permanent partial disability in excess of that previously granted claimant.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from July 17, 1978 through October 8, 1979. This award for temporary total disability is in addition to all previous awards granted claimant for his January 22, 1970 injury.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Stipulation of August 28, 1978.

WCB CASE NO. 77-484 December 6, 1979

RICHARD L. HARRIMAN, CLAIMANT
Merri Souther, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests Board review of the Referee's order which awarded claimant 128° for 40% unscheduled low back disability and allowed the Fund to set off against such award of compensation for temporary total disability which it had paid to the claimant after June 9, 1978.

Claimant contends that he is entitled to additional compensation for temporary total disability and also to an award for permanent partial disability. The Fund contends that it has made an overpayment of compensation for temporary total disability and that it should be allowed to off set such overpayment against any award for permanent partial disability claimant might receive.

Claimant suffered a compensable injury to his back while working as a roofer on April 28, 1976. Initially, claimant received conservative treatment from Dr. Zurflueh, a chiropractic physician.

On July 28, 1976 claimant's claim was closed by a Determination Order which awarded claimant compensation for temporary total disability from April 28 through June 6, 1976, less time worked.

Dr. Zurflueh continued to treat claimant and in September referred him to Dr. Bernson, an orthopedic physician, who, after examination, found symptoms of a herniated lumbosacral disc on the right side with nerve root compression which he

related to the industrial injury. Inasmuch as claimant had not responded to either conservative or chiropractic treatment, Dr. Bernson recommended surgical removal of the herniated disc, however, claimant was apprehensive and did not wish it done at that time.

On November 23, 1976 Dr. Bernson reported that he had not released claimant for work, that the estimated length of further work time loss was undetermined because of the symptoms of a herniated lumbosacral disc and the possibility of a myelogram. He stated that, as of that date, he was still treating claimant and claimant's condition was not medically stationary.

The Referee found that claimant's condition was medically stationary on November 22, 1976. He stated:

> "While no professional medical treatment was either received or sought regarding the injury from that time on, it was not until August 30, 1978 that the claimant was declared stable (Ex 33 - it should be noted parenthetically that from exhibit 15, there could be drawn an inference that on March 8, 1977, Dr. Bernson was very reluctant to declare him stable only because he had not seen him since November 22, 1976)."

The Referee further found that claimant rather than submitting to surgery as recommended, entered a program of vocational schooling, hoping to qualify for employment as a real estate appraiser. Claimant completed this course and graduated on June 8, 1978. In August 1978 he was hired as a probationary property appraiser for Marion County. Shortly thereafter he received a check from the Fund and was advised by it after he had called that the check would be deducted from his final award. Claimant cashed the check and spent it prior to receiving his first paycheck from Marion County. After June 9, 1978, $1,723.10 was paid claimant for time loss benefits. When the Fund became aware that claimant was employed it requested that it be furnished a report of his earnings. Upon receipt of such reports, the Fund stopped payment of compensation for temporary total disability.

As a result of the injury claimant has a herniated disc in his low back which causes back pain that radiates down his right leg. Claimant is 41 years old and is currently employed as a real estate property appraiser for Marion County. His salary is $1,032 a month. He has a high school education and prior to his injury had been a roofer both in Oregon and California for approximately 14 years. This type of work is seasonal, therefore, claimant had intermittent periods of unemployment, usually in the wintertime. Claimant's prior work background included working as an apprentice in the carpenter's union, as an aircraft mechanic in the Air Force, a grocer and a welding machine mechanic. Because of the limitations placed upon his work activities claimant is unable to return to any of these occupations.

The Referee concluded that claimant had suffered a loss of earning capacity equal to 40% due to his industrial injury. Prior to his injury he had been able to do a variety of semi-skilled jobs; as a result of his injury he can no longer perform any of those jobs. His loss of wage earning capacity has been lessened to some degree by his ability to qualify himself for a suitable vocation which he is now pursuing.

With respect to the dispute over the payment of compensation for temporary total disability, the Referee found that these payments were accepted by the claimant with the understanding that they would be deductible from any permanent award. The evidence supports a determination of the Evaluation Division that the worker was medically stationary as of November 22, 1976. A Second Determination Order was issued on November 6, 1978 which awarded claimant additional compensation for temporary total disability from August 13, 1976 through June 9, 1978, less time worked, and stated that the worker's condition was found to be medically stationary on November 22, 1976.

The Referee concluded that any compensation for temporary total disability paid after June 9, 1978 was erroneously paid and could be offset against the award which the Referee granted claimant for permanent partial disability.

The Board, on de novo review, finds that the medical evidence does not support an award equal to 40% of the maximum for unscheduled low back disability. Claimant has lost some wage earning capacity as evidenced by the fact that he cannot return to work as a welding machine mechanic or an aircraft mechanic and perhaps could not continue to work as an apprentice in the carpenter's union, but the limitations placed upon claimant's work activities by the doctors do not preclude him from desk work and that is exactly what he is doing at the present time. Apparently this is the type of work claimant desired to do because he selected the program which qualified him to be employed as a real estate appraiser. He is now working permanently as a real estate appraiser.

Therefore, the Board feels that claimant would be adequately compensated for his loss of wage earning capacity resulting from the industrial accident of April 28, 1976 by an award of compensation equal to 80° which represents 25% of the maximum.

With respect to the payment of temporary total disability, the Board finds that claimant was not medically stationary on November 22, 1976. To the contrary, on the following day, Dr. Bernson reported that claimant had not been released for work, that he was not medically stationary but was still being treated by Dr. Bernson and that it was impossible to estimate the time of further work loss. The Board finds no basis for the recital in the Second Determination Order, dated November 6, 1978, from finding claimant to be medically stationary on November 22, 1976 and the cutoff date of June 9, 1978 is evidently predicated upon the fact that claimant graduated from the vocational rehabilitation program on June 8, 1978. In the absence of a finding that claimant is medically stationary, has returned to his regular work, or his claim has been closed by a proper Determination Order, compensation for temporary total disability must continue.

In this particular case, the Second Determination Order erroneously stated that claimant's condition was medically stationary on November 22, 1976 and cut off payments of temporary total disability on the date after claimant finished his authorized vocational rehabilitation program. In the Board's opinion, the Second Determination Order was premature and should be set aside. It was not until Dr. Bernson's report of August 30, 1978 that claimant's condition was found to be stable. In that report Dr. Bernson stated that claimant had been released for modified work activity prior to starting his rehabilitation training and that his work capabilities were still modified, but as of the date of the August 30, 1978 report he would consider claimant's medical condition to be stationary and his disability to be slight.

The Board concludes that this is the first medical evidence that claimant's condition was medically stationary, therefore, claimant is entitled to receive compensation for temporary total disability through August 30, 1978 and the payment of time loss benefits between June 9, 1978 and August 30, 1978 were properly due claimant. There is no basis for offset for overpayment of compensation.

ORDER

The order of the Referee, dated July 6, 1979, is modified.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled low back disability and is awarded compensation for temporary total disability from June 9, 1978 through August 30, 1978, less time worked. The award of compensation for permanent partial disability granted claimant by this order shall be in lieu of the award granted claimant for permanent partial disability by the Referee's order.

There is no basis for the Fund to offset any payments for temporary total disability against the award granted claimant for permanent partial disability.

The attorney's fee granted claimant's attorney shall be confined to 25% of the compensation increased by the Board's order, not the award granted by the Referee's order.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

CLAIM NO. YC 418470 December 6, 1979

HARVEY REESER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on September 29, 1972 to his right knee. His claim was closed on October 3, 1973 with an award of temporary total disability from the date of injury to April 5, 1973, less time worked, and an award of compensation equal to 37.5° for 25% loss of the right leg. Claimant's aggravation rights have expired.

Claimant continued to have problems with the right leg and on January 8, 1979 Dr. Donald Slocum recommended additional surgery consisting of a high tibial osteotomy, lateral closing wedge type which was performed on January 11, 1979. Claimant, on January 23, 1979, requested his claim be reopened. The Board, by an Own Motion Order, remanded the claim to the Fund for acceptance and payment of compensation as provided by law commencing the date the claimant entered the hospital for surgery performed by Dr. Slocum on January 11 until closed pursuant to ORS 656.278, less any time worked.

Dr. Slocum reported that claimant had returned to work within one month after the surgery.

The closing examination was carried out by Dr. Slocum on September 19, 1979. He reported the range of motion of the right leg was from 0° to 135°, an improvement of 10°. X-rays demonstrate a 50% medial joint space with arthritic changes. He reported that claimant exhibits a stiff-legged gait with genu varum of the right knee.

On October 25, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on November 21, 1979, recommended that claimant be granted additional temporary total disability beginning January 11, 1979 through February 4, 1979 with no additional award for permanent partial disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 11, 1979 through February 4, 1979. This award is in addition to all previous awards granted claimant for his injury of September 29, 1972.

WCB CASE NO. 78-1202 December 6, 1979

PATRICIA ROGERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the January 24, 1978 denial by the Fund of her claim for an injury alleged to have been sustained on November 15, 1977.

Claimant, at the time of the injury, was 36 years old and had been working in nursing homes. She has a rather unstable back which the evidence indicated could easily be strained by lifting heavy objects.

Claimant alleges that on November 15, 1977 she and a co-worker were assisting a patient, who was rather a large person, into bed when the patient fell across claimant and caused her to strain her low back. The co-worker was not called as a witness. Claimant testified she did not know the whereabouts of this co-worker, however, she did not state whether she had made any efforts to locate her.

Another co-worker testified that she had worked with claimant near the end of the shift on November 15, 1977 but that claimant had not complained to her of any back difficulty.

Claimant did not see a doctor until November 21, 1977 when she was seen by Dr. LeRoy, although claimant said that she had been hurting most of the time since the incident of November 15. All the medical reports, which commenced with Dr. LeRoy's report of November 21, 1977, consistently relate to claimant's being injured at work, however, two separate dates are given: (1) November 17, 1977 and (2) November 15, 1977.

Claimant stated that one of her reasons for not reporting her industrial injury immediately was that she was afraid she would be fired if she did. However, she claimed that she did talk with her supervisor who advised her that she wouldn't fire claimant or lay her off because she didn't want claimant to draw unemployment. This was denied by the supervisor.

Witnesses who were called in behalf of the Fund testified that they had no knowledge of claimant's alleged injury or her claim therefor until November 21, 1977 when claimant resigned. The resignation presumably was because the defendant/employer would not allow claimant to wear slacks on the job but insisted that she wear a skirt.

The Referee concluded that although it was possible that claimant did injure her back at work and did not report it immediately because of fear of being fired, the stories she gave were so incredulous that he concluded that she had failed to carry her burden of proof. He affirmed the denial.

The Board finds that the denial was proper, however, it bases its finding not on the lack of credibility on the part of claimant but on the medical evidence.

No briefs were filed in this case and the Board relied strictly upon the medical reports which, in the opinion of the Board, did not support claimant's contention that she suffered a compensable injury on November 15, 1977 or at any other time.

ORDER

The order of the Referee, dated May 24, 1979, is affirmed.

WCB CASE NO. 78-8121 December 6, 1979

VERNON A. SCHEESE, CLAIMANT
Rick W. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Reconsideration

On November 13, 1979 the Workers' Compensation Board issued an Order on Review that reduced claimant's award of compensation from 320° for 100% unscheduled disability to an award of compensation equal to 160° for 50% unscheduled disability.

On November 20, 1979 claimant, by and through his attorney, requested reconsideration of the Board's order. Attached to the claimant's request for reconsideration was a brief setting forth certain facts and asking the Board to reconsider its order based on those facts.

The Board, after having reviewed claimant's request for reconsideration and the brief submitted in support thereof, affirms its previous order.

ORDER

The Board's Order on Review, dated November 13, 1979, is hereby affirmed.

WCB CASE NO. 77-5336 December 6, 1979

WILLIAM E. TIERNEY, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which approved its denial of March 10, 1978 of responsibility for claimant's dementia, but found that claimant had suffered an aggravation rather than a new injury and increased claimant's award to a total of 256° for 80% of the maximum allowable by statute for unscheduled disability.

At the time of his injury on July 24, 1975 claimant was a 50-year-old laborer. The injury occurred while claimant was lifting cardboard out of a machine to stack it and suddenly felt a "kink" in his neck. Claimant did not respond to conservative treatment and on September 15, 1975 Dr. Waldram performed a laminectomy L4-5, left. Prior to the surgery claimant had been examined on August 15, 1975 and was found to have an asymptomatic left carotid artery bruit. Dr. Waldram stated that claimant had an excellent post-operative recovery and would probably have mild continued difficulties with his back.

Claimant returned to work in December 1975 and his claim was closed by a Determination Order, dated March 31, 1976 which awarded claimant compensation for temporary total disability from July 24, 1975 through November 30, 1975 and compensation equal to 32° for 10% unscheduled low back disability.

After claimant returned to work he was assigned to do very light labor pool work. On January 25, 1977 Dr. Waldram advised the employer that claimant had had a re-exacerbation of his back pain and had been unable to work since January 17, 1977 and was disabled at that time. On February 1, 1977 Dr. Waldram released him to return to work.

There is a physician's initial report signed by Dr. Mason indicating that he saw claimant on January 19, 1977 and diagnosed recurrent lumbago. On August 10, 1977 a Determination Order was issued which related to the January 17, 1977 injury and granted claimant compensation for temporary total disability from January 15 through January 31, 1977.

The Referee found that there was some confusion with regard to this incident in January 1977. Claimant reported that it had occurred on the job, however, when he was examined by the Orthopaedic Consultants he told them he had developed the back pain while shoveling snow at home. The Referee found that because of claimant's memory problem and continuing state of confusion that claimant was an unreliable, though well-meaning, historian.

The Referee noted that claimant's appearance, speech and manner at the hearing corroborated his claim to have participated in substantial professional boxing matches. Claimant testified he had been knocked out six times and the Referee contributed his confusion and slurred speech to "cerebral atrophy, probably dementia pugilistica".

The Referee concluded that claimant had failed to offer any evidence to establish that his mental deterioration resulted from his low back injury; that claimant also had failed to prove entitlement to attorney's fees, time loss benefits or attorney's fee based on the employer's denial of March 10, 1978. In fact, the denial letter of March 10, 1978 was "a gratuitous denial which was not based upon a claim". In this denial letter, the date August 19, 1977 is mentioned. This is the date claimant mailed his first request for hearing. On June 17, 1977 claimant had signed an employee health insurance form upon which he indicated that his mental disability was not caused by his work.

The Referee also found that on January 17, 1977 claimant suffered an aggravation of his back injury of July 24, 1975 rather than a new injury even though the Determination Order of August 10, 1977 indicated that it related to an injury that occurred on January 17, 1977.

The Referee found that claimant had suffered a compensable back injury that had required surgery and that he had suffered continuing symptoms from that original condition which culminated in the second incident occurring in January 1977 which had been accepted as compensable by the employer and for which claimant received time loss benefits. The Referee concluded that the claim had been reopened for further treatment of the 1975 injury and that the "Determination Order" dated August 10, 1977 should have been entitled "Second Determination Order" indicating a second closure of the July 24, 1975 industrial injury.

With respect to the extent of claimant's disability the Referee found the testimony was unrebutted that although claimant had severe memory and reasoning problems prior to his industrial injury in 1975 his condition of confusion had deteriorated since that date. At the time of his injury claimant was able to function in his job by performing the same routine to which he had become accustomed over a period of many years. Because of his mental condition he was unable to adapt to new duties when he returned to work at the end of 1975. Claimant was unable to keep track of his tools and ". . . . would come off a coffee break and not remember where he had been working". The employer became increasingly aware of the safety problem which claimant's condition posed, e.g., claimant would often be unaware of movements of lift trucks in the area.

The Referee further found that at the time of the hearing it was clear that claimant was, at that time, totally disabled from pursuing gainful employment under any conditions except those which were equivalent to a sheltered workshop. However, claimant had failed to establish that his condition was that severe prior to his compensable injury, amd there was no evidence to suggest that claimant would not have been able to continue his former type of work had he not suffered the back injury. He increased the award from 10% to 80% of the maximum for unscheduled low back disability.

The Board, on de novo review, finds no basis for the substantial increase awarded claimant by the Referee's order. Prior to the 1975 injury claimant had had problems remembering the controls of the machine he was operating; other workers doing the same type of work did not have these problems. Claimant's memory and mental abilities progressively deteriorated. He repeatedly lost tools and on one occasion when he was given a ride home by a co-worker he was unable to remember where his home was. Eventually, claimant was terminated because of his confusion, inability to follow instructions and lack of memory. The employer's concern was basically for claimant's safety.

On July 21, 1979 Dr. Olmscheid stated that claimant had moderately severe dementia which was not caused or aggravated by his employment. He repeated this statement on November 21, 1977. The panel of physicians at Orthopaedic Consultants examined claimant on February 11, 1978 and said that claimant denied to them that he had any pain in his back or in his legs but that he did have some memory problems. The doctors diagnosed a dementia which was not related to the injury and stated that they believed a reopening of the claim was not justified because there was no change in his disability rating.

Claimant has no problems sitting or riding in a car. He does yard work and mows his own lawn. At the present time he is receiving Social Security benefits in the amount of $432.70 a month and a pension from the employer of $195.00 a month. Claimant has not applied for training to the Vocational Rehabilitation Division nor to the State Employment Office. He has not tried to look for work anywhere since leaving the employer.

Claimant is required to prove the extent of his disability by a preponderance of the competent medical evidence. In this case claimant has failed to prove that his disability exceeds the 10% awarded by the Determination Order of July 24, 1975. All of the medical evidence indicates that, at most, claimant's disability is mild and that there is no causal relationship between claimant's condition of dementia and his employment. The Referee found that claimant would have been able to return to his previous employment, even with his medical condition, had he not suffered a back injury. This finding is wholly unsupported by the record.

The Board concludes that with the exception of that portion of the Referee's order which approved the "gratuitous denial letter" of March 10, 1978, that the Referee's order should be reversed.

ORDER

The order of the Referee, dated May 23, 1979, with the exception of that portion thereof which approved the employer's denial of March 10, 1978, is reversed.

WCB CASE NO. 78-4334 December 10, 1979

RONALD DICKEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Newhouse, Foss & Roess, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer, a self-insurer, requests Board review of that portion of the Referee's order which awarded claimant compensation equal to 80° for 25% unscheduled disability.

Claimant, a 38-year-old lift truck driver, injured his low back on April 4, 1977. Claimant was driving a lift truck when a wheel fell off causing the axle to fall to the ground. The injury was diagnosed as a sprain of the lumbosacral spine superimposed on a pre-existing anomalous condition at the lumbosacral level. Claimant received conservative treatment and his claim was closed by a Determination Order, dated May 15, 1978, which granted claimant compensation for temporary total disability from June 8, 1977 through July 24, 1977, less time worked, and for temporary partial disability from July 25, 1977 to December 19, 1977 and 32° for 10% unscheduled low back disability.

Claimant was first released to return to light type work by Dr. Rapin on July 25, 1977. It was recommended that claimant avoid activities requiring lifting, bending or twisting. On May 23, 1978 Dr. Rapin released claimant to work "as a chip dump operator" but continued to place the same limitations on claimant's work activities. Claimant was released to full duty work on September 28, 1978 with the admonition from Dr. Rapin that he avoid heavy repetitive lifting and twisting activities.

At the hearing claimant complained primarily of chronic pain and limitation of motion in his neck and back. His physical condition at the present time limited his ability to perform activities which required heavy lifting, repetitive bending, lifting, stooping, overhead reaching and twisting and turning movements.

Claimant is 40 years old and has a 12th grade education; he has no other special training or experience. His work background has been primarily in the lumber industry. He worked for the present employer for 19 years and at the time of his injury was a forklift operator. Since his injury he has changed jobs and is presently employed as a truck dump operator, a job which requires some bending, stooping and overhead reaching. The limitations placed upon claimant's work activities adversely affected, to a certain degree, his ability to perform work which he had been able to do prior to his industrial injury.

The Referee, based upon the medical evidence, claimant's testimony concerning his residual symptoms and limitations which were supported by Dr. Rapin's reports, claimant's chronic symptoms and residuals, his age, education, training and experience and actual earnings after the injury, concluded that claimant was entitled to an award of compensation equal to 80° for 25% unscheduled disability.

The Board, on de novo review, finds that the medical evidence does not support the Referee's award and that claimant has been adequately compensated by the award made by the Determination Order, dated May 15, 1978, for his loss of wage earning capacity which is minimal. The Board concludes that the award made by the Determination Order should be restored.

ORDER

The order of the Referee, dated May 15, 1979, is reversed.

The Determination Order, dated May 15, 1978, is affirmed.

WCB CASE NO. 79-328 December 10, 1979

ROBERT C. HILL, CLAIMANT
Thomas O. Carter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,.

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

SAIF CLAIM NO. HC 140764 December 10, 1979

KENNETH S. LAWSON, CLAIMANT
Tom Hanlon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left leg and left shoulder on July 25, 1968 when he was stuck by a log. Claimant's claim was first closed by a Determination Order, dated June 26, 1970, which awarded claimant compensation for temporary total disability and 45° for partial loss of the left leg and 19° for partial loss of the left arm plus 3° impairment for loss of wage earning capacity. After this initial closure, the claim was again reopened and closed, resulting in claimant being awarded a total of 75% partial loss of the left leg, 10% partial loss of the left arm and 10% unscheduled disability. The claimant's aggravation rights have now expired.

On May 26, 1978 the claimant, by and through his attorney, requested the Board reopen his claim under own motion jurisdiction. The Fund advised the Board on June 21, 1978 that it would not oppose the reopening. The Board, on July 10, 1978, issued its Own Motion Order remanding the claim to the Fund for acceptance and payment of compensation commencing on March 16, 1978 and until closure pursuant to ORS 656.278.

On June 25, 1978 the claimant underwent reconstructive surgery to the left knee consisting of a pes plasty, medial half patella tendon shift and reefing of the semi-membranosis tendon. Claimant was rehospitalized on October 8, 1978 when the staple was removed from the proximal tibial metaphysis. He was readmitted to the hospital on January 29 for an osteotomy procedure of the left tibia. Dr. C. S. McLaughlin, in October 1979, reported that claimant was permanent and stationary and that he has a considerable degree of instability. It was the doctor's opinion that claimant did have permanent impairment. Dr. McLaughlin reported that claimant had been stationary since September 18, 1979.

On October 15, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on November 5, 1979, recommended that claimant be granted additional temporary total disability inclusive from March 16, 1978 through September 18, 1979 and be awarded no compensation for permanent partial disability in addition to that granted by the Determination Orders of June 1970, September 1973 and the Stipulated Order of March 1974.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 16, 1978 through September 18, 1979.

Claimant's attorney was granted an attorney's fee by the Board's Own Motion Order of July 10, 1978.

WCB CASE NO. 79-983 December 10, 1979

JAMES L. LYNCH, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Keith D. Skelton, Employer's Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the Referee's order which awarded claimant 96° for 30% unscheduled low back disability and 22.5° for 15% loss function of the right leg.

Claimant was a 55-year-old pond worker when he sustained a compensable injury to his back and groin on February 24, 1977, when the ground he was walking on gave way, causing him to fall. Claimant had worked for the employer for 30 years. The claim was first closed by a Determination Order dated September 23, 1977 which awarded claimant compensation for temporary total disability from March 2, 1977 through May 8, 1977.

As a result of his injury, claimant has submitted to three surgical procedures: (1) a bilateral hernia repair on March 10, 1977, (2) a right lumbar laminotomy at L3-4 and L4-5 levels with disc removal on October 28, 1977, performed by Dr. McGee, a neurosurgeon, and (3) exploratory surgery for the removal of scar tissue in the right groin area on April 6, 1978.

Except for a short period of several months after the first surgery claimant was off work until November 6, 1978 when he returned to his regular job for the employer. Dr. Johnson, who had performed the two surgeries in the groin area, reported on November 15, 1978 that both the inguinal hernia repairs were stable and there was no evidence of recurrence. At that time he placed no restrictions on

claimant but stated that Dr. McGee had requested claimant to avoid extremely heavy lifting, bending, and stress as applied to the lumbosacral sprain. Dr. Johnson felt that Dr. McGee should determine when claimant would be released to return to work inasmuch as claimant's residual problem was related to his spinal injury.

On December 19, 1978 Dr. McGee made a final evaluation of claimant's condition, stating claimant had successfully returned to his previous job which involved unloading logs and that although he noted some initial stiffness of the low back when he arose in the morning after about two or three hours of being up and around claimant felt he had fair range of motion and movement insofar as his back was concerned. He recommended that claimant continue to avoid extremely heavy lifting, bending, stress as job duties would permit. Claimant continued to report hypesthesia in the right lower leg and a minor feeling of "weakness" in the right leg.

On January 22, 1979 a Second Determination Order awarded claimant additional compensation for temporary total disability from September 13, 1977 through November 5, 1978, less time worked, and 32° for 10% unscheduled low back disability and 7.5° for 5% loss function of the right leg.

In September 1978 claimant had suffered symptoms of depression in connection with his industrial injury and first was seen by Dr. Ackerman, a psychologist, who later referred him to Dr. Kuttner, a psychiatrist, for treatment of these symptoms. Dr. Kuttner last saw claimant in May 1979; he had prescribed medication which apparently had improved claimant's depression considerably and on May 1, 1979 Dr. Kuttner reported claimant was suffering virtually no depression. This was verified by claimant's testimony at the hearing.

Claimant's background consists primarily of working in sawmills although he did spend approximately two hours in a vocational program sponsored by the Army which involved livestock farming. Prior to his industrial injury claimant had suffered injuries to his back several times in the late 1960's, however, he had lost no time from work as a result of those accidents.

The Referee found that claimant still had symptoms with respect to his back and right leg consisting of numbness and tingling in the right leg after about four hours of work. At the end of a work day his right foot "falls asleep" and

claimant loses a certain amount of control of the foot, however, he has no pain. He cannot tolerate prolonged sitting or standing. At the present time claimant is doing the same job he was doing at the time of his injury which consisted of helping unload logs off the truck and was done by pushing a button. The work does require bending and stooping in order to get the tie lines, however, claimant puts his hands on something for support when he is required to bend over, this assists him in returning to a standing position.

The Referee found that because of the weakness in claimant's right leg he could no longer do jobs at the mill which required walking on the logs in the pond nor could he operate a tug boat which he had been able to do on a fill-in basis prior to his injury.

The Referee concluded that claimant suffered a serious injury to his back and groin as a result of the February 24, 1977 injury; that the groin injury did not result in any residual disability. The symptoms of depression which claimant experienced for several months have completely dissipated as a result of treatment which he has received from Dr. Kuttner.

The Referee concluded that claimant had sustained a permanent disability with respect to his back and right leg and although his leg disability originated with the back injury under the circumstances separate awards could be made for the back and the leg.

The Referee further concluded that although claimant had returned to his regular job and was earning more than he was at the time of his industrial injury, that was not necessarily an indication that he had lost no earning capacity as a result of said injury, citing Ford v. SAIF, 7 Or App 549, wherein the Court ruled that the loss of earning capacity is measured by the loss of claimant's ability to obtain and hold gainful employment in the general labor market.

After considering claimant's residual physical limitations and his capabilities, age, education and work background, the Referee concluded that claimant had lost 30% of his earning capacity as a result of his low back injury.

The award of compensation for a scheduled injury is based upon impairment rather than loss of wage earning capacity. The Referee concluded that although claimant had not suffered a substantial loss of use of the right leg he had lost more than 5% because, in addition to the weakness of his right leg which his treating physician described as mild, claimant experiences numbness and tingling sensations with prolonged sitting and standing. The Referee concluded that claimant had lost 15% use of the right leg.

The Board, on de novo review, agrees that separate awards were properly made for the back and leg problems and that the back disability must be evaluated based upon claimant's loss of earning capacity whereas the leg injury is a matter of determining impairment. However, the Board does not find that the medical evidence supports an award of 30% of the maximum allowable by statute for unscheduled disabil

In this case claimant has returned to the same job in which he was engaged at the time of his injury and he has continued to work and be paid wage increases the same as th other employees. There may be certain things he was able t do prior to the injury that he cannot do now as a result of the injury but, in the Board's opinion, he is adequately compensated for that loss of wage earning capacity by an award of 64° which represents 20% of the maximum.

With respect to the scheduled injury the evidence justifies an increase from 5% to 15% and, to that extent, the Board concurs in the findings and conclusions of the Referee.

ORDER

The order of the Referee, dated June 22, 1979, is modified.

Claimant is awarded 64° of a maximum of 320° for 20% unscheduled low back disability. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-7856 December 10, 1979

ROYLEE MARLOW, CLAIMANT
Tim J. Helfrich, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which approved the employer/carrier's denial, dated Septemb 26, 1978, of claimant's alleged injury sustained on August 31, 1978.

The issue is compensability. The employer contends that claimant was an independent contractor at the time of the alleged injury or, if not, that he was not employed at that time by the employer. Claimant contends that he is entitled to additional compensation in the form of penalties for unreasonable resistance to the payment of compensation.

Claimant had answered a newspaper ad placed by the employer, a company which had contracted with a timber owner to cut down dead cedar and remove it by helicopter. The ad solicited workers to cut shake bolts. Claimant agreed to do this for $50 a cord plus an additional $5 for each cord he helped load to be transported. Claimant contended the agreement was verbal; the employer contended that there was a written contract signed by the parties. No contract was produced at the hearing and it was stated that it had been stolen during an alleged burglary, however, a form of contract which was purported to be identical to the one signed was submitted as an exhibit.

Claimant had control over when he worked and how long he would work; he used his own methods in accomplishing the job and furnished his own equipment. He was paid by the unit rather than by the hour and he was allowed to recruit other workers with defendant's approval and to form a "team" to do the work.

The employer specified the areas that were to be cut, the size of the shake bolts, specified the quality of the cedar that was acceptable and for which payment would be made and also specified the manner in which the cedar would be stacked and bundled for shipment by the helicopter. The employer evaluated the quality of the wood and at times refused to pay for some which claimant had cut. Neither party was prevented from terminating the association without notice or further liability.

The employer did not deduct premiums for workers' compensation coverage although the alleged contract required it. One of the co-owners of the defendant's company assumed claimant was an independent contractor because of the method of paying by piecework, however, he testified that he (co-owner) " . . . basically supervised the whole show .. . .".

The Referee concluded that the arrangement between claimant and the employer was a very loose, unrestricted one but that the employer reserved considerable control over claimant and that the facts establish that there was an employer-employee relationship between claimant and the defendant/employer.

The injury which allegedly occurred on August 31, 1978 at the work site of the employer was the result of claimant being struck by a limb and knocked to the ground while he was cutting a snag. The testimony was unrefuted that claimant cried out and was found on the ground with a bruised forehead. He was removed from the scene by a helicopter, hospitalized and treated.

The Referee concluded that the injury occurred as claimant alleged. On the question of whether he was an employee of the employer at the time of that injury the Referee found that claimant and the employer had agreed on such a relationship prior to claimant's beginning work on August 8, 1978; claimant subsequently became dissatisfied with his job and on August 25, certified on a Department of Employment form that he had quit working for the employer the previous day. On August 28 he also certified that he had not worked for the employer for the week ending August 26 and that during that period of time he had sought work from other employers.

However, claimant returned to the work site on August 31, 1978 to collect his tools and was persuaded by a co-worker and others who made up his cutting team to work that day. There was no discussion between the claimant and the employer concerning his termination nor did the purported contract mention it.

The Referee found that claimant apparently assumed, based on past experience, that he could quit at any time and that there was no showing that the employer was not of a contrary opinion. The Referee found it was not necessary that claimant convey his intent of terminating to the employer; that it was not generally held that notice requirements would be read into an agreement which was silent on that matter.

The Referee concluded claimant could unilaterally terminate his association with the employer without the necessity of prior notice and that because of claimant's long absence from the work site prior to August 31, 1978, his statement to the employment office that he had quit, his statement to that office that he was available for and seeking other work, and because he had returned to the work site on August 31, 1978 only to pick up his tools claimant had properly exercises his option to terminate his employment with the employer.

The Referee found no proof that the employer hired claimant for all time by hiring him on or about August 8, 1978 or that after August 31, 1978 the employer had ratified claimant's employment on that day by paying wages or by any other means. Therefore, claimant was not, in the opinion of the Referee, an employee of the employer at the time of his injury of August 31, 1978.

He found no justification for assessment of penalties but did approve the denial of claimant's claim by the employer.

The Board, on de novo review, reverses the Referee on his finding that claimant was not an employee of the employer on August 31, 1978. It agrees with the Referee that claimant did suffer, on August 31, 1978, an industrial injury as described by the claimant, a description which stands unrebutted.

Claimant was hired on August 8, 1978. The evidence indicates that he quit working for the employer on August 24, 1978 but there is no evidence that he ever advised his employer that he was severing their employment relationship. Contrary to the conclusion reached by the Referee, the Board does not find that claimant could unilaterally terminate his association with the employer without the necessity of prior notice.

When claimant walked off the job site on August 24, 1978 the employer had no way of knowing that he would not return the next day and even though he was off the job site for a week it was not until the employer received notice from the employment office that claimant had sought employment and had stated that he had quit working for the employer that he was aware of claimant's intention to terminate their employment arrangement, an arrangement which the Referee quite accurately described as loose and unrestricted. This notice was not received by the employer until <u>after</u> claimant had been injured on August 31, 1978.

The Board concludes that inasmuch as the employer had not been made aware of claimant's decision to quit and that claimant had returned to the work site the employer was obligated to pay claimant for any work done prior to the employer's actual knowledge of claimant's termination. Claimant was an employee at the time he suffered his industrial injury. The denial dated September 26, 1978 must be set aside.

ORDER

The order of the Referee, dated June 15, 1979, is reversed.

The denial by the employer/carrier of claimant's claim for an industrial injury sustained on August 31, 1978 is set aside and the claim is remanded to the employer/carrier to be accepted and for the payment of compensation, as provided by law, commencing on August 31, 1978 and until the claim is closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for prevailing on a rejected claim the sum of $1,000 payable by the employer/carrier. This attorney's fee is awarded for claimant's services both before the Referee and at Board level.

WCB CASE NO. 76-6883 December 10, 1979

KENNETH OLSON, CLAIMANT
Hayes Patrick Lavis, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which affirmed the Fund's denial of claimant's claim for compensability.

Claimant, 22 years of age, was employed as a cook at Sammy's Restaurant and alleges he developed gastroenteritis from his employment.

Claimant testified that the first episode occurred on December 24, 1975 while on vacation and after he had been off work for two days prior. Claimant's symptoms were extreme nausea, vomiting every hour and pain. Other episodes claimant had were on May 18, 1976, while he was working, June 6, 1976 while on his way to Reno and having been off work for three days prior, and was hospitalized in Susanville, and a July 18, 1976 episode for which he was hospitalized and occurring after he had terminated his employment with Sammy's Restaurant on July 14. On July 18 he was hospitalized for 24 hours, released, and readmitted on July 20.

Claimant testified he is now employed by the Thunderbird as a cook and since quitting his employment with Sammy's he has not had further episodes.

Claimant's condition was diagnosed by Dr. Honl as gastroenteritis.

On December 7, 1976 claimant's claim was denied by the Fund.

Interrogatories were submitted to Dr. Honl who responded that he diagnosed acute and chronic gastroenteritis.

In his opinion the condition can be caused by irritation from spices and fatty foods, by eating these things throughout the day. Dr. Honl felt that claimant's symptoms in relation to his work was a well-known problem. He opined that claimant's employment was a material contributing factor even if some of his attacks occurred while off the job.

On January 18, 1977 Dr. Honl reported that this condition is known as "cooks disease".

At the second session of hearing Dr. Much, the Fund's medical consultant, testified after reviewing all of the medical evidence. He defined gastroenteritis as inflammation of the gastrointestinal tract. The most common cause of this was bacteria or virus. It can also be caused by endocrine disease or emotions. He testified that the bacteria type is caused by contaminated food and/or drink. Dr. Much found the medical evidence to show claimant had a high blood count, which points to infection, as being the cause. He further testified that the onset of symptoms is insidious, one becomes nauseated first for a couple of days and gradually develops cramping and diarrhea.

The Referee found that claimant's theory that his gastroenteritis was caused by pressure from his employment was unsubstantiated. He further found that no contamination of food or drink at the employer's had been proven. He affirmed the Fund's denial.

The Board, on de novo review, finds compensability hinges on expert medical opinion. Dr. Honl, who examined claimant, unequivocally finds claimant's employment a material contributing factor to his condition. Dr. Much testified that the condition is insidious, taking days to reach the cramping stage. This fits the testimony of claimant concerning the episodes that he experienced, some two to three days after not being at work. Since leaving this employer claimant has had no further episodes.

Therefore, the Board concludes that the weight of the medical evidence preponderates in claimant's favor.

ORDER

The order of the Referee, dated January 25, 1979, is reversed.

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and the payment of compensation as required by law until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services at the hearing and at Board review the sum of $300, payable by the Fund.

SAIF CLAIM NO. A 662976 December 10, 1979

RALPH H. TEW, CLAIMANT
Hayner, Waring & Stebbins, Claimant's Attys.
Evohl F. Malagon, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on January 21, 1958. His claim was closed after two surgeries by an order, dated June 22, 1960, which awarded claimant compensation for temporary total disability and compensation for permanent partial disability equal to 36.25° equivalent to 25% loss of function of arm for unscheduled disability. Claimant's aggravation rights have now run.

Claimant continued to have difficulty with his back and on May 17, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim. The Board, after receiving certain medical reports from claimant's attorney, referred the matter to a Referee for a hearing.

The hearing was held on January 17, 1979 to decide the question of whether the claimant's present condition was related to the 1958 injury or if it resulted from a March 1976 injury. The claimant, after his original injury, had returned to work as a parts man. Claimant eventually established his own business doing auto repair work, painting and sandblasting. Claimant continued to have pain at the fusion site for which he would seek chiropractic treatment at least once a year. These pains limited his working to about half the time which his owning his own business allowed him to do.

Claimant, in March of 1976, was doing some sandblasting for Akin Motors. While doing this job claimant fell 6 to 7 feet to the ground from a ladder striking a trailer with his right side around the rib cage and then falling to the ground on his back. According to claimant's testimony, the

back problems continued and they involved the same type of gradual increasing discomfort at the fusion site. Claimant had not noted an accelerated back deterioration since the March 1976 fall. He had been receiving treatment since the March 1976 fall and had not yet returned to work.

Dr. Grieser, a neurosurgeon, diagnosed a narrow spinal canal which he related to the 1958 injury and in November of 1976 performed a decompressed laminectomy. Claimant was seen by Dr. Stainsby, a neurosurgeon, who opined claimant's present problems were due to a natural degenerative aging process which had been enhanced by the 1958 surgery.

The Referee concluded that based on all the evidence claimant had continuing back problems after his 1958 injury which has steadily deteriorated. He further concluded the 1976 injury did not permanently affect claimant's back condition by causing or hastening its deterioration so as to break the chain of causation between the 1958 injury and his present disability. It was his recommendation that the 1958 claim be reopened.

The Board, in an order dated March 2, 1979, remanded the claim to the State Accident Insurance Fund to be accepted and for the payment of compensation as provided by law, commencing on the day (exact day unknown) in March 1976 that claimant fell from the ladder until the claim was again closed pursuant to ORS 656.278 less any time worked. Further, the Board granted claimant's attorney an attorney's fee.

Claimant was found medically stationary as of September 26, 1979. On October 15, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on November 13, 1979, recommended claimant be granted an award of permanent total disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for permanent total disability effective September 26, 1979. Claimant is entitled to compensation for temporary total disability pursuant to the Board's Own Motion Order, dated March 2, 1979, from March 11, 1976 to September 25, 1976.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for permanent disability granted by this order, payable out of said compensation as paid, not to exceed $3,000. Claimant's attorney has already been granted a reasonable attorney's fee out of the compensation granted for temporary total disability by the Own Motion Order of March 2, 1979.

WCB CASE NO. 78-5690 December 11, 1979

JAMES ROGERS, CLAIMANT
George Hoselton, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks review by the Board of the order of the Referee which found claimant to be permanently and totally disabled as of January 16, 1979.

Claimant was employed by an Exxon gas station as a mechanic and manager. Claimant testified that on July 23, 1975 he was doing a valve job and stopped to go outside to pump gas. He testified that as he was pumping gas a car came up and struck him, throwing him against the car that struck him, hitting his head, then throwing him forward onto the car he was servicing striking his face and chest on that car.

Claimant had a prior head injury when struck by a cannon barrel in 1961 while in the Marine Corp and was in a serious automobile accident in 1967.

After this industrial injury, claimant testified he drove himself to the doctor's office. Blacking out several times on the way there.

On August 24, 1975 Dr. Gorman reported that he was the doctor claimant drove to see. When he saw claimant he was having little blackout spells. Diagnosis was whiplash injury, lumbosacral sprain and contusion to face with possible displacement of the silicone orbital disc in claimant's right orbit. He referred claimant to Dr. Struckman.

Dr. Struckman reported claimant's complaints were severe neck, and upper dorsal pain with low back pain and right shoulder pain. Dr. Struckman felt claimant would be quite sore for atleast a week.

On November 26, 1975 Dr. Dunn examined claimant and diagnosed probable C6 and L4 nerve root compression. On

December 3 claimant underwent a myelogram at both the cervical and lumbar levels. The myelograms were normal. Claimant remained hospitalized in traction.

On February 10, 1976 Dr. Dunn performed a laminectomy and foraminotomy. A lumbar venogram had been normal.

On May 11, 1976 Dr. Dunn reported claimant could perform light work and did not anticipate any permanent disability.

In September, 1976 Dr. Nickels diagnosed acute musculoskeletal strain lumbar and cervical spine. Claimant was hospitalized; it was noted by history that claimant's legs started collasping on him.

Cervical and lumbar myelograms were repeated in May, 1977 and were normal.

On May 14, 1977 Dr. Gardner reported a diagnosis of psychophysiological musculoskeletal reaction, post-traumatic survival sequele, personality disorder with passive-aggressive and hysterical features.

A psychological evaluation was performed by Dr. Painter on July 19, 1977. Claimant told Dr. Painter he had been working on an on-the-job training program in an appliance repair business until recently when he was forced to quit because of his condition. The doctor reported claimant tried to impress him with dramatic presentation of pain. Claimant was moderately depressed. The diagnosis was hysterical conversion reaction moderate to severe, depression moderate with sexual dysfunction and sleep disturbance. Claimant's IQ was average and the doctor strongly suspected organic brain syndrome, a tendency to drug dependency, economic security he felt rested with continuing disability, moderate contribution for prolonged disability by claimant's wife.

On July 20, 1977 Dr. Seres reported claimant's major problem was emotional response to physical problems. Claimant's motivation was questionable regarding return to work. Claimant was admitted to the Pain Clinic and Dr. Seres subsequently reported that claimant made rapid gains in mobility and endurance while so enrolled. Claimant was able to do strong full squats to the floor, with no bending or pain behavior. Dr. Newman, psychologist, felt claimant was capable, physically, of moderate work activity. His condition was medically stationary and retraining was not likely to succeed.

A neurological examination was performed by Dr. Grieser who reported claimant entered the office with a crutch.

Claimant's undressing slowly was quite theatrical. The doctor felt claimant was not in need of surgery.

An occupational therapist report of January 18, 1978 indicates claimant had proper body mechanics, had good recall, was very mobile in doing activities such as mopping a floor.

On August 4, 1977 Dr. Painter reported that claimant told him he was doing better. The doctor felt secondary gain was exerting a negative influence on claimant's overall adaptation.

Subsequently claimant told Dr. Seres he was doing well, doing his exercises and was on no medication except for aspirin. Dr. Seres felt claimant's lack of motivation was significant, but his condition was medically stationary.

A Determination Order of January 10, 1978 granted claimant 48° for 15% unscheduled low back, neck, right shoulder and head disability.

On October 17, 1978 Dr. Lewinsohn, professor of psychiatry, evaluated claimant. He reported that claimant arrived for the interview in a wheelchair. Testing was compatible with organic brain syndrome. In response to questions given to him Dr. Lewinsohn responded on October 26, 1978, that claimant was not capable of gainful employment and was permanently and totally disabled from brain damage reducing him in areas of memory, concentration, motor coordination and speed.

In December, 1978 claimant was hospitalized with chronic back syndrome and acute strain of the cervical and lumbar spine. History given at hospital admission was claimant fell off of a ladder.

On December 27, 1978 claimant was examined by Dr. Schostal for blackout spells. Claimant told him he was completely bedridden and could not walk. The doctor found claimant frequently hostile during questioning, claimant would also frequently "freeze" during the interview. Claimant arrived at the doctor's office in a wheelchair and claimed he could not move his legs. However, the doctor found good muscle tone and when coaxed claimant would give a weak movement. Sensory examination of the legs was impossible due to inconsistent responses. Dr. Schostal witnessed a blackout spell. He asked claimant to elevate his arms and claimant started to develop a bizarre shivering movement in all four extremeties. He then collasped and slumped on the table. Upon examining him there was clearcut fluttering of the eyelids and voluntary resistance to eyelid opening. Claimant came briskly out of his episode of unconsciousness. The doctor felt claimant had blatant hysteria and his blacking out was hysterical in nature and the doctor questioned the possibility of malingering. Claimant was not neurologically disabled.

On January 12, 1979 Dr. Nickles reported that in his opinion, physically and psychologically, claimant was permanently and totally disabled.

Claimant arrived at the hearing in a wheelchair wearing a neck brace, a lumbosacral corset and an arm brace. Claimant testified that he spends his days in bed in traction, only getting out of bed to go to the bathroom 3 or 4 times a day via his wheelchair. He testified he blacks out whenever he turns his head to the left or raises his elbows to shoulder height.

During claimant's wife's testimony at the hearing claimant blacked out and a sheriff's deputy took claimant to the hospital in a pickup as no ambulance was available.

The Referee found, principally on the basis of claimant's psychological reaction to this injury superimposed on physical residuals, that claimant was permanently and totally disabled effective January 16, 1979.

The Board, on de novo review, disagrees with the conclusions reached by the Referee. The Board finds many discrepancies in the record between the testimony of claimant and the medical findings. The history of the injury is given in at least four different versions. Aside from claimant telling Dr. Gorman about his blackout spells immediately following the injury, there appears to be no more mention in the medical reports of these spells from 1975 until 1978.

A picture produced in evidence shows claimant lying in his bed apparently in traction, wearing a neck brace and a lumbosacral corset. The picture, and the medical reports, do not indicate any atrophy in claimant's legs despite his testimony that he cannot use his extremeties. The December, 1978 hospitalization report refutes claimant's inability to get out of bed as he was hospitalized at that time having fallen off a ladder.

The Board further finds that the psychological condition has not been proven to be causally related to claimant's industrial injury and coupled with Dr. Schostal's witnessing of a blackout spell, makes claimant's psychological problems appear to be exaggerated and possibly a conscious endeavor on claimant's part for secondary gain.

The objective medical evidence indicates that claimant has suffered a loss of wage earning capacity for the residuals he suffered from his industrial injury greater then that awarded by the Determination Order. The Board concludes claimant is entitled to an award of 40% unscheduled disability.

ORDER

The order of the Referee on Reconsideration, dated 7/17/79, is modified.

Claimant is hereby granted an award of 128° for 40% unscheduled disability. In all other respects the Referee's order is affirmed.

SAIF CLAIM NO. C 275638 December 11, 1979

DONALD C. SCHMIDT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his left foot on November 20, 1970. His claim was first closed by a Determination Order, dated September 16, 1971, which awarded only temporary total disability. The claim was subsequently reopened for surgery and again closed on May 19, 1975 with an award of temporary total disability and permanent partial disability award for 50% loss of the left foot. The claim was again reopened and closed on August 4, 1977 with additional temporary total disability only. A Stipulation and Order, dated November 29, 1977, awarded claimant an additional award of compensation equal to 33.75° for 25% loss of his left foot. The Board, by an Own Motion Order, dated December 20, 1978, reopened claimant's claim. It was closed with an award of compensation for additional temporary total disability and compensation equal to 20.25° for 15% loss of the left foot.

Subsequent surgery was required and a stipulation and order, dated June 8, 1979, awarded claimant additional temporary total disability and additional 10% permanent partial disability for loss of the left foot making a total permanent partial disability award of 100% of the left foot.

Claimant was rehospitalized on July 30, 1979 for excision of a neuroma. Dr. John Corson reported on October 29, 1979 that claimant was medically stationary and in need of no additional treatment.

On November 6, 1979 the Fund requested a determination of claimant's permanent disability. The Evaluation Division of the Workers' Compensation Department, on November 21, 1979, recommended that claimant be granted temporary total disability from July 30, 1979 through October 29, 1979 and no permanent partial disability in addition to that previously granted.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 30, 1979 through October 29, 1979. This award is in addition to all awards previously granted claimant for his September 16, 1971 injury.

WCB CASE NO. 78-444 December 12, 1979

MILTON ANDERSON, CLAIMANT
Coons & Anderson, Claimant's Attys.
Jaqua & Wheatley, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant appeals the order of the Referee which did not increase his award for unscheduled disability. Claimant had been previously awarded 50% unscheduled disability for a low back injury and an additional 15% unscheduled disability for psychiatric impairment. Claimant contends he is permanently and totally disabled.

FACTS

Claimant, a 42-year-old partsman, fell off a shelf on February 1, 1973 injuring his back. Dr. Harold Rockey diagnosed this injury as an acute low back strain. A myelogram done on March 16, 1973 was normal. Dr. Rockey referred the claimant to Dr. Hockey for further evaluation.

Dr. Hockey reported on April 20, 1973 that he found no evidence of a lumbar herniated disc. His diagnosis was lumbosacral strain.

Claimant was referred to the Disability Prevention Division which found claimant would seem to need a job change although the objective findings were not really severe. Claimant was then referred to the Back Evaluation Clinic.

Dr. Norman Hickman, a psychologist, upon a referral from the Disability Prevention Division, reported in August 1973 that the claimant had a high school education and had been working for the last 16-17 years in the automotive parts business, which he did not particularly like. Dr. Hickman found the claimant to have an upper average to bright intellectual level. The claimant expressed interest in vocational training or employment driving a truck or wildlife management and preservation. Dr. Hickman felt claimant was experiencing moderate psychoneurotic reaction with anxiety, depression and possible hysterical components. He opined that this psychopathology was related to claimant's accident in a moderate degree, but claimant would suffer no serious psychological disability if he is satisfactorily rehabilitated so he could return to full time gainful employment.

The Back Evaluation Clinic's doctors diagnosed a lumbosacral sprain. They found a moderate to severe degree of interference from functional overlay. They opined the claimant was not stationary until further tests were done and that claimant was not able to return to his former occupation.

Dr. Rockey, in February 1974, reported that claimant's condition was basically unchaged and he continued to have stiffness in his back. He felt claimant was seriously disabled but could find no physical basis for it.

Dr. James Degge, an orthopedic surgeon, saw claimant in April 1974 and found tropism of the lumbosacral facets, instability at the L4-5 level with a lumbar convexity to the left, the appex between L4-L5. He felt claimant had a facet syndrome involving L4,L5 and L5-S1 intervals. He recommended continued conservative care.

In June 1974 Dr. Degge found claimant medically stationary. He felt claimant's permanent residuals were mild. Dr. Degge suggested claimant avoid activities placing heavy demands on his back such as prolonged lifting, bending or twisting. He felt claimant should be retrained in a lighter type of work and that claimant had a severe degree of psychoneurotic overlay, and under no circumstances was a good candidate for surgery.

A Determination Order, dated July 23, 1974, awarded claimant compensation for temporary total disability and compensation equal to 160° for 50% unscheduled disability for his low back injury.

In September 1974 Dr. J. Alan Cook, a psychiatrist, evaluated claimant. He diagnosed hysterical neurosis, conversion type with accompanying psychophysiological musculoskeletal disorder. He felt the prognosis for improvement with psychotherapy was guarded to poor, however, recommended a trial period of psychotherapy.

A Stipulation, dated October 22, 1974, reopened the claim for a three-month trial of psychotherapy.

Claimant began psychotherapy and also resumed his physical therapy. Claimant also underwent a trial of acupuncture beginning in January 1975 by Dr. Stanley Richmond.

In April 1975 Dr. Cook reported claimant continued to experience severe and disabling degrees of depression. He opined claimant's condition was not stable and should continue to receive some form of psychotherapy.

Claimant was referred for job sampling with Vocational Rehabilitation. Claimant reported to his counselor that he was not ready for work.

In January 1976 Dr. Richmond prescribed a transcutaneous nerve stimulator which claimant reported gave him considerable relief.

On March 30, 1976 Dr. Rockey found moderately severe disuse atrophy of claimant's low back which seemed to have had an hysterical component as its major or predominant cause. He felt the lack of activity contributed secondarily to claimant's symptoms. Dr. Rockey did not feel claimant needed additional orthopedic care, but felt that Dr. Cook should determine if claimant needed additional psychiatric care.

In August 1976 Dr. Cook reported that claimant maintained a condition of relative stability as long as some form of regular psychotherapy was maintained. He opined if claimant did not continue to receive such therapy, his condition would quickly deteriorate. Therefore, Dr. Cook did not feel claimant was medically stationary nor was it realistic to hope claimant would ever return to work with the possible exception of working as a process server. He felt claimant was functioning to the maximum of his ability.

The counselor for the Vocational Rehabilitation Division closed their file on August 23, 1976 based on the mutual decision of the claimant and the counselor. Claimant had not been able to work as a process server.

On August 26, 1976 Dr. Richmond reported that claimant was medically stationary. He felt claimant had a low back injury with some neuropathy remaining in the right sciatic nerve. He opined claimant could perform the work of a process server without aggravating his condition.

Claimant was examined by Dr. Charles Holland, a psychiatrist, on December 1976. Dr. Holland felt claimant was manifesting prolonged morbidity for a poorly characterized injury. His diagnosis was an adjustment reaction of adult life with some depressive features which appeared to be in remission.

On March 22, 1977 Dr. Cook reported that claimant had continued with his therapy and his condition had remained stable. He felt claimant's condition was medically stationary.

Dr. John Mundall, a neurologist, examined claimant and reported in October 1977 that his diagnosis was right cervical and shoulder muscle contraction pain, most likely related to tension, suspected migraine aura, chronic low back pain, most likely secondary to chronic lumbar strain.

In December 1977 Dr. Guy Parvaresh, a psychiatrist, examined claimant. He diagnosed anxiety neurosis and psychophysiological musculoskeletal disorder. Dr. Parvaresh felt claimant was not disabled from a psychiatric standpoint, to attempt further retraining or return to a job for which he was trained. He felt it was fair to assume claimant's injury might have aggravated a pre-existing condition and felt the total psychological impairment was not greater than 15%.

In February 1978 Dr. Arden Snyder replaced Dr. Cook as claimant's treating psychiatrist. He disagreed with Dr. Parvaresh's report in part. Dr. Snyder felt claimant's lack of motivation and inability to finish rehabilitation program was consistent with claimant's depression.

A Second Determination Order, dated June 8, 1978, awarded claimant additional temporary total disability and additional compensation equal to 48° for 15% unscheduled disability resulting from psychiatric impairment.

Claimant began an on-the-job training program as a counter salesperson in a gun shop on November 15, 1978. This program was to run through May 14, 1979.

At the hearing the claimant testified he had left the salesperson job three days prior to the hearing. He couldn't do the work because of his back pain. He was working four hours per day, five days a week.

The employer testified that claimant's work performance had decreased to the point he would eventually have to fire claimant. Claimant's job involved waiting on customers, cleaning glass cases, lifting boxes of bullets and checking freight. Claimant could sit or stand and he enjoyed this work.

The Referee, after reviewing all of the evidence, felt that the two Determination Orders adequately reflected the combined difficulties of this claimant and, therefore, affirmed the Determination Order of June 8, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reaches a different conclusion than the Referee. Claimant has not been able to successfully work as a process server or as a salesperson in a gun shop. However, the medical evidence alone does not establish that claimant is permanently and totally disabled. Therefore, the Board must review such factors as claimant's age, education, training, aptitudes, condition of the labor market, claimant's adoption to non-physical labor and his emotional condition. Claimant is now 48 years old, with a high school education and has upper average to bright intellectual level. All of claimant's training and work experience has been in laboring types of employment.

Claimant has been examined by three psychiatrists. The Board feels Dr. Parvaresh is more persuasive than Dr. Snyder who became involved late in claimant's treatment. Dr. Parvaresh found claimant was not disabled from a psychiatric point to attempt further training or return to a job at which he had experience or had been trained.

Therefore, the Board finds claimant is not permanently and totally disabled. However, the Board does find claimant is entitled to an additional award of compensation equal to 48° for 15% unscheduled disability based on claimant's loss of wage earning capacity.

ORDER

The Referee's order, dated May 11, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 256° for 80% unscheduled disability from his industrial injury of February 1, 1973. This award is in lieu of any and all prior awards.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

SAIF CLAIM NO. TA 652851 December 12, 1979

CLYDE L. BAKER, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his low back on January 31, 1958. This claim was originally closed by a Determination Order, dated January 6, 1959 which granted claimant compensation equal to 15% loss of an arm for unscheduled low back disability and 20% loss function of the left leg.

Claimant continued to have intermittent trouble with his left leg and continued to seek medical treatment for his condition. On March 15, 1979 he sought medical treatment for condition of varicose veins in the left lower leg. Dr. Gerald Casebolt reported in April of 1979 that he did not feel that the claimant's varicose veins were related to the injury. He noted claimant had a previous case of phlebitis, pulmonary embolis and a pre-existing obstruction of the inferior vena cava. Claimant requested an own motion order reopening his claim of January 31, 1958 for his current treatment. An Own Motion Order was entered on September 10, 1979 reopening the claim effective the date he came under treatment for varicose veins. The Board reopened the claim based on Dr. William Streitz' report of April 1979 in which he reported that he felt claimant's problem of varicose veins were related to the January 31, 1958 industrial injury. The Board concluded this was sufficient medical evidence to verify the reopening of the claim as of the date claimant commenced to receive treatment from Dr. Streitz for his varicosities.

In October 1979 Dr. Casebolt reported that the claimant's condition was medically stationary and that no further treatment was indicated other than he advised claimant to continue to wear elastic hose. There is no additional time loss during the time claimant had been receiving medical treatment.

On November 1, 1979 the Fund requested a determination of his current disability. The Evaluation Division of the Workers' Compensation Department, on December 4, 1979, recommended that claimant's claim be closed and that claimant be awarded no additional compensation for temporary total disability and no additional award for permanent partial disability.

The Board concurs.

ORDER

Claimant's claim for an industrial injury sustained on January 31, 1958 is hereby closed with no additional award of compensation.

SAIF CLAIM NO. C 384753 December 12, 1979

JANICE K. DETWEILER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 1, 1979 Dr. John Thompson reported that claimant had requested her claim be reopened for time loss. She reported to him that on October 26 she sustained a fall which she attributed to her knee giving away. Dr. Thompson was unable to substantiate on the basis of his examination whether the knee actually gave way or not. He found there was some question as to whether the recent fall was directly attributable to the old knee injury.

Claimant's claim for her July 27, 1972 injury was first closed on September 19, 1972. Subsequent to this closure, there had been other reopenings and closures. Claimant's aggravation rights have expired.

The State Accident Insurance Fund contacted Ms. Detweiler on November 29, 1979 and advised her that her aggravation rights had expired. She was further advised that the Fund would be hesitant to submit the matter to the Board on her behalf as the medical evidence appeared inconclusive. She requested that the Fund submit the medical evidence with their position and that she would submit a request for Workers' Compensation Board own motion consideration stating her contentions.

On December 3, 1977, in addition to advising the Board of the above, the Fund submitted a letter which stated that it was their position that the medical report indicates that both the July incident and October incident were temporary exacerbations with no material worsening of the condition to justify an aggravation claim. It further was the Fund's position that the medical report does not conclusively support the claimant's contention that the fall in October was directly attributable to her old injury. On that basis they opposed an Own Motion Order granting relief on the basis of the available medical evidence. Attached to this letter were several exhibits relating to the claim.

The Board, after thoroughly considering all the evidence before it, finds that there is not sufficient evidence to warrant a reopening of claimant's claim at this time. Claimant's request for own motion relief in the Board's opinion should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. GC 319260 December 12, 1979

GEORGE A. LINGREN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on August 2, 1971. He suffered a traumatic amputation of his distal right fifth phalanx. This claim was closed by a Determination Order, dated November 4, 1971, which awarded temporary total disability to August 16, 1971 and an award of compensation equal to 3° for 50% loss of the right little finger. Claimant's aggravation rights have now expired.

On July 31, 1979 Dr. Boyden reported that claimant's finger was continuing to break open and drain. He said surgery would be required to correct this problem and he related this condition to claimant's 1971 industrial injury. Surgery was set for August 8, 1979. The Board, by an order dated October 4, 1979, reopened claimant's claim as of the date he entered the hospital for the recommended surgery until the claim was again closed pursuant to ORS 656.278.

On August 8, 1979 Dr. Thomas Boyden did a revision of the amputated distal right fifth digit. He reported on November 2, 1979 that the finger amputation was fully healed and the worker's condition was, in fact, improved over prior status. Claimant returned to work on August 28, 1979 as earlier released.

On November 7, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on November 28, 1979, recommended that claimant be granted additional temporary total disability beginning on August 7, 1979 through August 27, 1979 with no additional award for permanent partial disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for additional temporary total disability from August 7, 1979 through August 27, 1979. This award is in addition to all awards previously granted to claimant for his August 2, 1971 injury.

SAIF CLAIM NO. C 75184 December 12, 1979

ROY A. PHILLIPS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 7, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury to his right foot sustained on April 27, 1967. Claimant's aggravation rights have expired.

On November 16, 1979 the Board received Dr. Schuler's reports of June 14, 1979 and October 1979. Dr. Francis Schuler reported in June 1979 that he examined the claimant and that on June 4, 1979 the claimant reported he had awakened and there was swelling and redness about the area of the scar of the operation on the dorsum of the right foot. There was no intervening injury or strain as far as claimant knew. Claimant had been working up until that time. Dr. Schuler felt that there had been a cellulitis in the foot, the cause of which was not known for sure, but claimant had had no injury or insect bites or break in the skin. He opined it was probable he had some old flare-up of the infection in his foot for which he still had some residuals. He reported that claimant would need treatment for his foot and would need antibiotics and would probably be off work another couple weeks with this condition unless it cleared up sooner.

On October 9, 1979 Dr. Schuler reported that he had last seen the claimant on July 17, 1979 and his right foot was still hurting him although there was no further evidence of cellulitis. He had dismissed the claimant to go back to work as of June 20 after seeing him the 19th of June. Claimant returned on October 8, 1979 stating that he had missed about three to four days the first part of August because of another flare-up of pain in his right foot. Dr. Schuler reported claimant again had gone back to work. Claimant told Dr. Schuler he had lost 11 days of work being off from the 28th of September until the present time. Dr. Schuler felt that claimant could return to work and he dismissed the claimant for work as of October 9, 1979. He felt the claimant probably irritated his foot at work.

On November 20, 1979 the Board informed the Fund of claimant's request and asked it to advise the Board of its position with respect thereto. On November 30, 1979 the Fund replied they had no opposition to reopening claimant's claim on an own motion order.

The Board, after thoroughly considering all the evidence before it, finds that there is sufficient evidence to warrant a reopening of claimant's claim at this time. Claimant's claim therefore is ordered to be reopened effective June 4, 1979 for payment of benefits until it is closed again pursuant to ORS 656.278.

Claimant's attorney is entitled to an attorney's fee for his services equal to 25% of the additional compensation granted for temporary total disability as a result of this order, not to exceed $750.

IT IS SO ORDERED.

WCB CASE NO. 79-386 December 13, 1979
WCB CASE NO. 78-10,304

LAWRENCE FIRKUS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUES ON APPEAL

Claimant seeks Board review of that portion of the Referee's order which affirmed prior awards of compensation equal to 57.6° for 30% loss of his right arm. He contends these awards are not adequate.

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which directed it to pay claimant compensation for temporary total disability from March 22, 1978 through November 15, 1978 at the same rate paid to claimant by the carrier subsequent to his injury of July 2, 1976. The Fund contends the correct rate for the temporary total disability was the one it established after the March 21, 1976 incident.

FACTS

Claimant was a 28-year-old log pond worker who sustained a compensable injury to his right elbow on July 2, 1976 when he fell off of a walk and hit his elbow on a float. His employer's workers' compensation carrier was the Employee Benefits Insurance Company. Dr. L. Phaon Gambee diagnosed this injury as epicondylitis or "tennis elbow". Dr. Gambee tried injections and casting the elbow without relieving claimant's pain.

In January 1977 the Orthopaedic Consultants examined claimant and concurred with Dr. Gambee's diagnosis. It was their opinion claimant was not at that time medically stationary and in need of further care including surgery as recommended by Dr. Gambee.

On February 28, 1977 Dr. Gambee carried out a surgical procedure on claimant's elbow. However, claimant continued to experience pain in the elbow. Claimant complained, after the surgery, of inability to completely extend his arm or touch his fingers to his shoulders and poor grip strength.

Dr. E. Robert Wells, in June 1977, opined it was most improbable claimant would be able to return to an occupation requiring heavy demands on the left [sic] upper extremity. He felt claimant specifically would be unable to do any heavy lifting, pushing, pulling and, therefore, would have to change occupations. On November 7, 1977 Dr. Wells reported claimant was medically stationary but not vocationally stationary.

On March 6, 1978 claimant began a vocational rehabilitation program as a manager trainee for a service station. Vocational Rehabilitation Division's workers' compensation carrier is the Fund. It was contemplated that while in this program claimant was to continue compensation for temporary total disability from the carrier in the sum of approximately $185 per week. Claimant participated in this program and performed all the job requirements although he experienced constant soreness and some limitations of movement in the elbow.

On March 21, 1978 while gassing a vehicle, the vehicle moved forward rather vigorously. This caused claimant extreme pain in the arm and exacerbated his epicondylitis. Claimant terminated the vocational training program. On June 8, 1978 the Fund accepted responsibility for the March 21, 1978 injury. On June 22, 1978 EBI denied responsibility for that incident. A hearing was held on this denial. The Referee affirmed EBI's denial on the basis of the applicability of ORS 655.605 and ORS 655.615.

The Fund paid the claimant compensation for temporary total disability at the rate of approximately $67 per week, based on its determination of an assumed wage for claimant's work of $100 a week. The assumed wage was determined by the Fund pursuant to ORS 655.615(3).

On August 27, 1978 Dr. Wells reported claimant was medically stationary, but not vocationally stationary. He opined claimant's condition had definitely deteriorated since the March 1978 incident in that claimant had an extension block of 30°. He opined claimant would have additional impairment. Dr. Wells felt claimant could return to a training program so long as heavy lifting, pushing, pulling, utilizing his right arm and not carrying more than 15-20 pounds in that arm.

On November 15, 1978 Dr. Wells reported claimant remained very symptomatic in regard to his right elbow with secondary significant residuals in the form of pain, restricted elbow movement, with consequent diminished grip and inability to effectively lift, push or pull. He again found claimant medically stationary.

A Determination Order, dated December 29, 1978, covering the injury of March 22, 1978, awarded claimant compensation for temporary total disability from March 22, 1978 through November 15, 1978 and compensation equal to 38.4° for 20% loss of his right arm. Another Determination Order of the same date, covering the injury of July 2, 1976, awarded claimant compensation for temporary total disability from July 2, 1976 through March 21, 1978 less time worked and compensation equal to 19.2° for 10% loss of his right arm.

Claimant testified he did not work from March 21, 1978 to March 5, 1979, when he began working 40 hours per week for a company that builds "trusses" for prefabricated houses. He still has difficulty with his elbow lifting and cannot fully extend or flex his right elbow. He is unable to perform some of his job duties. He stated that the longer he uses the arm the more pain he experiences. Claimant is right handed and now uses his left arm more if possible. He feels he has lost a good deal of strength in the arm and limits his off-the-job activities due to his arm problems.

The Referee concluded that the rate of temporary total disability the Fund should have paid claimant was $185 per week, the rate in effect prior to the March 21, 1978 incident and not the assumed wage of $20 per day. He noted that ORS 655.615(3) provides that the Fund may fix assumed wage rates for the "clients" enrolled in the work evaluation or work experience programs. He found the facts in this case demonstrate the unfairness of the Fund interpreting the discre-

tionary "may" in ORS 655.615(3) as mandatory when another and more reasonable basis for establishing a rate for temporary total disability was in evidence. He notes that even though claimant fully cooperated due to the March 21, 1978 incident, his weekly temporary total disability benefit was reduced by $118. The Referee felt that the legislature intended, in situations as found in this case, to encourage injured worker participation in vocational rehabilitation programs. The Fund's interpretation of ORS 655.615(3) in fixing an assumed wage rate at the level it did in this case creates a situation which would tend to discourage such participation. Therefore, he concluded that the Fund should have used the temporary total disability rate already established and ordered the Fund to pay claimant temporary total disability compensation from March 27, 1978 through November 15, 1978 at the same rate established prior to the March 21, 1978 incident.

He did not find the Fund's exercise of discretion under ORS 655.615(3) in establishing an assumed wage of $100 per week unreasonable and did, therefore, not assess penalties and attorney's fees.

Further, he concluded the claimant had failed to prove by the preponderance of the evidence a greater loss of function than the combined 30% already awarded.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, would reverse that portion of the Referee's order which ordered the Fund to pay temporary total disability compensation at the rate established prior to the March 22, 1978 incident. The Board fully concurs with the comments of the Referee regarding the application of ORS 655.615(3) in cases like this may lead to injustice. However, when the legislature enacted ORS 655.615(3) it gave the Fund authority to fix assumed wage rates and that is exactly what it did here. The Board, following the precedent of the case of Weert Frerichs, WCB Case Nos. 77-6693 & 78-3421, must order payment of temporary total disability compensation on the basis of the wage assumed by the Fund pursuant to ORS 655.615(3).

As to that portion of the Referee's order dealing with the issue of extent of disability, the Board concurs with the conclusions of the Referee.

ORDER

That portion of the Referee's order, dated June 15, 1979, in which the Referee ordered the Fund to pay claimant temporary total disability compensation from March 22, 1978 through November 15, 1978 at the same rate paid to claimant by Employee Benefits Insurance subsequent to his injury of July 2, 1976, is reversed.

Claimant is hereby granted compensation for temporary total disability from March 22, 1978 through November 15, 1978 at the assumed wage rate and the Fund is to receive credit for any temporary total disability already paid.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-9435 December 13, 1979

NORMAN GARBUTT, CLAIMANT
Welch, Bruun, et al., Claimant's Attys.
Frank A. Mascato, Employer's Atty.
Request for Review by Employer

The employer seeks review by the Board of the order of the Referee which granted claimant an award of 192° for 60% unscheduled disability. The employer contends the award is excessive.

Claimant, aged 52, was employed by J. W. Copeland Lumber Yards as a yard boss. After hours claimant also worked at breaking and shoeing horses, a job which earned him as much as he made at Copeland.

On November 21, 1975 claimant was loading lumber on a truck and injured his right shoulder. On December 16, 1975 Dr. Corrigan reported he was taking claimant off of work as his shoulder was tender but had no swelling.

On January 20, 1976 Dr. Corrigan diagnosed refractory bicepital tendonitis. Claimant underwent physical therapy.

By March of 1976 claimant's condition was worse with snapping and popping in the shoulder on flexion and abduction. Diagnosis was traumatic subluxation and dislocation of the long head of the biceps. By June, 1976 Dr. Corrigan recommended sugery.

Dr. Spady examined claimant on August 20, 1976 and found normal range of shoulder motion but claimant did have marked and obvious crepitus on abduction and flexion. His diagnosis was tear of the rotator cuff or torn biceps tendon.

On November 17, 1976 claimant was hospitalized and underwent surgery for excision of the interarticular portion of the long head of the biceps and tenodesis of distal stump into the humerus and repair of the rotator cuff tear.

On January 31, 1977 Dr. Corrigan reported claimant could never return to moderate or heavy work involving the use of the right extremity. By March, 1977 vocational rehabilitation was recommended. In August, 1977 Dr. Corrigan reported the claimant's impairment "is going to be very significant".

In a report of September 13, 1977 Dr. Corrigan indicated that claimant had not done well since surgery. The surgery did provide relief from disabling pain but he had persistent weak and painful shoulder in attempting to do anything at or above shoulder level. Claimant's limitation of motion was prominent. Dr. Corrigan reported claimant was to be enrolled in an outboard motor repair course and the doctor heartily agreed with this. Claimant's condition was medically stationary and his impairment was severe.

On September 2, 1978 Dr. Corrigan reported X-rays revealed early traumatic arthritis with joint space narrowing and sclerosis and he recommended joint replacement surgery or fusion but claimant was against further surgery.

A Determination Order of October 23, 1978 granted claimant 48° for 15% unscheduled right shoulder disability.

The vocational rehabilitation people found claimant highly motivated and he was placed in an OJT progran with Inland Marine Co. where he was still employed at the time of hearing. The OJT program was completed on June 9, 1978.

Claimant has a 9th grade education with past work experience in sawmills, logging, a moulding plant, professional quarterhorse trainer, horseshoer, buckaroo and truck driver.

At the hearing claimant domonstrated he could not move the right arm out and was not able to extend it much more than 1-2 inches from his body in an outward extension. Upon cross examination claimantadmitted to driving truck with a manual transmission hauling potatoes but quit because he wasn't making any money. He also tried hay baling and mowing and gave it up because of lack of profit.

The owner of Inland Marine Co., where claimant was employed at hearing, testified the work was electrical work done on small engines. He testified he had to do about 30% of claimant's work for him. He has observed claimant in obvious pain but he never complains. He felt he probably would not be able to keep claimant in the future as his output was too low.

There were films shown at hearing that were taken in May, 1976 before claimant's surgery, and March, 1977 after the surgery. These revealed claimant walking with a wheelbarrow handling hay, doing well work on a drilling rig.

The Referee found the films, in his opinion, did not discredit claimant's testimony. He felt the evidence indicated claimant suffered from a very significant impairment of the shoulder which forecloses him from employment in a wide range of the industrial labor market. He concluded claimant was entitled to an award of 192° for 60% unscheduled disability.

The Board, on de novo review, disagrees with the conclusion reached by the Referee. Although the medical evidence indicates claimant's impairment is severe the films discredit, in the Board's opinion, the medical reports and claimant's testimony. The films demonstated claimant working fully actively and without restriction. On the drilling rig claimant used his right shoulder, and used it overhead and the films as a whole indicate some rather strenuous use of that shoulder.

The medical evidence does reflect that claimant is precluded from heavy and moderate labor. Therefore, the Board concludes that the claimant would be adequately compensated for his loss of earning capacity from this injury by an award of 96° for 30% unscheduled right shoulder disability.

ORDER

The order of the Referee, dated April 30, 1979 is modified.

Claimant is hereby granted an award of 96° for 30% unscheduled right shoulder disability. This award is in lieu of that granted by the Referee, whose order in all other respects is affirmed.

WCB CASE NO. 78-6680 December 13, 1979

IONA RUTH GRIMM, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUES ON APPEAL

Claimant seeks Board review of the Referee's order which affirmed a Determination Order, dated October 19, 1978, and affirmed the denial of responsibility for the soft tissue mass on her left elbow. Claimant contends she was not medically stationary on October 5, 1978 and if she has become medically stationary since that date she is permanently and totally disabled.

FACTS

Claimant, then a 52-year-old trimmer in a food processing plant, sustained an injury to her left wrist, left arm, left shoulder and back when on October 16, 1975 she slipped and fell on wet cement. Dr. David Fitchett first diagnosed a sprain of the left wrist and strain of the right flank muscle.

Dr. Monty Ellison, in November 1975, diagnosed a dorsal left wrist sprain and a cervical sprain. On January 13, 1976 he reported claimant was still experiencing pain in her left wrist, forearm and discomfort in her neck and pain in the left shoulder area and persistent headaches. He felt claimant would have difficulty returning to work requiring repetitive head and neck movements, looking up repetitively or working with her arms and hands above shoulder level. He felt, however, claimant was capable of some more sedentary tasks and released her for work on January 19, 1976.

In May 1976 Dr. Donald Snider, a neurologist, diagnosed a chronic cervical strain. He released claimant for regular work as of July 12, 1976.

Dr. Henry Bruce, in April 1977, diagnosed a left carpal tunnel syndrome and performed a left carpal tunnel release on April 18, 1977.

Dr. C.W. Knox, associated with Dr. Snider, referred claimant to Dr. Herbert Spady. Dr. Spady felt claimant had either a cervical disc or thoracic outlet syndrome, but needed additional evaluation.

Dr. Bruce, in October 1977, diagnosed a soft tissue mass left elbow. He reported claimant had full range of motion at the left elbow. In November 1977 he reported claimant continued to have intermittent back pain which he diagnosed as chronic low back strain with nerve root tension signs.

On January 28, 1978, the Orthopaedic Consultants reported claimant complained of neck and left upper extremity pain, with some pain in her head, upper back, low back and right upper extremity. They diagnosed chronic cervical, dorsal, lumbar, and left wrist strains, by history only, status post left carpal tunnel release, exogenous obesity and severe functional overlay with hysterical features. They found no evidence of a left thoracic outlet syndrome and no evidence of a right carpal tunnel syndrome. It was their opinion claimant was medically stationary but may need an additional nerve conduction study to rule out right carpal tunnel syndrome. They opined claimant could orthopedically and neurologically return to her same job without limitations but noted claimant may be psychologically disabled and recommended a psychological examination. They rated loss of function of the dorso-lumbar spine and neck and left upper extremity as minimal. They felt the tissue mass at the left elbow was unrelated to her industrial injury. They felt her back pain was related to her industrial injury. Dr. Bruce concurred with this report.

Dr. Knox did not. He felt the EMG and NCT tests revealed an apparently mononeuropathy involving the right median nerve at the wrist with distal mild or early neurogenic atrophy.

In June 1978 Dr. Chen Tsai, a neurosurgeon, diagnosed cervical strain, probable right carpal tunnel syndrome, status post left carpal tunnel release, probable right L5 radicular irritation and left S1 radicular irritation.

On July 12, 1978 the carrier denied responsibility for the left elbow condition.

Dr. Daniel Halferty of the William A. Callahan Center, examined claimant and diagnosed degenerative intervertebral disc and joint disease lumbosacral spine and chronic strain with severe postural lordosis, status post left carpal tunnel release, possible right carpal tunnel syndrome, exogenous obesity and functional over focus on tissue tenderness and discomfort. A program of physical therapy and general conditioning was recommended.

Dr. Arlan Quan, a psychiatrist, evaluated claimant and diagnosed an anxiety neurosis, chronic, mild and unrelated to her industrial injury. He did not feel this condition sufficiently impaired claimant from resuming employment.

A Determination Order, dated October 19, 1978, awarded claimant compensation for temporary total disability from November 26, 1975 through July 11, 1976 less time worked and from January 11, 1977 through October 5, 1978 and compensation equal to 10% loss left forearm and 5% loss of the right forearm and 10% unscheduled disability for her neck and low back injury.

Dr. Knox, on December 26, 1978, reported claimant was not medically stationary. He reported claimant reported onset of low back pain which he felt was probably sustained in her industrial injury of October 16, 1975 but had not been picked up until this time.

On January 11, 1976 Dr. H. Neumann reported claimant described low back pain radiating down both legs. His diagnosis was bilateral bursitis shoulders, mild, chronic strain and sprain cervical, dorsal and lumbar spine, bilateral carpal tunnel syndrome, and sacralization of the transverse process of L5 with S1 and coccydynia. He felt claimant was medically stationary and should avoid activities which overstressed her back.

On April 4, 1979 the Orthopaedic Consultants, after again examining claimant, reported that they found no significant material worsening of claimant's condition. They opined she was medically stationary. It was their opinion the previous award of compensation was adequate. They did not feel the industrial injury was a major contributory cause and did not cause claimant's ongoing disease, the narrowing at L5-S1 with sclerosis of the L5-S1 facet joints along with the diffuse degenerative arthritis of the lumbar spine.

Claimant, now 56 years old, has a high school education. She has worked in restaurants, meat wrapping, seed packaging, cannery belt lines and general labor. She testified her condition has remained unchanged since October 1975. She testified she could stand for 20-30 minutes, sit for 30 minutes, lift 5 to 10 pounds. She says she is unable to carry a bag of groceries unless there were light items in it and denies being able to clean her own rugs, do yard work or stand on a chair. She quit looking for work because Dr. Knox told her she was unable to work.

Dr. Knox, in his deposition, could not tell whether the industrial injury caused claimant's soft tissue mass on her elbow. He admitted that recent examinations revealed claimant's neurological condition is basically unchanged. He admitted his conclusion that claimant's condition had worsened was based on pain and was purely subjective.

Films were introduced which show claimant going to and from her car and the post office. They show claimant pulling weeds, carrying a box and a bag of groceries, shaking a rug and getting into the trunk of her car and working in a bent over fashion in the trunk for 20-30 minutes.

The Referee concluded that based on the films, Dr. Knox's admission that his conclusions are based on subjective symptoms, that claimant's testimony was not credible and the opinions of doctors who relied on her explanation were not credible. He found claimant did not prove by a preponderance of the evidence any of her contentions.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, concurs with the Referee's conclusions. The films impeach claimant's credibility and cast doubt on Dr. Knox's conclusions. The Board finds that

the surveillance films and the reports of the Orthopaedic Consultants and Dr. Quan are more persuasive in this matter than is claimant's testimony and the conclusions of Dr. Knox. Therefore, the Board, after reviewing all of the evidence, cannot find that claimant has proven by a preponderance of the evidence any of her contentions and affirms the Referee's order.

ORDER

The Referee's order, dated July 10, 1979, is affirmed.

WCB CASE NO. 78-9234 December 13, 1979

VALERIA A. HUTCHINSON, CLAIMANT
Paul Rask, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks review by the Board of the order of the Referee which modified the Second Determination Order and granted claimant additional compensation for temporary total disability and an award of 160° for 50% unscheduled low back disability and 6.75° for 5% loss of the left foot.

Claimant requests cross-review by the Board contending that the award granted was inadequate.

Claimant, 36 years of age, was employed as a welfare assistance aide and on November 6, 1973 she sustained a compensable injury when a client started to fall and claimant tried to catch her and she struck her low back on the back of a sofa.

On November 12, Dr. Coletti diagnosed acute lumbosacral disc syndrome. X-rays were normal. On January 14, 1974 Dr. Coletti released claimant for regular work.

On March 25, 1974 Dr. Coletti reported claimant was medically stationary with no residuals.

A Determination Order of April 30, 1974 granted compensation for temporary total disability only.

Claimant then continued working for several years part of the time for the Welfare Division and part of the time for Children's Services. Claimant also testified during this period of time she injured her right knee which subsequently led to left knee problems and surgeries on both.

Claimant's back problems did, however, continue and Dr. Nash hospitalized claimant for a myelogram on April 4, 1978 and on April 18 he performed a laminectomy and discectomy.

Dr. Nash reported on April 24, 1978 that claimant's complaints were low back pain, left gluteal pain, left thigh pain radiating into her calf and foot, and swollen left knee. Dr. Hash opined that the need for surgery was an aggravation of her 1973 injury.

On September 4, 1978 Dr. Nash reported claimant had achieved maximal medical benefit and has permanent residuals. He released her for her previous level of employment.

Claimant did return to work on September 13, but was capable of working for only five days.

Claimant returned to Dr. Nash who reported on October 12, 1978 that by this date claimant's symptoms had subsided because she wasn't working. Claimant's difficulties working were with prolonged driving, sitting and standing. The doctor requested she return and try 1/2 days and felt she could tolerate this.

Claimant returned to her regular job on the recommended 1/2 day schedule and worked 8 1/2 days and quit being unable to tolerate working. She terminated on November 16, 1978.

A Second Determination Order of November 7, 1978 granted her 16° for 5% unscheduled low back disability and 5% loss of the left foot.

Questions were put to Dr. Nash, who responded on January 15, 1979, that claimant should do work devoid of repetitive bending, should not lift objects from the floor and from a counter not over 20-25 pounds. Claimant must avoid bending, squatting and stooping, and must wear her back brace daily.

On February 26, 1979 Dr. Nash reported that about five weeks ago claimant experienced a sudden onset of low back and left hip pain. A neurological examination revealed muscle spasms with decreased trunk motion. Dr. Nash recommended claimant not return to productive employment and follow a program of restrictive activity for 2-3 weeks.

Claimant testified she has a high school education with a BA equivalency in social work. Her only other employment has been in a cannery. Claimant testified she can only sit for 30 minutes and cannot walk very far.

The parties at the hearing stipulated that the Determination Order was in error on commencement of compensation for temporary total disability and agreed the date should have been March 28, 1978.

The Referee found that the evidence indicated claimant has a loss of wage earning capacity greater than awarded and that her impairment was moderate. He awarded her 160° for 50% unscheduled disability.

The Board, on de novo review, finds that evidence indicates claimant is totally precluded from any regular and gainful employment. The restrictions placed on claimant's work capabilities, physically, are severe. The job claimant held at injury, that of a social worker, is considered rather light work. Claimant has in the past attempted to return to this work and was unable to do so.

The Board, therefore, concludes claimant is entitled to an award of permanent total disability.

ORDER

The order of the Referee, dated April 24, 1979, is modified.

Claimant is hereby granted an award of permanent total disability effective the date of this order.

Claimant's attorney is hereby granted as a reasonable attorney's fee the sum of 25% of the increased compensation granted by this order, out of said compensation as paid, not to exceed $3,000.

Claimant's attorney is also granted as a reasonable attorney's fee for his services at Board review on a SAIF appeal the sum of $300, payable by the Fund.

SAIF CLAIM NO. WC 332608 December 13, 1979

TERRY L. TOUREEN, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on October 14, 1971 when he slipped and fell while setting chokers. The initial diagnosis was back strain with muscle spasm. Claimant's claim was initially closed by a Determination Order, dated February 1972, which awarded claimant temporary total disability to January 18, 1972. The Second Determination Order, dated September 6, 1974, awarded claimant additional temporary total disability and an award of compensation equal to 48° for 15% unscheduled disability for his low back injury. A Determination Order of August 26, 1976 awarded claimant additional compensation for temporary total disability and an additional award for 48° for 15% unscheduled disability. This award was in addition to that granted by the Determination Order, dated February 11, 1972. Claimant's aggravation rights have now expired.

A Stipulated Order, dated November 19, 1976, granted claimant an additional 48° for unscheduled disability, giving the claimant a total award equal to 144° for 45% unscheduled disability for his low back injury.

Claimant was enrolled in vocational rehabilitation from November 1976 to April 1977. During that time he was trained as a welder.

On May 2, 1978 the Board reopened the claim under an Own Motion Order. The claim again was closed on July 19, 1978 with an additional award of temporary total disability only. This was based on Dr. Fax' report in which he released the claimant to return to regular work on May 11, 1978. He had reported on June 9, 1978 that he found claimant's condition medically stationary and stated that he was roughly about the same as he had been prior to his latest flare-up of his back condition.

On January 16, 1979 Dr. Thomas Gritzka reported claimant was unable to work since December 18, 1978 because of exacerbation of pain secondary to pre-existing spinal injury. He noted the claimant's original injury was suffered on the job and that claimant should be entitled to time loss payments as of December 18, 1978.

By an Own Motion Order, dated March 29, 1979, the Board reopened claimant's claim. Time loss payments were begun on December 18, 1978.

Claimant reported to the Fund he had returned to work on June 11, 1979 as a welder-mechanic.

On October 30, 1979 Dr. Gritzka again examined the claimant. He reported that claimant was working as a machinist and welder and that he continued, according to claimant, to experience moderate backache at the end of the day. Claimant still was able to continue to work. Dr. Gritzka concluded that claimant was stable and stationary and he did not appear to have any impairment in addition to that which he had when he was examined by another doctor.

On November 9, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on November 26, 1979, recommended that claimant be granted an additional temporary total disability inclusive from December 18, 1978 through June 10, 1979 and no permanent partial disability in addition to that granted previously. Claimant had returned to work as a light welder mechanic on June 11, 1979.

The Board concurs.

ORDER

Claimant is hereby granted compensation for additional temporary total disability from December 18, 1978 through June 10, 1979. This award is in addition to all awards previously granted claimant for his October 14, 1971 injury.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of March 29, 1979.

WCB CASE NO. 77-6323 December 13, 1979

LYNN E. WHITE, CLAIMANT
Shepard & Steward, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks review of the Referee's order which granted claimant an award of compensation equal to 192° for 60% unscheduled disability for his back injury. It contends that this award is excessive.

FACTS

Claimant, 48 years old, was employed as a seed treater operator and truck driver when he injured his back on February 7, 1975 lifting a trough on his truck. Dr. Leland Beamer diagnosed this as a chronic lumbosacral strain and released claimant for light work on February 24, 1975. On June 13, 1978 Dr. Beamer released claimant for restricted work with no heavy lifting.

On August 26, 1976 Dr. Anthony Wattleworth diagnosed a probable bulging nucleus pulposis L5-S1 on the left. He suggested claimant wear a corset and continue with his back exercises. He felt that if claimant didn't improve a neurosurgical consultation would be needed.

Dr. Ray Miller, a neurosurgeon, hospitalized claimant on October 8, 1975 for a myelogram. The myelogrma was normal. Dr. Miller felt that claimant should not do any heavy lifting, but hopefully could return to work as a custodian. He felt claimant was medically stable as of October 10, 1975 with no need for further treatment. His diagnosis was lumbosacral strain.

The Orthopaedic Consultants, in October 1975, found claimant medically stationary. They advised against claimant returning to work as a truck driver with associated heavy lifting. They rated the loss of function as mild. Drs. Wattleworth and Miller concurred with this report.

A Determination Order, dated December 15, 1975 awarded claimant compensation for temporary total disability equal to 64° for 20% unscheduled low back disability.

Claimant was referred for vocational assistance in April 1976. Claimant expressed interest in obtaining a GED and in motel management.

An Interim Order, dated May 20, 1976, found that claimant was vocationally handicapped and that claimant was in an authorized program of vocational rehabilitation. Therefore, claimant's claim was reopened effective March 16, 1976.

Dr. Holm, of the Disability Prevention Division, in July 1976 opined that claimant had a moderate vocational handicap. He felt no surgical intervention was needed and that claimant could return to light to medium work with a lifting limitation to 30 pounds maximum. Claimant was then referred to a service coordinator.

Dr. J. Stephen Vizzard, a psychologist, reported that claimant had completed the 8th grade and his work experience was in manual labor. Dr. Vizzard, based on his testing of claimant, felt due to his limited abilities he was unsuited for academic retraining. It was felt it would be best if claimant was returned to a modified work in one of his previous occupations. Dr. Vizzard reported claimant was experiencing some fairly intense states of depression and nervousness related to unemployment.

Claimant's prior work has been as a truck driver, fertilizer bagger and loader operator, lumber mill work, farm work and janitorial work.

In March 1977 Dr. Arthur Hockey examined claimant and, after reviewing an EMG study, opined claimant had chronic low back pain with some radicular pain. He found no objective signs of a herniated disc. Dr. Hockey suggested referral to Dr. Seres' Pain Clinic.

Dr. Joel Seres, in May 1977, reported claimant's complaints were of low back pain with occasional numbness in the left leg. Claimant reportedly was using 3-4 aspirin per day. Claimant received abbreviated treatment while in the program since he asked to be discharged from the program. Claimant, while in the program, became more resistant to treatment. Dr. Richard Newman, of the Pain Clinic, reported claimant saw himself as permanently and totally disabled and the doctor doubted any effort of further rehabilitation, based on claimant's motivation, would be successful.

A Second Determination Order, dated June 13, 1977, awarded claimant additional compensation for temporary total disability only.

Dr. Hockey, on June 23, 1977, reported claimant was medically stationary. He found claimant had a fair range of motion in his back. Dr. Hockey opined claimant could perform work as a janitor or as a watchman.

On February 1, 1978 claimant's vocational counselor terminated vocational rehabilitation services based on claimant's feeling he was unable to perform any kind of regular work actively on an eight-hour basis.

Claimant testified at the hearing that he had chronic low back pain and left leg pain which was accompanied by periodic numbness and that activity increased his pain. Claimant testified he has given up yard work, sports, dancing and activities which require prolonged driving or sitting. Claimant now manages a 16-unit apartment-motel complex with his wife and children. He does minor repairs and lifts 50 gallon garbage cans which caimant says lays him up for a day or so afterwards. He is able to move refrigerators and stoves. Claimant said he was unwilling to work at a job paying less than $700-$800 per month and has refused a job as a nightwatchman because the pay was too low.

The Referee concluded claimant was not permanently and totally disabled. First he found the medical evidence did not establish claimant was permanently and totally disabled and he could not determine that claimant was motivated to return to work. However, considering all the evidence, he concluded claimant was entitled to an award of compensation equal to 192° for 60% unscheduled disability for his back injury.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, disagrees with the Referee. Claimant is not motivated to return to work or to rehabilitate himself. He has refused to take any job offered him. The medical evidence establishes that claimant is barred from heavy manual labor. Claimant has suffered only a lumbosacral strain and has undergone no surgeries. Therefore, the Board, after reviewing all of the evidence and comparing that evidence with other cases, concludes claimant is entitled to an award of compensation equal to 96° for 30% unscheduled disability representing his loss of wage earning capacity as a result of his industrial injury.

ORDER

The order of the Referee, dated May 21, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 96° for 30% unscheduled disability for his back injury. This award is in lieu of any prior awards. The remainder of the Referee's order is affirmed.

SAIF CLAIM NO. C 242099 December 14, 1979

FREDA DREXELIUS, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 14, 1979 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury to her low back which occurred on March 23, 1970. The claim was first closed by a Determination Order, dated May 29, 1973. Claimant's aggravation rights have now expired. Attached to this request were several documents in support of her request for reopening. Claimant indicates in her request that her low back disability has continually progressed and gradually worsened. Claimant has not returned to work since the original injury. It is claimant's contention that the medical evidence would indicate that claimant was clearly unable to engage in any substantial full time gainful employment. She contended that she was entitled to an increased award of permanent disability based upon her age, education, training and experience and was entitled to an award of permanent total disability.

On November 19, 1979 the Board advised the Fund of claimant's request and asked that it advise the Board of its position with regard thereto.

Claimant had been examined by the Orthopaedic Consultants who reported on November 6, 1978 that claimant's condition was stationary. They felt that based on their examination, the claimant's condition had improved since that in 1975. They found that only her subjective complaints had worsened. They noted that claimant had previously been awarded 50% unscheduled disability for low back injury which in their opinion was adequate.

In March 1979, Dr. Ronald Fraback reported that he examined the claimant and found that she had a chronic lumbar strain, secondary to her accident in 1970 and possibly aggravated by her congenital spondylolisis L5-S1. He did not think claimant's condition had worsened since 1973 and could not find any objective signs for this by comparing his examination to that of earlier examinations. He noted that claimant stated that she was definitely symptomatically worse. He felt she was stationary at that time.

On November 30, 1979 the Fund responded that they opposed reopening of claimant's claim under own motion jurisdiction. It was their position that claimant had failed to prove by a preponderance of the objective evidence that her condition had worsened.

The Board, after thoroughly considering the evidence before it, finds it is not sufficient to warrant a reopening of claimant's claim at this time. The request by claimant for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-7715 December 14, 1979

SARA J. GARNER, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the denial of her claim.

FACTS

Claimant, a 22-year-old dryer offbearer, alleges she sustained a compensable injury to her neck while employed on the dryer chain on June 22, 1978. Dr. Sharell Tracey, D.C., diagnosed a primary cervical subluxation.

Her claim was denied on August 24, 1978 on the basis that the injury did not arise out of or occur in the course of her employment. Claimant has been paid time loss as well as certain medical benefits.

Dr. Richard Matteri, an orthopedic surgeon, in March 1979, reported that he had treated claimant several times for chronic cervical strain syndrome. He had reported in December 1978 that he was treating the claimant for an injury that occurred while she was working.

Dr. Ronald Lechnyr, a psychiatric social worker, also reported in March 1979 that he was treating claimant for an on-the-job injury.

Claimant testified that in the early hours of June 21, 1978 a smoke alarm went off unexpectedly while claimant was in bed. She said she jumped out of bed and incurred a pain as a result of her actions. Claimant gave various inconsistent testimony to several facts relevant to the aftermath of

this incident. She, at first, denied reporting any injury to her shoulder as a result of this incident, however, later admitted to her supervisor, Ms. Samuels, that she had incurred an injury to her left shoulder. Claimant was to report to work at 4 p.m. on June 21; however, she called her supervisor to be excused on that date but her supervisor refused to excuse her. Claimant was assigned to light duty work when she did go to work on the 21st. Claimant worked the 21st and also the 22nd.

Claimant alleges that on June 22 that she was employed on the dry chain when she ducked to avoid being hit by a piece of veneer but was grazed on the forehead by the veneer. She alleges that this movement caused her to injure her neck. She alleges she went to the first aid center for treatment, however, no one was there. No report was made of claimant's going to the first aid station or receiving any treatment there. Claimant reportedly had two co-workers who knew of the injury and of claimant's problems. She did not report her injury to her supervisor, Ms. Samuels. Neither one of her co-workers were called as witnesses at the hearing.

Ms. Samuels testified that she had seen the claimant several times on June 22 but never received any indication by claimant she had been injured while at work. Claimant had told Ms. Samuels that she injured her left shoulder as a result of the smoke alarm incident.

Claimant left her job at the end of the June 22 shift and returned to work about four hours on July 11, 1978. She advises that at that point she advised a co-worker by the name of Montgomery that she had been injured. However, this was one of the witnesses who was not called by claimant.

The Referee, after reviewing all of the evidence, found that there were inconsistencies in the claimant's answers to various questions. It was his opinion that claimant probably did not suffer an on-the-job injury on Thursday, June 22, 1978. Therefore, he found the denial was correct and he affirmed the carrier's denial of August 24, 1978.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, after reviewing all of the evidence agrees with the Referee. The Board concurs with the Referee that claimant's testimony is highly suspect and not credible. There has been no report that claimant had received any first aid while she was at work nor has any doctor's report mentioned the fact that claimant had grazed her forehead as a result of the incident on June 22, 1978. The Board feels the medical evidence, as well as claimant's uncredible testimony and failure to call two witnesses who allegedly supported her version of the alleged injury does not lead the Board to conclude that claimant has met her burden of proving by a preponderance of the evidence that she did, in fact, suffer or sustain an industrial injury on June 22, 1978. Therefore, the Board affirms the Referee.

ORDER

The Referee's order, dated March 16, 1979, is affirmed.

SAIF CLAIM NO. C425162 December 14, 1979

HERMAN J. HOWLAND, CLAIMANT
Spears, Lubersky, Campbell & Bledsoe,
Claimant's Attys,
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 27, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury claimant sustained to his back on February 24, 1973. On November 15, 1979 claimant's attorney forwarded several medical documents in support of this request. Claimant's claim had been first closed by a Determination Order dated August 23, 1973. Claimant's aggravation rights have now expired on this claim.

By a letter dated December 22, 1976 the State Accident Insurance Fund denied claimant's aggravation claim. After a hearing and review by the Workers' Compensation Board and Court of Appeals, the claim was remanded to the State Accident Insurance Fund for acceptance and payment of compensation as provided by law until the claim was again closed pursuant to ORS 656.268. The mandate from the Court of Appeals was dated February 23, 1979. Based on that order the State Accident Insurance Fund again processed the claim and again closed the claim on March 29, 1979 and claimant was awarded additional temporary total disability compensation from June 1, 1976 through January 15, 1979, less time worked and compensation equal to 16° for 5% unscheduled disability resulting from his low back injury. Claimant has now appealed this Determination Order and requested a hearing setting forth the issues of premature closure of the claim, premature determination that claimant was medically stationary, entitlement to further medical care and treatment, raising the issue of extent of permanent partial disability and permanent total disability.

On November 19, 1979 the Board informed the Fund of claimant's request and asked it to advise the Board of its position in regard thereto. On November 30, 1979 the Fund advised the Board that while it was correct that claimant's aggravation rights had expired in this claim, the claimant still has appeal rights which he has now exercised and is still within one year of the last Determination Order which was entered on March 29, 1979. It was their position that since the claimant still has appeal rights, the Workers' Compensation Board's own motion jurisdiction was not applicable to this claim.

The Board, after thoroughly considering the evidence before it, concurs with the opinion expressed by the State Accident Insurance Fund. The request by the claimant for own motion relief, in the Board's opinion, should be, and is, denied.

IT IS SO ORDERED.

WCB CASE NO. 78-8618 December 14, 1979

ERNEST R. LA FRANCE, CLAIMANT
Rick W. Roll, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

ISSUE ON APPEAL

The employer appeals the Referee's order which granted claimant an award of compensation equal to 128° for 40% unscheduled disability for his low back and left hip injury, an increase of 112° or 35% unscheduled disability and compensation equal to 30° for 20% scheduled disability for loss of use of his left leg. The employer contends these awards are excessive.

FACTS

Claimant suffered an injury to his back on August 5, 1976. Claimant was 49 years old and employed as a grapple operator. This injury was diagnosed as a lumbar strain and lumbar disc syndrome, most likely with an L4-5 disc, L5 nerve root compression.

Dr. Edwin Kayser released claimant for regular work on December 6, 1976; however, in July 1977 he hospitalized claimant. Dr. Kayser reported claimant had returned to work and had been doing well until while cutting his lawn something gave out in his back. The doctor's examination found severe muscle tightness and muscle spasm of his lumbar spine. The admitting diagnosis was a lumbar disc syndrome. Dr. C. Tanabe also examined claimant and in September 1977 diagnosed a herniated disc at L4-5.

A myelogram was done on October 17, 1977 which was normal.

Dr. E. Berkeley hospitalized claimant for another myelogram on October 25, 1977. Claimant's second myelogram was performed on November 28, 1977 and was found to be equivocal by Dr. Berkeley. On November 29, 1977 Dr. Berkeley operated and found a small prolapsed intervertebral disc on the L5,S1 on the left, adhesions along the left S1 root, and the left L5 root was also found to be tethered.

Dr. Berkeley released claimant for modified work on April 5, 1978 with restrictions on lifting and bending starting on April 10, 1978. On July 6, 1978 he released claimant to work and suggested claimant avoid bending and lifting heavy objects and found claimant was medically stationary as of July 6, 1978.

A Determination Order, dated November 1, 1978, awarded claimant compensation for temporary total disability and compensation equal to 16° for 5% unscheduled disability for his low back injury.

Claimant is now 52 years old and has an eighth grade education. He testified he has constant dull pain in the hip and left leg. Twisting or lifting weights of more than 30-40 pounds bother his back. His left leg sometimes goes numb when he walks and this causes him to stumble. He feels his back doesn't bother him if he watches what he does; i.e., avoids prolonged sitting and riding in cars. He feels the surgery helped him, but after trying his old job as a loader operator, he found the steady jarring caused too much pain. However, he currently is employed on a full time basis as a carpenter. This job pays less than his old job and certain activity associated with this job such as ladder climbing or riding on a riding lawnmower still bother claimant.

Claimant's other witness corroborated his testimony.

The Referee concluded after reviewing all the evidence that claimant was entitled to both an unscheduled disability and scheduled disability award. He concluded that claimant was entitled to an award equal to 128° for 40% unscheduled disability, based on claimant's loss of wage earning capacity. He concluded that based on claimant's and other witnesses' testimony, claimant was entitled to an award equal to 30° for 20% loss of function in the left leg.

BOARD ON DE NOVO REVIEW

The Board, after reviewing all the evidence concludes that the Referee's awards were high. Claimant has now returned to full time employment without losing any time from work due to any back or leg pain. He currently feels the surgery helped his back to the extent he doesn't use a brace and uses his pain medication once a month. Claimant is able to perform his current job with some discomfort while doing certain activities. He does move slower and more cautiously now. Claimant based on the medical evidence is barred from ever returning to any form of employment requiring bending or lifting of heavy objects. Claimant testified that sometimes his left leg becomes numb and this causes him to stumble when he walks. Claimant says he can sit for approximately one hour. Therefore, the Board concludes, after reviewing all the evidence, that claimant is entitled to an award of compensation equal to 96° for 30% unscheduled disability based on claimant's loss of wage earning capacity and an award of compensation equal to 15° for 10% scheduled disability based on claimant's loss of function of the left leg.

ORDER

The Referee's order, dated April 16, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 96° for 30% unscheduled disability for his back injury and an award of compensation equal to 15° for 10% unscheduled disability for the loss of function in his left leg. This is in lieu of any prior awards.

The Referee's order, in all other respects, is affirmed.

WCB CASE NO. 79-1176 December 14, 1979

LESLIE G. MYRICK, CLAIMANT
John Ross, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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. 78-5684 December 14, 1979

LINDA L. PATTERSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON APPEAL

Claimant appeals the Referee's order which granted her an award of compensation equal to 208° for 65% unscheduled disability for upper back injury, affirmed the State Accident Insurance Fund's (Fund) refusal to reopen her claim and found no basis to assess any penalties or attorney's fees. The claimant contends she is permanently and totally disabled, entitled to have her claim reopened with penalties and attorney's fees for the Fund's refusal to do so and that the denial of the Fund is incorrect.

FACTS

Claimant, 36 years old, was employed as a chain builder when she injured her neck on September 29, 1975 lifting her arm to reach a hoist. She felt a pull in her neck and right shoulder. This was diagnosed as a myocervical strain. She returned to work on October 6, 1975. The injury was classified as non-disabling. The employer is insured by the Fund.

In November 1975 Dr. Robert Cook reported claimant was experiencing symptoms referrable to her neck and right upper extremity and more recently symptoms referrable to her back and left lower extremity. Claimant was given physical therapy and improved. She was off work from November 21, 1975 to December 8, 1975.

A Determination Order, dated January 30, 1976 awarded claimant compensation for temporary total disability from October 3, 1975 to December 7, 1975 less time worked.

In October 1976 claimant was hospitalized by Dr. Michael Graham with low back pain with left leg radiation to the heel. A myelogram revealed a probable herniated disc at L5-6 anteriorly and from the left side. Claimant, while hospitalized, also developed a bladder disorder. Claimant is a diabetic. On October 30, 1976 Dr. Graham performed a L5-S1 laminectomy with excision of extruded disc fragment and extensive decompression of L5-S1 on the left. The disc material was old, hard and scarred.

The Orthopaedic Consultants examined claimant in March 1977 and they reported that claimant complained of constant back pain and numbness and aching sensation in her left lower extremity. She reported to them she could perform her household duties and housework, but in a guarded fashion. She had no neck or arm problems. Their diagnosis was: (1) herniated disc L5,L6, status post-laminectomy, (2) multiple level neuropathy involving S1 and lower, (3) cervical sprain by history resolved and (4) insulin dependent diabetes mellitus. They did not find claimant medically stationary. They opined claimant could return to a sedentary form of employment. They suggested a referral to the Division of Vocational Rehabilitation for job placement or retraining.

On March 21, 1977 Dr. Graham concurred with the referral to the Division of Vocational Rehabilitation. He found claimant to be well motivated for return to work. He felt claimant was capable of work where she could intermittently sit, with some standing, some walking, with no heavy lifting or heavy work of any kind in a stooped or bent position.

Claimant was referred to a service coordinator for vocational assistance in April 1977.

Claimant reported to Dr. Graham in May 1977 she had continuing back pain, a catching feeling in the back, some radiating leg pain and numbness, but was still better than before surgery. She continued to have problems with her diminished sensation in the clitoris. Dr. Graham prescribed a transcutaneous stimulator unit for claimant which didn't help. In July 1977 he reported claimant had increased difficulties and ordered a myelogram. Claimant was hospitalized in July 1977 for the myelogram. This procedure revealed a status post-operative lumbar laminectomy with residual S1 radiculopathy on the left. Dr. Graham felt claimant had a residual diabetic polyneuropathy.

While hospitalized, Dr. Toomas Eisler, a neurology resident, examined claimant. He found no evidence of any significant peripheral neuropathy. He suggested claimant be referred to the Pain Clinic. Dr. Graham concurred with this suggestion.

In August 1977 the Orthopaedic Consultants again saw claimant. They found in addition to the herniated disc L5-L6 left and status post-operative laminectomy, degenerative arthritis and disc disease L3,4,5 and 6, sensory loss left lower extremity, perineum and left trunk, functional overlay with anxiety tension and diabetes mellitus. They could not explain the extensive sensory loss claimant reported. They found no atrophy or muscle weakness. It was their opinion claimant was medically stationary from an orthopedic point of view. They felt claimant's loss of function due to her injury was mildly moderate. They recommended referral to the Pain Clinic.

Claimant also was contacted by a vocational coordinator in August 1977 and advised him she did not feel physically ready to participate in a vocational assistance program.

On October 5, 1977 Dr. William Smith, a neurologist, examined claimant for her back pain, left foot and leg and lack of sexual sensation. He felt claimant had a post-operative laminectomy syndrome with continued back and leg pain.

Claimant enrolled in the Pain Evaluation Clinic from October 1977 to February 1978. She made very slow, but definite, progress.

Dr. M. Howard Weinstein, a psychiatrist, examined claimant in March 1978. He diagnosed an anxiety reaction secondary to physical problems. He felt claimant should continue with the Pain Clinic program.

In April 1978 claimant was again referred for vocational rehabilitation.

On May 16, 1978 Alison Herdener of the Pain Clinic reported claimant was improving slowly but was resistent to their efforts.

Dr. Graham, in June 1978, reported that claimant was stationary. He estimated claimant's permanent impairment as moderately severe. He felt claimant could be employed in

employment not requiring full time standing, sitting, repetitive bending, twisting or lifting and should be restricted primarily to sedentary type work. He felt an ideal job would be one where she could sit part of the time, but be able to get up and move about and not have to do any bending, twisting or prolonged standing. In July 1978 Dr. Graham advised claimant she was not permanently and totally disabled and encouraged claimant to proceed with vocational rehabilitation's goal of bench work in a florist shop.

A Determination Order, dated July 12, 1978, awarded claimant additional compensation for temporary total disability from October 12, 1976 through June 9, 1978 and compensation equal to 64° for 20% unscheduled disability for her upper back injury.

On August 2, 1978 claimant was found to be ineligible for vocational rehabilitation. Claimant felt she was unable to commit herself to any type of schedule because of too much back pain.

In September 1978 Dr. Michael Mason, a neurosurgeon, reported claimant's electrical studies indicated a probable polyneuropathy secondary to her diabetes involving both lower and upper extremities. He suggested claimant undergo another myelogram and additional nerve conduction studies.

On September 21, 1978 Dr. Graham wrote the Fund advising it that claimant was not stationary and should have her claim reopened effective September 8, 1978. On September 8, 1978 Dr. Graham had reported that claimant was experiencing continuing severe difficulties with back ache and leg pain. He felt a second opinion was needed regarding performing a dorsal decompression and possibly also a two-level arthrodesis from L4 through the sacrum to relieve her pain.

Claimant's attorney wrote to the Fund on September 29, 1978 enclosing a copy of Dr. Graham's September 21 report and demanded reopening of the claim immediately and payment of temporary total disability.

On October 2, 1978 claimant had a lumbar and cervical myelogram. Except for evidence of the previous surgery it was normal.

On October 4, 1978 an cystometrogram and cystoscopy were done. These revealed a normally functioning bladder.

Dr. Mason reported on October 30, 1978 that he didn't feel further surgery would benefit claimant. He felt it was likely her peripheral neuropathy was more advanced than seemed evident by clinical examination. The nerve conduction studies indicated a polyneuropathy involving both lower extremities and right upper extremity.

On December 1, 1978 Dr. Harwood advised the Fund that in his opinion it was not responsible for the polyneuropathy condition since it was diabetic in nature.

On December 18, 1978 Dr. Graham opined claimant was permanently and totally disabled for return to gainful employment secondary to the combination of her prior back difficulties and what appeared to be a more generalized diabetic polyneuropathy. Dr. Mason concurred with this opinion, but was unable to estimate to what degree they contributed to her disability.

On January 30, 1979 Dr. Mason reported claimant had a diabetic neuropathy and therefore was more likely to develop nerve root compression symptoms and to recover from them much slower. He did not find claimant's diabetes to be related to her injury. He felt claimant had significant restrictions and would not be able to do physical activities that required bending or lifting, especially in a repetitive fashion. It was his opinion claimant's back and left leg pain and numbness were related to her industrial injury and that it was a material contributing factor to her present neurological condition.

The Fund denied claimant's request for reopening on February 8, 1978.

Claimant, now 40 years old, is a high school graduate and has completed a 6-month secretarial course. She did not like secretarial work. After a 10-year absence from the work force, claimant returned performing a series of manual labor jobs. Her job with this employer was repetitious and occasionally moderately heavy. She now complains of constant low back pain and pain in both legs. She also testifies that her left foot is numb and she drags it when she walks which causes her to stumble. She still has vaginal numbness as well. Her family does the majority of the work around the home according to claimant and her husband. Claimant and her other witnesses all describe claimant as being very energetic before the injury but after the injury claimant has not been very energetic.

Dr. Harwood testified at the hearing that even though he is not a Board certified specialist he disagreed with the opinion of claimant's physicians who were. It was his opinion that all of claimant's current symptoms were due to her polyneuropathy.

The Referee, after reviewing all the evidence, concluded claimant was not permanently and totally disabled. This was based on the limitations placed on claimant and her lack of effort to show that she is willing to seek regular and gainful employment. However, he did conclude that claimant was entitled to an award of compensation equal to 65% of the statutory maximum. The Referee noted the Fund paid for the medical expenses and paid temporary total disability for the time claimant was hospitalized but had not been presented with an aggravation claim and therefore need not pay any compensation for temporary total disability. He concluded the Fund's refusal to reopen and the lateness of their denial did not support an award of penalties or attorney fees.

BOARD ON DE NOVO REVIEW

The Board, after reviewing all the evidence, affirms the Referee's conclusions. There were no briefs in this case to assist the Board. Since the Fund's untimely denial was not set forth as an issue on appeal, the Board will not discuss that issue.

ORDER

The Referee's order, dated May 8, 1979, is affirmed.

WCB CASE NO. 78-6880 December 14, 1979

LIONEL P.J. Roy, Claimant
Samuel A. Hall, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund (Fund) seeks review by the Board of the order of the Referee which granted claimant 96° for 30% unscheduled disability.

Claimant was employed by Cuddeback Lumber Co. pulling on the greenchain and on June 3, 1977 claimant's right shoulder commenced being painful. The diagnosis on June 7 was strain of the right shoulder.

By August 22 claimant had full range of motion but had palpable crepitus on abduction, flexion and external rotation. Claimant had an arthrogram on September 13. On October 24 Dr. Robertson released claimant for work.

Dr. Baker reported on December 19, 1977 that claimant was back to work at light duty for the employer working as a security guard. Dr. Baker's diagnosis was coracoacromial ligament syndrome superimposed on degenerative tendinitis of the rotator cuff.

A Determination Order, dated December 29, 1977, granted claimant time loss only.

Claimant underwent another arthrogram on January 30, 1978 which was normal. On February 17, 1978 Dr. Baker performed surgery for resection of the right coracoacromial ligament.

The employer wrote to the Fund on March 29, 1978 reporting that Dr. Baker had released claimant for regular work on March 27 but claimant had not shown up.

Dr. Baker reported on April 3, 1978 that claimant was released for full work on March 27 although claimant was very loath to attempt to return to work.

On April 10, 1978 Dr. Baker reported claimant told him he was a great deal better since the surgery. Claimant had no muscle atrophy, no restriction of motion, no crepitation and had good strength on abduction.

A Second Determination Order, dated April 24, 1978, again granted claimant time loss only.

On June 12, 1978 Dr. Baker recommended claim closure as claimant was medically stationary, was not working and claimant should be granted an appropriate disability.

From June 1978 through December 1978 claimant sought no medical treatment. Claimant went to work for Conifer Lumber Company on June 16, 1978 and was fired on September 24, 1978. Claimant pulled on the dry chain, a job, he testified, he was capable of performing today. Claimant's boss at Conifer testified at the hearing that claimant was fired because he was late to work 7-9 times and usually late by 3-4 hours.

On January 22, 1979 Dr. Smith evaluated claimant who had complaints of right neck, shoulder and arm pain. The EMG and nerve conduction studies showed a mild active denervation in the abductor digit equini on the right. Claimant underwent cervical and lumbar myelograms which were normal.

On January 24, 1979 Dr. Smith diagnosed neck-shoulder-arm syndrome with involvement of the brachial plexus. Objective evidence showed neurovascular compression in the area of the thoracic outlet or cervical nerve root compression problem.

Claimant was examined by the Orthopaedic Consultants who reported on March 21, 1979 that claimant said his pain was constant and the same for the last six months. He had constant numbness and tingling down the right arm into the 2nd-4th fingers. Upon physical examination claimant had grip strength of 50 on the right and 135 on the left. Sensory examination revealed hypesthesia of the entire right arm and right side of the neck. There was mild functional interference. Diagnosis was coracoacromial ligament resection right shoulder and some degree of adhesive capsulitis and functional overlay. Claimant was angry, frustrated and depressed because he could not find light work and was having financial difficulties and marital discord. Claimant was precluded from his regular occupation but could perform medium to light work. They recommended vocational rehabilitation. Total loss of function of the neck was none and of the right shoulder was mildly moderate.

Claimant is 42 years of age with a high school education and two years of college in blueprint drafting and mechanical engineering. His past work experience has been as a powder monkey, cook, professional football player, soldering computers boilertender and owner/operator of a gas station.

Claimant testified at the hearing that he could work on the dry chain and could do security guard work. He has searched for many jobs without success. He testified that his loss of the right arm is total. He indicated he had no feeling in the right hand, no grip, cold weather affects him, he cannot sleep on the shoulder, cannot run as the swinging of his arms hurt him.

The Referee found that the evidence indicates shoulder disability and he concluded that claimant would be adequately compensated for his loss of wage earning capacity by an award of 30% unscheduled disability.

The Board, on de novo review, concurs with the award granted to claimant of 30% unscheduled disability. The Board also finds that the medical evidence of record indicates claimant has loss of function of his right arm. The Board concludes that loss of function is equal to 10%.

ORDER

The order of the Referee, dated May 21, 1979, is modified.

Claimant is hereby granted 19.2° for 10% loss of the right arm. The remainder of the Referee's order is affirmed in its entirety.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-8053 December 17, 1979

ETTIS BROCKETT, CLAIMANT
Cash R. Perrine, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Cheney & Kelley, Employer's Attys.
Request for Review by Claimant

On July 23, 1979 claimant requested his claim for a 1954 industrial injury be reopened under the Board's Own Motion jurisdiction. Claimant had been employed by Leonard Lundgren Lumber Company at the time of his 1954 injury. The Fund provided workers' compensation coverage for this employer. Attached to his request was a letter from Dr. J. P. Carroll which stated claimant had been forced to quit work due to back pain. Dr. Carroll opined that claimant's current condition was a continuation of claimant's original injuries and previous back surgery.

On August 1, 1979 the Board requested the Fund to advise it of their position. The Fund, on August 14, 1978, replied that the medical information was insufficient and was referring claimant to the Orthopaedic Consultants to be examined.

On August 2, 1979, Industrial Indemnity advised the Board it had denied claimant's claim for an injury or occupational disease alleged to have occurred on January 16, 1979. It felt that the available evidence indicated that claimant's current condition was related to his 1954 injury while he was employed by Lundgren Lumber and not while employed by Brooks Resources, for whom it provided workers' compensation coverage.

On September 17, 1979 claimant requested that both matters be consolidated and requested a hearing on the denial of Industrial Indemnity.

On October 18, 1979, the Fund informed the Board it had been advised claimant had filed a claim for a new injury against EBI (sic) which had been denied and that a hearing was pending. Claimant's attorney advised the Fund he was requesting these matters to be consolidated and remanded for fact finding hearing. The Fund was not opposed to a consolidation to resolve whether claimant's present condition was due to an aggravation of his 1954 injury or a new injury.

The Board finds conflicting medical evidence in this matter and agrees with the parties that these matters ought to be consolidated and remanded to the Hearings Division for a hearing. The sole issue to be decided at the hearing is whether claimant has suffered a new injury or an aggravation of an original injury. Therefore, claimant's own motion request is remanded to the Hearings Division of the Board to be consolidated with WCB Case No. 79-8053. The Referee shall take evidence on both claims and determine whether or not claimant's present condition is directly related to his 1954 compensable injury and represents a worsening thereof since that last arrangement and award of compensation; or is the result of the injury or work exposure on January 16, 1979. Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board.

If the Referee finds that claimant's present condition is the result of the 1954 injury and represents a worsening thereof he shall submit his recommendation to the Board that claimant's request for own motion relief be granted and enter his order approving the denial of the 1979 claim.

If the Referee finds claimant's present condition is the result of his industrial injury or exposure of January 16, 1979 then he shall recommend to the Board that the request for own motion relief be denied and enter an Opinion and Order disapproving the denial.

WCB CASE NO. 78-827 December 17, 1979

STANELY DILLEY, CLAIMANT
Coons & Anderson, Claimant's Attys.
Lively & Wiswall, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips and McCallister.

ISSUES

The employer seeks review by the Board of the order of the Referee which granted claimant an award of permanent total disability effective May 25, 1975 and found the Fund to be responsible for all psychiatric and psychological treatment previously rendered and all such treatments required in the future.

FACTS

Claimant, presently 59 years of age, was employed as a panel patcher for Woolley Enterprises and on April 1, 1974 he stepped on a knot on the floor and twisted his right ankle and knee.

Claimant came under the care of Dr. Rapp who diagnosed sprain right knee and right sacroiliac.

Claimant had a prior back injury and underwent a laminectomy in 1958 and continued thereafter to have intermittent back problems which Dr. Rapp treated into March of 1974, the month preceeding the injuries herein.

Claimant returned to his regular job for this employer on April 15 and worked steadily until October 18, 1974 when the mill closed. Dr. Rapp continued treating claimant weekly. By June 1974 Dr. Rapp found claimant almost symptom-free. Without his knee brace claimant's knee would swell.

In September 1974 claimant was examined by Dr. Young who diagnosed strain of the right leg resulting in ankle sprain and possible internal derangement of the right knee. Symptoms strongly suggested to Dr. Young claimant might have a torn meniscus. He recommended an arthrogram. Dr. Young further felt claimant had a minimal aggravation of his pre-existing back condition by his abnormal gait and strain from the injury but it was not functionally disabling. In October 1974 an arthrogram was normal.

In April 1975 Dr. Rapp reported claimant had applied for social security disability.

On May 27, 1975, after hospitalization, Dr. Young performed a right medial meniscectomy.

By August, 1975 Dr. Rapp reported claimant had a severe limp and walked with a cane.

On November 13, 1975 claimant was evaluated at the Disability Prevention Division by Dr. Halferty. Claimant's complaints were aching inside the knee which buckles on him at times, aching of the low back with pain and soreness in both hands. Functional inference upon examination was thought to be mildly moderate. Dr. Vizzard's psychological evaluation revealed claimant had a high school education, average IQ, overfocus on organic illnesses and a series of hypochondriacal fixations. He felt claimant could not return to his regular occupation with poor potential for retraining. He reported that claimant feels he will not be able to return to his former occupation "because he has been laid off". Dr. Vizzard concluded that adding claimant's physical condition to his age and his psychological factors that it is unlikely he would ever again be a productive worker.

On December 9, 1975 Dr. Young found claimant medically stationary. He felt the disability from the industrial injury involved was mildly moderate and he was disabled from his previous occupation.

Vocational assistance was withdrawn because the service coordinator felt claimant was not motivated and because the claimant was "on Social Security Disability".

A Determination Order of January 13, 1976 granted claimant 30° for 20% loss of the right leg.

In April 1976 claimant was examined by Dr. Woolpert. He found the claimant had by history sustained a work injury to the right knee and back. He felt the back "most likely" should be considered an aggravation of previous back difficulty rather than a completely new episode. He felt the right knee injury was directly related to the back, that the knee was imcompletely recovered. He prescribed physical therapy and bracing.

On April 28, 1976 Dr. Rapp reported that in his opinion claimant was permanently and totally disabled.

On May 3, 1976 Dr. Young reported that claimant's right leg disability was mildly moderate and claimant was disabled from jobs requiring prolonged standing, extensive walking, stair climbing or heavy lifting. He reported the claimant's low back impairment "attributable to the industrial injury per se" was minimal. On May 24, 1976 Dr. Young advised he felt no specific treatment was indicated for either the knee or the back. With regard to the back he reported " . . . I feel Mr. Dilley's back problem is now of many years duration and I do not feel that a reasonably short course of traction would provide any long lasting beneficial effects".

On June 8, 1976 a stipulation reopened claimant's claim. In September and December 1976 the claimant was examined by Dr. Norris-Pearce, a neurologist. Dr. Norris-Pearce concluded that the claimant was suffering from a peripheral neuropathy unrelated to the injury, but he was also suffering from a post-traumatic depressive neurosis related to the industrial injury. He recommended psychiatric treatment. In December 1976 Dr. Woolpert reported that in his opinion claimant "most likely" would be a complete total disability in respect to return to work.

Dr. Norris-Pearce saw claimant again and reported on June 20, 1977 that he "continued to be symptomatic from intermittent back pain as well as right knee weakness".

Claimant came under the care of a psychiatrist, Dr. Brown, who found he was suffering from severe depression and was marginally maintaining himself. In October 1977 Dr. Brown found claimant's condition stationary and reported that he had shown considerable improvement from the person he first saw.

On January 26, 1978 a Second Determination Order granted claimant an additional award of 30° for 20% loss of the right leg for a total loss of the right leg of 40%.

On February 21, 1978 a vocational counselor interviewed the claimant. He reported:

> "During this interview I saw this older man as having a great amount of trouble walking, sitting or standing for any length of time. He talked a great deal about his physical problems and his inability to work at any job on a regular basis.
>
> "We briefly discussed some light work activity such as security guard jobs and he felt this type of work would be too physically demanding."

He went on to report, based on the medical information he had (from Dr. Woolpert and Dr. Brown) that claimant would not benefit from Vocational Rehabilitation Division services.

On April 5, 1978 Mr. Stipek, Ph.D. and employment specialist, after interviewing and examining records, reported that in his opinion claimant was unemployable based upon his complaints and the time needed for physical and psychological therapy and the "impression of the way the man presents himself". Aptitude wise, there were jobs claimant could perform.

On May 5, 1978 claimant was examined by the Orthopaedic Consultants. Their diagnosis was right leg neuropathy, unrelated to the injury, large functional overlay and degenerative osteoarthritis of the right knee. They felt claimant was precluded from his regular occupation with or without limitations but did find him employable. It was their opinion claimant was entitled to 50% loss of the right leg.

During April 1978 the claimant was examined by Dr. Holland, a psychiatrist. He also reviewed the voluminous medical records. Dr. Holland found claimant to be a passive-dependent personality who overfocused on his disability. Dr. Holland felt claimant's situation was complex, and yet, a normal course for a passive-dependent personality after having an industrial injury. Dr. Holland felt that it was an interplay between claimant's injury and his premorbid personality which combined to result in his total incapacitation at that time. The doctor felt claimant was using his personality to deal with the injury in a self-defeating way.

In summary, Dr. Holland opined that claimant was having much of his difficulty not because of the injury, but because of how he was before the injury. The doctor felt claimant worked until the plant shut down, and if the plant had not shut down, claimant would still be working.

Claimant's request for hearing from the Second Determination Order was postponded as claimant's attorney was hurt in an automobile accident so an Interim Order on Stipulation was entered on May 15, 1978 which granted claimant compensation for temporary total disability from May 1, 1978 to June 30, 1978.

On August 7, 1978 Dr. Fagan reported the Orthopaedic Consultants did not examine nor rate the back impairment; they felt all his back problems were related to his 1958 back injury.

In December 1978 vocational rehabilitation assistance was again offered to claimant.

Claimant has not worked nor sought any kind of employment since the mill shut down in October 1974 nor has he sought any rehabilitation or retraining.

Claimant testified at the hearing that he could stand for 20 minutes, sit for 30 minutes and lies down throughout the day.

The Referee found that claimant, in his opinion, was not retrainable and his earning capacity had been totally destroyed, rendering him unable to function. The Referee concluded claimant was entitled to an award of permanent total disablity.

BOARD ON DE NOVO REVIEW

The majority of the Board, on de novo review, finds the claimant has not proved permanent and total disability as a consequence of the injuries suffered April 1, 1974. We find the claimant's injuries have resulted in permanent partial disability to the right leg, a scheduled member, and that the prior Determination Order's granting 40% disability to the right leg is correct and must be affirmed.

The claimant has failed to prove by a preponderance of the evidence that he has sustained unscheduled low back and/or unscheduled psychological permanent disability as a consequence of the April 1, 1974 accident.

The claimant was able to perform his regular job until the mill "closed". The majority of the Board concludes it was this event which has caused the claimant to remove himself from the labor market. The clamant's right leg injuries and the temporary worsening of his pre-existing low back and psychological conditions are not a material contributing factor to his claimed permanent total disability.

The Referee's order is reversed and the Determination Order is reinstated.

ORDER

The order of the Referee, dated May 22, 1979 is reversed.

The Determination Order, dated January 26, 1978, is affirmed.

Board Member Phillips dissents as follows:

I respectfully dissent from the majority opinion of the Board and would affirm the Referee's order.

The evidence indicates that although claimant worked until the mill shutdown he was having continuing problems and was being treated by Dr. Rapp weekly. The evidence also indicates claimant's back condition, which pre-existed this injury, was aggravated by this industrial injury. Dr. Young found such aggravation was related to claimant's abnormal gait from the right leg injury causing a strain to his back. The injury aggravated his degenerative joint disease of the lower lumbar levels.

Claimant's right knee condition together with his low back pain precluded him from returning to his regular occupation. The restrictions placed on claimant's activities by Dr. Young were, no prolonged standing, no extensive walking, stair climbing or heavy lifting. These restrictions also preclude him from a large segment of the industrial labor market.

Both Drs. Rapp and Woolpert found claimant was unable to be gainfully employed and felt he was permanently and totally disabled.

I find claimant's right leg and low back impairment considered together with his age of 59, his past working experience limited to heavy manual labor occupations, and the unfeasibility of retraining makes his loss of wage earning capacity total and permanent. I would, therefore, affirm the conclusion of the Referee.

SAIF CLAIM NO. B18969 December 17, 1979

KENNETH L. DILLON, CLAIMANT
Starr & Vinson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to his back on September 17, 1963 while loading a truck. The claim was closed by a Determination Order, dated June 7, 1965, which awarded claimant compensation for temporary total disability and compensation for permanent partial disability equal to 50-3/4° equivalent to a 35% loss of function of an arm for unscheduled disability. Claimant's aggravation rights have expired.

On November 7, 1978 Dr. James R. Degge reported that claimant was seen after recent surgery on his low back performed for his spinal stenosis of the L4-5 level. This surgery was on August 8, 1978. Dr. Degge reported that claimant had undergone a decompressive laminectomy L4-5 on August 8, 1978 which removed a proliferative bone of the previous fusion causing spinal stenosis at that level. He indicated that claimant had been off work since January of 1978. Claimant complained of pain in the low back which claimant noticed on prolonged standing or prolonged sitting and walking. It was Dr. Degge's opinion that claimant recovered from his decompressive laminectomy for the proliferative bone related to the previous lumbar fusion in the midline of the L4-5 level. He reported that claimant's condition appeared stationary. He would consider on the basis of the examination of November 1978 claimant's permanent residuals were in the mildly moderate.

On December 5, 1979 the Fund advised the Board that they had received the additional reports requested on claimant's request for reopening his claim under own motion jurisdiction. It submitted that the reports they had conclusively supported a relationship between claimant's treatment in August 1978 and his original injury. Based upon this it was their position that it would not oppose an Own Motion Order reopening the claim.

The Board, after thoroughly reviewing all the evidence before it, finds that claimant's claim should be opened under its own motion jurisdiction for treatment claimant received and for any time loss or any other benefits he may be entitled to.

ORDER

Claimant's claim for an injury sustained on September 17, 1963 is remanded to the State Accident Insurance Fund for acceptance and for payment of compensation commencing the date claimant entered the hospital for his August 8, 1978 surgery and until the claim is closed pursuant to ORS 656.278.

SAIF CLAIM NO. A483046 December 17, 1979

DAVID HIEBERT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 31, 1979 Dr. J. R. Becker requested the State Accident Insurance Fund reopen claimant's claim for his right knee. Claimant had originally injured his left knee on June 20 and June 30, 1955. The claim was first closed in December 1976 by a Determination Order awarding an award equal to 50% loss of the left leg. Claimant's aggravation rights have expired. Subsequently, claimant has had right knee problems and has had his claim reopened and closed.

On April 3, 1974 the Board, under its own motion jurisdiction, ordered the claim reopened for further medical care and treatment and payment of associated temporary total disability. Dr. Becker had reported on February 19, 1974 that the claim should be reopened again for treatment offering prosthetic joints for both knees. On May 8, 1974 Dr. Becker performed a total left knee arthroplasty and on June 20, 1974 the same operation was performed on claimant's right knee. The Board entered its Own Motion Determination on June 26, 1975 awarding claimant additional compensation for temporary total disability.

In May of 1977 the Fund voluntarily reopened claimant's claim based on claimant's continuing right leg pain. In September 1978 Dr. Becker reported that he felt claimant still had some pain in the knee but claimant was medically stationary. The Board, by its Own Motion Order, dated November 17, 1978, granted claimant an award of additional time loss and compensation equal to 50% loss of use of his right leg. Claimant now has a total award equal to 50% loss use of the left leg and 80% loss use of his right leg.

Dr. J.R. Becker, on October 31, 1979, suggested that a surgical replacement and tibial plateau portion of the artificial joint that was installed should be done. Comparison x-rays taken in the recent past show that claimant had some cold flow of the tibial plateau portion of the Marmar knee joint. There was evidence of two fractures in the plastic wire identification loop.

On November 30, 1979 the Fund advised the Board that it was not opposed to an Own Motion Order reopening the claim for recommended treatment.

The Board, after thoroughly considering all of the evidence before it, finds that the evidence is sufficient to warrant a reopening of the claim at this time. The claim should be reopened for payment of all compensation benefits as provided by law for the surgery as recommended by Dr. Becker in his October 31, 1979 order and until such time as it is again closed pursuant to ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. C8972 December 17, 1979

WALTER W. VAN HOOSER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to his back on March 13, 1966 when while working as a patrolman he was involved in an automobile accident. Claimant missed about three weeks of work and his claim was closed by an award of permanent partial disablity. Claimant's aggravation rights have expired.

Claimant continued to have problems with his back and in 1975 required additional care.

On May 22, 1979 Dr. Thomas Bachhuber examined claimant. Claimant reported he had been having increasing difficulty. Claimant stated that he had been having episodes of low back pain since his motor vehicle accident in 1966. Dr. Bachhumber's initial impression was that claimant had a chronic lumbar strain. However, when the claimant failed to improve with conservative treatment and developed right leg pain, he hospitalized the claimant on June 20, 1979 for a myelogram. This revealed defects at the L4-5 and L5-S1 levels. On June 25, 1979 Dr. Bachhumber performed laminectomies at both levels. He felt it was possible there was underlying bulging or pathology of the disc at that level dating from the motor vehicle accident in 1966.

On October 16, 1979 the Orthopaedic Consultants reported after examining claimant that in their opinion claimant's current problems were related to his industrial injury of 1966.

On December 4, 1979 the State Accident Insurance Fund informed the Board of claimant's request that his claim be reopened under the Board's own motion jurisdiction and that they would not oppose reopening of this claim.

The Board, after thoroughly examining all the evidence before it, concludes that the claim should be reopened effective June 9, 1979 the date the claimant last worked and that he is entitled to payments of compensation and other benefits as required by law until the claim is closed pursuant to ORS 656.278.

ORDER

Claimant's claim is hereby reopened for payment of benefits and compensation as provided by law from June 9, 1979 and until it is closed pursuant to ORS 656.278.

WCB CASE NO. 79-207 December 17, 1979

WILLIAM YOUNG, CLAIMANT
Jerome Bischoff, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Amended Order On Review

An Order on Review was issued in the above entitled matter on December 14, 1979. On page four of this order it erroneously indicates that it was entered on November 14. Therefore, the Board amends that portion of the order so that it correctly reads "this 14th day of December, 1979"; claimant's appeal rights shall run from that date. The remainder of the order is affirmed.

IT IS SO ORDERED.

SAIF CLAIM NO. PC 369226 December 19, 1979

MARLOW JOHN FAHEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right shoulder on May 15, 1972. His claim was originally closed on August 21, 1972 with an award of compensation for temporary total disability only. Claimant's aggravation rights have now expired. Subsequent to the first closure, the claim was reopened and again closed on March 12, 1973 with an award of compensation for temporary total disability only.

The Board reopened claimant's claim by an order dated February 26, 1979. This was based on Dr. Weinman's surgery performed on November 29, 1978. This consisted of an acromioplasty and repair of the rotator cuff of the right shoulder.

Dr. Weinman released claimant for regular work on April 4, 1979. On November 8, 1978, Dr. Weinman reported claimant was medically stationary and had less pain in the right shoulder than he had prior to his surgery and had more strength than he had before surgery.

On November 21, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on December 10, 1979, recommended claimant be granted additional compensation for temporary total disability from November 28, 1978 through April 3, 1979 and an award of compensation equal to 32° for 10% unscheduled disability for his right shoulder injury.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 28, 1978 through April 3, 1979, less time worked, and compensation equal to 32° for 10% unscheduled disability for his right shoulder injury sustained on May 15, 1972. These awards are in addition to any previous awards claimant may have been granted.

WCB CASE NO. 78-7415 December 19, 1979

ARNOLD HANSEN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUES ON REVIEW

The State Accident Insurance Fund (Fund) appeals that portion of the Referee's order which assessed a period of time loss to be paid by the Fund from June 19, 1978 through September 7, 1978 plus a penalty of 25% thereof due to the unreasonable delay in making the denial and the unreasonable refusal to pay time loss and awarded claimant's attorney a sum of $1,000 as and for a reasonable attorney's fee in addition to and not out of the time loss and penalties payable to claimant. The Fund contends the awarding of time loss, penalties and attorney's fees was incorrect and the Referee's affirmation of its denial was correct.

Claimant cross-appeals, contending that the award of penalties, attorney's fees and time loss was correct, however, the Referee's affirmation of the denial was incorrect.

FACTS

Claimant, then a 53-year-old faller, sustained an injury to his low back on May 4, 1976 when, while falling a tree, he stepped back to get out of way of the tree and twisted his low back. Dr. Streitz, in August 1976, reported the claimant returned to work on May 14, 1976 and continued to work until July 21, 1976 at which time he quit work. Dr. Streitz diagnosed a discogenic low back pain. He felt the claimant was not medically stationary and may possibly need a myelogram to rule out a herniated disc problem. A myelogram was performed on August 24, 1976 and was normal.

In September 1976 Dr. Streitz reported that the claimant continued to have back discomfort with prolonged sitting or standing. He reported that claimant also experienced back stiffness in the morning. He indicated that claimant was using a powersaw around the house and experienced a worsened condition after using this as well as after attempting to play golf and changing his car battery. Dr. Streitz opined that claimant was medically stationary but not capable of heavy work activities and would be unable to return to his work in the woods.

In October 1976 Dr. Streitz reported that his diagnosis was degenerative joint disease of the lumbosacral spine. He felt that claimant was practically stationary and capable of moderate work activities. He indicated this should preclude lifting greater than 30 to 40 pounds and prolonged standing. He reported that claimant, at that time, was still unable to return to logging activities in the woods. He reported that he may be able to return to logging activities in the spring.

On November 5, 1976 Dr. Streitz reported that claimant was medically stationary. He opined that it was possible that claimant could return to his regular occupation in the spring. He indicated claimant was going to take his winter vacation and then planned to return to his regular logging activities in the spring. He felt it was reasonable for claimant not to go to the Disability Evaluation Clinic based on his determination and past history of returning to work after such injuries.

The Determination Order, dated December 14, 1976 awarded claimant compensation for temporary total disability from May 6, 1976 to October 28, 1976, less time worked.

In May 1977 Dr. Streitz reported that claimant returned from his winter vacation in Arizona and continued to have low back problems. He reported that claimant had had marked spasms for six weeks after arriving in Arizona and had been under doctor's care while there. He did not feel that claimant's chances for returning to heavy logging activities were good.

On July 20, 1977 Dr. Streitz reported that his diagnosis was still degenerative joint disease of the lumbosacral spine with possible discogenic low back pain without evidence of a ruptured disc. He indicated that this was an ongoing

degenerative process and felt that claimant would be unable to return to heavy work activities such as his previous work as a bucker and faller. He did feel that claimant was capable of modified moderate work activities as well as light work activities. He felt the claimant should limit prolonged sitting of greater than one hour and standing for prolonged periods in one position on hard surfaces for more than 15 to 30 minutes. He felt claimant should avoid lifting greater than 30 pounds and avoid repetitive lifting. Walking, in his opinion, was unlimited. He opined that the claimant's injury of May 4, 1976 aggravated and added to the pre-existing ongoing degenerative process. He again opined that claimant was stable and at a stationary level. He stated claimant's continuing medical treatment will consist of symptomatic treatment for episodes; the main task at hand was affecting a change in occupation. He felt the changes claimant experienced were permanent and that some of the increase in symptoms may ensue over the years. He did feel that claimant had some fair residual capacity provided the limitations mentioned are followed in a rehabilitation program or a new occupation could be effected.

Claimant was examined by Dr. James Mason, of the William Callahan Center in September 1977. Dr. Mason's diagnosis was a chronic lumbosacral strain with mild residuals according to his examination but with marked subjective complaints. He found no clinical evidence of nerve compression. He found a moderate emotional overlay with considerable exaggeration regarding claimant's low back status. It was his opinion that claimant intended to retire and subconsciously was after a settlement. Further, he reported that x-ray evidence revealed a moderate severe disc degeneration L5-S1 and probably a facet joint arthritis at L4-5-S1 bilaterally. Dr. Mason did not feel that claimant was interested in physical rehabilitation or vocational rehabilitation. He suspected that claimant probably had already retired. He felt that the physical disability was mild in his low back organically and mildly moderate in each knee. Claimant had had surgery on his left knee in 1953 and in 1968. Dr. Mason opined that claimant would be able to tolerate light work and would need a job change on a physical basis from actual logging work. He thought the claimant was still capable of doing supervisory work which he had a done for years as a partner/owner of a logging outfit.

Dr. Oda Kent, a psychologist, examined and tested the claimant and found the claimant somewhat overfocused on his physical symptoms and was experiencing a great deal of anxiety as a result of his current situation. It was the doctor's opinion that claimant's anxiety and uncertainty as to his vocational future were related and that if the proper amount of attention was given to his vocational future his anxiety would be alleviated to a greater extent. Dr. Kent, as team chairman of the vocational team, reported it was the consensus of the vocational team that claimant did possess a vocational handicap due to physical limitations and that claimant should not return to the occupation in which he was previously experienced and/or training due to the possibility of exacerbation of his symptoms. They referred the claimant to the Oregon Vocational Rehabilitation Division for possible plan development. Dr. Streitz concurred with the recommendations of Dr. Kent.

A Determination Order, dated December 21, 1977, indicated claimant was referred for vocational rehabilitation. However, the program was withdrawn. It was ordered that claimant was entitled to additional compensation for temporary total disability from October 27, 1977 through December 12, 1977. On a redetermination the Department found that claimant's disability was the same as that on the order dated December 14, 1976.

A Stipulation, dated March 27, 1978, stipulated the claimant was to be awarded compensation for temporary total disability from July 12, 1977 through September 13, 1977 inclusive and a 15% unscheduled disability for his low back.

In June 1978 Dr. Streitz reported that claimant had been doing well until on either the 16th or 17th of June 1978 he had the onset and sudden increase of low back discomfort. He reported that claimant did not recall any incident or trauma but felt that his increased symptoms may have started after he stepped off a ladder. Dr. Streitz' diagnosis was still a discogenic low back pain. He recommended continuing conservative care. Dr. Streitz recommended that claimant's case be reopened as he felt the symptoms related to his pre-existing condition.

Claimant was hospitalized in July 1978 for a myelogram which revealed the extrusion of nucleus pulposus. This was at the L4-5 level on the left side. Based on this Dr. Martin Andersen recommended that claimant undergo a laminectomy with resection of a herniated nucleus pulposus, L4-5 on the left.

On August 2, 1978 Dr. Streitz performed a laminotomy with disc excision L4-5 interspace and a laminotomy with exploration but no disc excision at L5-S1 interspace.

On August 21, 1978 Dr. Streitz reported the claimant's back symptoms had remained stable for some time but that claimant had an exacerbation in the summer with a weakness of extensors of the left foot. He reported that the surgery revealed a very large protruding disc at L4-5 level and a narrow sclerotic L5-S1 interspace without herniated disc. It was his opinion that the etiology of the claimant's current back pain was a herniated nucleus pulposus. He felt that this current problem was due to a continuation of degenerative process of his discogenic disease. He reported that claimant's current preoperative symptoms relate directly to his pre-existing condition.

On August 30, 1978 Dr. George Harwood, medical consultant for the Fund, after reviewing the medical reports in this case, opined that claimant's discogenic disease pre-existed his injury of May 4, 1976 and, therefore, was not the responsibility of the Fund. It was his professional opinion that claimant's current problem was a natural progression of his discogenic disease (pre-existing underlying condition). Based on this report, the Fund, on September 7, 1978, denied the reopening of claimant's claim on an aggravation claim.

Dr. Streitz, in his deposition, was of the opinion that the job injury of May 4, 1976 aggravated the pre-existing degenerative condition of the lumbar spine. He also opined that the incident of stepping off the ladder, a non-industrial injury, on or about June 16, 1978, aggravated the pre-existing degenerative disc disease. Dr. Streitz said that in July 1977 he reported that the claimant had pain in the right greater than in the left and had some radiation to the right leg and toes. He then reported that after the June 1978 incident where the claimant stepped off the ladder the radiation was to the left. He concurred that this would

indicate that the annulus fibrosis had ruptured and something was coming out on the left side to produce the discomfort. He indicated that the surgical report of August 2, 1978 indicated there would be a good size tear.

Dr. Andersen had his deposition taken and opined that any trauma including the non-industrial injury of stepping off the ladder would have aggravated the discogenic condition. He concurred that when the claimant stepped off a ladder wrongly, causing a severe exacerbation of pain immediately, and causing him to go back to see Dr. Streitz, that incident was an aggravating incident in regard to his underlying degenerative disc disease.

Claimant and his wife both testified that he has had continuing persistent back and leg pain since his injury. He testified that any activity may cause the pain to increase. There are periods when the claimant has no acute attacks.

The Referee found in analyzing all the evidence in the case that the Fund's denial is correct. He found that claimant's current problems were the result of the natural progression of a discogenic back disease. He concluded that the ladder incident occurred and caused the most recent exacerbation. He found the present problems were not caused by the job injury. He found that this non-job intervening ladder incident eliminates every responsibility of the Fund for claimant's current condition. However, he found that Dr. Streitz' letter of June 19, 1978 constituted both a claim for reopening and a statement verifying inability of claimant to work. Therefore, payment of time loss should have commenced within 14 days of the date of the letter. He found that no time loss was paid from that date until the date of denial which was beyond the 60-day period. He found there was unreasonable delay in making the denial and there was also unreasonable refusal to make any payments. He ordered the Fund to pay time loss from June 19, 1978 through September 7, 1978 and assessed a penalty of 25% thereof due to an unreasonable delay in making the denial and the unreasonable refusal to pay time loss. He also assessed an attorney fee in addition to and not out of the time loss and penalty of $1,000 for the Fund's unreasonable resistance to the payment of compensation. He affirmed the denial of the Fund dated September 7, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the conclusions reached by the Referee. The medical evidence in this case indicates prior to that Stipulation, claimant's main complaints were to the right side of his body. After the surgery in August 1978 the complaints were on the left side. This evidence along with the opinions of Dr. Streitz and Dr. Andersen indicate that the claimant has not suffered a worsening of his condition relating to the industrial injury since the last award of compensation.

The Board finds, as did the Referee, that the Fund was unreasonable in its refusal to pay compensation from the date of Dr. Streitz' letter of June 19, 1978 and were negligent in not denying the claim within 60 days. The Board finds that the Referee's assessment of penalties and attorney's fees was correct and in this case were not excessive.

ORDER

The Referee's order, dated July 10, 1979, is hereby affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

SAIF CLAIM NO. C 397390 December 19, 1979

ARCHIE D. LAPPING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 3, 1979 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury to his left ankle sustained on September 26, 1972. Claimant's aggravation rights have expired.

On August 3, 1979 Dr. Howard Cherry reported claimant quit working as of November 12, 1979 due to his left ankle condition. Dr. Cherry reported that the scar on the ankle was tender and that tapping on the edge of the scar caused tingling to go down to the area of the toes where claimant had tingling. Dr. Cherry requested that the claim be reopened and that claimant would be under treatment.

On November 2, 1979 the Orthopaedic Consultants reported that they had examined claimant and that claimant complained of a constant dull aching in the ankle. They diagnosed a post-traumatic arthritis of the left ankle and cutaneous neuroma in the surgical scar of the left ankle. They opined that claimant's condition was not stationary and that his claim should be reopened for further treatment. It was their opinion that claimant's current ankle problems were certainly directly related to his work-related injury of September 2, 1972.

The Fund, in a letter dated December 10, 1979, indicated it had no opposition to an Own Motion Order reopening claimant's claim for further treatment. The Board, after fully considering all of the evidence before it, concludes that claimant's current problems were directly related to his 1972 injury and his claim should be reopened at this time for further treatment and compensation.

ORDER

Claimant's claim for an industrial injury sustained on September 26, 1972 is hereby remanded to the State Accident Insurance Fund to be accepted for payment of compensation and other benefits commencing the date claimant last worked, November 12, 1979, and until the claim is closed pursuant to ORS 656.278.

SAIF CLAIM NO. A 872730 December 19, 1979

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Own Motion Order

On October 31, 1979 an Own Motion Determination was entered by the Board awarding claimant compensation for temporary total disaability from August 15, 1977 through the date of the order. The Board, at that point, deferred any award of compensation for permanent partial disability until determination had been made by the Court of Appeals on the issue of which carrier was responsible for claimant's present condition.

On November 7, 1979 claimant's attorney asked that the above order be set aside. They contended that claimant's condition had worsened and that Dr. Nag, the treating physician in this matter, had never found the claimant medically stationary. The motion went on to point out that claimant was enrolled in an authorized vocational rehabilitation program and that if the Employee Benefits Insurance Company was found responsible that the temporary total disability be reimburseable. The motion continued to point out that if claimant was still in the authorized program of vocational rehabilitation his time loss would continue to be paid and would not cease the date of the Board's order. The motion went on to state that the claimant agreed with the Board that it was premature to make any award of compensation for permanent disability. However, the claimant did not agree that it was timely now to terminate his temporary total disability.

On November 13, 1979 the Board issued an amended order which awarded claimant compensation for temporary total disability from August 15, 1977 through the date of the October 31 order, less time worked, and awarded claimant compensation equal to 30% loss of the arm for unscheduled disability. On the same date as this order, claimant's attorney forwarded the Board a copy of Dr. Nag's physician's report, dated November 1979. In that report Dr. Nag certified that claimant was not released to return to work and that the estimated length of time loss was undetermined at that point. Dr. Nag stated that claimant was not medically stationary. A myelogram had been done in August 1979 which was not normal.

On November 27, 1979 the Board entered an order setting aside the Amended Own Motion Determination. It ordered the claim be reopened since the claimant was not stationary. It ordered that the claimant's claim for his injuries sustained on July 25, 1961 should be considered in an open status and that the Fund should continue to pay claimant compensation for temporary total disability until the claim is again closed pursuant to the provisions of ORS 656.278.

On November 29, 1979 the Fund advised the Board that they had never been advised of the motion to set aside the amended order. They further advised the evidence submitted was in conflict with the closing evidence submitted by the Fund and it was absent of any explanation for the conflict and any definite findings or recommendations for treatment. They requested that they be advised of the Board's position in this matter and given an opportunity to respond.

On December 3, 1979 claimant's attorney advised the Board that he had received a copy of the Fund's November 29, 1979 letter. Claimant's attorney stated that at all times claimant's request for reconsideration had been sent to the Fund's counsel. He contended that the Fund had known all along claimant's request for reconsideration of the various Board's orders. It was the claimant's position that the Fund had simply chosen to make no response until the Board had issued its order setting aside the Amended Own Motion Determination. Claimant's attorney had not been furnished with copies of the Orthopaedic Consultants' report which the Fund had acted on in closing this matter. Therefore, claimant's attorney did not know whether Dr. Nag's most recent report conflicted with the Fund's documentation. It was suggested that since Dr. Nag was claimant's treating physician, that the Fund could write him to get full reports if they need it. Claimant's attorney pointed out that if the Fund objected to the last order entered in this claim, it has a right to request a hearing before the Board's Hearings Division under ORS 656.278. Claimant requests the Board to deny the Fund's motion for reconsideration.

At the present time the Board does not have sufficient evidence before it to enable it to make a determination whether claimant's present condition was medically stationary or not. Therefore, the Board would refer this matter to the Hearings Division with instructions to set it for a hearing to determine whether or not claimant's present condition is medically stationary. Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with a recommendation that claimant is or is not medically stationary and, if so, what date claimant was medically stationary and a recommendation as to claimant's extent of disability.

WCB CASE NO. 78-7426 December 20, 1980

ROBERT R. PARRICH, CLAIMANT
Annala, Lockwood, Carey & Hull,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUES ON REVIEW

Claimant seeks Board review of the Referee's order which awarded claimant 20% loss of his left arm above the elbow which was equal to 38.4°. This award was in lieu of other awards for permanent partial disability awarded by the Determination Order of January 27, 1978 and September 12, 1978. The Referee did not award any further compensation for temporary total disability. Claimant contends that he is entitled to compensation for temporary total disability from November 4, 1977 through March 21, 1978 because the claim was prematurely closed and that he is entitled to an additional award of compensation for permanent partial disability for injury to his left arm.

FACTS

Claimant, a 24-year-old planer chain puller, sustained a compensable injury to his left wrist on March 16, 1977 while pulling lumber. Claimant had pain in his left arm and numbness in his left hand. This injury was diagnosed as a carpal tunnel syndrome of the left wrist. On April 29, 1977 a carpal tunnel release surgery was performed by Dr. W. Duff. In July 1977 Dr. Duff reported that claimant had a good return of motor strength in the median nerve distribution and had no objective numbness in the left arm. However, he reported that claimant continued to complain of numbness in the lateral two fingers and pain in the ulnar styloid process. The doctor felt this possibly represented an ulnar nerve impingement and referred claimant to Dr. Crumpacker for repeat nerve conduction studies.

In July 1977 Dr. Crumpacker reported that it was his impression from his examination that there were other factors causing problems in claimant's left wrist. He thought it was possible that claimant suffered from tendinitis, synovitis or some other inflammatory problem. He also felt it could be some problem other than an inflammatory process.

On August 26, 1977 Dr. Duff released the claimant for work to see if he could manage his job. Dr. Duff reported in early September 1977 that claimant had telephoned to inform him that he had returned to work, lasted about 45 minutes, and was simply not able to handle the green chain. He advised claimant not to return to work. On September 28, 1977 Dr. Duff reported that claimant complained about loss of strength in the left hand, aching in the entire left upper extremity, numbness around the wrist involving the whole hand and inability to do any heavy work at all. He found these symptoms rather at variance with the findings on his examination which indicated only a mild loss of grip strength, excellent mobility of the wrist joint, minimal scar tenderness and no demonstrable neurologic deficit. He strongly recommended an independent orthopedic evaluation to consider the possiblility of permanent impairment of the hand and a possible change of occupation.

On November 8, 1977 Dr. Theodore Pasquesi diagnosed a chronic distal ulnar pain, humeral bursitis left elbow, post-operative carpal tunnel syndrome, and functional overlay. He opined that claimant was stationary and would probably have to engage in work not requiring repetitive forceful motion such as he would have to perform when pulling lumber. It was his opinion that the combined impairment of the left upper extremity, on the basis of carpal tunnel syndrome, neurological defect and chronic moderate pain, was 19% of the upper extremity. Dr. Duff concurred with this report.

On January 27, 1978 a Determination Order awarded claimant compensation for temporary total disability and permanent disability equal to 15° for 10% loss of the left forearm.

In March 1978 Dr. C. Bruce Schwartz recommended the claim be reopened and that claimant have wrist surgery. He felt that claimant had some additional time loss as a result of his March 16, 1977 work incident. He felt claimant's complaints represented bizarre symptoms. On March 22, 1978 Dr. Schwartz performed surgery to release the carpal canal

on the left. He found that the nerve was quite bound to the transverse canal ligament. In August 1978 Dr. Schwartz again examined the claimant and reported that claimant was working 40 hours a week at his regular job. Claimant was not pulling on the chain or doing other more strenuous activities. Claimant complained that he occasionally gets numbness in his hand particularly at rest and occasionally at night. As long as he is active he has no problems. The claimant felt he only had about 60% of his full strength. When claimant worked he constantly wore a brace on his left wrist. The doctor found that the left upper arm measurement is 1/4 inch less than the right and the left lower arm is 3/8 inch less than the right. He opined that the claimant was doing quite well, the claim should again be closed and that claimant continued to have mild disability in the arm. He had released the claimant for light duties effective on June 15, 1978.

A Stipulation, dated June 1, 1978, reopened the claim effective March 21, 1978 for further care and payment of benefits.

A Second Determination Order, dated September 12, 1978, awarded claimant compensation for temporary total disability from June 1, 1978 through June 14, 1978 and permanent disability equal to 5% loss of his left arm in addition to the previous award granted him.

On January 26, 1979 Dr. Schwartz reported that in his opinion claimant's condition now was improved over what it had been when he saw him in February 1978. He felt he could assume claimant's condition was not stable when he saw him in February 1978 and historically claimant had not been any better in November of 1978 so he doubted that his condition could be considered stable at that point. He further stated that he was not sure what constituted premature closure of the claim but if one uses the definition of medically stationary he would have to conclude the claim was prematurely closed. He opined that the extent of permanent partial disability would be 20% of an amputation at the shoulder level. He reported that claimant's arm measurements indicate that he had been quite active and at least doing more work than his non-dominant contralateral arm.

Claimant testified at the hearing that he was not able to work from November 4, 1977 through March 20, 1978 but he did draw some unemployment benefits during that period. He felt since his second surgery that the pain in his arm has decreased and the pain is no longer constant. He feels also

that the strength has improved. He testified that cold bothered his arm and he has intermittent pain according to the amounts of exertion he engages in. His left hand and fingers also get cold and numb. He is currently employed at a job where he straightens boards which progress towards him on rollers. This requires him to lift, flip and turn boards weighing up to 200 pounds. Claimant also shovels sawdust. He testified that although he is left handed, he now primarily uses his right arm in his work and uses his left arm for leverage because it lacks strength. He feels he can't grip with the left hand and reports that the left arm tires easily. He continues to wear an elastic brace up to the elbow which restrains the bending of the wrist. He feels he has lost 50% use of the arm. At his present job he has not lost any time at work and has been working two hours overtime each day.

Claimant's foreman testified that there are 20-25 men employed at the same type of work as claimant and that claimant has the same ability to work as they have. He stated that claimant has only complained to him on one or two occasions about his arm. He feels the work claimant is doing could be classified as moderate.

The Referee, after reviewing all the evidence in the file, concluded that claimant's compensation for permanent disability should equal 38.4° for 20% loss of the left arm above the elbow. He did not find that claimant was entitled to any award for additional compensation for temporary total disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review of the entire record, concurs in the Referee's assessment that claimant is entitled to an award equal to 38.4° for 20% loss of the left arm above the elbow. However, the Board finds, contrary to the Referee's finding, that claimant is entitled to additional time loss. Based on Dr. Schwartz' report of January 26, 1979 and claimant's testimony, it would appear that claimant was unable to work due to the injury from November 4, 1977 through March 20, 1978.

ORDER

The Referee's order, dated March 13, 1979, is modified.

Claimant is hereby granted an award for additional temporary total disability from November 4, 1977 through March 20, 1978 in addition to any previous awards of temporary total disability.

Claimant's attorney is granted as and for a reasonable attorney's fee a sum of 25% of the increased compensation up to a maximum of $750. The remainder of the Referee's order is affirmed.

WCB CASE NO. 77-4353 December 20, 1979
WCB CASE NO. 77-7805

GERALD SCHARN, CLAIMANT
Doblie, Bischoff & Murray, Claimant'sAttys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Willamette Industries seeks Board review of that portion of the Referee's order which set aside its denial of claimant's claim for an alleged 1968 injury. The employer contends it did not receive actual notice of the compensable injury until September 12, 1977 and, therefore, claimant's filing was not timely.

FACTS

Claimant filed a written claim for compensation on September 12, 1977 for a January 8, 1968 industrial injury. Claimant testified that on that date, he experienced numbness and loss of control in his right hand and soreness in the right shoulder while pulling on the green chain. He reported this to his lead man and then the personnel manager. Claimant sought medical treatment and two days later returned to the personnel manager and told him he'd been hurt and asked for forms for obtaining compensation.

Claimant testified he did not specify workers' compensation. Claimant was covered with both workers' compensation and union off-the-job insurance. Claimant and the employer would have to elect which coverage was desired, depending on the nature of the injury.

Claimant did sign two claim forms for his off-the-job insurance policy. Claimant indicated on both forms his injury was not caused by work and that he had not filed for any industrial benefits. The personnel manager on both claim forms indicated claimant's disability was not caused by or aggravated by claimant's work.

Claimant testified he filed for compensation for his off-the-job policy in order to receive benefits in the shortest amount of time. This claimant said he did after some discussion with the personnel manager.

Dr. Mark Melgard originally diagnosed claimant's condition in 1968 as probable viral radiculopathy. However, claimant continued to complain and a myelogram was done which revealed a probable central disc at C5,6. A decompressive laminectomy was done in March 1968 with excision of the protruded disc at that level.

Claimant returned to work in approximately January 1969 on the green chain and until he sustained another injury in May 1976. Claimant filed a claim for the May 1976 injury which was accepted.

On June 30, 1977 the carrier for the employer denied responsibility for the back and cervical problems, but accepted the May 1976 injury.

On September 26, 1976 the carrier denied claimant's claim for the January 8, 1968 injury stating it was not timely filed.

The Referee found after reviewing all of the evidence that the employer had actual knowledge of claimant's injury on January 8, 1968. He found claimant's testimony of what occurred was supported by the medical evidence. The Referee noted that the personnel manager had been advised by claimant that he experienced right hand and shoulder difficulty pulling on the green chain and asked the personnel manager for assistance in filing for compensation. However, the Referee points out there was never a relationship of the work activity to the physical condition definitely established during the discussions between claimant and the personnel manager. However, the Referee concluded that the information available to the employer was sufficient to constitute knowledge of an injury in January 1968 and consequently the claim was timely filed.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reaches a different conclusion than the Referee. The Board finds that the employer had no notice or knowledge of a January 1968 work injury. Claimant did not, during his discussions with the personnel manager, ever relate his symptoms to his work activity. The Referee found there had not been a specific diagnosis concerning the cause of the complaints or the relationship of the condition to the job activity. The Board can find no actual evidence in the record that the employer had actual knowledge of a January 1968 industrial injury. The Board concludes absent actual knowledge by the employer of a January 1968 industrial injury the claim was not timely filed as required by ORS 656.265 and the claim is barred. Therefore, that portion appealed from the Referee's order is reversed.

ORDER

The Referee's order, dated May 8, 1978, is modified.

That portion of the Referee's order setting aside the denial in Case No. 77-7805 and remanding the claim to the carrier for payment of benefits until the claim is closed pursuant to ORS 656.268 and awarding claimant's attorney the sum of $900 is reversed and the carrier's denial is approved.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-2003 December 20, 1980

JACK TEFFT, CLAIMANT
Carey & Joseph, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks review of the Refereee's order which affirmed the State Accident Insurance Fund's (Fund) denial of his claim. Claimant contends that the Referee was in error in so affirming the Fund's denial.

FACTS

Claimant, at the time of his alleged injury, was 54 years old and was employed as a cat driver. He alleges that on November 28, 1978, while in the course and scope of his employment, he sustained an injury to his back when he fell from a cat tractor onto a pile of logs. Dr. Bradford Stephens reported on December 5, 1978 that he had treated the claimant on December 1 and that claimant related that he had fallen off his cat. He diagnosed severe low back strain. Dr. Stephens reported on December 8, 1978 that claimant's low back and right leg remained painful. He found some swelling and ecchymosis about the right lower leg. He advised the claimant continue to rest. Claimant was also complaining of numbness in both hands which had pre-existed his alleged injury of November 1978.

On January 16, 1979 Dr. H. H. Hendricks reported that the claimant had bilateral carpal tunnel syndrome. He felt that the claimant had a generalized peripheral neuropathy. He suggested further evaluation looking for possible systemic factors causing this condition.

Dr. Stephens in February 1979 reported that claimant's current back condition was related to an injury of November 28, 1978. He felt the claimant had a back strain. He noted that the claimant's numbness in his hand was not related to his back condition.

In February 1979 Dr. Roger Ross, an internist, reported that claimant had severe hypothyroidism. He saw no relationship between this condition and claimant's injury.

On February 20, 1979 the Fund denied claimant's claim. This is based on the fact that, according to their investigation, claimant's injury occurred while he was moving a refrigerator and, therefore, it did not qualify as an industrial injury.

On April 6, 1979 Dr. Bradford Stephens reported that claimant's condition was caused when he slipped from the cat. He indicated that claimant was at that time hospitalized for further evaluation of his back condition and referred the Fund to his office notes of March 28, 1979.

On April 8, 1979 Dr. K. German reported that he diagnosed a massive herniated disc, probably 4-5, complication of a hypothyroid condition and apparent ear infection. He was given a history by claimant of falling in November from a cat onto some logs. He reported the claimant remembered that his back and leg were quite painful after this fall and that he continued to try to work, however, the pain became such that he had to take the next day off and since that time having a lot of back and leg pain to the point where he can hardly walk.

Claimant testified at the hearing that on the day of the injury he had told two co-workers of this incident. One of the co-workers, a Mr. Mason, corroborates claimant's story, however, the other co-worker, a Mr. Palmer, refutes claimant's version of the story. Mr. Mason testified that he did not see the claimant slip and fall, but the claimant did tell him about it during the noon hour. He further testified that claimant showed some discomfort during the afternoon and he was not as fast as he was before. Mr. Palmer, at first testified it was possible claimant had made the statement during the lunch hour, but that he did not recall claimant saying any such thing. However, he subsequently testified that if claimant had told him that he had fallen off of the caterpillar that he would have remembered that. Mr. Palmer further testified that he did not hear claimant complain about anything during the entire day except for normal complaints about his bad arm.

These two gentlemen rode with the claimant from the logging camp to Mr. Lowe's residence.

Mr. Palmer helped the claimant load a refrigerator into claimant's pickup truck that evening (November 28). Mr. Palmer testified he did not recall claimant made any complaints about his low back or legs during the ride home or while helping load the refrigerator.

Claimant's employers, Mr. and Mrs. Lowe, were never informed of this injury by claimant. Mr. Lowe testified that he talked to the claimant the evening or afternoon of November 28, the date of the alleged injury.

Claimant testified that he took off the day after the alleged injury to return a refrigerator and camping trailer to his home. Claimant said he had intended to take the trailer home the night before, but a fuse had blown out and he had no lights. He said that since he was afraid the snow was going to get deeper, he towed the trailer the following day during daylight hours.

The medical evidence indicates that claimant has numerous other medical problems which he does not claim were connected to the alleged industrial injury such as his hypothyroidism, bilateral carpal tunnel syndrome, high blood pressure, arthritis, etc.

The Referee concluded that after hearing and observing the claimant, he would question the claimant's credibility. He did not believe the claimant had proven, by the preponderance of the evidence, that he had slipped and fallen from the caterpillar as he alleged. Therefore, after giving consideration to all the evidence, he affirmed the denial letter.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee. The Board agrees with the Referee that claimant's version of how the alleged incident occurred is not credible. Dr. Stephens did not notice any eccymosis until the week after his first examination. Mr. Palmer testified that he did not notice claimant having any difficulties loading the refrigerator or the trailer. Mr. Palmer also testified that he did not remember claimant's alleged conversation with him about the claimant's injury. Therefore, the Board would affirm the denial of the Fund based on claimant's failure to meet his burden of proof.

ORDER

The Referee's order, dated May 23, 1979, is affirmed.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

WCB CASE NO. 78-8674 December 20, 1979

WAYNE VAN DOMELEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUES ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the Determination Order, dated September 15, 1978, which awarded claimant compensation for temporary total disability from February 14, 1978 through August 22, 1978. Claimant contends that he is entitled to an award for permanent partial disability as well.

FACTS

Claimant, a 34-year-old truck driver, sustained an injury to his back on October 18, 1977 while lifting lumber. Dr. Greg Stilson, D.C., diagnosed a primary cervical subluxation, with attendant lumbosacral subluxation.

On August 22, 1978 Dr. Nathan Shlim reported claimant had been examined by him. Claimant reported that he had been lifting some heavy timber on or about October 18, 1977 when he developed a pain in his neck. Claimant had continued working for a few weeks and then with the discomfort he quit and went to see Dr. Stilson. Dr. Shlim could find absolutely no abnormality in the examination. He felt that claimant was not in need of any further treatment and he should be back at work.

On September 14, 1978 Dr. Stilson reported that claimant still complained of neck and back pain, pain between his shoulders, aching legs and inability to sleep well or to do overhead work or lifting. He felt the prognosis for future recovery and possible return to heavy work was guarded. He recommended that claimant undergo competent employment counseling to assess his suitability for work other than heavy labor. He released the claimant for light work on March 22, 1978.

A Determination Order, dated September 15, 1978, awarded claimant compensation for temporary total disability from February 14, 1978 though August 22, 1978 but made no award of permanent disability.

Dr. Theodore Pasquesi reported on November 6, 1978 that he had found no objective findings which he considered to be significant. He felt all of claimant's problems were purely subjective. He opined that based upon claimant's symptoms which entailed predominantly the dorsal lumbo area and the right scapular areas as well as the cervical area that this was probably on the basis of some instability. He felt claimant's stature is one which probably would not lend itself to heavy manual labor on a continuous basis. In his opinion, the claimant should probably obtain or seek work not requiring repetitive bending, stooping, twisting and not lifting more than 30 pounds. He felt on the basis of chronic moderate pain in the various areas described that claimant had an impairment equivalent to 10% of the whole man.

Claimant is now 36 years old and has a high school education. Claimant also has attended community college taking courses in English and interior decorating. Claimant has also attended real estate school. Claimant testified on the date of October 18, 1978 he was employed as a carpenter warehouseman and truck driver. He said he was loading 32-foot timbers and injured his back on that date. Claimant was terminated by his employer on November 3, 1977 and the employer still had no notice of an injury. Claimant testified that the first time he saw a doctor was on February 14, 1978. Claimant has not worked since he was fired by the employer on November 3, 1977. Claimant's prior work experience was mostly in construction work with some warehouseman work, some car salesman work and gas station attendant work.

A co-worker testified on the date of the injury, October 18, 1977, the claimant was not even in the Portland area where claimant alleged the injury occurred but was in LaPine. This co-worker backs his testimony up with motel receipts.

The Referee found that claimant's testimony was not credible. He felt that the employer offered evidence to discredit claimant's testimony and the Referee found this to be accurate. Therefore, he ordered the Determination Order of September 15, 1978 affirmed. He based this on the fact he did not feel claimant had suffered any permanent disability based on the credible evidence in the file.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's conclusions. The consensus of the medical evidence indicates that claimant has no objective findings; all finding are subjective. The Board finds, as the Referee does, there is some question of claimant's credibility. However, the Board after reviewing all of the evidence finds that claimant has not met his burden of proving by a preponderance of the evidence that he has sustained any permanent partial disability. Therefore, the Board concludes the Referee's order must be affirmed.

ORDER

The Referee's order, dated May 3, 1979, is affirmed.

WCB CASE NO. 78-3605 December 26, 1979

HETTIE EAGLE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUES ON REVIEW

Claimant seeks Board review of the Referee's order which granted her an additional award of compensation equal to 48° for 15% unscheduled disability. A Determination Order had awarded claimant compensation for temporary total disability and compensation equal to 64° for 20% unscheduled disability for her low back injury. The Referee further found that claimant's claim had not been prematurely closed. Claimant, on appeal, contends her claim should have been reopened and that she is entitled to additional temporary total disability and permanent partial disability.

The State Accident Insurance Fund (Fund) contends, on cross-appeal, that the Referee's award of permanent partial disability is excessive and should be reversed.

FACTS

Claimant, a 59-year-old housekeeper and cook, sustained an injury to her back on April 27, 1977 when she slipped and fell in a pool of water from a leaking refrigerator. The injury was diagnosed as a cervical strain and lumbo-dorsal strain.

Dr. Robert Koza released claimant for regular work with no heavy lifting and found claimant was medically stationary on June 21, 1977. He felt claimant would have no permanent impairment.

A Determination Order, dated September 13, 1977, awarded claimant compensation for temporary total disability from May 13, 1977 through June 20, 1977. Claimant's claim was voluntarily reopened on November 17, 1977.

Dr. John Hardiman reported that claimant continued to experience back and neck pain. In October 1977 his diagnosis was a chronic low back strain syndrome. By November 1977 Dr. Hardiman reported claimant was very depressed and referred her to a psychiatrist for her situational depression.

Dr. John Anderson, a psychiatrist, on November 14, 1977, felt claimant suffered depressive neurosis which was precipitated by her back injury. He noted she had been experiencing a grief reaction following her divorce and the death of her mother. Dr. Anderson recommended claimant receive psychiatric treatment. By December 1977, Dr. Anderson was hopeful that claimant would not experience any permanent impairment. He felt claimant should improve, but she should not return to her previous job.

On January 28, 1978 Dr. Hardiman opined, based on claimant's back injury, psychological component which slowed her recovery, age and motivation, he was doubtful claimant would ever return to work, regardless of what training she receives.

Claimant was examined on March 2, 1978 By Dr. Edward Colbach, a psychiatrist, who diagnosed neurotic depression related to the aging process, claimant's divorce, her moving from Arizona, and her mother's death. He felt claimant presented a complicated picture, that her initial injury was involved in it, but he was unable to say to what extent. He opined that her psychiatric condition was stationary. Dr. Hardiman concurred.

Dr. Anderson reported in April 1978 that he generally agreed with Dr. Colbach that claimant had improved significantly since the beginning of her psychiatric treatment and had successfully resolved some of the issues surrounding her divorce and her mother's death. Claimant, however, continued to complain of back pain which Dr. Anderson felt contained psychosomatic elements.

In April 1978 Dr. Louis Loeb, psychologist, reported that claimant was somewhat depressed but recovering. He felt in view of her age and educational background coupled with her back problem, she was a questionable candidate for return to work.

Claimant was referred to the William Callahan Center. Dr. Daniel Halferty, medical examiner, diagnosed degenerative joint disease of the lumbar spine, aggravated by claimant's injury. He felt it was difficult to visualize claimant's returning to her previous job.

A Determination Order, dated May 1, 1978, awarded claimant additional compensation for temporary total disability from October 28, 1977 through April 6, 1978 and compensation equal to 20% unscheduled disability for her low back injury.

Dr. Norman Hickman, in August 1978, diagnosed moderate reactive depression, moderate anxiety reaction and psychophysiological reactions. In his opinion claimant's psychopathology was related significantly and materially to claimant's injury and was secondary to it. Dr. Hickman opined that if claimant's vocational and financial problems were satisfactorily solved, she would not suffer significant permanent psychological disability. He recommended vocational assistance and further supportive counseling.

On September 8, 1978 Dr. Hardiman again examined claimant and found little change. He didn't feel claimant was a surgical candidate.

Dr. Howard Cherry, on October 24, 1978, requested claimant's claim be reopened. He felt, based on his examination, that claimant's condition was much worse now than when closed. He diagnosed: "(1) neck strain essentially recovered, (2) low back strain severe, (3) probable herniated disc syndrome L5-S1 on the left, (4) congenital abnormalities of lumbosacral joint, (5) calcified bursitis of the left greater trochanter and hip area".

In January 1978 Dr. Cherry reported claimant had tried to work in a florist shop and lasted four days. He noted claimant had enrolled on her own in a GED program. Claimant continued to complain of a sore back. Dr. Cherry opined claimant was unable to return to the type of work she had previously done and probably could not be rehabilitated to a suitable occupation.

Claimant, now 61 years old, has an 8th grade education and her work experience consists primarily of working as a cook, waitress and nurse's aide. She testified she is less active now than prior to her injury of April 1977. She also testified she could not sit, stand, or walk for prolonged periods of time. She also stated she has restrictions in bending, stooping, lifting and moving about.

The Referee found claimant did not have strong motivation to return to work. It was noted claimant intended to continue her schooling. He noted claimant sat for approximately three hours at the hearing before displaying any discomfort, yet testified she could sit only about 45 minutes without difficulty. Further, the Referee found claimant did not have any impairment of either leg or psychologic impairment. However, based on the medical reports, he concluded claimant was entitled to an increased award of compensation equal to 48° for 15% additional unscheduled disability for her back injury and that the claim had been correctly closed.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's conclusion that claimant's claim was correctly closed. Both Drs. Hardiman and Colbach had found claimant medically stationary prior to the May 1978 Determination Order.

However, the Board does not agree with the Referee's increasing claimant's award for unscheduled disability. The Board notes the limitations and restrictions place on claimant by her physicians, but finds that the award of compensation claimant received adequately compensates her for the loss of wage earning capacity she suffered from her April 1977 injury. There is no evidence which supports claimant's contention that she is entitled to an award of 75-100% unscheduled disability. Claimant is barred at most from returning to work at her former job. Therefore, based on the totality of all the evidence, the Board concludes claimant is not entitled to any increase in her award of compensation for her back injury and would reverse that portion of the Referee's order which granted her an increase and would restore the Determination Order of May 1, 1978.

ORDER

The Referee's order, dated May 4, 1979, is modified.

That portion of the Referee's order granting claimant compensation equal to 48° for 15% unscheduled disability in addition to her previous awards and an attorney fee is reversed. The Determination Order, dated May 1, 1978, is restored. The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-1697 December 26, 1979
WCB CASE NO. 78-9629

FRED McKINNON, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUES ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which found claimant to be permanently and totally disabled.

FACTS

Claimant was 37 years old and employed by a grocery store on March 1, 1975 when he suffered a myocardial infarction. Claimant returned to his work in the same capacity in June of 1975 but was rehospitalized in July 1975 and then returned to his work.

On November 22, 1976 claimant experienced pain in his chest while lifting 50-pound bags of dog food. He filed a claim for this incident and for the March 1, 1975 incident.

Dr. John Wilson reported on November 29, 1976 that claimant suffered from atherosclerotic vascular disease with risk factors which included cigarette smoking, arcus senilis at age 38 and type A personality, past history of myocardial infarct and now probably has functional Class II angina, gout and asthma. Dr. Wilson reported claimant was under a great deal of stress since both of clamant's parents had died and claimant had marital difficulties related to his fear of suffering another infarc while engaging in sexual intercourse.

Dr. Wilson performed arteriograms which revealed 40% stenosis left coronary artery and 40-60% stenosis of right coronary artery. His diagnosis was coronary artery disease and reduced left ventrical function.

In February 1977 Dr. Wilson opined claimant was totally disabled from his previous job.

On May 18, 1977 the Fund denied claimant's claim for the November 22, 1976 incident.

In August 1977 Dr. Wilson reported that claimant's acute coronary insufficiency was precipitated by his lifting of 50-pound bags of dog food.

By an Opinion and Order, dated September 27, 1977, the myocardial infarction of March 1, 1975 and the episode of angina of November 22, 1976 were remanded to the Fund for acceptance and payment of compensation.

In October 1977 Dr. Wilson opined that claimant was permanently and totally disabled but able to carry out sedentary activities. In January 1978 Dr. Wilson reported claimant continued to have chest pain related to claimant's coronary artery disease, but remained stable. He noted claimant's coronary artery disease is progressive and would likely worsen in the future. In his opinion, claimant was a candidate for rehabilitation if the activity did not require more than mild exertion.

Determination Orders dated February 22, 1978 were entered for both incidents. For the November 22, 1976 incident, claimant was awarded compensation for temporary total disability only. For the March 1, 1975 incident, claimant was awarded compensation for temporary total disability and compensation equal to 160° for 50% unscheduled disability for his heart injury. (This Determination Order was not in the file and administrative notice is taken of Workers' Compensation Department records.)

Dr. Michael Fleming, a clinical psychologist, in a report dated March 9, 1978, reported claimant had bright-normal intelligence. Claimant's work history was confined solely to the grocery business, in which claimant had been first employed at the age of 15. Claimant has a high school education. Dr. Fleming felt claimant might need a job with less stress than that of an assistant store manager. He found claimant was experiencing moderately severe anxiety reaction and a moderately high degree of depression and frustration. Claimant was unable to find work and Dr. Fleming felt this led to deterioration of claimant's self-concept. Dr. Fleming opined claimant's moderately severe psychopathology was at least moderately and materially related to claimant's heart condition and resulting employment situation. He recommended claimant receive immediate vocational assistance and psychological assistance.

Claimant was referred to the Vocational Rehabilitation Division on March 9, 1978. Claimant began an authorized rehabilitation program in sales on May 22, 1978 and completed it on October 22, 1978.

Dr. Fleming, in September 1978 reported claimant was responding to treatment and regaining confidence to return to full time employment.

A stipulation, dated October 23, 1978, abated a hearing on the March 1975 incident and dismissed claimant's request for hearing on the November 1976 incident. The parties preserved the right to litigate the issue of temporary total disability and permanent disability arising from both incidents. Claimant was to continue to receive temporary total disability from May 22, 1978 until he completed or was termined from his rehabilitation program.

A Determination Order, dated November 21, 1978, awarded claimant additional compensation for temporary total disability from May 22, 1978 through October 22, 1978 and awarded no additional permanent disability.

Claimant was hospitalized in November 1978 for an asthma attack caused by his heart medication.

In March 1979 Dr. Fleming reported claimant had completed his sales training and had been actively seeking employment without success. He advised claimant not to take a job where claimant would be paid strictly on commission, since this would create too much stress. Claimant was experiencing some discouragement. Dr. Fleming felt continued support was needed.

Dr. Wilson, in April 1979, reported that claimant should only work at sedentary activity. He specifically prohibited any strenuous exercise and in particular, lifting or pushing of any weight above 15 to 20 pounds.

Ms. Louise McGregor, a vocational rehabilitation counselor, testified at the hearing on claimant's behalf. She felt claimant's age and his heart attack would make employers fearful of hiring him. She feels that if claimant had been older, his condition would be accepted by more employers. She said claimant is well-motivated and his fully cooperated with her in attampts to try and obtain employment. However, she noted that claimant's only work experience has been in the grocery business. She felt claimant could be employed in the future and is physically able to work in the sales field.

Claimant, now 40 years old, has, on his own, completed 56 hours toward an associate degree at a community college. He now takes nitroglycerin one to two times per week for chest pain which radiates down his arm. Claimant feels he is getting more nervous and upset because he can't find employment, plus he is going to school and still has the fear of another myocardial infarction. He has gone to 64 "face to face" interviews and sent out 150 resumes. He states he doesn't intend to give up. He testified that his main problem in obtaining employment is his lack of experience in certain fields, coupled with his age and heart condition. Claimant doesn't feel he could return to the grocery business. At home, he does mow the yard, vacuum, and performs various other household chores.

The Referee, after reviewing all the evidence, concluded that claimant was permanently and totally disabled.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, disagrees with the Referee and would reverse his award of permanent total disability. Claimant is extremely well motivated and has cooperated fully with all the parties. The medical evidence indicates claimant is capable of sedentary work. Claimant is bright and fairly young. Claimant and Ms. McGregor both feel that claimant can perform in a sales type capacity. It appears that claimant's main problem in obtaining employment is his lack of experience in fields other than the grocery business. The Board, based on all of the evidence, finds that claimant is not permanently and totally disabled. However, it finds claimant's loss of wage earning capacity is greater than that for which he has been compensated. Therefore, the Board finds that claimant is entitled to an award of compensation equal to 256° for 80% unscheduled disability for the injury to his heart.

ORDER

The Referee's order, dated June 7, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 256° for 80% unscheduled disability for the injury to his heart. This is in lieu of all previous awards.

The remainder of the Referee's order is affirmed.

SAIF CLAIM NO. C 407537 December 27, 1979

RUSSELL M. ALLEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The State Accident Insurance Fund (Fund) received medical evidence that further surgery was necessary due to the claimant's November 19, 1972 injury. Claimant suffered deep second degree burns of the face and dorsum of both hands on November 19, 1972. The claim was initially closed by a Determination Order, dated September 28, 1973, and claimant's aggravation rights have expired. The Fund, therefore, referred the matter to the Board along with supporting medical documents for consideration under its own motion jurisdiction.

On November 19, 1979 Dr. John R. Jarrett reported that he had performed an amputation of the right ring and little fingers and left little finger at the PIP joints. He indicated it was due to claimant's 1972 injury.

The Fund, in its letter of December 11, 1979, indicated it had no objection to reopening claimant's claim.

The Board, after full consideration of the evidence before it, concludes that claimant's current problems are directly related to his 1972 industrial injury and his claim should be reopened. It finds that claimant is entitled to temporary total disability from the date he entered the hospital, November 19, 1979.

ORDER

Claimant's claim for an industrial injury sustained on November 19, 1972 is hereby remanded to the State Accident Insurance Fund to be accepted for the payment of compensation commencing on the date claimant was hospitalized by Dr. Jarrett, November 19, 1979 and other benefits, until his claim is closed pursuant to ORS 656.278.

CLAIM NO. 390940 December 27, 1979

ENRIQUE ALVAREZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 25, 1979 claimant requested the Board exercise its own motion authority to reopen his claim. Claimant had sustained a compensable injury on September 15, 1978 to his chest. Dr. Bibler reported claimant had a known hiatal hernia for the last three to four years and in September of 1978 he diagnosed a hiatal hernia with reflux esophagitis aggravated by the job incident or accident.

On April 18, 1979 the State Accident Insurance Fund (Fund) denied claimant's claim for his esophagitis on the basis that it was not directly related to his occupational exposure. They advised claimant they were unable to accept responsibility for surgical intervention or continued treatment of his esophagitis.

On August 28, 1979 claimant was advised by an attorney that his request for hearing on this denial had been filed late and that the attorney was unable to assist claimant in his case.

The Board, after thoroughly reviewing all the evidence in the file, finds that it is not sufficient at this time to warrant a reopening under its own motion jurisdiction. The request by claimant for own motion relief should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. D 15827 December 27, 1979

DAVID L. BRONSON, CLAIMANT
Goode, Goode, Decker, Beckham
& Nelson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 21, 1979 claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction to open his claim for an industrial injury he had sustained on March 16, 1974. Claimant's aggravation rights have expired. Attached to this request to reopen were several medical exhibits.

Claimant sustained a compensable injury on March 16, 1974 when he was bitten on the leg and knee by a coyote. Dr. Lew Myers reported in October 1979 that claimant continued to have symptoms from his coyote bite. He reported this was not disabling though it would certainly remain uncomfortable for claimant. He reported that claimant had not lost any time because of his symptoms. It was his opinion and recommendation that surgical exploration and neurolysis of the peroneal nerve at the site of the injury was indicated and requested the Fund's consideration for this procedure.

On December 3, 1979 the Board requested the Fund to advise of its position with regard to claimant's request for reopening under own motion relief. On December 7, 1979 the Fund responded that it was not opposed to an Own Motion Order reopening the claim for treatment as recommended by Dr. Myers.

The Board, after considering all the medical evidence before it, concludes that claimant's claim should be reopened if and when he is hospitalized for the treatment and surgery as recommended by Dr. Myers. The claim should remain open from that point until it is closed pursuant to ORS 656.278.

Claimant's attorney is entitled to a reasonable attorney's fee for his services equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $750.

IT IS SO ORDERED.

WCB CASE NO. 79-3690 December 27, 1979

ROSCOE GEMMELL, CLAIMANT
Rolf Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Advisory Opinion

The Board, after being asked to issue an advisory opinion in regard to its Own Motion Determination, dated November 20, 1979, advises the parties that its Own Motion Determination dealt only with the left knee condition resulting from claimant's 1962 injury and it had no information that any subsequent injury intervened and affected claimant's knee. Therefore, the Board concludes the Referee has jurisdiction to decide this case on its merits.

WCB CASE NO. 77-484 December 27, 1979

RICHARD L. HARRIMAN, CLAIMANT
Merri Souther, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On December 6, 1979 the Board entered an Order on Review in the above entitled matter granting claimant compensation for permanent disability equal to 80° and compensation for time loss from June 9, 1978 through August 30, 1978, less time worked. It directed that the Fund would not be allowed to offset any payments for time loss against the award granted for permanent disability and awarded claimant's attorney a fee.

On December 10, 1979 the Fund asked the Board to reconsider its order contending that claimant was not entitled to compensation after August 1, 1978 because he had returned to work on that date and, therefore, an offset of those earnings during that period of time should be allowed.

Claimant, on December 17, 1979 requested reconsideration of the Board's order with respect to the Board's award of 80° for 25% permanent partial disability. Claimant also asked for a clarification on the amount of attorney's fee granted both at the hearing level and Board level.

The Board feels that the attorney's fee section of its December 6, 1979 order should be clarified as follows:

> "Claimant's attorney is hereby granted a reasonable attorney's fee for his services equal to 25% of the permanent partial disability award plus 25% of the temporary total disability award granted by this order not to exceed $3,000. This attorney fee award is to be in lieu of that granted by the Referee."

The Board, after thoroughly considering the evidence before it, concludes that its order should otherwise remain the same. The issue raised by the Fund concerning temporary total disability was clearly covered by the Board in its order and needs no clarification. The requests for reconsideration submitted by both parties should be denied. The order, as clarified by the indented paragraph on page one of this order, should be reaffirmed.

IT IS SO ORDERED.

SAIF CLAIM NO. EC 280757 December 27, 1979

DONALD C. HECK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 1, 1979 claimant's wife requested on behalf of claimant that his claim be reopened under the Board's own motion jurisdiction. Claimant had sustained a compensable injury to his back on December 10, 1970. The claim was originally closed by a Determination Order, dated August 2, 1971. The claim subsequently has been reopened for additional medical care and payment of compensation and again closed.

Dr. John Thompson reported on September 17, 1979 that claimant had returned complaining of more pain in his back and left leg. He requested authorization to perform a myelogram. Dr. Thompson performed the myelogram on October 19, 1979 and it revealed some irregularity explained on the basis of either arachnoiditis or post surgical scarring. The main abnormality found was poor filling of the left S1 nerve root. Dr. Thompson felt surgical exploration of the S1 nerve root was needed, despite little evidence to support this decision.

The State Accident Insurance Fund, on November 21, 1979, reported it desired an independent examination of claimant.

On December 5, 1979 the Orthopaedic Consultants reported that claimant's condition was stable and needed no further orthopedic or neurological treatment. They felt claimant might benefit from going to the Northwest Pain Clinic to help him deal with his pain more adequately.

On December 19, 1979 the Fund advised the Board it preferred to make no recommendation in this case.

On December 19, 1979 claimant's employer suggested that claimant's claim be reopened.

The Board, after reviewing all of the evidence in the file, finds that the claim should be reopened effective October 19, 1979, for payment of compensation and benefits as provided by law, including attendance at the Northwest Pain Clinic, as suggested by the Orthopaedic Consultants, and to remain open until closed under ORS 656.278.

ORDER

Claimant's claim for an injury sustained on December 10, 1970, is remanded to the State Accident Insurance Fund for acceptance and payment of compensation and other benefits provided for by law, effective October 19, 1979 and until closed pursuant to ORS 656.278.

WCB CASE NO. 78-251 December 27, 1979

DALE A. HEIN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of his low back condition.

FACTS

Claimant, a 37-year-old carpenter, alleges he sustained a compensable injury to his neck and back on December 7, 1976 while erecting scaffolding. He stated he thought he had pulled a neck muscle. Dr. C. A. Hites diagnosed a paraspinous thoracic muscle strain.

Claimant next saw Drs. Stanley Donahoo and Patrick Golden. Claimant reported to them neck stiffness and pain and numbness in his hands. Dr. Golden diagnosed cervical osteoarthritic disease with chronic cervical spine strain.

On May 11, 1977 Dr. William Streitz reported claimant was complaining of neck and low back pain. Claimant reported that his low back discomfort started 4-6 weeks ago and was without incident or injury as he was not working. Dr. Streitz noted claimant's weight had increased 40 pounds bringing claimant up to approximately 300 pounds. Dr. Streitz diagnosed cervical arthrosis and discogenic low back pain.

On September 29, 1977 Dr. Lewis Van Osdel, of the William Callahan Center, reported claimant complained of low back, neck and interscapular discomfort. Dr. Van Osdel diagnosed strain, chronic lumbar muscle and ligaments resolved.

On November 22, 1977 Dr. Streitz reported that claimant's low back symptoms had cleared. He felt claimant was medically stationary.

In December 1977 Dr. Mario Campagna reported claimant, at that time, had no low back pain. He diagnosed nerve root compression C6, right, secondary to protruded cervical disc secondary to the accident of December 7, 1976 and marked obesity.

A Determination Order, dated December 27, 1977, awarded claimant compensation for temporary total disability and compensation equal to 32° for 10% unscheduled disability for his low back, neck and right shoulder injury.

On January 2, 1978 claimant was rehospitalized by Dr. Campagna. After a myelogram, Dr. Campagna performed an anterior spinal cord decompression. The final diagnosis was a protruded cervical disc C5-C6.

Dr. Alstrup Johnson, Jr., in May 1978, reported he had seen claimant for back pain in November 1977. Dr. R.E. Hjort reported he had seen claimant in December 1977 for pain in the upper thoracic area.

On July 31, 1978 Dr. Campagna reported claimant was medically stationary. He felt claimant had a mild disability of the neck.

On December 12, 1978 Dr. Campagna again examined claimant. Claimant reported to have continuing low back pain. Dr. Campagna diagnosed nerve root compression, S1, left, secondary to extruded L5 disc, left, not related to the accident of 1976, marked obesity and possible herpes zoster.

Claimant was also examined in December 1978 by Dr. William E. Matthews. Claimant told Dr. Matthews that in December 1976 he did not remember having any back problems. Claimant reported he first felt low back problems in March 1977. Dr. Matthews opined claimant's main problem was

degenerating disc in the neck and low back and perhaps becoming symptomatic, at least in part, because of working activity. He noted claimant never had had a definite industrial injury. Dr. Matthews reported that claimant's low back difficulty in March 1977 probably represented a gradual breakdown of the lumbosacral disc, which led finally to a definite disc protrusion in November 1978. He found it quite possible claimant's increased weight and increasing problems of chronic tension were factors in precipitating both the symptomatic phase of the disc degeneration as well as the protrusion of the disc. He felt that if no one wanted to make a big case to the contrary, all of claimant's back condition could be treated as part of his injury. However, he went on to say that neither the neck or the low back were totally, from an orthopedic medical sense, industrially related as they had a lot to do with degenerative problems which were unrelated to the industrial activity.

On December 22, 1978 claimant underwent a microlumbar discectomy with removal of extruded lumbosacral disc, left.

On January 4, 1979 the Fund denied responsibility for claimant's low back condition.

Claimant testified he had no prior back problems except for some minor soreness. He claimed his back problems came on gradually over some period of time, gradually worsening until December 1978. Claimant stated he gained weight because of his decreased activity due to his neck and shoulder problems. He stated he had lost 50 pounds since January 1978.

The Referee found that the discomfort of the low back was not forthcoming for several weeks and since during the time between the emerging of the low back symptoms and the diagnosis of an extruded disc claimant had gained considerable weight, as well as had times when his back was asymptomatic, there was question as to whether legal causation had been adequately established. She found that legal causation to relate either the original injury or aggravation of such as manifested by the low back condition to the work related incident or to another independent cause had not been established. Further, on the basis of Dr. Matthew's opinion relating the back condition to claimant's work, the Referee did not find medical causation had been established either. Therefore, the Referee concluded the denial was correct.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's conclusions. For the same reasons as the Referee found, the Board does not find the claimant has proven by a preponderance of the evidence that his low back condition was caused by or aggravated by his work activity. The Board finds that claimant failed to establish both legal and medical causation in this claim and that the Fund's denial was proper.

ORDER

The Referee's order, dated June 11, 1979, and reinstated on July 24, 1979, is affirmed.

SAIF CLAIM NO. A 846956 December 27, 1979

LOYAL W. JOHNSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to his ankle, hip and arm on November 4, 1960 when he was involved in an automobile collision. The claim was first closed by a Determination Order, dated June 27, 1963. Claimant's aggravation rights have now expired.

On November 15, 1979 Dr. Thomas Bolton reported that he had again examined the claimant. He felt that claimant was having increasing difficulty and suggested that surgery be carried out. He reported that the current problems of claimant are the result of the original injury and requested a reopening of the old claim. Dr. Bolton found that claimant had increasing problems with the forearm and that it appeared that stabilization of the fracture would give him a functional arm and improve the use of it.

The Fund, in its letter dated December 11, 1979, stated it would not oppose an Own Motion Order reopening this claim. Attached to this letter were various medical reports from their files.

The Board, after reviewing all the documents furnished it by the Fund, concludes the claim should be reopened with compensation for temporary total disability to commence on the date claimant is hospitalized for the treatment recommended by Dr. Bolton and until the claim is closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. HB 155225 December 27, 1979

WELDON McFARLAND, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a 46-year-old carpenter, was injured on October 27, 1965 when some two-by-fours fell across his neck and back, knocking him down. He had immediate low back pain. Claimant also reported pain in the left leg.

Dr. Norman Logan reported the claimant had his back fractured while employed in July of 1962. Claimant reported returning to work four months following that injury and had not had any trouble with his back until the October 1965 incident. Dr. Logan diagnosed a severe acute lumbosacral strain with sciatic nerve irritation in the left leg. A myelogram was performed on November 9, 1965 which revealed a bilateral filling defect at L3-4 intervertebral level. Claimant decided not to have surgery.

Dr. Ray Grewe performed a laminectomy at L3-4, L4-5, and L5-S1 with decompression of the nerve root on the left and removal of intervertebral discs of L4-5 on January 28, 1966.

In June 1966 Dr. Logan reported claimant had tried to work but had been able to work only 21 days before being forced to quit due to continued back pain. Dr. Logan reported that he did not release the claimant to work except to work as a night watchman. He felt it best the claimant allow his back to heal.

In August 1966 Dr. Grewe reported the claimant desired to do light work. He was trying to get light work as an apple box inspector during the apple harvest in the Hood River area. Claimant was still continuing to have complaints of back and left lower extremity pain. In November 1966 Dr. Grewe reported that claimant was gradually but slowly improving and he did not think the claimant was capable of returning to full time heavy duty work.

In October 1967 claimant was readmitted to the hospital with pain of the low back and left lower extremity. Claimant reported to Dr. Grewe at that time that pain had been gradually increasing in his back and left lower extremity.

On November 27, 1967 Dr. Logan reported that claimant had a lumbar strain with left sciatic nerve irritation and osteoporosis of the lumbar spine with generalized degenerative disc disease. It was the opinion of Dr. Logan that the claimant had never completely recovered from his original injury of October 1965. Dr. Grewe concurred that the claimant's current problem related to his October 1965 injury.

In May 1968 Dr. Logan reported that claimant had improved. Claimant still had some left leg pain and was wearing a brace. Claimant stated that his leg pain was much less and he felt better when he returned to work. It was felt at that time that claimant could try some light work which would not involve bending or lifting.

In June 1968 Dr. Logan reported that claimant had tried to return to work but no one would hire him due to his previous back injury. Claimant reported placing his application to several job locations. For the present time claimant felt he was able to take a job as a maintenance man for an apartment house owner.

In July 1968 Dr. Robert Patton, Medical Examiner of the State Compensation Department, reported that in his opinion claimant was stationary and his claim could be closed and he should be awarded 60% loss of the arm for unscheduled disability due to his back injury. A Determination Order, dated July 19, 1968, awarded claimant compensation for temporary total disability and 50% loss of the arm for unscheduled disability for his back injury.

Dr. Philip Blatt reported in June 1974 a diagnosis of osteoporosis. He performed a myelogram in May 1974 and claimant was again hospitalized for pain in the low back, right hip and both groins. The diagnosis by Dr. Grewe was compression fracture T12, L1, L2 and L4 caused by the osteoporosis.

On November 11, 1974 claimant was rehospitalized for lumbar strain, compression fracture at D11 and D12, L1 and L2 and acute intoxication caused by a combination of ethanol, Valium and Tylenol #3. On November 26, 1974 Dr. Logan reported that claimant had worked from 1968 until 1971 as a laborer. He was off work approximately two years and returned to work in 1973 as a brick layer. He reported that claimant had had increasing low back pain since his original injury with no recent history of an injury. Dr. Logan requested the claim be reopened for treatment of his low back and superimposed osteoporosis.

In December 1975 claimant reported to Dr. Grewe that he had been granted an award of permanent total disability.

Dr. Grewe reported in July 1975 that claimant had been disabled since 1965 to the present time except for working in 1968, 1969, 1970 and 1971 and occasionally up until 1973. He reported that claimant had been totally off work since January 1974.

In January 1975 Dr. Logan reported that the etiology of claimant's osteoporosis was probably secondary to pain. It was his feeling the condition of his back was secondary to his original injury of 1965. Dr. Grewe agreed with this opinion.

In May 1975 Dr. Grewe had reported that claimant had been significantly disabled as far as gainful employment was concerned for a number of years.

In October of 1976 Dr. Grewe reported the claimant's condition was stable. He did not prescribe any medication and did not plan any neurological treatment at that point.

In October 1976 Dr. Blatt reported that the claimant's condition was stationary.

In July 1977 Dr. Logan reported that claimant was still being seen at regular intervals and continued to have low back pain. He reported that claimant was unable to bend or lift and was able to be up on his feet for about an hour.

In August 1977 Dr. Blatt reported that claimant at that time was able to walk six to eight blocks when he was feeling well. According to claimant he continued to have back pain brought on by certain movements. He stated he had to move carefully and could not lift anything without producing some back pain. Dr. Blatt opined that claimant's condition was essentially stationary and would continue to require medical treatment for his problem of osteoporosis.

On September 27, 1977 Dr. Grewe reported that claimant was stationary. He felt claimant would continue to require treatment for his osteoporosis condition.

In May 1978 Dr. Grewe reported that claimant was doing sheet metal work. Claimant was planning to become employed as a truck driver or in a related field. Claimant was insistent on having additional treatment rather than trying to accommodate to a work situation compatible with his residual symptoms. Dr. Misko recommended a radical sympathectomy.

In September 1978 Dr. Grewe advised the State Accident Insurance Fund that claimant was hospitalized with widespread histastic carcinoma with lung involvement. He reported that he had performed surgery and the removal of the stellate ganglion was done to extent the scope of the sympathectomy.

On May 1, 1979 claimant died from respiratory arrest as a consequence of widespread metastic bronchiogenic carcinoma.

In May 1979 Dr. Logan reported that it was his feeling that the claimant was permanently and totally disabled, being unable to perform any part of his previous occupation under ordinary conditions permitting him to earn a livelihood. He reported that claimant's back was so painful that he was unable to bend or lift or stand for long periods of time without developing excruciating pain. He related all the claimant's disability to the 1965 industrial injury.

On April 28, 1979 Dr. Blatt reported that claimant, in his opinion, was totally and permanently incapable of performing any work at a gainful occupation. He reported claimant had been unable to work since September 1973 due to back pain, disc surgery precipitated by his 1965 back injury and subsequent severe osteoporosis and compression fractures. He reported the last time he had seen claimant in 1978 the claimant continued to have severe back pain brought on by certain motions. He reported claimant's back motion was limited severely by pain and he was unable to sit for more than a few minutes at a time without adjusting his position or walking around. He reported that claimant's ability to walk varied greatly from day to day and also was limited by recurring exacerbation of back pain.

A Determination Order entered in 1968 granted claimant compensation equal to 60% loss of function of the arm for unscheduled disability. Claimant's claim was reopened by a Board's Own Motion Order on October 14, 1975. At a hearing, Dr. Logan related the osteoporosis progression to claimant's disuse of the back as a result of the 1965 injury. The claim was remanded, by an order dated July 13, 1976, to the State Accident Insurance Fund for time loss commencing on May 22, 1974 and penalties and attorney fees. This was affirmed by the Board on March 31, 1977, the circuit court on January 26, 1978 and the Court of Appeals on April 5, 1978.

Another hearing was held and an Opinion and Order was issued on May 18, 1977 for the Fund's failure to comply with the previous orders. Penalties and attorney fees were assessed for the Fund's unreasonable acts. This was affirmed by the Board.

By Own Motion Determination of August 14, 1977 the Board closed the claim with no award of permanent partial disability.

Claimant's attorney, the State Accident Insurance Fund, and the Board all agreed to reconsider the August 14, 1978 Own Motion Determination. After reviewing the entire file, the Evaluation Division of the Workers' Compensation Department opined that the injury was responsible for temporary exacerbation of the osteoporosis condition and that the medical care and treatment for the osteoporosis ceased at the time the treatment for the carcinoma commenced. They recommended allowing additional compensation for temporary total disability from August 16, 1978 to the date the claimant was hospitalized for treatment of carcinoma plus any compensation already paid for this period allowing no additional compensation for permanent partial disability.

The evidence in the file indicates that claimant was paid compensation for temporary total disability from May 22, 1974 to August 15, 1978.

The Board, after reviewing the entire file reached a different conclusion from that reached by the Evaluation Division. The Board, based upon the medical evidence in the file, finds that claimant was permanently and totally disabled on August 16, 1978 and remained so until the time of his death. Therefore, the Board orders that the claimant be granted compensation for permanent total disability from that date, August 16, 1978, to the date of his death, May 1, 1979.

ORDER

Claimant is hereby granted compensation for permanent total disability commencing on August 16, 1978.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

SAIF CLAIM NO. HC 371451 December 27, 1979

WILLIAM PARTLOW, SR., CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left knee on May 3, 1972. After undergoing surgery on his left knee the claim was closed by a Determination Order, dated March 5, 1973, which awarded temporary total disability and an award of compensation equal to 45° for 30% loss of the left leg. Claimant's aggravation rights have expired.

Due to claimant's worsened knee condition, the claim was reopened for additional surgery on January 22, 1976. The claim was again closed with an award of additional temporary total disability and an additional award equal to 15° for 10% loss of the left leg by a Determination Order, dated January 7, 1977. An Opinion and Order, dated June 10, 1977, granted claimant an award equal to 120° for 80% loss of the left leg in lieu of any previous awards. This Opinion and Order was affirmed by the Board on January 4, 1978.

On January 25, 1979 a total condylar knee replacement was performed. The claim was again reopened by an Own Motion Order, dated February 26, 1979, for this surgery.

On November 1, 1979 Dr. John R. Hazel reported that claimant was medically stationary. The claimant indicated he discontinued using canes, crutches or any other supporting devices. He was able to walk without any support at that time. Dr. Hazel found no effusion within the joint and the claimant had complete extension. He found claimant had considerable medial and lateral instability which was inherent with the implant. He opined the only residuals were obviously that claimant has an arthroplastic implant with limited flexion of only about 105 to 110 degrees and mild to moderate instability of the knee.

On November 28, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on December 14, 1979, recommended that claimant be granted compensation for additional temporary total disability from January 25, 1979 through November 1, 1979 and that he be granted no additional award for permanent partial disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 25, 1979 through November 1, 1979. This award is in addition to all awards previously granted claimant for his May 3, 1972 injury.

CLAIM NO. A 662976 December 27, 1979

RALPH H. TEW, CLAIMANT
Hayner, Waring & Stebbins,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On December 10, 1979 the Board entered its Own Motion Determination in the above entitled matter. An error has been brought to the Board's attention which should be corrected. On page two, paragraph six, line five, the date "September 25, 1976" should be changed to read "September 25, 1979". The order, in all other respects, is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-7426 December 28, 1979

WILLIAM L. BREWSTER, CLAIMANT
John Patrick Cooney, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which found a claimed left knee injury of June 27, 1978 compensable. The Fund contends the claimant did not suffer a compensable injury as alleged.

FACTS

Claimant, a 42-year-old heavy equipment mechanic, filed a claim for an injury to his left knee he says occurred while at work on June 27, 1978. On November 1, 1978 Dr. Ralph Thompsen, after an arthrogram, diagnosed a torn media meniscus and a possible Baker's cyst.

On November 15, 1978 the Fund denied responsibility for claimant's claim for a tear of the medial meniscus and possible Baker's cyst. The Fund's first contention is that no accidental injury occurred during the claimant's work activity on June 27, 1978. The second contention is that if there was an incident at work on June 27, 1978 the consequences are not compensable because that incident did not produce an injury which required "medical services". (See ORS 656.005(8)(a).) The third contention is that the claimant suffered a subsequent intervening injury on October 29, 1978 arising out of an off-the-job hunting accident.

On June 27, 1978 claimant was in the course and scope of his employment at a job site located in the Walker Creek area of the State of California. He testified he was placing a hydraulic pump and motor on a yarder and while doing this he turned and felt his left knee "pop". He said he felt immediate pain and discomfort. The pain eased up and he finished out the day. However, later that day, he experienced increasing pain with swelling of the left knee. Claimant testified that on June 28, 1978 he called a Mr. David Longberg, his service manager, advised him of the incident, and that he had injured his left knee.

Claimant continued to work on a full time basis as scheduled but experienced chronic pain and swelling in his left knee periodically, between June 27, 1978 and October 29, 1978. He testified his left knee condition was exacerbated by kneeling, walking and turning corners.

On October 29, 1978 claimant went on a hunting trip. While hunting he twisted his left knee. Coincidental to the "twisting" he experienced a recurrence of the same symptoms he had experienced from June 27, 1978 to October 29, 1978. However, because the symptoms were increased he sought medical treatment at the emergency ward of Providence Hospital.

The emergency room record indicates that claimant was injured on October 29, 1978 when he twisted his ankle hunting in the woods. The record further reflects that the claimant had experienced "off and on" difficulty with the knee for which he had made an appointment (prior to October 29, 1978) with Dr. Thompsen, an orthopedist.

Dr. Thompsen reported that he had first seen claimant on October 31, 1978 after claimant had been seen in the emergency room at Providence Hospital on October 29, 1978. The history the doctor received was that claimant had injured his leg in July of 1978 at work; he opined the difference as between the July date and the June date might be catagorized as a "mild discrepancy". Nonetheless, the description of the injury was that claimant was working on machinery at about that time and had since then reinjured his knee three or four times while walking on uneven ground and twisting. Dr. Thompsen reported the latest episode on October 29, 1978 was simply an exacerbation of claimant's previous difficulties of locking of the knee and was compatible with injury sustained as claimant described. Dr. Thompsen reported that a meniscectomy had been performed and a large tear in the meniscus was found, compatible with an old injury. He opined that there was no way of knowing to what extent the October 29 injury had exacerbated claimant's difficulty. Dr. Thompsen found the Baker's cyst was due to the swelling of the deranged knee.

Mr. Longberg, claimant's supervisor, testified and corroberated the claimant's testimony relating to the claimed incident and injury of June 27, 1978.

Based upon the evidence presented at the hearing, including the credible testimonies of all the witnesses, the Referee concluded that the claimant had proved by a preponderance of the evidence he had sustained a compensable injury. The Referee did not believe that the hunting incident of October 29, 1978 was an intervening or superseding incident. It appeared to the Referee that based on the entire record such an event was a recurrence or an exacerbation of claimant's chronic left knee difficulty which he had experienced from June 27, 1978 to October 29, 1978. Therefore, the Referee set aside the Fund's denial and remanded the claim to it for acceptance and payment of compensation.

BOARD ON DE NOVO REVIEW

The Board concurs with the conclusion reached by the Referee. The Board's conclusion is based on the fact that Dr. Thompsen relates claimant's difficulty in October 1978 to an injury arising out of the work activity during the summer of 1978. In addition, based on the testimony of the claimant's supervisor, the Board finds the injury was timely reported. Further, in the light of Dr. Thompsen's opinion on causal relationship, the Fund's contentions regarding the lack of "medical services" and "subsequent intervening injury" became moot. Therefore, the Board finds as did the Referee that the claimant has proven by the preponderance of the evidence that he sustained a compensable injury and the Fund's denial was not correct.

ORDER

The Referee's order, dated June 6, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

SAIF CLAIM NO. B 18969 December 28, 1979

KENNETH L. DILLON, CLAIMANT
Starr & Vinson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On December 17, 1979 the Board entered an Own Motion Order in the above entitled matter directing claimant's claim be reopened commencing on the date claimant entered the hospital for his August 8, 1978 surgery and until closed pursuant to ORS 656.298.

It has been brought to the Board's attention that it inadvertently failed to grant claimant's attorney a fee for his services in claimant's behalf. Therefore, on page two, after the third paragraph, the following should be inserted:

> "Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750."

The remainder of the Board's December 17, 1979 Own Motion Order should be affirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-5786 December 28, 1979

JOSEPH DONALDSON, CLAIMANT
Anderson, Fulton, Lavis & Van Theil,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which awarded him compensation equal to 90° for 60% loss of use of his left leg, being an increase of 30° for 20%; plus compensation equal to 96° for 30% unscheduled disability for his back injury, being an increase of 32° for 10%. Claimant contends he is entitled to an award of permanent and total disability.

FACTS

Claimant sustained an injury to his left knee on January 21, 1966 when he twisted it while turning quickly to push out a load of plywood. After an arthrotomy and a medial meniscectomy, this claim was closed by a Determination Order, dated September 1, 1966 which awarded claimant compensation for temporary total disability and compensation equal to 7.5° for 5% loss of function of the left leg.

On January 28, 1974 claimant, 31 years old, sustained a compensable injury to his neck and back when while working as a choker setter he was struck by a hay wire. Claimant was released for work and found to be medically stationary as of February 18, 1974.

A Determination Order, dated March 27, 1974, awarded claimant compensation for temporary total disability.

In June 1974 Dr. David Waldram reported claimant was not medically stationary. His diagnosis was a traumatic compression fracture at T4 with a subsequent deformity at that level. Dr. Waldram related the condition to claimant's January 1974 injury.

On October 2, 1974 Dr. Waldram operated on claimant. Exploration and Harrington instrumentation at the T3 through T7 levels were performed. He reported claimant also was having difficulty with left knee instability, both in medial ligaments and posterior capsule region, which Dr. Waldram felt may require more treatment. Dr. Waldram noted claimant was very aggressive and probably would return to heavy type of labor despite his pretty severe fracture.

On May 20, 1975 claimant underwent left knee surgery. Claimant developed complications and was rehospitalized in June 1975 and again in October 1975. Dr. Waldram diagnosed septic arthritis of the left knee.

In March 1976 Dr. Waldram reported claimant was complaining of significant pain in the knee and had evidence of marked instability.

In March 1977 Dr. Theodore Pasquesi found claimant medically stationary. He felt claimant may need surgery for removal of the rods eventually. He rated claimant's impairment of dorsal spine at 9% of the whole man and rated impairment of the left lower extremity at 48%.

In April 1977 Dr. Waldram opined claimant was totally disabled from his previous type of work and was markedly limited because of his knee to do any labor. He found lack of motion, atrophy and pain, plus instability in the knee. He opined that the status of claimant's knee made it little better or actually even worse than if it had been amputated. Dr. Waldram opined claimant would eventually require a fusion or total arthroplasty of the knee. He felt claimant was not medically stationary.

In May 1978 Dr. Waldram reported claimant had a totally destroyed knee joint with chronic instability and pain. In June 1978 Dr. Waldram indicated he felt claimant was unable to do any significant walking, climbing, but may do a sedentary job or one requiring standing for a short period of time. Dr. Waldram's prognosis was for continued difficulty and disability of the knee with the possible need to do a left knee fusion and Harrington rod removal in the future. Claimant also continued to experience pain in the thoracic spine.

A Determination Order, dated July 20, 1978, awarded claimant additional temporary total disability and compensation equal to 64° for 20% unscheduled disability for his back injury and compensation equal to 60° for 40% loss of his left leg.

In February 1979 Dr. Waldram reported claimant continued to have back and left knee problems but was doing farm work. Dr. Waldram found severe atrophy of the left knee with severe medial instability. He reported claimant had repetitive neck spasms and back problems due to the irritation caused by the rods. Claimant reported he could work four hours and then needed to rest his knee.

In March 1979 Dr. Pasquesi, in response to interrogations, reported claimant may need a fusion of the knee and that the impairment for fused knee in a neutral position was 50% of the lower extremity.

Claimant testified he has continuing chronic back, neck and knee pain. He indicates any activity aggravates his pain. His back condition affects his ability to perform heavy lifting and using his arms in an overhead or extended position. His left knee condition affects his ability to perform prolonged walking, standing, driving, walking on uneven or rough ground, climbing up and down ladders and getting off farm equipment. Claimant feels his main problem is his left knee, but due to both the knee and back, claimant has given up or limits his other activities. Claimant is now 37 years old, has a high school education plus two years of community college where he majored in dairy technology and livestock management. Claimant's work experience prior to his injury had been manual labor working in the logging industry, plywood mills, driving truck and laborer. Since the summer of 1978, claimant has worked for his father on a dairy farm. He feels the job duties aggravate his left leg and back conditions.

The Referee found claimant was not permanently and totally disabled. However, he concluded that the evidence did indicate claimant was entitled to increased awards for both his back and leg injuries. Therefore, he increased claimant's award for the loss of the left leg and increased the award for claimant's back injury to 30% unscheduled disability.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, concurs with the Referee that claimant is not permanently and totally disabled and agrees with the Referee's assessment of unscheduled disability for claimant's back injury. However, the Board finds that based on Dr. Waldram's medical reports that claimant is entitled to an increase in his scheduled disability for his left leg. Dr. Waldram reports that the left leg is no better and may be even worse than if it were amputated. Claimant's testimony as to the limitations he has is supported by Dr. Waldram's opinion. Therefore, the Board concludes claimant has suffered a 75% loss of use of his left leg and would so modify the Referee's order.

ORDER

The Referee's order, dated May 31, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 112.5° for 75% loss of function of his left leg. This award is in lieu of any previous awards granted for loss of function of the left leg.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-1565 December 28, 1979

DANNY W. INGERSOLL, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant an award of compensation equal to 60° for 40% loss of the left hand. The Fund contends this award is excessive.

FACTS

Claimant, a 26-year-old iron worker, sustained a compensable injury on September 21, 1978 to the tips of the ring and long fingers of his left hand when they were nearly amputated between two pieces of iron. Dr. John Coletti operated on claimant's fingers and repaired them with pin fixations of the fractures. Dr. Coletti released claimant for regular work on December 4, 1978.

On February 9, 1979 Dr. Coletti reported that he examined claimant and found the claimant lost half of the motion of distal interphalangeal joints, but still had significant residual function and had a slightly flexed attitude of these joints. He said the injuries to claimant's ring and long fingers had healed and that he felt he had salvaged the finger tips with good functional results. He reported however, that claimant's fingers would not feel quite the same as they did prior to the injury and were now somewhat stiffer. The objective findings were: nonunion, terminal phalanges which were atrophying and would probably be quite satisfactorily functional; the decreased sensation by the cutting of the fingertips, although there is protective sensation present; and the loss of half of the terminal joint motion of the distal interphalangeal joints of both of these fingers. He reported that the claimant continued to experience discomfort primarily from excessive pressure on the fingertips and sensitivity to cold. Based on the above findings he was not opposed to closing the claim.

A Determination Order, dated March 27, 1979, awarded claimant compensation for temporary total disability from September 21, 1978 through December 3, 1978 and permanent disability equal to 22.5° for 15% loss of claimant's left hand.

Claimant testified at the hearing that he has now returned to his prior work. He stated he is now essentially limited to welding and is unable to engage in connecting the iron as that involves climbing the girders into the air. Claimant feels he is no longer able to trust his left hand. He feels he is unable to exert gripping pressure with the left hand and is afraid to trust the left hand for gripping functions involving use of strength. He feels that one of his fingers has a loose bone and when pressure is put on that, claimant receives an electrical shock-like sensation which involuntarily causes his hand to give way. Claimant further testified he is also excluded from bolting operation as he cannot distinguish with his left hand what end of the bolt he has. He also stated he has difficulty pulling hoses and cords necessary for burning and welding, but still is able to function as a welder. He further testified that he has extreme pain in his left hand when he is exposed to cold weather. He does experience some pain when his hands are exposed to heat, although not as severe as when exposed to cold. He is unable to carry buckets of bolts weighing over thirty-five pounds with his left hand. Claimant stated that he now spends about 90% of his time welding; prior to his industrial injury he spent about 10% of this time welding.

The Referee, after considering all the evidence, concluded the claimant's permanent partial disability was equal to 60° for 40% loss of his left hand.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, disagress with the conclusion reached by the Referee. The Board finds that the medical evidence in this case does not establish that the claimant is entitled to the award that the Referee granted. Dr. Coletti, in his 1979 report, stated the injuries to the ring and long fingers had healed and that the fingertips had been salvaged with good functional results. The Board, after considering the medical evidence and claimant's testimony, finds that the Determination Order issued March 27, 1979 adequately compensates claimant for loss of function of his left hand caused by the injuries to the tips of his ring and long fingers. Therefore, the Board concludes that the award of compensation granted by the Referee was incorrect and reverses that award and reinstates the award granted claimant by the Determination Order, dated March 27, 1979.

ORDER

The Referee's order, dated July 12, 1979, is reversed.

The Determination Order, dated March 27, 1979, is reinstated.

WCB CASE NO. 76-4242 December 28, 1979

JOSEPH JENSEN, CLAIMANT
Yturri, Rose & Burnham, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

On May 11, 1979 Referee Danner entered his Opinion and Order affirming the June 30, 1975 Determination Order. On June 7, 1979 claimant requested Board review of that order, alleging he was entitled to compensation for temporary total disability prior to July 24, 1978 and subsequent to June 30, 1975.

On December 5, 1979 claimant, by and through his attorney, requested the Board to remand the matter back to the Referee to receive into the evidence two additional medical reports or, in the alternative, to accept the reports as exhibits to be reviewed by the Board with the other evidence. Claimant indicated that the two medical reports referred to clearly showed that he was totally disabled from approximately May 1976 to the date of his request, December 5, 1979. He stated that the reports were not available at the time of the hearing.

On December 10, 1979 the Fund responded to claimant's motion indicating that the issue before the Referee involved a substantial period of time (from June 1975 to July 1978) and there was no reason why medical reports could not have been obtained regarding claimant's condition during those years in time for the hearing. The Fund recommended that claimant's motion be denied.

The Board, after thoroughly considering the arguments before it presented by both parties, concludes that claimant had ample opportunity to present the medical evidence in question before the Referee at the hearing. The Board finds no reason to remand the matter to the Referee or to admit the two medical reports as exhibits before it and claimant's request for the Board to act on this is hereby denied.

IT IS SO ORDERED.

WCB CASE NO. 78-6963 December 28, 1979

HARROLD G. MADDEN, CLAIMANT
Myrick, Coulter, Seagraves & Myrick,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order that affirmed the State Accident Insurance Fund's (Fund) denial of his claim for an injury allegedly suffered on June 26, 1978.

FACTS

Claimant, a 48-year-old shovel operator, alleges that he sustained a compensable injury to his back on June 26, 1978 when he slipped off the shovel he was operating. Claimant continued to work and first sought medical treatment on July 7, 1978 from Dr. Thomas Turek. Dr. Turek diagnosed lumbosacral strain with sciatic nerve irritation.

Claimant, in November 1968, had experienced a left hip and back injury when a tree fell on him. A laminectomy and disc excision L4-5 was done for this injury on August 2, 1971 by Dr. Wilson.

At the Back Evaluation Clinic, Drs. Kimberley, Abele and Paxton, diagnosed severe psychoneurosis with mental depression, post-laminectomy symptoms, mild chronic shoulder-arm syndrome. They found the claimant's condition was stationary. It was their opinion that claimant's chief disability was severe depression. They believed that there was a mildly moderate loss of function of a low back and neck regions.

Dr. Mario J. Campagna reported in December 1972 that he felt that the claimant's condition was stationary. He felt that there was considerable functional overlay which made the evaluation of claimant's condition difficult. He opined that there was a moderate subjective disability to the low back resulting from the accident of November 1968.

A Determination Order, dated May 9, 1973, granted claimant compensation for temporary total disability and compensation equal to 128° for 40% unscheduled disability for his low back injury.

Claimant again injured his back on March 31, 1978 when while lifting a guyline block he fell with it. This was diagnosed as a lumbosacral strain by Dr. Turek. Dr. Turek, in June 1978, reported that the claimant, in his opinion, would suffer no permanent impairment for his injury of March 1978.

A Determination Order, dated July 11, 1978, granted claimant an award for temporary total disability only for his March 31, 1978 injury.

In July 1978 Dr. C. D. Potter reported that claimant was experiencing pain radiating down the left leg posteriorly to the left calf. His diagnosis was a probable nerve root irritation secondary to the fall of June 1978, involving the right L5 or S1 nerve root. He advised claimant not to do any work for at least the next two weeks, and asked the claimant to return.

In late July 1978, Dr. M P. Renaud, reported that the claimant had improved sufficiently so that he did not require hospitalization. He did not find claimant medically stationary at that time. Claimant stated to him that the pain in the lower extremity was gone. The claimant complained of pain in the lumbosacral area especially if he sat for any length of time.

On August 10, 1978 the Fund denied responsibility for claimant's low back pain, diagnosed as lumbosacral strain with sciatic nerve involvement. This was based on the fact that it could not substantiate any on-the-job accident or incident while claimant was employed for Don Clark Logging on or about July 26, 1978 which would have produced this condition.

Mr. George Mason, the yarder operator, reported that he had seen the claimant fall off the shovel claimant operated on several occasions. On June 26, 1978 he saw the claimant slip off the shovel and when claimant came into view, he was holding his back. On the next day Mr. Mason stated that he talked to the claimant and the claimant related that he had seen the "boss" and told him that he discussed the fact of the accident with him. He further testified that he saw the claimant walk up and down the road trying to walk off the back pain. Mr. Mason was able to distinguish this particular fall from others in that he did not recall any other time when he observed the claimant rubbing his back and bent over.

Claimant testified that he reported this incident not only to Mr. Mason, his immediate supervisor, but he also reported it to the son of the owner of the operation, his boss. Claimant stated that both of them requested him to come back to work the next day and stay on the job. Claimant agreed to come back to work and stayed there until his back became worse and the work slowed down.

Claimant further testified that prior to his seeking medical treatment on July 7 he had fallen off of a porch. On this occasion, there was a party or a social gathering at which alcoholic beverages were served. Claimant stated that at this employee party he had fallen over backwards off of the side of a porch, a distance of about two feet, and landed on top of a fellow-employee. He stated at that time he felt better after this incident.

The Referee found the claimant had not met his burden of proof. He concluded that considering that long history of claimant's back problems, his continuing to work following this alleged incident, the failure to seek proper medical attention, and the intervening fall at the party, that he was constrained to conclude that the burden of proof had not been met. It was his opinion that the medical opinions on and after July 7 attributing the findings to the work incident were based on deficient histories omitting the party fall. Therefore, he affirmed the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, disagrees with the Referee and reverses his Opinion and Order. The preponderance of the evidence indicates that claimant did fall as he alleged on June 26, 1978. Claimant adequately explains his delay in his seeking medical care. The employer corroborates the claimant that he had been requested by the employer to continue to work. Claimant complied with this request. Further the incident involving the claimant falling off the porch at the employee party is not an intervening incident which caused the claimant to seek medical care. There is no evidence of any disability resulting from this fall off of the porch. All the medical evidence indicates that the claimant sustained an injury in June 1978 and supports claimant's testimony as to how this event occurred. Therefore, the Board finds the claimant has met his burden of proof, that he did sustain a compensable injury to his back on June 26, 1978.

ORDER

The Referee's order, dated March 12, 1979, is reversed.

The claimant's claim is remanded to the State Accident Insurance Fund for acceptance and payment of compensation until it is closed pursuant to ORS 656.268.

Claimant's attorney is granted as and for a reasonable attorney's fee both at the hearing level and at Board level a sum equal to $1,000, payable by the Fund.

WCB CASE NO. 78-535 December 28, 1979

FLOYD SHORES, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which granted claimant an award of permanent total disability and an attorney's fee. The employer contends claimant is not permanently and totally disabled.

FACTS

Claimant, a 50-year-old spotter and gate operator, sustained a compensable injury to his back on April 15, 1977 while working on a drop gate. In September 1974 claimant had been awarded 25% loss of vision in his left eye for a 1972 injury.

Dr. Jerry Becker, in May 1977, diagnosed this injury as a chronic lumbosacral sprain.

In June of 1977 claimant refused to apply for vocational assistance.

Dr. Lewis Van Osdel, medical examiner at the William A. Callahan Center, examined claimant in September 1977. Claimant reported a low back ache present about 25% of his waking hours, aggravated by sitting over 20-30 minutes and stooping. Claimant reported he could walk only two blocks, stand 30 minutes and drive no more than 25 miles. Claimant also complained of weakness in both lower legs relieved by walking and moving about. Claimant also had complaints of soreness in the muscle of the upper extremities. Dr. Van Osdel diagnosed chronic strain, lumbar muscles and ligaments superimposed on mild scoliosis to the left at D8, compensated with degenerative disc disease at the lumbosacral joint by history, chronic strain upper dorsal muscles and ligaments and hypertension. No objective evidence of nerve root compression or irritation was found. Dr. Van Osdel felt claimant had a mild vocational impairment and did need a job change. Claimant failed to return to the Center for treatment and was discharged from the program for non-participation.

Dr. Becker, in November 1977, reported claimant was medically stationary. He suggested claimant continue to work with a service coordinator to obtain employment in some modified type employment which did not require heavy prolonged stooping or bending at the waist.

A Determination Order, dated January 11, 1978, awarded claimant compensation for temporary total disability and compensation equal to 16° for 5% unscheduled disability for his back injury.

Dr. Norman Hickman, psychologist, diagnosed in July 1978, reactive depression with anxiety moderately severe, psychophysiological reactions, musculoskeletal and incipient schizophrenic reaction. He opined this psychopathology was materially and significantly related to the claimant's industrial injury of April 1977.

Dr. Guy Parvaresh, psychiatrist, reported in October 1978 that claimant had no formal education, could barely write and could not read. Claimant reported to have worked 26 years as a roofer and also had been employed in farming and mill work. Dr. Parvaresh found no significant degree of psychiatric impairment except for a basic personality disorder. Dr. Parvaresh, after reviewing the orthopedic report, found no substantial degree of impairment to alter claimant's life style in any extent. He found claimant had no motivation to make any effort to return to gainful employment. Claimant was content to live on his Social Security. Dr. Parvaresh found no appreciable degree of psychiatric impairment and felt claimant could return to work but then the limitation should be based on his orthopedic problems.

Dr. Thomas Stipek, a vocational consultant, opined that based on claimant's restriction to sedentary work and considering the vocational information, age, education, there were no jobs claimant was capable of performing competitively eight hours per day, 40 hours per week.

Dr. Becker, in December 1978, reported claimant should be directed to non-low back selling work; in essence, avoiding repetitious stooping, bending, lifting or twisting in the low back.

Claimant testified he continues to experience pain in his low back, arms, legs and left eye. He can lift 25 pounds. Claimant stated his eye problems makes driving difficult, but he is still able to drive. Claimant has not reapplied with his employer for employment nor has he applied for employment with any other employer or even sought assistance from any state or private agency. His former job no longer requires lifting or pushing. Claimant is able to mow his yard and does some housework. Claimant still enjoys fishing.

The Referee, after reviewing all of the evidence, concluded claimant was permanently and totally disabled.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the Referee's finding that claimant is permanently and totally disabled. There is no evidence that claimant has attempted to rehabilitate himself nor any evidence that claimant has attempted to return to or find employment. The medical evidence indicates claimant has a lumbosacral strain with some subjective radiation of pain into the left leg.

Claimant has refused to complete his program at the Callahan Center. Further, claimant has not sought any employment or made any effort to return to his former job, which he testified had been modified so that lifting and bending would not be part of the job description.

The Board concurs with the employer that the record in this matter indicates claimant is satisfied to retire on Social Security, hunt and fish and voluntarily exclude himself from the general labor force.

The Board finds that the medical evidence alone does not establish that claimant is permanently and totally disabled. Therefore, after considering all the other relevant factors, including motivation, efforts at rehabilitation or effort to seek employment, the Board concludes claimant is not permanently and totally disabled. However, the Board does find claimant is entitled to a greater award than that granted by the Determination Order for permanent partial disability which reflects claimant's loss of wage earning capacity based on these same factors, and therefore concludes claimant is entitled to an award of compensation equal to 144° for 45% unscheduled disability for his low back injury.

ORDER

The Referee's order, dated April 10, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 144° for 45% unscheduled disability for his low back injury. This award is in lieu of any and all prior awards. The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-281 December 31, 1979

DAVID KINDRED, CLAIMANT
Anderson, Fulton, Lavis &
VanThiel, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks review of the Referee's order which did not award him compensation for temporary total disability from November 9, 1977 to February 19, 1978, however awarded claimant an additional 15° for 10% loss of his left leg. Claimant contends he is entitled to additional compensation for temporary total disability and additional compensation for permanent partial disability.

FACTS

Claimant, a 62-year-old longshoreman, sustained a compensable injury to his legs when he was run over by a lumber stacker on April 9, 1976. His injuries were first diagnosed as a compound fracture of the left tibia fibula, a crush injury to the left leg, a closed fracture of the right distal fibula with a non-displaced fracture and multiple abrasions to the legs. The left leg required insertion of skeletal pins in the tibia and closed reduction of the fracture and casting of the left leg. After the initial surgery claimant underwent skin grafts on the left leg and a medial meniscectomy on the right knee. Claimant also developed stomach problems which Dr. John Foster related to claimant's prolonged confinement to bed coupled with the stress of the accident which reactivated the stomach pain.

In September 1976 Dr. Foster reported that claimant's left leg was completely healed as far as skin coverage. He doubted claimant was ever going to return to his previous employment considering claimant's age and the extent of his injuries. He noted that claimant was fairly close to retirement. Dr. Foster felt that claimant was going to have very little motion in either ankle and probably some chronic swelling in the left calf due to the crushing type injury.

In January 1977 Dr. Foster diagnosed a nonunion of the left tibia and fibula and performed an iliac bone graft to the left tibia and fibula.

In July of 1977 Dr. Foster reported that he did not feel claimant's condition at that time was stationary. He noted, however, that claimant's injuries at the present time were severe enough that it was obvious that claimant was going to have significant permanent disability and that the claim could probably be closed at the present time with the diagnosis of residual pain, mild to moderate; post-meniscectomy right knee; minimal to mild degenerative ankle pain on the right which was markedly improved by an injection of cortisone; crushing injury (severe), left leg; marked degree of skin loss; claimant's skin grafts were well healed; there was nonunion with internal rotational deformity of the left tibia; clinically solid union and good x-ray evidence of the union, post grafting procedure; marked loss of motion left ankle with a total of perhaps 5° of motion in the dorsal volar plane and essentially 0 in the medial lateral planes with about 12° to 15° equinous deformity of the foot due to shortening of the gastrocsoleus group; residual pain due to degenerative changes in the left ankle secondary to the above crushing injury of the leg. Dr. Foster did not feel that claimant was able to perform his previous duties and due to his age he did not feel that claimant could be retrained for any other job. He recommended retirement and closure of the claim.

In November 1977 the Orthopaedic Consultants examined claimant and reported that claimant's condition was stationary and the claim could be closed. Their diagnosis consisted of (1) comminuted compound fracture through the distal one/third of the left tibia and fibula with moderately severe displacement. Treatment by pin fixation with pins being incorporated into the cast; (2) fracture of the distal one/third of the right fibula without displacement; and (3) a torn medial meniscus of the right knee. Claimant stated to these examiners that he had no intention of returning to the labor market and that he was perfectly satisfied to live from now on upon his longshoreman's pension, Social Security, and any sum of money he may get from settling this case with the State Accident Insurance Fund. It was their opinion that claimant might, if the necessity arose, be able to engage in some type of sedentary work. It was their opinion that the residual disability as a result of the claimant's injury to the left leg be classified as moderately severe and that which was present in the right leg as mild. Dr. Foster concurred with this report.

A Determination Order, dated March 14, 1978, awarded claimant compensation for temporary total disability from April 9, 1976 through November 9, 1977 and compensation equal to 22.5° for 15% loss of the right leg and 75° for 50% loss of the left leg.

In May 1978 Dr. Foster performed a corrective osteotomy of the distal tibial and derotated claimant's leg and brought his foot out of inclinus so that claimant could walk with a normal shoe. The doctor related this surgery to the original injury. By October 1978 Dr. Foster found that claimant still had persistent swelling and some discoloration in the left leg due to a chronic venous insufficiency. He felt that as of the 26th of October, 1978 the claimant reached a maximum of recovery and the claim could be closed. He felt that no further disability had been incurred.

A Second Determination Order, dated December 12, 1978, awarded claimant additional compensation for temporary total disability from February 19, 1978 through October 26, 1978, but did not award any additional permanent partial disability.

On January 18, 1979 Dr. Foster reported that claimant still suffered from chronic edema of the left lower leg whenever it becomes "dependent" and also reported it was aggravated by hot weather. Dr. Foster reported that with the extreme crushing injury of the original trauma claimant was going to have circulatory problems of a permanent nature for the rest of his life in the leg. He felt the corrective surgery performed on claimant had brought his foot into better alignment. In Dr. Foster's opinion claimant's disability had probably decreased since his claim closure.

The Referee, after reviewing all the evidence, found that claimant was not entitled to any additional compensation for temporary total disability. As to the extent of permanent partial disability, the Referee felt, based on claimant's chronic edema of the lower leg aggravated by dependency and hot weather, his permanent circulatory problems, inability to return to his job as a longshoreman as well as other outside activities, claimant was entitled to an increased award for his loss of function of the left leg. The Referee noted that the claimant limped and used a cane if he walked for any length of time. Therefore, the Referee ordered that the claimant be granted additional compensation equal to 15° for 10% loss of the left leg.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's finding that the claimant is not entitled to any additional compensation for temporary total disability. However, the Board, after reviewing all the evidence in the file, finds that claimant is entitled to an increased award for the loss of function of the left leg. The Board finds that the injuries sustained by the claimant are confined to the scheduled area only. Therefore, the Board would modify that portion of the Referee's order which granted claimant additional compensation equal to 15° for 10% loss of function of the left leg and would award claimant compensation equal to 120° for 80% loss of function of the left leg, in lieu of prior awards for loss of function of that member.

ORDER

The Referee's order, dated May 2, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 120° for 80% loss of function of his left leg. This is in lieu of all prior awards for loss of function of that member. The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 77-3298 January 4, 1980

HENRY BERNARD, CLAIMANT
Keith D. Skelton, Claimant's Atty.
Dennis VavRosky, Employer's Atty.
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which increased claimant's award of permanent partial disability from 5% to 15% loss of the right arm and awarded attorney fees out of the increased compensation and imposed penalties and attorney fees for the employer's failure to transmit medical reports to claimant's counsel. The employer contends that the evidence does not support the increased award nor does it support the awarding of the penalties and attorney fees for its failure to transmit medical reports.

Claimant cross-appeals contending the award for permanent loss of the right arm was not adequate and that a psychiatrist's report was improperly admitted.

FACTS

Claimant, a 48-year-old chipper operator, sustained a compensable injury to his right shoulder and left ankle when struck by a piece of iron and wood on September 8, 1976. Dr. Elon Lee Wood diagnosed bruises of the suprascapular area with paresthesia of the entire right arm and hand probably due to a nerve injury in the shoulder and a bruised left ankle. He released claimant for regular work on September 28, 1976. He felt claimant would probably not have any permanent impairment.

On November 12, 1976 Dr. John Raaf reported that claimant complained of numbness in the right forearm and hand. He diagnosed "mild spondylosis, slight scoliosis, cervical spine". He had to perform an EMG on October 23, 1976 which revealed mild diffuse abnormalities. Dr. Raaf, in December 1976, reported claimant had grip strength in the left hand of 270 pounds and in the right hand of 90 pounds. On testing the muscles in the right arm, Dr. Raaf found that claimant exhibited considerable weakness, however, he did not feel that claimant was exerting as much strength as he could. Claimant advised the doctor he was doing a little work around his place, but he did not want to go back to regular work.

In January 1977, Dr. Henry Storino, a neurologist, saw the claimant. He felt that claimant was not yet ready to go back to work. He felt the prognosis for full recovery was good. Dr. Storino felt claimant had probably sustained a mild to moderate degree of contusion to the right brachial plexus as related to his injury in September 1976. He found in his examination that the right grip was still weaker as compared to the left and the flexors and extenders of the right hand showed very mild weakness. Claimant also had very mild weakness of the right tricep and right deltoid. He found no atrophy in the arm or the small muscles of the hand. Dr. Storino felt the sensory loss in the right hand and forearm and arm were a little out of proportion to the objective findings.

In March 1977 Dr. Raaf reported claimant had had a repeat EMG and nerve conduction study done in early March 1977. Dr. Raaf examined both upper extremities and found they appeared to be normal. He found claimant's left grip was 260 pounds and the right grip was 100 pounds. In spite of the EMG and nerve conduction studies, Dr. Raaf began to suspect some functional element was present. He noticed claimant held his right hand in a protective position and movement to unbutton his clothes with that hand were fumbling in nature. Dr. Raaf asked claimant if he would like to return to work and claimant responded that it would be impossible to do his prior job with his employer. Dr. Raaf suggested light work. Claimant replied that his supervisor preferred that he would not go back to any type of work in the mill as long as his hand was in its present condition because he might injure the hand due to numbness. Dr. Raaf asked claimant if he was not losing a great deal of money by being off work. Claimant replied that with his insurance money and and wife working he was "making out all right". Finally, claimant advised Dr. Raaf that while he is being laid up with the right arm he decided to have a total hip replacement performed by Dr. Corrigan.

On April 29, 1979 Dr. Harold Paxton, a neurosurgeon, examined claimant and reported that he was complaining of numbness and weakness in the right arm. After examining claimant, Dr. Paxton diagnosed some minimal brachial plexus injury. However, he felt the disability which he was seeing was a hysterical paralysis of the right arm.

In May 1977 Dr. Charles Bird, an orthopedic surgeon, examined claimant and reported that claimant had an almost total stocking glove distribution of his symptom and based on all the subjective tests and the lack of any real objective findings, he found it hard to establish any organic diagnosis. Dr. Bird diagnosed a minimal brachial stretch with probable minimal residuals and probable hysterical paralysis. He felt that claimant had minimal disability as a result of this injury. He did not feel there was any interference from a functional standpoint with the examination nor did he get an impression that there was any deliberate attempt by claimant to magnify his symptoms.

On May 17, 1977 Dr. Raaf reported that claimant still complained that his right arm tingled and bothered him a great deal at night. Dr. Raaf doubted that there was any real loss of strength of the right arm. He reported a sensory examination revealed a stocking type anesthesia up as far as the elbow. It was his opinion that the organic loss of the function of the right arm was mild (probably not more than 5% loss of function of the arm). He felt the claimant could return to work and there was no treatment indicated unless a psychiatric examination would be helpful to claimant.

On May 17, 1977 Dr. Edward Colbach, a psychiatrist, interviewed claimant. He felt the claimant had suffered a loss of personality. His diagnosis and explanation for claimant's disability in the right hand was that of hysterical neurosis, conversion type. Dr. Colbach indicated that this meant claimant had certain sensory motor changes in his right upper extremity which were not the result of actual physical damage, but were the result of certain psychological conflicts. He reported that claimant was unable to cope with the complicated life led in the twentieth century America. He felt that this conversion reaction had certain secondary gains or payoffs for him. It allowed the claimant to assume a rather passive position in life and to be taken care of. He felt that claimant was able to save face by simply saying that the situation was really not his fault but that he was "hurt" on the job. He felt the right hand was swollen because of disuse. He reported that in situations like this it was always possible that the claimant was malingering or faking his condition. Dr. Colbach advised that

claimant could be considered medically stationary; that a settlement should be made just as soon as possible, and then that claimant should be left alone. He predicted that once a settlement was made, the claimant would gradually get better and would probably return to work. In late May Dr. Colbach reported that the claimant said he was ambidextrous and always used his left hand a lot. He felt that some sort of work using the left hand would be preferable for claimant at this point. Dr. Wood concurred with the reports of Dr. Raaf and Dr. Colbach.

A Determination Order, dated July 28, 1977, awarded claimant compensation for temporary total disablity and compensation equal to 9.6° for 5% loss of claimant's right arm.

On April 14, 1977 Mr. Keith Skelton wrote the employer advising him that he had been retained to represent the claimant. He requested that all medical reports be referred to him relating to this injury and any statements the employer had taken from the claimant that were in their possession relating to the injury be forwarded to him and advise him if they wanted the claimant examined. In response to this, Mr. A. E. Jackson wrote to Mr. Skelton on May 11, 1977 advising Mr. Skelton an examination by Dr. Colbach had been arranged and that they were withholding all medical reports being held pending receipt of a signed authorization from claimant.

Claimant testified that he worked for the employer for less than a week at the time of his injury. He stated that his principal complaint now is numbness in his lower forearm and hand. Claimant since this injury has worked for an employer doing general mechanic work; however, he was only employed by them for four weeks before he quit. Claimant testified that he quit because he cannot hang onto a wrench due to his right shoulder problem. He stated he had difficulty driving because he has difficulty holding things in his hand. He cannot tell how tight he is gripping.

Mr. Steven Walker, an investigator, was hired by the employer to investigate this case. Mr. Walker testified that he observed the claimant moving objects which were large enough to be held with both hands over distances of 20 to 25 feet. He observed that claimant did not favor either hand. He also observed claimant dragging large pieces of plastic, one in each hand, around the rear of the house. Mr. Walker saw the claimant bend when he observed him emerging from a Safeway store pushing a grocery cart full of groceries. He observed the claimant withdraw the groceries from the cart and place them in the rear of a vehicle. He did not observe the claimant having any difficulty or limitation with respect to the use of the right hand and arm during the entire period of observations. Mr. Walker also took surveillance film of claimant.

Mr. A. Jackson, Industrial Relation Manager for the employer, testified that he had received a letter, dated April 14, 1977, from Mr. Skelton. He stated that it was normal practice and normal procedure to obtain a statement of representation signed by the claimant from his attorney. The reports requetsed by Mr. Skelton were forwarded to him on August 4, 1977. Mr. Jackson stated that he at all times relied upon Bulletin No. 69 which he interpreted as imposing a requirement on claimant's counsel to supply written confirmation from the claimant that the attorney actually represented the claimant.

Dr. Colbach also testified at the hearing and had reviewed the films. He testified that the glove anesthesia was a total loss of sensation to pin prick over the entire hand, wrist and beyond. Dr. Colbach, after reviewing the films, felt that it did not show any evidence that claimant favored his right hand. He further felt that the films were inconsistent with the story claimant told him and the way he presented himself to Dr. Colbach in his office on May 17, 1977. Dr. Colbach testified he observed him engaging in various activities using his right hand without disability. Dr. Colbach concluded that if he was a trier of fact and he would have to say that the claimant was faking. After again seeing the films on claimant's counsel's suggestion, Dr. Colbach opined that claimant was a malingerer.

The Referee, after reviewing all the evidence in this case, found that the withholding of medical reports to claimant's attorney was clearly improper. He found that the temporary total disability payments had been terminated on June 27, 1977. He found that pursuant to ORS 656.262(8) that the direct responsibility employer should be liable for additional amounts of 25% of the amount then due plus attorney fees which may be assessed under ORS 656.382. He found that penalties should be assessed on the compensation then due which would be based on the compensation for temporary total disability payments from fourteen days after the request dated April 14, 1978, i.e., April 28, 1977 through June 27, 1977. He found that claimant was entitled to 25% of such a sum as a penalty; in addition, claimant's attorney was entitled to a fee to be paid by the employer in addition to any fee based on an additional award of compensation.

As to the extent of disability, the Referee found no basis for making an award of unscheduled disability. He found there were no objective findings for claimant's allegation of disability extending into the shoulder which would be necessary to establish unscheduled disability. Rather, he found that claimant's disability was confined to the loss of function of the right arm which the Referee felt would be adequately awarded by an increase of compensation equal to 19.2° for 10% loss of the right arm making a cumulative award of 28.8° for 15% loss of the right arm.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the Referee's order. The Board finds that the Referee's award of additional compensation representing loss of function of the arm is not supported by the evidence in this case. All of the evidence in the file clearly indicates that the claimant has more use of his arm than he testified to. Therefore, the Board would reverse the Referee's award for additional compensation and reinstate the Determination Order.

The Board finds that the Referee's assessment of penalties and attorney fees for the employer's failure to forward medical reports to claimant's attorney was also incorrect. The Court of Appeals indicated that sanctions consisting of penalties and attorney fees may not be imposed for the failure to supply medical documents even when such failure is not justified. Morgan v. Simpson Lumber Company, 38 Or App 579, ____ P2d ____ (1979). Therefore, the Board would reverse the Referee's order in its entirety.

ORDER

The Referee's order, dated October 26, 1978, is reversed.

The Determination Order, dated July 28, 1977, is reinstated.

SAIF CLAIM NO. TC 24692 January 4, 1980

VELTON L. BRIDGES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

The Board entered is Own Motion Determination in the above entitled matter on December 5, 1979. An error has been pointed out to the Board which should be corrected. On page two, in the second paragraph and also in the fourth, the references to "32° for 10% unscheduled disability" should be changed to read "19.2° for 10% unscheduled disability".

The remainder of the order should be affirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-5221 January 4, 1980

JAY CASCIATO, CLAIMANT
Welch, Bruun & Green Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which awarded penalties and attorney fees for unreasonable conduct by it in processing this claim. The Fund contends its processing of this claim was proper.

FACTS

Claimant, a 20-year-old laborer, sustained a compensable injury to his back in late October or early November 1977. He advised his supervisor of this condition and was sent for medical treatment. Claimant was then laid off by the employer. Claimant eventually found other employment and since has had various jobs with other employers.

On February 10, 1978 Dr. David Dixon's clerical person reported claimant had been injured on the job and had been told not to report it as such. Dr. Dixon felt claimant's back problem was definitely caused by his job injury. On February 14, 1978 Dr. Dixon reported claimant was complaining of back pain and diagnosed a back sprain. He related this condition to an industrial injury and felt claimant should receive compensation for time off since November 1977.

On February 21, 1978 the Fund wrote the employer asking for an accident report. The employer responded on March 8, 1978 that it did not believe the accident had occurred and asked the Fund to investigate. On March 9, the Fund wrote claimant advising him it was seeking additional information and would contact him of its decision.

On April 21, 1978 the Fund notified claimant his claim was accepted and classified as non-disabling. In response to claimant's call, a representative of the Fund called claimant and advised claimant his doctors would have to medically verify his time loss. Claimant advised the Fund he had been off work since November 1977.

On June 6, 1978 claimant's attorney wrote the Fund informing it claimant had been unable to work; he requested the claim be reclassified as disabling and asked for medical reports. Claimant's attorney received medical reports on July 19, 1978 and October 16, 1978.

On July 7, 1978 claimant's attorney filed a request for hearing. On August 8, 1978 claimant's attorney requested the Evaluation Division to reclassify this claim as disabling. On October 17, 1978 it replied it needed medical reports to determine if this claim was disabling or non-disabling and the file did not contain any medical information at all. On October 31, 1978 it again wrote claimant's attorney denying his request for reclassification on the grounds it no longer had jurisdiction to make a decision on that issue. Further, it stated all requests for action had come from claimant's attorney's office and the Fund had not yet submitted any material asking for determination of any issue.

The Referee, after considering the evidence presented, concluded that the Fund had a duty to submit to the Evaluation Division the alleged conflicting medical reports and have Evaluation make a determination of whether the injury was disabling or non-disabling and that it had acted unreasonably in failing to do so to justify an award of penalties and attorney fees. Therefore, he awarded claimant penalties on any compensation for temporary total disability hereinafter awarded and an attorney fee in the amount of $500.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's conclusion. The Fund had a duty to forward all of the medical information it had to the Evaluation Division and did not and this was an unreasonable act on its part to justify awarding penalties and attorney's fees.

ORDER

The Referee's order, dated November 8, 1978, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 78-9562 January 4, 1980

RALPH W. COOK, CLAIMANT
Douglas Minson, Claimnat's Atty.
SAIF, Legal Services, Defense Atty.
Order

Claimant, by and through his attorney, filed a motion to remand his claim to the Referee to receive additional evidence which was unavailable at the time of the hearing. The Board, after thoroughly considering the motion, finds that there is no satisfactory explanation for the failure of claimant to produce the medical report from a June 1979 examination until November 1979. Therefore, the Board would deny claimant's motion.

ORDER

Claimant's motion to remand this claim to the Hearings Division is denied. All briefs are to be filed no later than February 14, 1980.

WCB CASE NO. 78-437 January 4, 1980

FRANK FALCO, CLAIMANT
Herb Selms, Claimant's Atty.
Velure & Heysell, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer/carrier seeks Board review of the Referee's order which found that the claimant sustained a compensable injury on October 17, 1977. The employer contends the alleged injury that claimant suffered was not compensable.

FACTS

Claimant, a 31-year-old body shop repairman, allegedly sustained a compensable injury to his right knee on October 17, 1977. Claimant had been hired as a body and fenderman. On October 17, 1977, his first day at work, claimant testified the foreman told him that he was to park his car in the school district's parking lot where the employer rented space. He testified the employer told him to jump the fence to get to the garage. He testified he parked his car and grabbed his tool box, jumped the fence and went to work.

In the process of working, claimant discovered he needed a piece of additional equipment which he had left in his car. He advised the foreman of this fact and went to get it. In climbing over the fence, which was five feet tall, claimant somehow got hung up in the fence and injured his right leg. A man walking down the street observed claimant in difficulty and climbed over the fence to assist claimant. Together the two walked out through a gate opening in the fence, which claimant saw for the first time. Claimant returned to the garage, advised the foreman of the situation and continued to work, however, the pain continued to get worse in the right knee.

On March 2, 1978 claimant was shopping in a Safeway store when he fell and broke the cast which had been placed on the knee after the October 1977 incident and injured his right knee.

Mr. Merle Townsend, manager for the employer, testified that he had hired the claimant as a Journeyman Body Repairman, but claimant's work was not up to par. He testified he never knew of anyone jumping the fence. He stated it was only ninety feet from the gate to where claimant had jumped the fence. He did not notice the claimant was limping on that particular morning.

Claimant originally filed his claim for this October 17 injury on November 23, 1977. The claim was denied by the employer/carrier on January 1, 1978.

Dr. C.D. Potter reported on October 18, 1977 the claimant injured his knee on October 17, his first day on the job, when he was moving his car at the request of his supervisor. He reported that claimant sustained an injury to the lateral aspect of the right knee and came to his office with marked effusion. Dr. Potter's diagnosis was a grade two sprain, lateral collateral ligaments of the right knee. He placed the claimant's leg in a cylinder cast and asked him to return in two weeks for a follow-up check.

On October 24, 1977 Dr. Potter reported claimant was having difficulty with his cast because of a claustrophobic reaction. Dr. Potter treated claimant with a knee immobilizer and removed the cast.

On March 2, 1978 Dr. A.C. Minzer reported that claimant had fallen in a Safeway store and struck his right knee and also twisted his neck. Claimant was complaining of severe neck pains and severe pain in the right knee. Claimant complained that he could not move his right knee at all. Dr. Minzer diagnosed cervical strain and a contusion of the right knee.

On April 14, 1978 Dr. William Matthews reported the claimant was complaining of a painful right knee. The history he was given was that claimant slipped in a Safeway store on March 2, 1978. Dr. Matthews reported the x-rays of the right knee were entirely normal. He diagnosed a hemarthrosis of the right knee with probable internal derangement. He felt that the present signs suggested that the lateral meniscus was the most likely site of internal derangement. An arthrogram done in late April 1978 revealed a definite tear of the medial meniscus.

On May 25, 1978 Dr. Porter reported that when he saw the claimant in late November 1977 the claimant had no pain with the maximal varus or valgus stress of the knee. He reported the claimant had failed to keep appointments in December of 1977 and January of 1978, however, he did see the claimant on February 10, 1978 at which time the claimant was having give-a-way of his knee. He asked the claimant to obtain an arthrogram which the claimant did. He scheduled an appointment in February 1978 which the claimant failed to keep. The next time he saw the claimant was on March 16, 1978. Dr. Porter reviewed the arthrogram with the claimant at that time and he found claimant had a tear of the medial meniscus. He advised claimant to have surgery but had not seen the claimant since that date.

On May 17, 1978 Dr. Matthews reported that he had seen the two arthrograms and compared them. He advised the claimant they were essentially similar and he could tell no definite difference. He reported the arthrogram in February was done as a consequence of the knee symptoms which claimant said began in October with his industrial injury when he jumped over the fence to get something and had injured his knee in the process. Dr. Matthews thought that surgical excision of the medial meniscus was reasonable at some point in time, however, there was no hurry and he felt it would be better if the claimant would clarify the industrial injury status first.

On March 3, 1978 Dr. Mario Campagna examined the claimant and reported that he complained of pain in the neck and the right shoulder and right arm with numbness, tingling and headaches. Claimant reported that he had slipped and fell on March 2, 1978 while in the Safeway store. Dr. Campagna diagnosed a cervical strain.

A recorded statement was taken on February 14, 1978 in the claimant's attorney's office. In that statement claimant gave the same history of the injury in October 1977 as he gave at the hearing.

Mr. Ken Klein's statement was also taken. He had hired the claimant. He reported that claimant gave a history of returning from the parking lot and that claimant was limping when he returned. He asked the claimant what had happened and the claimant advised him he had jumped over the fence and pulled his knee out of place. Mr. Klein asked the claimant why he did this and the claimant responded he had been advised to get back in a hurry and he took the shortest way. Mr. Klein stated that he had never told claimant to jump the fence. Mr. Klein stated that jumping the fence saved walking about a half a block to the location of the gate.

The Referee, after reviewing all the evidence, found that claimant had proven that he had sustained a compensable injury on October 17, 1977. The Referee found the Lane v. Gleaves Volkswagon, WCB Case No. 77-1184, was controlling and set aside the denial issued by Industrial Indemnity Underwriters Insurance Company on behalf of the employer and held the claim was compensable.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Lane, supra., case relied upon by the Referee was reversed by the Court of Appeals in March 1979. Lane v. Gleaves Volkswagon, 39 Or App 5, ____ P2d ____ (1979). The Board, in that case, found an injury compensable since that claimant's climbing of a fence was neither expressly prohibited by the employer, nor was it unreasonable. The Court of Appeals, in reversing the Board, held that an unreasonable act or prohibited conduct by a claimant would deny compensation for injuries that result from such acts. In the Lane case, they held that the claimant's attempt to climb a seven-foot fence which had a locked gate was a very graphic way of prohibiting claimant from taking the route he insisted on trying when leaving the employer's premises. The Court went on to say that given that there was a safe alternative, claimant's decision to climb over the fence was unreasonable. The Board, after reviewing all the facts in this case, finds that the claimant's act was unreasonable. Therefore, the Board finds his claim is not compensable.

The Board notes that there was some confusion as to which insurance carrier provided coverage for the employer in this case. However, this does not affect the Board's ruling in this case.

ORDER

The Referee's order, dated October 17, 1978, is reversed.

The employer/carrier's denial of January 1, 1978, is approved.

WCB CASE NO. 78-5554 January 4, 1980

ISSAC W. JOHNSON, CLAIMANT
Coons & Anderson, Calimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which remanded claimant's occupational disease claim to it for acceptance and payment of benefits. It contends that claimant's degenerative spine condition is not compensable as an occupational disease.

FACTS

Claimant, a 56-year-old yard man, filed a claim on April 12, 1978 alleging an occupational disease to his lower and upper back. Claimant alleged that his almost 16 years of driving a lift truck in the log yard over bumps and into pot holes had aggravated and accelerated the gradual wearing out of his low back, upper back and neck.

Claimant, in early 1974, reported low back pain and pain in a number of joints, including shoulder, hands, and right elbow. Dr. Larry Hirons diagnosed left subacromial bursitis, right elbow lateral epicondylitis, and osteoarthritis, hands and low back.

Dr. Frederic Davis, in April 1974, reported claimant's symptoms were improved with rest. He reported that the pain was localized in the low lumbar area and might radiate to the right or left. Dr. Davis indicated positional changes or lifting or carrying aggravated the pain. He noted claimant worked as a stacker and did some heavy lifting and a lot of sitting and had done this for a number of years. X-rays revealed degenerative changes at the L4-5 and L5-S1 levels with disc space narrowing, disc calcification and marginal osteophytes. Dr. Davis recommended claimant avoid heavy lifting and, if at all possible, carrying heavy objects as well.

On January 6, 1978 Dr. Davis reported claimant returned and reported gradual and progressive increase in his back pain. He noted claimant had continued to work as a stacker, doing very little lifting. Dr. Davis diagnosed severe osteoarthritis of the lumbar area.

On March 31, 1978 Dr. R. Matteri reported that claimant's job consisted mainly of driving over rough ground and continuous turning from side to side at the same time, as well as a lot of heavy lifting, bending and stooping. Dr. Matteri diagnosed severe advanced degenerative spondylosis of the lumbar spine. He suggested claimant avoid any occupation requiring heavy stooping, lifting, or bending.

On June 8, 1978 Dr. Theodore Pasquesi opined that claimant had a progressive problem which would continue to bother him and probably would increase in severity whether claimant worked at his present job or not. Dr. Pasquesi noted arguments could be made both ways, but in his opinion, claimant's claim was not industrially related. He stated the possible liability would be on the basis of an occupation disease rather than any injury. He felt it was impossible to separate, as causitive factors, claimant's activity at work from activities away from work. Dr. Pasquesi reported, "If the industrial carrier feels it should assume responsibility on the basis of an occupational disease, then the patient will probably need continued care, and probably will have considerable impairment."

On June 14, 1978 the Fund denied claimant's claim.

Dr. Davis, in his deposition, opined that claimant's job running the stacker was a material contributing cause to claimant's severe and advanced lumbar spondylosis or degenerative disc disease in claimant's lumbar spine.

Claimant testified his off-the-job activities consisted of fishing, work around the house and some garden and yard work. Claimant and his two witnesses testified as to the development of claimant's back symptoms, noting that in the last two years of employment his condition was "bad".

The Referee concluded that the weight of the evidence was that claimant suffered an occupational disease because of his work. He found Dr. Davis to be more persuasive than Dr. Pasquesi. The Referee noted claimant's condition is a degenerative one, worsened materially by the movement, activities and trauma of his work for 16 years. He found that claimant's other activities may have contributed to the ultimate condition, but did not bar the claim. Therefore, the Referee set aside the Fund's denial and remanded the claim to it.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, agrees with the Referee. Dr. Davis opined that claimant's work accelerated and hastened the development of spondylosis or degenerative disc disease in claimant's lumbar spine. The facts of this case are not unlike those found in Beaudry v. Winchester Plywood Inc., 255 Or 503, 469 P2d 25 (1970). In Beaudry (supra.) the Court found the worker's "bursitis" condition compensable as an occupational disease. In this case, claimant's pre-existing disease, arthritis, was accelerated or aggravated and permanently worsened by his working as a "stacker" driver. Therefore, the Board finds, as did the Referee, that the claimant has met his burden of proof and that the Referee correctly set aside the Fund's denial.

ORDER

The Referee's order, dated March 27, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 78-9971 January 4, 1980

LOREN MILLER, CLAIMANT
Monte Walter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which awarded claimant additional compensation equal to 96° for 30% unscheduled disability for a total of 128° for 40% unscheduled low back disability. The Fund contends that this award is excessive.

FACTS

Claimant, a 34-year-old laborer, sustained a compensable injury to his back and left leg on July 27, 1977 when he jumped into a manhole on a construction site. Dr. Fred Richards diagnosed a low back pain with an acute re-injury of claimant's low back. Claimant had had back surgery in 1969 for another industrial injury.

On September 20, 1977 Dr. Richards reported claimant had been referred for rehabilitation. He reported that claimant still had sciatica of the left leg. Dr. Richards felt that if claimant returned to the same or like work he would have a repeat of his symptoms.

A rehabilitation program was begun by claimant on January 16, 1978 and continued until July 14, 1978. Claimant was trained as a machinist.

In February 1978 claimant was involved in a motor vehicle accident. Dr. Richards reported that this aggravated his industrial injury.

On June 20, 1978 Dr. Richards reported claimant had graduated from a rehabilitation program and was ready for work. He reported claimant would have some limitations; prolonged standing would cause the left leg to become painful, irritating the sciatic nerve; likewise squatting, bending, etc. produced the same symptoms; he felt lifting should be limited to around 30 pounds. He reported claimant was stationary.

In July 1978 Dr. Theodore Pasquesi reported claimant was working as a machinist. Claimant complained that bending, stooping, lifting or standing for more than an hour caused pain in his back and into his left hip area. Dr. Pasquesi opined that claimant was stationary and his total impairment was 27% of the whole man.

A Determination Order, dated July 27, 1978, awarded claimant compensation for temporary total disability and compensation equal to 32° for 10% unscheduled disability resulting from his low back injury.

Claimant testified that he has completed eight years in the military, worked in ceramics, has been a private investigator, a welder, a salesman, a ranchworker, a backhoe operator and a machinist. He further testified he no longer has back problems, just occasional sciatica. He uses no medication and can sit for three hours at a time. He participated in team bowling and weekend wood cutting and loading.

The Referee concluded that based on the medical evidence and claimant's limitations, he had suffered a greater loss of wage earning capacity than he had been awarded by the Determination Order. Therefore, he found claimant was entitled to compensation equal to 128° for 40% unscheduled disability for his low back injury. This was in lieu of the previous award.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The medical evidence indicates claimant has chronic sciatic nerve condition which affects his left leg. Dr. Pasquesi rated the absence of a left achilles reflex at 5% impairment of the whole man. This, coupled with claimant's testimony and his limitations, leads the Board to conclude claimant is entitled to an award equal to 15° for 10% loss of function of the left leg.

Further, the Board finds the Referee's award of unscheduled disability is not supported by the evidence. Using the evidence in this case, the Board concludes claimant is entitled to an award of compensation equal to 80° for 25% unscheduled disability for his low back injury.

ORDER

The Referee's order, dated June 7, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his low back injury and compensation equal to 15° for 10% loss of function of his left leg. These awards are in lieu of the award granted by the Referee's order which in all other respects is afffirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO 78-8618 January 4, 1980

ERNEST R. LA FRANCE, CLAIMANT
Rick W. Roll, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Amended Order On Review

The Board, on December 14, 1979, issued its Order on Review in the above entitled matter. It has been brought to its attention that there is a typographical error which should be corrected. On page 3, paragraph 3, line 4, the word "unscheduled" should be changed to read "scheduled".

The remainder of the order should remain unchanged.

IT IS SO ORDERED.

WCB CASE NO. 79-1474 January 4, 1980

MARJORIE I. STEPHENS, CLAIMANT
Goldsmith, Siegel, Engel
& Littlefield, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which set aside its denial of claimant's claim of carbon monoxide intoxication and remanded it to them for acceptance and payment of benefits. The Fund contends its denial was correct.

FACTS

Claimant, 52 years old, alleged that while employed as cashier at a car wash, she developed carbon monoxide intoxication from breathing fumes from running automobiles in a confined area. She filed her claim for this condition on November 1, 1978.

Dr. Michael Bower diagnosed probable carbon monoxide intoxication. He indicated this was related to an industrial injury or exposure. He first treated claimant for this condition in July 1978. Dr. Bower suggested claimant take time off from work.

On December 15, 1978 Dr. Bower reported that claimant had an elevated blood level of carbon monoxide while working in the booth (12%). He repeated the tests after claimant's removal from the booth for 7-10 days and they revealed a level of 4.3%. He noted claimant had continued to smoke during this entire time. Dr. Bower felt these tests indicated an environment of elevated carbon monoxide which was probably self induced, plus lack of adequate ventilation to remove the smoke. He could not say this condition was totally job related.

On December 5, 1978 G. F. Baker, an industrial hygienist, reported that the booth in which the cashier sits is 5' x 7-1/2' x 8' and located about 10' from the nearest lane of cars. He reported the ventilation was good. Five tests for carbon monoxide were done. Four tests resulted in safe levels of "CO". However, a test taken after the cashier had finished smoking a cigarette with the window closed for ten minutes, caused a test result that was outside the safe level. Mr. Baker concluded that primary exposure to CO came from cigarette smoking and not vehicle exhaust.

Claimant was released for regular work by Dr. Bower on December 19, 1978. He was unable to determine if claimant had suffered any permanent impairment from this exposure.

On January 17, 1979 the Fund denied claimant's claim. The basis for its denial was that it could not substantiate that claimant's work caused or materially and permanently worsened her condition. Their information indicated the primary cause of claimant's condition was from smoking.

Claimant testified she had begun working on a full time basis in 1976 and put in 40-65 hours per week. The booth has one window near the line of customers which is always left open for customer service. She stated there is no ventilation in the booth. She testified she was required to remain in the booth 8 to 10 hours per day without breaks.

As she described the design of the car wash, customers park in front of the booth, leave the motor of the car running, walk to the window, pay the bill and then sit in their car until it is their turn to move forward. Claimant's daughter, also employed by the car wash, corroborated claimant's testimony.

Claimant further testified she has smoked since she was 15 years old and did smoke on her job. In 1978 she began to notice she had a constant headaches, felt dizzy, nauseated, staggered when she walked, had a change in her vision, suffered from loss of memory and her skin broke out. While on vacation in August 1978 she noted she began to feel better, but when she returned to work all the symptoms returned.

Claimant did stay off work from October 30, 1978 to December 19, 1978. She noted that her condition improved even with an increase in cigarette smoking. However, on her return to work, she developed headaches, staggered a little, and her memory deteriorated.

The Referee, after reviewing all of the evidence, concluded that claimant had proven by a preponderance of the evidence that claimant's carbon monoxide poisoning was caused by her work. Therefore, he set aside the denial and remanded the claim to the Fund for acceptance and payment of benefits.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the conclusions of the Referee.

ORDER

The Referee's order, dated June 29, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 78-8993 January 7, 1980

HAROLD RAIKES, CLAIMANT
Starr & Vinson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

The Board issued an Order on Review on November 8, 1979 which affirmed the Referee's award of permanent and total disability to claimant. The Board's order granted claimant's attorney the sum of $200 as an attorney's fee for prevailing at the Board level.

On November 19, 1979 claimant's attorney moved the Board to reconsider the attorney's fee awarded to him, contending such fee was inadequate.

The Board, after considering claimant's attorney's Motion to Reconsider the attorney's fee, finds the attorney's fee granted was adequate and finds that claimant's attorney's motion should be denied.

IT IS SO ORDERED.

WCB CASE NO. 79-9039 January 9, 1980
WCB CASE NO. 79-6347

ARCHIE DEAN, CLAIMANT
Bloom, Ruben, Marandas & Sly,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Order Denying Own Motion Relief

On December 6, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury to his low back sustained on December 12, 1977. This claim was closed by a Determination Order, dated May 18, 1978, which ordered the claimant compensation for temporary total disability from December 13, 1977 through January 9, 1978 and temporary partial disability from January 10, 1978 to March 5, 1978. Claimant's aggravation rights have not expired. Attached to claimant's petition were several medical documents in support of claimant's request. Claimant contends that at no time did he ever receive a copy of such a Determination Order until such time as he saw an attorney in July of 1979. In his affidavit he states that he was not aware of the receipt of the Determination Order issued on October 2, 1978 for an injury sustained on July 12, 1978. Claimant contends that as a result of these injuries he sustained a permanent disability for which he has not been compensated.

Claimant sustained an injury to his back on July 12, 1978. A Determination Order, dated October 2, 1978, for his injury awarded claimant compensation for temporary total disability only. Claimant's aggravation rights on this claim have not expired. Claimant also asked this claim be reopened in his requests.

Claimant had requested a hearing on this May 18, 1978 Determination Order. This request for hearing was received by the Hearings Division on July 25, 1979. The employer and its carrier, by and through their counsel, filed a motion to dismiss the Request for Hearing on the grounds that it was not timely filed within one year as required by statute. The motion to dismiss the Request for Hearing was granted by the Referee.

The Board, after thoroughly considering the evidence before it, finds it is not sufficient to warrant opening the claimant's claims under its own motion jurisdiction at this time. The request by claimant for own motion relief should be denied.

IT IS SO ORDERED.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal on this order.

CLAIM NO. C 332261 January 9, 1980

TWYLA K. GOULD, CLAIMANT
Kenneth Zenger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 1, 1979 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury to her back sustained on September 13, 1971. Claimant's claim was first closed by a Determination Order, dated February 2, 1972, which awarded claimant compensation for temporary total disability only. Claimant's aggravation rights have expired.

On November 8, 1979 the Board informed the Fund of claimant's request and asked it to advise it of its position with regard thereto. On November 21, 1979 the Fund replied that based upon the information it had it would not oppose an own motion reopening of the claim.

On September 13, 1979 Dr. Francis Nash reported he was referring the claimant to the Orthopaedic Consultants for another opinion concerning claimant's ruptured disc. He further indicated that he was requesting surgery for a lumbar laminectomy which was scheduled to take place on December 11, 1979.

On December 25, 1979 the Orthopaedic Consultants reported that claimant had not worked since August 3, 1979. Their diagnosis was a probable ruptured disc at L5-S1 on the left; S1 radiculopathy, mild; degenerative joint disease at L5-S1, moderate. It was their opinion that claimant's current problems were related to her industrial injury of September 13, 1971. They did not feel that claimant, however, was a good candidate for surgery at that point considering her obesity. They concluded that claimant's condition had materially worsened since her last award or arrangement of compensation in 1972.

The Board, after thoroughly considering the evidence before it, finds that it is sufficient to warrant reopening claimant's claim at this time. The request by claimant for own motion relief is granted.

ORDER

The claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation for temporary total disability from August 3, 1979 and other benefits as provided by law until it is closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

SAIF CLAIM NO. EC 76074 January 9, 1980

JAMES HANSEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requested the Board exercise its own motion jurisdiction and reopen his claim for an injury to his right wrist sustained on May 26, 1967. Claimant's aggravation rights have expired.

Dr. Richard C. Zimmerman reported on November 21, 1979 that the claimant had very limited motion in his right wrist due to the traumatic arthritis and a vascular necrosis. He felt that claimant had a carpal tunnel syndrome which was related to the original accident since EMG tests done at the time of the original accident showed delay at the carpal tunnel. Dr. Zimmerman felt the claimant's symtomatology had reached the state where claimant desired to have operative relief of the carpal tunnel. Dr. Zimmerman suggested such procedures to him and wrote to the State Accident Insurance Fund asking them to reopen his claim.

On December 24, 1979 the Fund advised the Board that it did not oppose an own motion order reopening the claim. Attached to this letter were various exhibits forwarded from their claim file.

The Board, after thoroughly considering the evidence before it finds it is sufficient, at this time, to reopen the claimant's claim for his May 26, 1967 injury for additional compensation and benefits when and if he undergoes the surgery recommended by Dr. Zimmerman.

IT IS SO ORDERED.

WCB CASE NO. 78-8799 January 9, 1980

ELIZABETH L. LEEK, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which approved the employer's denial for a claim for an ulcer condition and ordered the employer to pay claimant interim compensation from the date of disability until the date of the denial less any salary paid for the period along with a penalty of 15% of the amount owed and awarded claimant's attorney a sum of $450. Claimant contends, on review, that her ulcer condition is, in fact, compensable.

FACTS

Claimant, a 52-year-old Motor Vehicles Department employee alleges that she developed a duodenal ulcer related to her work stress. She filed a claim for this condition on August 22, 1978.

Dr. Duane Thompson, D.O., diagnosed a stress ulcer, gastric and hyperchlorhydria. He did not indicate at first that this condition was the result of an industrial injury or exposure.

Claimant contends that the stress was caused by the condition at the Motor Vehicles Department office in Beaverton, Oregon. She stated that this office was understaffed and the supervisory leadership was uncoordinated.

On August 14, 1978 Dr. Charles R. Rosenblatt reported that claimant had a five-month history of pain in the right upper quadrant. His diagnosis was a duodenal ulcer, uncomplicated. He reported that claimant was employed at the Motor Vehicles Bureau and was under extreme pressure at work.

On October 24, 1978 the State Accident Insurance Fund (Fund) denied the claimant's claim for the duodenal ulcer condition. The basis of the denial was that there was insufficient evidence that claimant's work activities were causal factors to the ulcer condition.

On October 17, 1978 Dr. Rosenblatt reported that he did not know whether claimant's condition was job related. He stated that stress ulceration in the upper gastro-intestinal tract was well known, well documented, and a clinical entity.

On October 31, 1978 Dr. George Harwood, medical consultant for the Fund, opined that the duodenal ulcer was not caused from job exposure or job activities. He agreed that duodenal ulcers usually result from stress. It was his opinion that the personality of the person involved was also key. He stated that this condition was readily seen in a person who has a certain type of personality and who would develop an ulcer regardless of their environment because of their reaction to the stimuli around them. He felt this condition would develop from stress at home or other places other than work.

In March 1979 Dr. Duane Thompson reported that he had been treating the claimant since October 1974. He had been impressed that the claimant was charming, gracious and a socially well-integrated individual. He noticed, however, in late spring and early summer of 1978 that she became apprehensive and uneasy. He reported that on several occasions she mentioned the rigors of her job with the Motor Vehicles Department where she was employed. She indicated major sources of irritation and stress were understaffing, uncoordinated policies, and erratic supervisory policies. He said there was some type of relationship between one of the supervisors and a fellow female employee. He reported that all these conditions were very aggravating for a person as thorough and meticulous as claimant. Dr. Thompson reported that when claimant began complaining of her abdominal pain he immediately considered a stress ulcer as a possible cause of the pain. This, in fact, was the eventual diagnosis of claimant's condition. Therefore, it was his opinion that there was a greater than 50% chance, in all medical probability, that her condition was job related.

Claimant testified that her symptoms of illness began approximately 10 months after transferring to the Beaverton office. She stated she was very nervous, could not sleep well and suffered from a "gassy tummy" and started taking an antacid. The office in Beaverton required that people stand in line which created additional pressure on claimant, according to her testimony. She testified she felt she was constantly rushed and she did not appreciate this. Claimant testified that her office was understaffed and due to the smallness of the office and the number of people, was subject to varying room temperatures. Claimant also testified she felt she was subjected to ridicule by her supervisors and that she took her work very seriously. She stated that often the problems of her working environment were taken home with her.

The Referee, after reviewing all of the evidence, concluded that claimant had not met her burden of proof that her ulcer condition was caused by the stress of work, however, the Referee concluded that claimant was entitled to compensation from the date of her disability, July 28, 1978, to the date of the denial, October 24, 1978, along with a penalty of 15% of the amount owed and assessed as and for a reasonable attorney's fee the sum of $450 for his representation of claimant in obtaining her interim compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses that portion of the Referee's order which affirmed the denial of the employer. The medical evidence indicates that claimant's treating physician, Dr. Thompson, finds the stress of her work caused the duodenal ulcer. The only stress claimant was exposed to was at work. Dr. Harwood, the Fund's medical consultant, was of an opposite opinion and Dr. Rosenblatt was unable to say for sure whether claimant's work caused the duodenal ulcer condition. However, Dr. Rosenblatt does state that stress is a well-recognized and well-documented cause of duodenal ulcers. Dr. Harwood concurs that duodenal ulcers usually result from stress. Dr. Thompson reported claimant had been in good health and free of any stomach ailments prior to her employment in August of 1977 in Beaverton Motor Vehicles' office. Dr. Thompson reported that she became irritated and uneasy and related this to irritations and stresses related to her job. Therefore, the Board concludes that claimant has met her burden of proof by establishing that her duodenal ulcer condition is compensable.

ORDER

That portion of the Referee's order, dated May 31, 1979, which affirmed the denial of the claimant's claim is reversed.

Claimant's claim for the duodenal ulcer is remanded back to the State Accident Insurance Fund for acceptance and for payment of benefits as required by law until closure under ORS 656.268.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services both at the hearing and at Board review a sum equal to $600, payable by the Fund.

CLAIM NO. ZA 928712 January 9, 1980

KENNETH MASON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left knee on June 5, 1962. Claimant's claim was initially closed by a Determination Order of October 29, 1962 which awarded him an award of compensation equal to 16.5° for 15% of the loss of his left leg. Claimant's aggravation rights have expired.

Claimant subsequently developed traumatic arthritis which was attributed to the original injury. On July 6, 1977 claimant underwent a medial meniscectomy of the left knee and on March 29, 1978 had a total knee replacement done in his left knee.

In September 1979 the Orthopaedic Consultants examined claimant and reported his condition was stationary. They opined the total loss of function of the left knee was moderate, around the upper limits of that range.

On September 25, 1979 Dr. Stevens reported that he felt the total disability claimant had was equal to that for a knee fusion with an inch of shortening with some pain.

Claimant had been receiving payments of time loss since October 5, 1976.

On October 16, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on December 20, 1979, recommended that claimant be granted compensation for temporary total disability from October 5, 1976 through September 25, 1979 and an award of compensation equal to 33° for 30% loss of function of his left leg. This was based on their finding 46% combined impairment in the left leg and finding claimant had been given "15%" scheduled disability already for the left leg.

The Board, after thoroughly reviewing all of the medical evidence in the file, finds that claimant is entitled to an award of compensation equal to 66° for 60% loss of function of his left leg. This award is supported by the reports of the Orthopaedic Consultants and Dr. Stevens which indicate claimant has moderate loss of function in the left leg. This award is in lieu of any and all previous awards granted claimant. The Board concurs with the recommendation of the Evaluation Division that claimant be granted an award of compensation for temporary total disability from October 5, 1976 through September 25, 1979.

ORDER

Claimant is hereby granted an award of additional compensation for temporary total disability from October 5, 1976 through September 25, 1979 and an award of compensation equal to 66° for 60% loss of function of the left leg. This award is in lieu of all previous awards for loss of function of the left leg.

CLAIM NO. D53-122440 January 9, 1980

PATSY CARPENTER MATHES, CLAIMANT
Frohnmayer & Deatherage, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 19, 1979 Employers Insurance of Wausau advised the Board that based on a report dated May 23, 1979 from the Orthopaedic Consultants it would not oppose an Own Motion Order reopening claimant's claim for a July 17, 1968 injury. It further advised the Board it was presently paying compensation for temporary total disability under another claim which also had been opened under an Own Motion Order. Wausau stated it authorized surgery to claimant's low back since it pertained to her injury of July 17, 1968 and would voluntarily pay compensation for temporary total disability under that claim.

In the May 1979 report from the Orthopaedic Consultants it was reported claimant had had three prior back surgeries. They suggested that L4 be added to the previous existing fusion between L5 and S1.

The Board, after reviewing all of the material in this claim, finds that it is sufficient to order reopening of her July 17, 1968 claim for the additional surgery and hospital expenses. Claimant is also entitled to compensation for temporary total disability for this claim, but is not entitled to be paid compensation for temporary total disability under both claims. Therefore, the Board would order her claim for her July 17, 1968 injury be reopened for additional compensation and other benefits if and when she enters the hospital for additional surgery.

Claimant's attorney is entitled to a reasonable attorney's fee equal to 25% of the increased compensation granted by this order for temporary total disability, payable out of said compensation as paid, not to exceed $750.

IT IS SO ORDERED.

CLAIM NO. C 402055 January 9, 1980

RUDOLPH NAIMAN, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 30, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction under the provisions of ORS 656.278 to reopen his claim for an industrial injury suffered on October 12, 1972. On that date, claimant had fallen off a roof and injured his back. Attached to this request were several medical documents.

In September 1979 Dr. M. J. Wilson reported that claimant complained of having intermittent difficulty with his low back, legs as well as his arms and neck since his original injury. He also reported in the past year or so claimant had been having increasing stiffness in his hip and more limitation of motion and pain in his left posterior hip which he, claimant, blamed on his low back. Dr. Wilson noted that the x-ray reports taken in 1972 indicated a "fused deformed hip". Claimant had also mentioned an earlier hip fracture on the left side. Dr. Wilson diagnosed continuing symptoms of cervical nerve irritation probably secondary to the degenerative disc and osteoarthritic changes present. He reported from the history it appears these were connected with the injury of 1972. In addition, he diagnosed claimant as having a grade I spondylolisthesis with symptoms of mechanical low back instability and nerve root irritation. He reported this was further compounded by an arthritic deformed left hip which, during the last couple of years, gradually progressed to the point where it was painful and symptomatic because of the restriction of motion and limp, and he felt claimant was probably placing more strain on his already unstable back. Dr. Wilson opined that the hip condition pre-existed his industrial injury. There was, however, a possibility that the spondylolisthesis L5-S1 may well have been traumatic considering the compression fracture of L1 or 2 at the time of the original injury. He concluded that in any event the claimant was in need of treatment for his low back and hip condition. He felt an attempt to remove some of the strain in the low back, consideration of a hip resurfacing procedure to alleviate the left hip pain and improve his motion and gait probably would take precedence. Therefore, he recommended claimant undergo a left hip resurfacing which he had tentatively scheduled for November 30, 1979.

Also, in September 1979, the Orthopaedic Consultants examined the claimant. Their diagnosis was chronic lumbosacral strain, healed compressions, minimal L1 and L2, old injury to the left hip, possible injury to the head of the femur in 1959 and melancholy senilis of the left hip with degenerative arthritic changes, fairly advanced. It was their opinion that the changes in the hip were likely to progress with the passage of time. They felt the claimant's condition was stationary at that time. They also concluded the condition that was present in his left hip was probably not due to the injury except through some aggravation, has caused increasing symptoms to a mild degree in the back, as well as the symptoms that were caused from his 1972 fall. They did not feel that the hip was badly aggravated by this injury because of the fact he did not have really much complaint in the hip until five or six months later after he returned to work.

Claimant's claim had been first closed by a Determination Order, dated March 15, 1974, which awarded claimant compensation for temporary total disability and temporary partial disability and compensation equal to 48° for 15% unscheduled disability resulting from an injury to his low back. A Second Determination Order, in June 1977, awarded claimant additional compensation for temporary total disability. A stipulated and disputed claim settlement was entered in October 1978 which awarded claimant an additional award of compensation equal to 64° for 20% permanent partial disability for his back injury. Also, a disputed claim for a cervical condition was settled for the sum of $2,100. Claimant's aggravation rights have now expired.

On December 4, 1979 the Fund was given 20 days to respond to claimant's request. On December 7, 1979 the Fund indicated it would oppose reopening of claimant's claim for his 1972 back injury. It was the Fund's position that the hip condition was not the result of the October 12, 1972 injury. Further, it was their position that any current back symptoms are attributable to the hip condition rather than a direct result of the October 12, 1972 injury.

The Board cannot determine if claimant's condition is related to his October 12, 1972 injury, therefore, remands claimant's own motion request to the Hearings Division for a hearing. The Referee shall take evidence on this matter to determine whether or not claimant's current condition requiring treatment is related to the October 12, 1972 injury or whether the current condition is attributable to the hip condition and if the hip condition is related to the October 12, 1972 injury. Upon the conclusion of the hearing, if the Referee finds that claimant's present condition is a result of his 1972 injury and represents a worsening thereof he shall submit his recommendation that claimant's request for own motion relief be granted. If the Referee finds that claimant's present condition is not due to his October 12, 1972 injury, the Referee shall submit his recommendation that claimant's request for own motion relief be denied. In either event, the Referee shall cause a transcript of the proceeding to be prepared and submitted to the Board with his recommendation.

CLAIM NO. C 391545 January 9, 1980

PATRICIA PANKRATZ, CLAIMANT
Emmons, Kyls, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 22, 1979 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury to her low back sustained on August 30, 1972. Her claim was first closed by a Determination Order, dated February 28, 1973 which awarded her 5% of the maximum allowable by statute for unscheduled low back disability. Claimant's aggravation rights have expired. Attached to claimant's petition were several medical documents in support of her request. Claimant indicated that she had been unable to work since September 7, 1978 and was still unable to work.

On September 12, 1979 the Board informed the Fund of claimant's request and asked it to advise the Board of its position with regard thereto. On December 27, 1979 the Fund replied that it was forwarding to the Board a report from the Orthopaedic Consultants and that based on that report they had no objections to an Own Motion Order reopening this claim.

Dr. Chen I. Tsai reported in May 1979 that he had examined claimant on September 7, 1978 at the request of her treating physician. He reported that after his examination he performed back surgery on the claimant on October 23, 1978. It was Dr. Tsai's opinion that based on medical probability that claimant's low back pain and bilateral sciatica were related to her injury sustained in August 1972 and eventually required surgery on October 23, 1978. He reported that she had not been able to be gainfully employed at the time of his consultation on September 7, 1978.

On October 29, 1979 the Orthopaedic Consultants reported that claimant's condition was medically stationary. It was their opinion that claimant's physical impairment of her low back was related to the 1972 injury.

The Board, after thoroughly considering the evidence before it, finds that it is sufficient to warrant reopening of claimant's claim at this time. The request by claimant for own motion relief is granted.

ORDER

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation for temporary total disability effective September 7, 1978 and for payment of other benefits as required by law until the claim is closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

CLAIM NO. D 113902 January 9, 1980

EARL ANSEL WOFFORD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 26, 1979 claimant, by and through Dr. Linton G. Weed, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury to his left leg sustained on March 17, 1965. Claimant's aggravation rights have expired.

Claimant's original injury occurred when he was struck with a haul-back line, which resulted in a severe injury to the left leg.

Dr. Linton G. Weed, in his request for reopening, reported that there was an unstable scar in the posterior lower leg just above the heel that had broken down and could not be successfully treated without surgery. He desired to admit the claimant for debridement and probable skin grafting in the near future.

On December 21, 1979 the State Accident Insurance Fund enclosed Dr. Weed's request for reopening and additional medical evidence from its file. It was the Fund's position that they were unopposed to reopening the claim.

The Board, after thoroughly considering the evidence before it, finds that it is sufficient to warrant a reopening of claimant's claim for his March 17, 1965 injury at the time he is admitted to the hospital for surgery. Therefore, the Board orders that the claimant is entitled to additional compensation and other benefits as provided by law if, and when, he is hospitalized for the surgery as recommended by Dr. Weed.

IT IS SO ORDERED.

SAIF CLAIM NO. FC 68580 January 10, 1980

AMELIA MARIE JOY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her right leg on July 27, 1967. Her claim was initially closed by a Determination Order, dated November 13, 1968, which awarded claimant compensation for temporary total disability and compensation equal to 52.5° for 35% loss of function of her right leg. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with the right leg resulting in additional reopenings and reclosings of her claim. She was granted a total permanent partial disability equal to 120° for 80% loss of function of the right leg as a result of the various openings and closings.

On August 1, 1977, Dr. Russell Gustavson reported that claimant developed additional problems with her right lower leg. He felt she would need additional hospitalization. On March 10, 1978 the claimant underwent an amputation of her right leg below the knee.

On December 13, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on December 27, 1979, recommended that claimant be granted additional compensation for temporary total disability from August 1, 1977 through December 10, 1979, when she was found to be medically stationary according to their information, and compensation equal to 135° for 100% loss of function of the right foot. This award for the right foot was in lieu of all previous awards issued in this claim.

The Board was advised that the claimant died of a cancer condition on December 30, 1979.

The Board, after thoroughly reviewing the record in this matter, finds that there was no evidence that claimant was medically stationary on December 10, 1979. Therefore, the Board finds that claimant is entitled to compensation for temporary total disability from August 1, 1977 through December 30, 1979. The Board concurs with the recommendation of the Evaluation Division concerning the award of compensation equal to 135° for 100% loss of function of a foot.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 1, 1977 through December 30, 1979 and an award of compensation equal to 135° for 100% loss of function of her right foot, this award being in lieu of all other awards for loss of function of the right leg.

WCB CASE NO. 77-6952 January 10, 1980

WILLIAM K. LYDDON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Gearin, Landis & Aebi, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the Determination Order, dated August 18, 1978, that awarded claimant compensation for temporary total disability only. Claimant contends he is entitled to an award of compensation for both unscheduled and scheduled disabilities.

FACTS

Claimant, a 20-year-old tapper, sustained a compensable injury to his left eye, left shoulder and left side of his face on June 22, 1978 when some molten aluminum blew out of a tapping cruce burning him.

Dr. David McDaniel diagnosed corneal burn of the left cornea secondary to molten aluminum. In July 1978, Dr. McDaniel found that the eye had completely healed and he felt claimant would have no problem with his eye in returning to work. He did find severe scarring of the left shoulder.

Dr. Rolf Nesse, on July 24, 1978, diagnosed first and second degree burns of the left face, left neck, left arm and left chest, a corneal burn and pulled muscles in the left thoracic spine. He reported that all of the burns had healed and claimant could return to work. Dr. Nesse found claimant medically stationary and released him for regular work as of July 13, 1978.

A Determination Order, dated August 18, 1978, awarded claimant compensation for temporary total disability from June 22, 1978 through July 13, 1978.

On October 20, 1978 Dr. McDaniel reported he had given claimant a complete examination. He found the corneas were entirely clear with no residual scar on either the cornea or the lids. He did find a refractive error and ordered glasses for claimant.

Claimant has a high school education and has worked as a bus boy and cannery worker.

Claimant testified he feels an "electrical" pain down the lower left part of his back when he turns or pushes objects. He stated the scar tissue is sensitive to the sun and the wind and is tight in the left shoulder area. He feels his left eye is sensitive to wind or foreign objects. He reports that light blinds his left eye, which causes him to close his eye. Claimant also complained of bluriness at close distances in the left eye and tenderness around the lids. Since his injury, claimant testified he becomes easily irritated and angered. He is unable to return to his former job because of his fear now of fire, sparks and burns.

Claimant testified that since his injury he has been employed as a fruit packer, fruit picker, truck driver and was working for a screen manufacturer at the time of the hearing.

The Referee found no medical evidence to establish claimant sustained any permanent partial disability as the result of the industrial injury. Therefore, he affirmed the Determination Order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's conclusions. The claimant has failed to meet his burden of proof that he has sustained any permanent disability as the result of his June 22, 1978 industrial injury. There is no medical evidence which establishes that claimant sustained any permanent disability. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated March 12, 1979, is affirmed.

WCB CASE NO. 79-5789 January 11, 1980

JOHN CONRADI, CLAIMANT
Joseph Post, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Order of Dismissal

Claimant, by and through his attorney, and the employer, by and through its attorney, had entered into a Stipulation and Order of Dismissal, dated September 21, 1979, and approved by a Referee on October 1, 1979. It provided that claimant was to be paid compensation for temporary total disability from September 5, 1979 until he was determined to be medically stationary and provided for an attorney's fee for claimant's attorney. Claimant agreed to withdraw his Request for Hearing on a Second Determination Order, dated June 22, 1979. Claimant requested review of the stipulation on October 26, 1979.

The employer, by and through its attorney, on October 29, 1979 moved the Board for an Order of Dismissal of claimant's request for review because the dismissal was effective immediately and claimant had no appeal rights from it, thus the Board did not have jurisdiction to review this case.

On December 11, 1979 claimant responded to the employer's motion. Claimant had obtained additional medical evidence he did not have prior to the Referee's approval of the Stipulation. This evidence was a report from the Orthopaedic Consultants, dated October 30, 1979, which stated claimant was not medically stationary from September 8, 1978 to September 5, 1979. Claimant's treating physician had found claimant was medically stationary on April 6, 1979, but also agreed, on September 19, 1979, claimant was not medically stationary on September 5, 1979. Claimant asked for an award of additional temporary total disability or a remand to the Referee for the receipt of additional evidence on the issue of compensation for temporary total disability from April 7 to September 5, 1979 which was denied in the Stipulation and Order of Dismissal.

The employer, on December 18, 1979, responded that the information could have been obtained prior to the signing of the Stipulation, but was not and asked its motion be granted.

The Board, after thoroughly considering all of the facts, finds it does not have jurisdiction to proceed to review this claim. The stipulation signed by the parties disposed of all the issues in this case. Claimant had the opportunity to obtain additional information prior to his signing the stipulation but did not. No appeal rights exist and the Board does not have jurisdiction in this case. Therefore, the Board grants the employer's motion.

ORDER

Claimant's request for review, dated October 26, 1979, is dismissed.

WCB CASE NO. 79-1929 January 11, 1980

LAWRENCE DALY, CLAIMANT
Alan M. Lee, Claimant's Atty.
Giacomini, Jones & Zamsky,
Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which awarded to claimant compensation equal to 60° for 40% loss of use of his left forearm and compensation equal to 15° for 10% loss of his right forearm. The employer contends these awards are excessive.

FACTS

Claimant, a 23-year-old chain puller, sustained a compensable injury to both hands and wrists due to the strain of pulling on the chain. This condition was diagnosed as bilateral carpal tunnel syndrome. Dr. Richard Laubengayer performed a synovectomy of both wrists on March 13, 1978. Claimant was released for regular work on May 15, 1978 and found medically stationary as of May 9, 1978. Dr. Laubengayer did not anticipate any permanent disability.

In November 1978 Dr. Laubengayer reported the right hand was essentially normal. He found the left hand had some sticking of the flexor tendon to the long finger; although the finger extended to the nautral position, it did not hyperextend as the other fingers did. Dr. Laubengayer also found a weakness of grip on the left side. The sensory examination was normal and he found claimant was medically stationary.

A Determination Order, dated January 16, 1979, stated that the information before the Workers' Compensation Department was not adequate to support a determination of claimant's permanent partial disability and that a determination would be made when adequate information had been received. It granted claimant compensation for temporary total disability from March 3, 1978 through May 14, 1978.

A Second Determination Order, dated February 14, 1979, awarded claimant compensation equal to 9.6° for 5% loss of his left hand.

Claimant testified he continually has difficulties with both hands. He continues to have a loss of grip strength in the left hand. He stated both wrists cramp up and cause him pain just above the heel of the hand, on the palm side with any prolonged use. He feels he has no strength in his left little finger. Claimant is right-handed and feels he lost a small degree of grip strength. His hand also cramps when he writes and frequently shakes.

The Referee based on the evidence concluded claimant was entitled to an award of compensation equal to 60° for 40% loss of use of his left forearm and compensation equal to 15° for 10% loss of use of his right forearm.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's award for the right forearm. However, the Board finds the award for the left forearm is not supported by the evidence and would modify that portion of the Referee's order. The Board finds that, based on the evidence, claimant is entitled to an award of compensation equal to 37.5° for 25% loss of function to his left forearm.

ORDER

The Referee's order, dated July 23, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 37.5° for 25% loss of function of his left forearm. This is in lieu of all prior awards for permanent partial disability for loss of function of that forearm.

The remainder of the Referee's order is affirmed.

JOHN W. HASS, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which awarded him compensation equal to 64° for 20% unscheduled disability and increased his permanent partial disability compensation for loss of the left forearm by 15%. Claimant contends he is permanently and totally disabled.

FACTS

Claimant, a 56-year-old carpenter, sustained an injury to his left hand on November 30, 1973 when he was struck with a sledge hammer by a co-worker while holding a stake. This was diagnosed as a comminuted, probably compound, fracture of the fifth metacarpal of the left hand. On February 15, 1974 amputation of the fifth ray to the level of the proximal portion of the metacarpal was done.

On February 20, 1974 Dr. Samuel Gill reported that claimant continued to complain of pain in the metacarpal phalangeal joint of the small finger which radiated up the arm to the elbow. He reported that claimant's original injury was a massive crushing injury and fracture of the fifth metacarpal of the left hand. Dr. Gill found that claimant had a severe pain problem with dystrophy.

In April 1974 Dr. Lisac reported that the claimant demonstrated the formation of a relatively good fist but lacked a few degrees in motion of all joints in the injured fingers. He reported that claimant still had all the findings of reflex sympathetic dystrophy with cool moist sweaty palm and shiny skin on the back of the hand which intermittently had a bluish discoloration. He reported that claimant was an extremely independent individual with a lot of psychological overlay and that he would continue to work with claimant to get him to the point of being able to use his hands for all types of activities. He released the claimant for regular work as of May 13, 1974. He did not find claimant's condition stationary at that point. On August 23, 1974 he reported that the claimant's condition was medically stationary and that claimant had significant permanent partial disability relative to the loss of the fifth ray of the left hand. He opined that claimant's permanent disability was not only due to the loss of the 5th ray but was due to the impairment of the remainder of the hand with some sensitivity in the scar and permanent loss of motion at the metacarpal phalangeal joints and the PIP joints of the fingers as well as weakness of grip.

A Determination Order, dated September 10, 1974, awarded claimant compensation for temporary total disability and compensation equal to 37.5° for 25% loss of his left forearm.

On April 11, 1975 Dr. Lisac reported that he had seen the claimant on April 8, 1975. Claimant reported that he had been totally asymptomatic from the last time he had seen him on August 1974 until about two months prior to this appointment. Two months prior to this date, claimant had had a black and blue nodule appear. Claimant reported he developed sensitivity further down the side of the hand in the region of the proximal portion of the scar. Dr. Lisac injected the area and reported that claimant improved, however, he still continued to report numbness in the ulnar finger and sensitivity over the scar. By May 1975 Dr. Lisac reported that the claimant once again was symtpomatic relative to the side of the hand. Claimant was reporting a lot of pain and tingling with a positive Tinel's sign along the scar. Claimant reported the pain was keeping him awake all night and causing some cramping in his hand.

On July 9, 1975 Dr. Samuel Gill examined the claimant and reported that he had continued to experience pain. His diagnosis was painful neuroma secondary to the ray amputation. By December 1975 Dr. Gill reported that the claimant had had episodes of significant increase in his symptoms which he felt were on an emotional basis rather than an organic problem. He reported that there was no doubt in his mind that claimant had an organic disease and a dystrophic type hand, but there was no question either that significant functional overlay clouded this picture. He reported claimant was doing carpentry work in heavy construction using the injured hand. The claimant told the doctor he suspected he was going to have a great deal of trouble pursuing this type of work. Dr. Gill reported it would be advisable that claimant be considered for lighter type of work.

Claimant was hospitalized in March 1976 with lower chest pain and recurrent epigastric pain.

On July 2, 1976 Dr. Morris Button reported that after examining claimant his diagnosis was a crush injury with ray amputation left little finger, ulnar nerve neuromas palm left hand, and flexion contractures of the left ring finger. On August 12, 1976 Dr. Button performed an excision of multiple digital neuromas left palm and decompression of the ulnar nerve.

On January 28, 1977 Dr. Button reported that claimant continued to complain of tenderness in the left hand and wrist region and soreness and swelling on the side of the left hand. He felt claimant's total impairment of function of the left upper extremity findings was 42% and an additional 13% based on the subjective findings, for a total of 55% permanent impairment of the upper extremity. Dr. Button opined the combined impairment of the left hand was 36% which was 32% of the upper extremity.

A Determination Order, dated May 3, 1977, awarded claimant additional compensation for temporary total disability and compensation equal to 30° for 20% loss of the left forearm.

On August 11, 1977 Dr. Oren R. Richards reported that he diagnosed claimant as having arteriosclerotic heart disease with evidence of past myocardial infarction and angina pectoris; hypertensive disease; thoracic radicular

pain; pancreatitis; hiatal hernia; Willebrands' disease; residual injury of the hand with causalgic syndrome; and severe reactive depression. He noted that claimant's depressive reaction had been present since his first examination of claimant in 1972. He opined that claimant's depressive reaction had been aggravated and worsened by claimant's industrial injury. He also opined that claimant would not be capable of sustained employment in his present situation and "this seems to be a progressive one".

In September 1977 claimant began vocational training with a goal of being a construction inspector.

A Stipulation, dated March 4, 1978, reopened claimant's claim for further medical care and treatment with compensation for temporary total disability as of the date claimant entered Providence Hospital on January 7, 1978 for a shoulder-arm syndrome related to his original injury.

On March 9, 1978 a cervical myelogram was performed which was normal. Claimant had been hospitalized in December 1977 for a possible myocardial infarction.

On March 6, 1978 Dr. Curtis Hill reported that claimant continued to have complaints of pain in the left arm and shoulder. He felt that the claimant certainly had a component of pain radiating from his neck into his arms.

On June 1, 1978 claimant entered the Northwest Pain Center. Dr. Seres diagnosed a probable recurrent neuromas of the left hand, status post-traumatic amputation of the fifth digit, conversion reaction suspected and significant depression suspected. While at the Center, the staff observed claimant and reported that he had questionable motivation. Dr. Seres found that psychologically, claimant revealed himself to be very emotionally guarded and had many features associated with hysterical conversion reaction.

On August 18, 1978 Dr. Frank Kloster, after examining claimant, reported that he found substantial functional or pathophysiologic overlay in claimant's condition. Dr. Kloster reported that claimant did have coronary heart disease and did suffer from angina pectoris. Claimant also described a pain originating in the left arm with radiation upward into the neck and down into the chest which Dr. Kloster found sounded like a "hand, arm, shoulder" syndrome a form of causalgia which was poorly understood.

On June 22, 1978 claimant's vocational rehabilitation program was terminated based on the fact his handicap was too severe or there was an unfavorable medical prognosis. The counselor reported that claimant completed a few building inspection classes in the fall of 1977, but had not been able to attend classes on a steady basis since that time due to medical problems. He reported that claimant had been admitted to the Northwest Pain Center on June 6, 1978 but discharged to intensive care within 24 hours with symptoms which appeared to be a heart attack. Claimant indicated he felt it would be quite some time before he was able to work and planned to retire on Social Security at the age of 62.

On December 15, 1978 Dr. Richards reported that claimant was again hospitalized with epigastric and left chest pain and also with intense shoulder-arm pain. He reported that claimant's depressive reaction permeated the entire problem and somatization of his problem undoubtedly occurred. He knew of no way to separate out claimant's various problems.

A Determination Order, dated December 18, 1978, awarded claimant additional compensation for temporary total disability only.

On March 12, 1979 Dr. Kloster, after reviewing an exercise stress test, opined that the episode of chest pain which claimant experienced did not represent myocardial ischemia and angina pectoris. It was his opinion that the greater medical probability was that claimant's pain was a form of causalgia related to his left hand injury with varying degrees of radiation up into his arm, shoulder and sometimes into his neck, back or left chest. Dr. Kloster therefore agreed with claimant's treating physician that this condition was related to claimant's hand injury rather than his heart condition.

Claimant testified at the hearing that he continues to have pain in his hand. He described his pain as more or less constant and occasionally flare up and radiating into the shoulder area. He testified that the majority of the time his pain was limited to the area between the hand and just above the elbow. Claimant still is able to drive a car when he feels like it, is able to walk, read and engage in other activities. Claimant has not taken the test for a building inspector and has no plans to do so. Claimant testified that he could work as a building inspector if he had taken the test. However, because of the pain, he feels he would be unable to sit through the entire test.

The Referee, after reviewing all of the evidence, concluded that claimant was entitled to an additional award equal to 22.5° for 15% loss of the left forearm plus an award of compensation equal to 64° for 20% unscheduled disability for his shoulder injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's assessment of the loss of function of the arm. The Board finds as the Referee did that claimant is not permanently and totally disabled. However, based on Dr. Kloster's reports relating the pain in the shoulder to the industrial injury to the hand, the Board finds, based on claimant's age, education, experience, and the evidence in this case, that he was entitled to a larger award of unscheduled disability representing his shoulder condition. Therefore, the Board would modify that portion of the Referee's order which awarded claimant compensation equal to 64° for 20% unscheduled disability. The Board finds that claimant is entitled to an award of compensation equal to 256° for 80% unscheduled disability for his left shoulder and neck injury.

ORDER

The Referee's order, dated June 26, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 256° for 80% unscheduled disability for his shoulder-neck injury. This award is in lieu of any and all prior awards for unscheduled disability.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-8618 January 11, 1980

ERNEST R. LA FRANCE, CLAIMANT
Rick W. Roll, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Order Denying Request

The Board issued an Order on Review on December 14, 1979 which granted claimant an award of compensation equal to 96° for 30% unscheduled disability for his back injury and an award of compensation equal to 15° for 10% unscheduled disability for the loss of function of his left leg. (This was amended by an order, dated January 4, 1980, which corrected the award of compensation for the left leg to scheduled disability.)

On December 27, 1979 claimant and his attorney requested the Board reconsider its order. They felt that the Board's award of compensation was inadequate.

The Board, after thoroughly reviewing claimant's request, denies his request for reconsideration. Claimant has failed to show sufficient reason for his request. Claimant argues he can no longer engage in certain activities. There is no indication that such information was not available at the time of the hearing. Therefore, the Board must deny claimant's request for reconsideration.

IT IS SO ORDERED.

WCB CASE NO. 78-7772 January 11, 1980
WCB CASE NO. 78-5526

ELFORD D. RADKE, CLAIMANT
Pozzi, Wilson,Atchison, Kahn
& O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the denials entered by Aetna Casualty and Life Company and Insurance Company of North America. Claimant contends that his continuing hip and back problems were the compensable result of heavy lifting activities carried on in his job. He contends that the denial issued by Aetna should be reversed and the claim against Aetna for low back and hip injuries should be declared compensable and the claim be remanded.

FACTS

Claimant, a 46-year-old auditor, alleges that lifting boxes of receipt books resulted in his sustaining a compensable injury to his back on or about March 3, 1977.

In May 1977, Dr. Francis B. Schuler reported that the claimant complained, after a lifting episode, of having difficulty the next morning with his back. Claimant reported no radiation of pain, just pain in his back. Claimant received chiropractic treatments for relief of his pain. Dr. Schuler reported that claimant had a total hip replacement on the left side performed in 1972. The claimant did not feel that he had any trouble with his left hip. He stated his work as auditor required that he lift papers and records and things of that nature which had just recently "gotten to him". Dr. Schuler diagnosed a strain of the lumbar spine, superimposed on existing degenerative changes which were accompanied by some shortening of the left lower extremity due to a total hip procedure of an old deformity of the left hip, which had now become loose. He reported that claimant was getting some increased shortening with tilt of the pelvis.

On October 14, 1977 Dr. E. Robert Wells reported that claimant was complaining of inability to stand straight for long periods of time without severe hip pain and also night pain in the region of the hip. Claimant reported he was lifting a box in March 1977 and felt a "snap". He continued to work and carry on a full schedule, but felt the amount of pain which he was currently having was almost the same as he had prior to the hip replacement. Dr. Wells diagnosed a status post total hip joint replacement on the left with loosening of the acetabular component, proximal migration, and possible rotary malposition of the female component.

In April 1978 Dr. Wells', in response to a letter from Aetna Casualty and Surety Division, reported that claimant had experienced a snap in his left hip and Dr. Wells felt that that may well have represented the initial loosening of the acetabular component and was associated with the back strain at the same time. He felt that from this the loosening may have been secondary to the industrial lifting injury and that this does occur after a total hip replacement. As to whether this was industrially related, Dr. Wells felt it was highly variable and varied by individual.

In May 1978, Dr. Schuler responded to a letter from Aetna reporting that he had diagnosed a strained back. He reported that the back became symptomatic because of claimant's lifting of the boxes. He reported that because claimant had strained his back and had the hip problem which tended to keep the back from straightening out. He felt that the hip problem, other than this, was related to his industrial injury "only that it was there". He reported that the hip problem pre-existed claimant's industrial injury to his back. He did not feel that the injury claimant had had caused a loosening of the acetabular component, since claimant was having trouble with the hip before the injury. He reported that the loosening of the acetabular component was one of the complications of a total hip replacement. He said the only relationship the hip had to the back strain was that there was a shortening which left a tilt of the pelvis, causing an imbalance of the muscles in the back which would tend to promote a continued backache.

On May 17, 1978 Aetna denied responsibility for any further back care of claimant. This was based on Dr. Schuler's report.

On June 5, 1978 Dr. Wells reported that it was his belief that the loosening of the acetabular component and the industrial injury may well be related. He was unable to say this with complete assurance, however. He felt that the description of the "snap" or "pop" which claimant described, with the history of good function of his hip joint prior to that time and claimant's difficulty continuously since would certainly suggest such a conclusion. Therefore, he was unable to agree completely with Dr. Schuler's conclusions.

On April 18, 1979 the Orthopaedic Consultants reported that they had examined the claimant. Claimant, at that time was complaining of a dull, aching sensation in the left hip. Their diagnosis was a lumbar strain superimposed upon degenerative disc disease of the lumbar spine and a post-operative left total hip arthroplasty with loosening of the acetabular component and superior migration, status post-septic left hip and hemiatrophy of the left lower extremity. They opined that the claimant's greatest disability at the present time was secondary to the failure of his total hip replacement and loosening of the acetabular component. They felt the loosening of this prosthesis was not caused by his occupation, indeed there was no specific isolated traumatic event, however, the degenerative process may well have been aggravated by claimant's work activities. They opined that the problems of the low back are secondary to the degenerative process and the secondary stresses from a disorder in his left lower extremity. It was their opinion that claimant's condition was medically stationary at that time. They rated the total loss of function of the low back as related to this injury as minimal and the total loss of function of the left lower extremity due to this injury as mild.

Claimant also filed a claim for injuries sustained in the summers of 1974 and 1975 while moving heavy items to one of the employer's campgrounds. On September 11, 1978 Insurance Company of North America denied this claim.

On December 1978 Dr. Schuler reported that since claimant had quit heavy lifting and excessive walking the migration in his hip had stopped. Dr. Schuler opined it may well have been that claimant's work could have caused a loosening and migration of his total hip. He reported that claimant's back and hip both were feeling better since he had stopped lifting. Dr. Schuler was indecisive about whether or not claimant's claim was legitimate. He thought it would be best to get an independent examiner's opinion before the claim was closed.

In April 1979 Dr. Wells reported that claimant's continued program of diminished activity avoiding squatting, lifting-squatting, bending, and carrying had been successful in reducing his problems, although in the future he may require a revision procedure. He pointed out that the series of events in claimant's case were most unusual. He noted that acetabular loosening in the first five years was extremely uncommon. He believed that there was a direct relationship between this incident and claimant's working requiring bending, stooping, lifting and carrying of heavy objects.

Claimant testified at the hearing that he was required to lift boxes of receipts which weighed 30-40 pounds apiece and move them approximately 10 feet. He stated that up to that time of lifting the boxes of receipts he had been symptom-free. He stated he thought that it was his back that had snapped or popped indicating an area just below the belt line on the mid left. He said that he had learned from a chiropractor's x-rays that he had a shortened leg and a hip component had loosened. Claimant indicated that in 1976 his back had hurt so bad that he couldn't get out of bed and he had gone to a chiropractor who took x-rays and then manipulated his back. He was told that it would not last because his left leg was somewhat shorter than his right. Claimant advised his chiropractor that this was impossible since surgery had corrected that problem in 1973. Claimant then called Dr. Smith, the physician who performed the total hip replacement, and x-rays were sent to him.

Dr. Moor, who is in the same office as Dr. Smith, on September 20, 1976, reported claimant had "a couple of complaints", one of which involved back problems to the extent that claimant required chiropractic care. Dr. Moor questioned a radiolucent line around the cement of the acetabular component.

The Referee, after reviewing all the evidence, found that claimant had not made out a claim against Insurance Company of North America. He further found that the insurance carrier, Aetna, had carried out its responsibility towards claimant insofar as continuing responsibility for the back condition and any responsibility for the associated hip condition as of the day of the denial letter of May 17, 1978. The Referee noted that INA had provided workers' compensation coverage prior to July 1, 1976 and that since that date Aetna had provided insurance coverage. Therefore, the Referee affirmed the denials of both insurance carriers.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the conclusions of the Referee. The Board does not find that the claimant's testimony was impeached. The Board does find that the medical evidence in this case does not support claimant's contention that the 1977 incident was responsible for his left hip condition. Therefore, the claimant has failed in his burden of proof that this condition was related to the 1977 incident. The Board concludes the Referee's order must be affirmed.

ORDER

The order of the Referee, dated June 21, 1979, is affirmed.

WCB CASE NO. 77-3978 January 14, 1980

RAY O. DAY, CLAIMANT
A.C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Remand

On May 4, 1978 the Board entered its Order on Review in the above entitled matter which affirmed the Referee's order dated September 30, 1977. That order awarded claimant compensation for permanent and total disability effective November 20, 1976, less payment made on and after November 20, 1976 for temporary total disability.

The Fund requested judicial review of the Board's order.

On December 11, 1978, the Court of Appeals reversed the Board's order and remanded the matter to the Board for the entry of an order reinstating the Determination Order.

On January 8, 1980 the Board received the Judgment and Mandate from the Court of Appeals and, in conformity therewith, issues the following order.

ORDER

The order of the Workers' Compensation Board, entered May 4, 1978, which affirmed the Referee's order of September 30, 1977, is reversed.

The Determination Order, dated June 7, 1977 which awarded claimant compensation for temporary total disability inclusively from November 21, 1976 through April 19, 1977 is reinstated.

WCB CASE NO. 78-4010 January 14, 1980

M. KELLY ELLENBURG, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which reopened claimant's claim and ordered payment of compensation for temporary total disability from April 3, 1978 until claimant was found stationary; assessed penalties and attorney fees for the Fund's nonpayment of certain medical bills and its defacto denial of responsibility of certain medical bills. The Fund contends it should not be required to pay penalties and attorney fees and the attorney's fee awarded by the Referee was excessive. It also contends that it did not have to open the claimant's claim to commence payment of temporary total disability from April 3, 1978 until the claimant was found stationary.

FACTS

Claimant, a 37-year-old clerk, sustained a compensable injury to her neck and back on February 10, 1978 when she slipped and fell. Dr. Larry J. Maukonen diagnosed acute flexion extension injury of the neck and a right paraspinal muscle spasm secondary to the neck injury. He recommended conservative treatment and prescribed mild analgesics and muscle relaxants.

In March 1978 claimant was hospitalized for neck pain and stiffness. Dr. John E. Nelson examined claimant while hospitalized and reported that after a trial of traction and physical therapy there was little improvement. The claimant had been scheduled for a myelogram; however, claimant thought she might be pregnant so this was postponed.

On March 31, 1978 Dr. Maukonen performed a myelogram which was normal. This myelogram was of the upper thoracic lumbar and lower thoracic areas.

On April 1, 1978 Dr. James T. Barryman reported the claimant complained of aching in her back and both lower extremities. He felt that a venogram was indicated as claimant had an echomotic area in the right calf without obvious cause.

Dr. Maukonen, on April 3, 1978, reported that claimant had undergone two pregnancy tests performed on March 28, 1978 and March 30, 1978, both of which were negative. The venogram done on April 1, 1978 was reported to be normal. Dr. Maukonen opined that he did not foresee claimant getting over her pain problem and felt that she would have protracted problems and pain. He felt she should not return to any work that required any amount of lifting. He felt the claimant's condition should be considered stable with the future of chronic intermittent neck problem. Dr. Maukonen opined that claimant could be employed either at a job or retrained in one which did not require any lifting with her arm or remaining in one position for prolonged periods of time.

On April 25, 1978 Dr. Maukonen advised Dr. William Young that claimant had undergone two pregnancy tests which were negative; however, she had then informed him that the Public Health Department stated that she was now six to seven weeks pregnant which meant that she was supposedly seventeen days pregnant at the time of the negative pregnancy test. He asked Dr. Young for his opinion and recommendations as to treatment.

On May 4, 1978 Dr. Maukonen reported the claimant had been seen on May 3 complaining of a very sore neck. Claimant reported she was having continual neck pain which had increased since learning she was pregnant. She was anxious about possible birth defects, the question of a possible abortion and future pregnancy-related tests due to the myelogram. He felt at that time or at least until amniocentesis was performed, claimant would not be able to work. He reported she was off all medication and using only heat and traction with bed rest. He stated:

> "Although the pregnancy is obviously not work related, the anxiety over possible birth defect, in view of the irradiation and medications for evaluation and treatment of her injury, is directly related to the injury and I, therefore, feel that her visits to Dr. Young, amniocentesis, ultrasone, etc., for evaluation for possible teratogenic effects and any indicated abortion should be covered by SAIF."

A Determination Order, dated May 17, 1978, awarded claimant compensation for temporary total disability and compensation equal to 16° for 5% unscheduled disability resulting from her neck injury.

On June 14, 1978 Dr. Maukonen advised the Fund that he had mistakenly released the claimant to work. He felt that since claimant had been taken off all medication, it was not reasonable for her to work at that time. The claimant could only tolerate being out of traction for three to four hours at a time. He felt that based on her inability to remain out of traction or her inability to tolerate traveling that he had been wrong in stating that the claimant could be released for work of a limited type. His diagnosis was a cervical strain with chronic neck problems. He requested that the claimant be given a trial of biofeedback and felt if that failed a trial of transcutaneous stimulation might be useful.

On July 10, 1978 Dr. Maukonen requested the claimant be allowed funding for attending child birth classes for learning relaxation techniques and stretching exercises. On July 20 he suggested that claimant undergo psychiatric evaluation for continuing chronic pain problems and episodes of excessively demanding behavior and anger concerning the evaluation treatment and the claim determining process involved in her industrial injury.

On August 1, 1978 the State Accident Insurance Fund denied responsibility for any tests or treatments for problems due specifically to her pregnancy since the various tests and treatments she was given did not arise directly out of her February 10, 1978 industrial injury.

On August 23, 1978 Mr. Steven Brown, attorney for the Fund, advised Dr. Maukonen that certain bills would be paid by the Fund as extraordinary obstetrical expenses. He indicated that the bill for medical care and treatment for the cervical condition would be paid as part of the Fund's obligation for injury-related medical care. He further stated it was the Fund's position that they were not obligated to pay for the biofeedback or the child birth classes.

On November 17, 1978 Dr. Maukonen reported the claimant was still not medically stationary and was still unable to work because of her persistent neck pain secondary to her chronic cervical strain.

Dr. Chester D. Cornog reported in January 1979 that claimant had chronic strain of the paraspinous muscles related to the February 10, 1978 industrial injury and that the subsequent pregnancy was unrelated.

Claimant testified at the hearing that she had worked until the birth of each of her other seven children.

The Referee concluded the claimant was entitled to temporary total disability compensation from April 3, 1978 until she is found to be medically stationary.

Further, the Referee found certain medical bills had not been paid by the Fund. He found that when the myelogram was done in May 1978 claimant was pregnant and that various obstetric tests were needed to determine if the myelogram or other treatment had affected the fetus. Therefore, the Referee ordered the Fund to reopen the claim as requested by Dr. Maukonen and provide claimant with benefits to which she was entitled by law; pay to claimant appropriate temporary total disability compensation from April 3, 1978 until she became or becomes medically stationary; pay all cervical injury-related expenses not paid; pay the obstetric expenses alluded to by Mr. Brown's letter of August 23, 1978; pay to claimant an additional amount equal to 25% of the temporary total disability compensation and obstetric billings due not to exceed $300; and pay claimant's attorney a total fee of $1,000. The Referee also approved the Fund's denial of payment for biofeedback training and for childbirth training.

The parties have stipulated at the time of hearing that the Fund's refusal to reopen the claim was a de facto denial of benefits.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the findings of the Referee. The medical evidence in the file indicates that the claimant's condition was not stationary as first reported by Dr. Maukinen in April 1978 and was not stationary at the time of hearing. Therefore, the Referee was correct in ordering the reopening of the claim for payment of compensation and other benefits at that time. The Board finds, as did the Referee, that the Fund's failure to reopen the claim after being advised of Dr. Maukonen's mistake was unreasonable as was its refusal to pay for certain medical treatment and tests as required due to claimant's myelogram and treatment prior to the time it was found that she was pregnant to justify a penalty. The Board concurs with the Referee's ordering the Fund to pay for the medical expenses as set forth in Mr. Brown's August 23, 1978 letter.

The Board does not find that the attorney's fee awarded in this instance was excessive.

ORDER

The order of the Referee, dated March 13, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 79-1808 January 14, 1980

LYNN W. FLETCHER, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which ordered it to pay to Pacific Motor Trucking Company (PMT) $1,000 as and for a reasonable attorney's fee for its failure to comply with a Referee's order, dated December 27, 1978, ordering it to repay PMT such sums as PMT had paid to claimant pursuant to an order designating it paying agent, dated September 5, 1978. The Fund contended the Referee exceeded his jurisdiction and it did not have to comply with the Referee's order pending appeal.

FACTS

Claimant suffered a compensable injury to his back in December 1972 while employed by PMT. Claimant subsequently obtained other employment, but as of January 11, 1978, he could not continue to work due to increasing back pain. Claimant was then employed by Betty's Bookkeeping Service, a contributing employer, represented by the Fund. Claims were filed with both employers. PMT denied claimant's aggravation claim alleging he had sustained a new injury. The Fund denied claimant's new injury claim, alleging he had suffered an aggravation of the 1972 injury. An order designating PMT as the paying agent pending a hearing pursuant to ORS 656.307 was entered on September 5, 1978.

A hearing was held and the Referee issued an Opinion and Order, dated December 27, 1978, finding claimant had sustained a new injury. He ordered the Fund to accept claimant's claim and further ordered the Fund to repay PMT those sums it had paid pursuant to the order designating it as the paying agent. This order has been appealed to the Board.

It was stipulated that the Fund has not paid anything to PMT pursuant to the Opinion and Order, dated December 27, 1978.

The Referee found that the Fund had failed to comply with the Opinion and Order issued December 27, 1978 and entitled PMT to a reasonable attorney's fee in the sum of $1,000.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of an attorney fee to PMT. It is not within the power of either the Board or a Referee to direct adjustments under an order designating a paying agent. The Workers' Compensation Department has that exclusive authority. The Board or a Referee does have the power to decide which party is responsible for the payment of compensation and other benefits. The Board finds that ORS 656.283 does not apply in situations where the dispute is between two insurance carriers. Further, the Board finds that ORS 656.313, which provides that an appeal by an employer or the Fund does not stay compensation, applies directly and only to claimants and not to situations where two carriers are involved, in such cases as is present here. Therefore, the Board reverses the Referee's order.

ORDER

The Referee's order, dated July 26, 1979, is reversed.

WCB CASE NO. 79-278 January 14, 1980

EDNA L. FOX, CLAIMANT
Pozzi, Wilson, Atchison, Kahn,
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which awarded claimant compensation equal to 208° for 65% unscheduled disability for her low back injury. The Fund contends this award is excessive.

FACTS

Claimant, a 63-year-old linen maid, sustained a compensable injury to her back on September 16, 1977 while lifting a bundle of sheets.

Dr. George Maskell, in October 1977, reported that x-rays revealed generalized osteoporosis and degenerative arthritis aggravated by trauma. He diagnosed claimant's injury as a lumbosacral strain.

Claimant was released for modified work and found medically stationary by Dr. Maskell on November 29, 1977.

A Determination Order, dated February 21, 1978, awarded claimant compensation for temporary total disability only.

On March 24, 1978 Dr. Winfred Clarke reported he had examined claimant and diagnosed:

> "(1) I think she has signs and symptoms of nerve irritation, probably a disc rupture and very probably L5-S1 on the right, and there is marked narrowing of this interspace on X-ray.
>
> "(2) She also has the changes that are present up in the dorsolumbar area . . . and the relationship of this to her injury I think we will have to ascertain better when we compare the films . . .
>
> "(3) She does have an ankylosing spondylitis that I think preexisted her trauma and is giving her no distress".

Dr. Clarke felt that if claimant did not improve, he would have to hospitalize her.

In May 1978, Dr. Clarke opined that claimant had either an ankylosing spondylitis or a Marie-Strumpell disease of the joints of her mid-back. He did not find this related to her back injury. He referred claimant to the William Callahan Center.

In July 1978 Dr. Clarke reported that claimant had gone to the Callahan Center, but her back got worse and she was told to go home. He indicated claimant did not intend to return to the Center. Dr. Clarke felt the claim could be closed.

On October 19, 1978 the Orthopaedic Consultants, after examining claimant, diagnosed chronic lumbosacral sprain superimposed upon a moderately severe degenerative arthritis of the dorsal and lumbar spine and pre-existing rheumatoid arthritis of the spine. They opined claimant was stationary and could not return to her same occupation, but was capable of sedentary work. They rated the total loss of function of the back due to this injury at the lower limit of mildly moderate.

A Determination Order, dated November 17, 1978, awarded claimant additional compensation for temporary total disability and compensation equal to 80° for 25% unscheduled disability resulting from her low back injury.

In December 1978, Dr. Clarke reported claimant complained she was unable to walk as much in the past 4-6 weeks and had more pain than she did before. She also told Dr. Clarke she couldn't work or do her housework and occasionally developed right leg pain.

Claimant has an eighth grade education and has worked in housekeeping, managing small motels and sales. Claimant testified she returned to work after she was released by Dr. Maskell, but had too much pain and quit. She has not sought any other employment because she feels she has too much pain to work. Claimant draws Social Security benefits.

The Referee found claimant had suffered a chronic lumbosacral strain superimposed on severe degenerative arthritis. He concluded that, based on the evidence in this case, claimant was entitled to a greater award and, therefore, granted claimant an award of compensation equal to 208° for 65% unscheduled disability for her low back injury. This was in lieu of the award granted by the Determination Order, dated November 17, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reaches a different conclusion than the Referee did in this case. The Board finds claimant has failed to cooperate in the rehabilitation effort and specifically failed to work with the personnel at the Callahan Center. Further, the Board finds the weight of the evidence does not establish that claimant's Marie-Strumpell disease is related to her industrial injury. Claimant's industrial injury was a lumbosacral strain and the arthritic condition is in the dorsal area.

Further, the Board finds claimant has not shown she is motivated to return or to attempt to return to work. The Orthopaedic Consultants, the only medical personnel to rate impairment, found a total loss of function of claimant's back due to this injury at the lower limit of mildly moderate. They opined claimant was capable of sedentary work.

Therefore, the Board concludes the award made by the Referee should be modified. The Board, based on all of the evidence, finds that claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability for her back injury.

ORDER

The Referee's order, dated June 25, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for her low back injury. This award is in lieu of the award for unscheduled disability granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 78-8490 January 14, 1980

CHARLES R. JOHNSON, CLAIMANT
Fitzwater & Fitzwater, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

CLAIM NO. C604-13464 January 14, 1980

PATRICIA ENGLISH KEZAR, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On May 25, 1979 the Board issued an Own Motion Order setting aside an Own Motion Determination of February 2, 1979; it remanded the claim to the carrier to be accepted and for payment of compensation as provided by law, commencing on December 27, 1978 (the date Doctor Hauge first examined claimant) and continue until the claim was closed pursuant to ORS 656.278; allowed an offset of payments made under the Own Motion Determination against temporary total disability ordered by the May 1979 order; and granted claimant's attorney a fee. The carrier did not resist Dr. Hauge's request for surgery to be performed on the right buttock.

On December 28, 1979 the carrier, by and through its attorney, forwarded to the Board a report from Dr. Christopher Hauge. Dr. Hauge reported that he performed surgery on the claimant for a revision of the right buttock deformity on June 4, 1979. He felt claimant was disabled from June 4, 1979 to September 4, 1979.

The Board, after reviewing this evidence, concludes its May 25, 1979 order was in error. Claimant is entitled to an award of compensation for temporary total disability from June 4, 1979 through September 4, 1979 and not from December 27, 1978 and the claim shall remain open until closure under ORS 656.278. Therefore, the Board would modify its May 25, 1979 Own Motion Order and grant claimant compensation for temporary total disability from June 4, 1979 through September 4, 1979 and the claim shall remain open until closure under ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-6416 January 14, 1980

JEAN LARRANAGA, CLAIMANT
Michael S. Fryar, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the employer's partial denial of claimant's claim for injuries, namely, dizziness and headaches allegedly caused by claimant being struck in the eye by a piece of chalk on November 30, 1977. Claimant contends the Referee's order affirming the partial denial was in error.

FACTS

Claimant, a 36-year-old loom operator, was struck in the eye by a piece of marking chalk thrown at him by another employee on November 30, 1977. This injury was diagnosed as a hyphome, contusion of the left eye.

On January 24, 1978 Dr. John L. Wobig reported that claimant's visual acuity was 20/60 in the left eye. He found that intraocular pressure was within the normal range and that he was taking claimant off all of his medications. He planned to release claimant to return to light work as of March 1, 1978. He further reported that claimant had a sublaxated lens and a cataract which was developing and would require at some later date corrective measures.

On March 2, 1978 Dr. Trenton Spolar reported that the claimant had persistent pain on his left side. Claimant also was reporting headaches and decreased visual field as well as complaints of dizziness.

On April 6, 1978 Dr. J. Bruce Bell reported that he had examined the claimant and found some cervical osteoarthritis which may be contributing to claimant's problem. However, he viewed this as basically a visual balance organ disturbance. Later he reported he felt this was probably related to claimant's original industrial injury. Dr. Bell reported that claimant, subsequent to his industrial injury, has developed a traumatic cataract. Claimant also was complaining of dizziness which created trouble for him driving a car. Dr. Bell said that claimant reported feeling a whirling sensation, increased sickness of his stomach and blurring of vision since this had occurred. Claimant also reported headaches which would last anywhere from two to three hours. Claimant said his main problem was his difficulty with driving secondary to both the dizziness and the visual difficulty. Dr. Bell reported that he had seen claimant in 1975 for an episode of dizziness. His diagnosis was dizziness of an unknown etiology.

On June 13, 1978 Dr. Sam L. Meyer reported that claimant's current diagnosis was a dislocated left lens with early cataract formation and with left inferior angle recession and a partially paralytic pupil on the left. He felt that claimant would eventually have to have his cataract removed. He reported that at the current time claimant was not medically stationary. Dr. Meyer did not feel that the problem with dizziness or headaches was related to his left eye condition. He thought claimant could be released for work at this time in work that didn't require good stereoscopic vision, because claimant had good vision only out of one eye.

On July 7, 1978 Dr. Bell reported that after extensive studies had been performed it was his feeling, since he could find no other etiology for the headaches and dizziness, that they were partially related to the industrial injury and probably the fact that he could not use his eyes appropriately was responsible for the particular sensation that claimant had.

On July 24, 1978 Dr. Wobig concurred with the report of Dr. Meyer. He especially concurred that since claimant had one good eye on the uninvolved side, he could do work that did not require depth perception or stereoscopic vision.

On September 21, 1978 Dr. Robert Faust reported that the history, lack of physical findings and ENG findings were strongly suggestive of benign paroxysmal positional vertigo. He felt that the time of the onset of this condition was suggestive of some causal relationship to claimant's injury; however, it was difficult to relate the pathology to such an injury. It was his opinion that it was possible that claimant's vertigo may be secondary to his disturbed vision.

On November 7, 1978 Dr. Paul E. Schroder reported that in his opinion claimant's benign positional vertigo was related to his eye injury of November 30, 1977. This is based on claimant's relating the onset of his dizziness to the time of his incident. Dr. Schroder reported that benign positional vertigo was often related to blunt head trauma. Claimant's history, as given to Dr. Schroder, was that he was struck in the eye by a piece of chalk which, in Dr. Schroder's opinion, produced only a mild blow to the head; however, claimant related that he fell to the floor at this time and was momentarily dazed. Claimant reported he did not recall if he had struck his head on the floor and in Dr. Schroder's opinion this was a definite possibility from his description of the incident.

On August 7, 1978 the employer's insurance carrier denied any responsibility for claimant's current complaints of headaches and dizziness. This was based on their evaluation that the preponderance of the medical evidence received indicated that these complaints were not causally related to his eye injury that claimant had suffered on November 30, 1977.

Dr. Bell, in his deposition, reported that he had examined claimant in 1975 and at that time claimant was having some nervousness and dizziness. Claimant also reported periods of times when he was nervous, upset, dizzy and lightheaded. It was Dr. Bell's opinion that the primary cause of the claimant's problems at that time was anxiety. Dr. Bell reported he next saw claimant in March 1978 and claimant gave him a history of being struck with a piece of chalk in the eye and being knocked unconscious, having a lot of pain in the eye and subsequently developing a traumatic cataract in the eye that was struck. Claimant reported he developed dizziness which was severe and which created trouble in driving a car and was characterized by a whirling sensation, sickness of his stomach, blurring of vision and headaches. It was Dr. Bell's opinion that the cause of dizziness for which he treated claimant in 1978 was the accident that he had suffered. On cross-examination, Dr. Bell

stated that in 1975 he had reported that the claimant gave a history of periods of time when he would get quite nervous and upset, dizzy and lightheaded over the last five years. It was Dr. Bell's opinion that this condition was caused by anxiety, tension and nervousness. The doctor admitted that on January 12, 1976 he reported to Dr. Dowd that he suspected that claimant may have some sort of damage to his balance organ that was permanent. Dr. Bell reported that the history given to him by the claimant for the 1977 injury did not involve any blunt-head trauma or a history of unconsciousness caused by head trauma and that the only report he had was of claimant being struck in the eye by a piece of chalk. He agreed that it was possible that claimant's dizziness could be the same type of dizziness which was caused by the anxiety claimant had previously. Dr. Bell stated, having no objective evidence to support his conclusion, that the dizziness and vertigo could be caused by anxiety, arthritis, some type of labyrith problem, inability to use his eyes properly or any one of many things. He further admitted that the lightheadedness and vertigo could equally be caused on an anxiety basis as the eye injury sustained by the claimant based upon objective physical findings.

Claimant testified at the hearing that he had no prior problems with any dizziness.

The Referee, after reviewing all the evidence, concluded that claimant had not met his burden of proof and, therefore, approved the employer's partial denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's findings. The preponderance of the medical evidence indicates claimant's condition of dizziness and vertigo was not related to his industrial injury of November 30, 1977. This is based on the fact there is no evidence of any blunt-head trauma or any evidence of any head trauma at all. Drs. Myer and Wobig both find there is no relationship between the claimant's headaches, dizziness, vertigo and his industrial injury. Therefore, the Board affirms the partial denial as issued by the carrier.

ORDER

The order of the Referee, dated June 20, 1979, is affirmed.

WCB CASE NO. 78-3680 January 14, 1980

A. B. McMANUS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant an award of permanent total disability. The Fund contends this award is excessive.

FACTS

Claimant, a 49-year-old spinner, alleged that in January 1975 while lifting 30-pound spools of wool on his shoulders he developed headaches and tenderness in the cervical spine. Dr. Larry Bassinger diagnosed left serous otitis, headaches cause unknown, occipital neuralgia, and cervical nerve root syndrome.

In January 1975 Dr. George Throop opined that claimant was suffering predominantly sinus type headaches with secondary muscle contraction type headaches.

Claimant was hospitalized by Dr. Bassinger in February 1975 with a history of having left frontal and mid suboccipital headaches for four weeks. Dr. Bassinger's final diagnosis was vascular, migraine type, headache involving the left frontal area, superficial varicosities of the greater saphenous vein bilaterally, and phlebitis of the left greater saphenous vein.

On March 26, 1975 Dr. Throop stated he found no permanent neurological defects in the tests or examinations he had done so far.

On March 28, 1975 Dr. Bassinger reported he felt that claimant's job did contribute to the nerve roots stretch injury of C1-2 on the left which in turn contributed to claimant's vascular headaches.

On April 28, 1975 Dr. George Harwood, the medical consultant for the Fund, opined that the cervical strain did not have a connection with the claimant's headaches. He agreed with Dr. Throop that his condition was probably a sinus headache or vascular migraine headache.

On May 5, 1975 the Fund denied claimant's claim for a cervical strain.

On May 5, 1975 Dr. Throop reported that he felt claimant had suffered acute cervical sprain or strain and that his continuing prolonged convalescence had more of a functional rather than an organic cause.

On June 2, 1975 Dr. Throop diagnosed a muscle contraction headache caused by numerous things, including cervical strain caused by claimant's heavy lifting at work. He suggested the underlying initial cause of claimant's condition was a cervical spine strain that had been aggravated by an underlying emotional or psychological stress.

In June 1975 Dr. J. Mark Ackerman, a psychologist, concluded claimant was suffering from an anxiety reaction with marked psychophysiological and depressive symptoms. Claimant reported the onset of this coincided with his employment at the woolen mill and the gradual onset was not related to any emotional trauma which Dr. Ackerman was aware of. It is his opinion that the claimant's work was a material contributing or aggravation factor in his psychological disability.

On June 19, 1975 Dr. Bassinger indicated that based upon a reasonable medical probability that claimant's chronic headaches and neck pain with the accompanying marked functional and psychological overlay had been contributed to by the injury in January 1975.

An Opinion and Order, issued on January 5, 1976, remanded claimant's claim for his head and neck condition as well as his psychological condition to the State Accident Insurance Fund for acceptance and payment of compensation. This was affirmed by the Board.

On April 27, 1976 Dr. Ackerman reported that claimant had been referred for a vocational rehabilitation program. Claimant believed this would be for engine tune-up training, however, it turned out to be for general mechanics involving removing and replacing transmissions. Claimant said he was unable to do the lifting and bending necessary in this job and soon discontinued the work. In the spring claimant had enrolled in a community college, however, because he had only a seventh grade education, was having difficulty with his studies. Dr. Ackerman considered the claimant still to be mildly depressed and suffering from an anxiety reaction of mild proportions and suspected a continuation of psychophysiological difficulties from which he formerly suffered. He considered claimant to be psychologically stationary at that time and saw no need for future appointments.

In May of 1976 Dr. Throop reported that the claimant was complaining of pain in all extremities and all joints of his body except the left leg. It was his opinion that claimant suffered from a psychiatric condition.

In September 1976 Dr. Ackerman reported the claimant needed supportive counseling. Since claimant's condition had worsened and was not stationary, he requested the Fund reopen the claimant's claim for treatment.

In June 1976 claimant was seen in the emergency room for chest pain resulting from hyperventilation and anxiety. Dr. Bassinger reported that the anxiety was due to claimant's involvment in finals at the community college and his poor grades. He felt this anxiety was not directly related to the industrial injury. Dr. Ackerman disagreed and opined that the axiety attack was a direct sequel of his industrial injury.

A Determination Order, dated November 18, 1976, ordered claimant compensation for temporary total disability and also awarded claimant compensation for unscheduled permanent total disability effective November 4, 1976. This order was set aside by the Second Determination Order of November 29, 1976 because claimant was not medically stationary.

Dr. Ackerman, on December 9, 1976, found the claimant stationary.

On January 24, 1977 Dr. Julia Perkins, a psychologist, diagnosed a neurotic depressive reaction. She felt claimant should be viewed as unemployable at that time largely due to personality characteristics and a suspected lack of motivation for returning to work, along with other problems. It was her impression that claimant would not return to work. Dr. Perkins opined that to a moderate degree the emotional upset related to personality characteristics existing before his injury.

In January 1977 the Orthopaedic Consultants diagnosed drug intoxication by history, diffuse arthralgia and myalgia not interrelated, reactive depression probably secondary to the athralgia and myalgia, headaches, tension variety probably secondary to the arthralgia, myalgia and obesity. It was their opinion that any injury related problem was stationary and no further treatment was indicated. They found that the arthralgia and myalgia were not injury related. They could not find any residual problems in claimant's neck, back or extremities that were injury related. They recognized that claimant had noninjury related conditions which made it unlikely that he would work at that time. The Orthopaedic Consultants indicated claimant should have a psychiatric examination to determine if he had any psychiatric disability due to this injury.

On May 23, 1978 Dr. Marion Maltby, a psychiatrist, diagnosed a conversion (compensation) neurosis. He found there was also some depression present. It was his opinion that the conversion (pain) symptoms were not related to his work, rather to his need to be disabled as a way of coping with life.

On August 15, 1977 Dr. Peter Winters diagnosed severe hypocondriacal neurosis with secondary depression, in regression, which was not responding to past and present therapy. He felt that claimant should be returned to farm work since claimant was quite capable of operating tractors and produce trucks. He did not feel that it was in claimant's best interest if others concurred with claimant's impression that he was truly physically disabled.

On December 12, 1977 Dr. Guy Parvaresh, a psychiatrist, opined that claimant presented clinical signs and symptoms of chronic neurosis, best characterized as hypochondriotis. He did not feel the claimant was in need of psychiatric care. Dr. Parvaresh felt it would not be reasonable to assume responsibility for claimant's psychiatrical problems since by history and the nature of the illness, it could not conceivably be attributed to his job.

A Determination Order, dated May 8, 1978, awarded claimant compensation for temporary total disability from May 5, 1975 through February 9, 1978, less time worked.

On May 31, 1978 Dr. Cherry reported that claimant was unable to work. Claimant, in July 1978, underwent a myelogram which was normal.

On August 21, 1978 Dr. Cherry stated that claimant was totally and permanently disabled.

On September 21, 1978 Dr. Ackerman stated he agreed with Dr. Winters' report totally with the exception that he felt claimant could not return to farm work or any work. He felt that claimant was severely disabled.

On November 30, 1978 Mr. Adoph, Vocational Consultant, opined that claimant was "unemployable and probably untrainable in work that he otherwise was capable of performing which existed in significant numbers locally".

Claimant and his wife testified that at the time of the hearing they currently managed a nine-unit motel complex and began doing this in February of 1978. They are paid $400 dollars a month plus free living accomodations. Claimant testified that he only works at the motel two hours a day. He says he aids his wife in making and stripping the beds and does minor repairs and vacuums occasionally. Claimant testified that he and his wife were trying to find a larger unit to manage. Claimant stated he has difficulty driving from Albany to Portland and has to stop once or twice. However, claimant also testified that he and his wife have driven non-stop to Reno on four occasions since 1975. He reported he has also driven to Oklahoma in three days and driven back in three days without any problems. Claimant testified he has not sought any other employment. Claimant has a seventh grade education.

Claimant's wife testified that claimant does even more things in the motel like mowing the yard and helping with the laundry.

Movies were introduced at the hearing and show claimant doing more work at the motel than he testified he was capable of.

The transcript from the prior hearing reveals that claimant had had headaches for a ten to twelve year period before he filed this claim. Claimant occasionally left work due to these headaches. At that hearing claimant testified that he often got headaches at night when he wasn't even working. He testified also that these were less frequent at the time of the first hearing coming only about twice a week for about two hours. Claimant also advised Dr. Ackerman that he had no family problems or emotional complaints when in fact the evidence indicates that since 1970 claimant had an ongoing, progressive emotional problem which had been slowly becoming worse. He was involved in a domestic problem which eventually ended in divorce. In addition to this, his brother was severely disabled and living with him up until 1974 when he was committed to a mental hospital and his two closest sisters had heart attacks.

The Referee found claimant was credible and that the films did not impeach him. Based on all the medical evidence he found that claimant was permanently and totally disabled.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The medical evidence in the record indicates that the psychiatric condition is not permanent. There is no proof of an ongoing disability due to claimant's injury. The Board finds that the opinions of the psychiatrists, Drs. Parvaresh, Maltby and Winters are more persuasive in this matter than those of Dr. Ackerman. However, based on the orthopedic and neurological findings of Drs. Throop and Bassinger, the Board finds that claimant is unable to return to his former job. This disability, along with claimant's age, education, prior work experience, and other factors, leads the Board to conclude that claimant is entitled to an award equal to 96° for 30% unscheduled disability for his loss of wage earning capacity due to his injury in January 1975.

ORDER

The Referee's order, dated July 16, 1979, is modified.

Claimant is hereby granted an award of compensation for his neck injury equal to 96° for 30% unscheduled disability. This award is in lieu of the award granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 78-9027 January 14, 1980

LAURENA F. OWNBY, CLAIMANT
John L. Hilts, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On December 27, 1979 the State Accident Insurance Fund (Fund) requested Board review of the Referee's order entered on November 30, 1979. The request was postmarked December 28 and received by the Board on December 31.

It has been brought to the Board's attention that Referee Danner reopened this case on December 27, 1979 and, therefore, the Fund's request for Board review is moot. The Fund asked that its request be cancelled.

ORDER

The request for review entered by the Fund on December 27, 1979 is hereby dismissed.

WCB CASE NO. 78-5535 January 14, 1980

KATIE M. WARE, CLAIMANT
Merten & Saltveit, claimant's Attys.
William Replogle, Employer's Atty.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

SAIF CLAIM NO. ZC 251934 January 15, 1980

JAMES COLLIER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On July 6, 1979 the Board issued an Own Motion Order remanding claimant's claim for his June 23, 1970 injury to the State Accident Insurance Fund (Fund) for acceptance and payment of compensation commencing on May 25, 1979 and until the claim was closed pursuant to ORS 656.278 less time worked. Subsequently, on July 30, 1979, Dr. William Klass indicated he authorized time loss from May 2, 1979. This information was provided to the Fund who did not oppose commencing compensation for temporary total disability as of May 2, 1979.

Therefore, the Board amends its earlier order to reflect this change.

ORDER

The Board's Own Motion Order, dated July 6, 1979, which reads "commencing on May 25, 1979", is amended to read "commencing on May 2, 1979".

WCB CASE NO. 78-6348 January 17, 1980

DICK BABCOCK, CLAIMANT
Malagon & Yates, Claimant's Atty.
Velure & Heysell, Employer's Attys.
Order Denying Motion

An Opinion and Order was issued in the above entitled case on September 18, 1979. On October 1, 1979 United Pacific/Reliance Insurance Company (United) requested review of this Opinion and Order. United, on December 5, 1979, moved the Board to accept an operation report dated December 5, 1979 because it was not available at the time of the hearing.

The State Accident Insurance Fund (Fund), on January 7, 1980, advised the Board it objected to the Board accepting the report.

The Board, after thoroughly considering the motion, would deny it. The Board will not consider evidence that was not part of the record at the time of the hearing unless there is an agreement between the parties that it can. The appeal in this case was not based on the December 5, 1979 report, but on the record as it existed at the time of the hearing. Therefore, the Board would deny United Pacific/ Reliance Insurance Company's motion.

The briefing schedule is modified and the Fund is given 20 days from the date of this order to file its brief and United is given 10 days after that to file its reply, if any. In any event, all briefs are due no later than 30 days from the date of this order.

ORDER

The motion submitted by United Pacific/Reliance Insurance Company is hereby denied.

WCB CASE NO. 79-4497 January 17, 1980
WCB CASE NO. 79-6913

HAROLD BUCHMAN, CLAIMANT
Bruun, Green & Caruso, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order Denying Motion

An order designating paying agent was entered on August 7, 1979 designating Employee Benefits Insurance (EBI) as the paying agent pending a hearing. Both EBI and the State Accident Insurance Fund (Fund) had denied responsibility for claimant's condition.

An Opinion and Order, dated October 26, 1979, affirmed the Fund's denial and remanded the claim to EBI for acceptance and payment of compensation. EBI appealed this order on November 2, 1979 and served copies on the claimant and his attorney, EBI and the employer, Greenwood Inn. On November 13, 1979 the Board advised claimant, the Fund, and Greenwood Inn it had received a request for review. On December 18, 1979 a letter setting forth a briefing schedule was mailed to the attorney for the Fund and Greenwood Inn.

The Fund, on December 27, 1979, moved the Board for an order dismissing the request for review based on the failure of the appellant to mail it a copy of the request for review.

EBI and Greenwood Inn responded on January 3, 1980 that they had preserved their appeal rights against claimant. They argued that in cases where two employers are contesting responsibility for claimant's condition, and one employer is found responsible and appeals, the other employer was automatically a party to the appeal by virtue of an order issued pursuant to ORS 656.307. Further, they argued, the Fund had actual notice of the appeal by virtue of the correspondence addressed to it by the Board within 30 days of the Referee's order as required by statute.

The Board, after thoroughly considering all of the evidence and the arguments of the parties, denies the Fund's motion to dismiss for the reasons set forth by EBI and Greenwood Inn.

ORDER

The Fund's motion to dismiss the request for review in the above entitled case is denied.

WCB CASE NO. 77-7695 January 17, 1980

JOHN BOGLE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
G. Howard Cliff, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which granted him compensation equal to 160° for 50% unscheduled disability for his back injury. Claimant contends this award is too low.

FACTS

Claimant, a 53-year-old ironworker, sustained a compensable injury to his low back on September 25, 1975. This injury was first diagnosed as a possible herniated disc.

In October 1975 Dr. Mark Melgard reported he had first seen claimant in 1970. Claimant had had a back injury in October 1971 and had back surgery in 1973. Claimant stated he had returned to work on September 26, 1975, but was unable to tolerate it. Dr. Melgard diagnosed a strained back, but didn't find many objective findings. X-rays revealed the prior fusion was solid.

In November 1975 Dr. Melgard reported claimant had tried light work, but had been unable to do it.

On January 15, 1976 Dr. Price Gripekoven reported he felt claimant was medically stationary as of December 16, 1975. Dr. Gripekoven opined claimant was disabled for any type of heavy physical labor and should be retrained in a more sedentary type job. He felt claimant could be employed on a full time basis in a sedentary type job which did not involve repetitive lifting of over 20 pounds, bending or stooping on a regular basis. Dr. Melgard concurred with this report.

On March 26, 1976 Dr. Del Schaeffer, D.C., indicated he did not find claimant was medically stationary. He also felt claimant had a pre-existing double hernia which was causing claimant stomach pain.

In May 1976 Dr. Gripekoven indicated claimant had numerous complaints of pain in the neck, shoulders, mid dorsal spine, low back with radiation to the left leg and hip and aching in the buttocks. Dr. Gripekoven diagnosed degenerative arthritis of the lumbar spine, solid fusion L5-S1 and cervical, dorsal, and lumbar sprain by history. He felt claimant was medically stationary. It was his opinion the best solution for claimant's problem would be to get claimant back to work.

Claimant had begun welding training through the Vocational Rehabilitation Division in March 1976. He could not tolerate overhead welding and quit the program. He later started GED classes but failed to finish them.

Claimant was evaluated at the Disability Prevention Center in February 1977. The admitting diagnosis was: "1. Chronic lumbar sprain L4-5; 2. Radiculopathy L5 left; 3. Osteoarthritis of the thoracic and lumbar spine. 4. Postoperative status: Laminectomy and fusion - 1973; 5. Bilateral inguinal hernias; 6. Chronic right rhomboid strain; 7. Emphysema; 8. Gastritis, hypoglycemia and hpertension [sic] by history. . .". The vocational team felt claimant was unable to return to his former occupation as an ironworker, truck driver, construction laborer, or modified employment because of physical limitations. Employment was not available and there appeared to be a substantial risk of further injury to claimant.

Dr. J. Stephen Vizzard, psychologist, reported claimant had a sixth grade education, average intelligence, but low test scores. Claimant said he was interested in returning to iron work, but if he couldn't he would be interested in metal or wood working or welding. Dr. Vizzard felt claimant was experiencing fairly strong depression and anxiety due to his limitations. Dr. Carl Holm, in a discharge report, indicated claimant could do light work.

On July 15, 1977 claimant's vocational rehabilitation referral was suspended and finally terminated on August 16, 1977.

In August 1977 Dr. Marens Maltby, psychiatrist, reported claimant was fearful of being unable to return to his high paying ironworker job.

In April 1973 claimant had a spinal fusion, L5, to the sacrum for his 1971 injury performed by Dr. A. C. Kimberley. Dr. Kimberley, in April 1974, wrote: " . . . I wish to state that my rating of 50% was comparable to a 30% total bodily impairment". He also reported claimant had chronic emphysema and gastro-intestinal complaints with his smoking and nervous tension, both unrelated to his industrial injury.

An order, dated May 20, 1974, awarded claimant unspecified disabilities of 20%.

A Determination Order, dated October 21, 1977, awarded claimant compensation for temporary total disability and compensation equal to 48° for 15% unscheduled disability for his low back injury.

On March 3, 1978 Dr. Norman Hickman, psychologist, after evaluating claimant, reported claimant had average intelligence, however, had low test scores and one test indicated claimant would have difficulty in any new learning situation. Claimant told Dr. Hickman he had pain in his entire back; had difficulty walking; could not stand for over 15 minutes, or sit over 30 minutes; had pain in his left leg and low back with bending or overhead work; had occasional neck stiffness; momentary episodes of dizziness related to hypoglycemia; and a hearing impairment. Dr. Hickman, based on claimant's test scores and claimant's complaints, felt claimant could not perform any of the jobs on a full time basis he was qualified for. Dr. Hickman felt, based on the medical reports, claimant's difficulty in new learning, age, education, work experience and limitations, claimant was unable to return to full time gainful employment. He found claimant had severe psychopathology which was directly and materially related to his industrial injury.

On March 21, 1978 Vocational Rehabilitation terminated its services because claimant, due to back pain, was unable to pursue employment or participate in a rehabilatation training program at that time or in the foreseeable future.

In April 1978 Dr. Maltby reported his original diagnosis in 1972 was conversion neurosis. The doctor found little indication of motivation on claimant's part and noted claimant had been granted Social Security disability retroactive to September 1975 which would result in even less motivation. Dr. Maltby opined claimant's conversion (compensation) neurosis pre-existed his September 1975 injury and was neither caused by nor materially aggravated by that injury.

In April 1978 Dr. Sanders reported his diagnosis was chronic obstructive pulmonary disease, bilateral inguinal hernia, hypoglycemia, gastritis, duodenitis and degenerative disc disease. He opined claimant was permanently disabled.

Also, in April 1978, Dr. Gripekoven reported claimant was medically stationary and should avoid heavy physical work, which involves bending, lifting, or uninterrupted standing or sitting. He felt claimant could be employed on a full time basis in a sedentary type job. Dr. Gripekoven opined claimant's award of 15% adequately reflected his disability for the September 1975 injury. He felt claimant's total disability of the back was moderate, estimating it to be 50% of the back. Dr. Gripekoven felt claimant's emotional state might preclude him from employment. He found claimant also had significant drug dependency. He felt his examinations in 1978 and 1976 were the same.

On May 11, 1978, Dr. Gripekoven indicated claimant could do light work which would involve principally standing or walking with occasional periods of sitting, lifting of 10 pounds, and occasionally 20 pounds. He felt claimant needed a job which would allow frequent movement and changing of position.

On May 25, 1978 Dr. James Hampton examined claimant and found various nondisabling or asymptomatic conditions. He asked claimant why he wasn't working and claimant stated it was his back.

On June 5, 1978 Mr. R. E. Adolph, a vocational consultant, forwarded a list of jobs that were in existence which he felt claimant could perform. Dr. Gripekoven concurred that claimant could perform all of the jobs with the exception of those requiring driving.

On June 13, 1978 Dr. Hampton, after reviewing the list of jobs opined claimant could probably do any of the jobs if he was strongly motivated. However, he didn't feel claimant was strongly motivated to return to full time work.

Dr. Maltby, in June 1978, after reviewing the list of jobs, felt claimant was psychologically capable of performing any of them. He did not feel claimant was motivated to do any of them because of the lower pay and prestige value as compared to his former job.

On November 21, 1978 Dr. John T. Cheekal opined claimant was permanently disabled and not able to be gainfully employed.

Dr. Hickman testified at the hearing that from June 1972 to March 1978 claimant's psychological condition had deteriorated and now was almost irreversible. He felt psychological factors were present which prevented claimant from returning to full time work. Dr. Hickman said claimant saw himself as an ironworker and in no other position. He felt claimant could not adapt to a vocational setting due to lower wages and less prestige than an ironworker. Dr. Hickman reported claimant had average intelligence and his low test scores could be influenced by his attitude and if claimant wanted to be an ironworker, he would not qualify for many other types of jobs.

Dr. Maltby testified he first saw claimant in 1972 and diagnosed compensation neurosis. He felt this rewarded claimant for being disabled. Dr. Maltby felt claimant had no motivation for rehabilitation. He felt claimant was psychologically incapable of working and claimant's psychopathology was neither caused nor materially aggravated by his injury; further his lack of motivation had no causal relationship to the industrial injury.

Claimant testified he has a 6th grade education and has worked most of his life as an ironworker. He has also worked as a truck driver, bus driver and a laborer. He complained of constant back pain from his neck down to his tailbone and to the left hip and left leg. Claimant has not looked for work since his injury. He is currently not receiving any medical treatment.

In August 1978, claimant drove to Eastern Oregon and was observed bending, squatting, stooping, fishing (six hours per day for three days), carrying a 20-pound suitcase, ice chest, and climbing over a barricade. Claimant did not appear to limp during all of these movements, as he said he does.

The Referee, after reviewing all the evidence, did not find claimant to be permanently and totally disabled. He did not find claimant unemployable, but that he was precluded from heavy employment. Therefore, he granted claimant an award of compensation equal to 160° for 50% unscheduled disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board finds Dr. Maltby more persuasive than Dr. Hickman in this case. Claimant's psychopathological condition is neither caused by nor materially worsened by his injury. Further, claimant is not motivated for return to work or to participate in rehabilitation. However, the Board finds, because of his impairment, claimant has sustained a greater loss of wage earning capacity than that granted by the Referee. Claimant is unable to return to heavy employment. He has a sixth grade education, is 58 years old, and his basic experience has been in iron work. Therefore, the Board finds claimant is entitled to an award of compensation equal to 240° for 75% unscheduled disability, in lieu of all prior awards for permanent partial disability.

ORDER

The Referee's order, dated February 23, 1979, is modified.

Claimant is hereby granted an award of ocmpensation equal to 240° for 75% unscheduled disability for his back injury. This award is in lieu of any and all prior awards for unscheduled disability.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-520 January 17, 1980

DAVID E, CHANNER, CLAIMANT
Daniel G. Hoar, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the denial of claimant's claim by the State Accident Insurance Fund (Fund). Claimant contends he has sustained a compensable injury.

FACTS

Claimant, a 30-year-old driller in a drilling and blasting operation, alleges he sustained a compensable injury to his back on December 5, 1978 while lifting heavy objects. On the report of the occupational disease or injury, the employer noted that on December 6, 1978 a co-employee of claimant saw claimant walking and moving as if his back were hurt and asked claimant if he had hurt his back on the job. Claimant responded that he had not, that he had fallen in the bathtub. The employee indicated that on December 9, 1978 the claimant told a Mr. L. W. Govro that he was unable to work because he had fallen in the bathtub and had hurt his back.

On December 9 claimant received treatment at the emergency room of the Woodland Park Hospital. Claimant gave a history at that time of throwing his back out while coughing the previous night. The diagnosis was a lumbosacral sprain.

On December 13, 1978 Dr. James Dineen reported claimant had advised him that he strained his back bending over to pick up heavy objects such as a drill, steel, rocks, etc. Claimant complained of back and left leg pain. Dr. Dineen diagnosed a lumbar disc syndrome. He did not feel that this injury would cause any permanent impairment.

On December 14, 1978 Dr. James W. Cruickshank reported that claimant had given him a history of pulling on some equipment and feeling something in his low back snap. Claimant stated that he developed pain in the low back and subsequently very severe pain in his left leg, the pain radiating down the posterior aspect of the left leg. Dr. Cruickshank diagnosed a probable acute herniated disc L5-S1 level on the left. He referred the claimant for a myelogram which was done on December 14, 1978 and revealed a defect at the L4-5 level that was consistent with a herniated nucleus pulposus. Dr. Cruickshank performed a laminectomy at the L5-S1 level on December 15, 1978.

On December 19, 1978 Dr. D. Surman indicated he had treated claimant on December 9, 1978 for a back injury which had occurred on December 8, 1978. He diagnosed a lumbosacral sprain.

On December 22, 1978 the Fund denied claimant's claim for his back and left leg injury allegedly occurring on December 5, 1978. Information in their file indicated that claimant's "present condition is not related to, nor was it a consequence, of the course and scope of his employment". Therefore, they entered their formal denial of claimant's claim.

On March 24, 1979 Dr. Cruickshank stated that it was theoretically possible to herniate a disc with a forceful sneeze or cough, however, it would be highly improbable that this alone was responsible for rupturing a relatively normal disc. It was his opinion that damage to a disc resulted from some sort of trauma such as lifting heavy weights or doing work which, in effect, applied a large force to the low back area. He noted that in the patient with no prior history of back injury, except for the normal wear and tear of that particular patient's work, it was very unlikely that a cough would produce a herniated disc.

Claimant testified that on December 5, 1978 he was lifting a drill steel weighing about 80 pounds at which time he heard a "crack" and felt a dull pain in his back. He stated that December 5, 1978 was a Tuesday and that he worked through the remainder of the week through Friday. He stated he had back discomfort during that time but since he did not have to do any more lifting, was able to continue to work.

Claimant testified that on Friday evening, while taking a shower, he coughed and felt pain in his low back and started to fall. He stated he was able to brace himself and lower himself to his knees. After this incident, claimant stated he needed assistance to get out of the tub and also assistance to get out of bed the following morning and assistance to go to the doctor on Saturday, December 9.

Three witnesses testified on behalf of the employer. None of them knew anything of claimant's low back situation until after the coughing incident in the tub-shower.

Dr. Much testified on behalf of the Fund. He agreed with Dr. Cruickshank's opinion that a cough in the shower was insufficient without some additional trauma to herniate the disc. He further testified that something unusual and acute occurred in the shower-tub that was a material cause of the disc herniating.

The Referee, after giving consideration to all the evidence, concluded that the denial of the Fund ought to be affirmed. He believed the testimony of the employer's witnesses more than he believed the claimant's testimony. He felt that the testimony of the employer's witnesses was more plausible and believeable. He did not feel the claimant's testimony was credible. Therefore, the Referee affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the conclusion reached by the Referee. The Board, after reviewing all of the evidence in the file, finds the claimant has not met his burden of proof in this matter. Therefore, the Board would affirm the Fund's denial based on claimant's failure of proof.

ORDER

The order of the Referee, dated August 3, 1979, is affirmed.

WCB CASE NO. 78-8621 January 17, 1980

LARRY L. CORNUTT, CLAIMANT
Jules, Drabkin, Claimant's Atty.
Acker, Underwood, Beers, Smith
& Warren, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which ordered that claimant should be paid compensation for temporary total disability as of January 30, 1979 and continue to be so paid until he was found to be medically stationary by Dr. Poulson. The employer contends that this was incorrect and the claimant is not entitled to compensation for temporary total disability since he was medically stationary on or about October 23, 1978 when his claim was closed. The employer also contends that the Referee should have reviewed the evidence and determined if and how much permanent partial disability claimant had resulting from his industrial injury.

FACTS

Claimant, a 24-year-old truck driver, sustained a compensable injury to his back on July 24, 1978 while unloading a sliding glass door from his vehicle. Dr. J. Nicholas Fax diagnosed a severe lumbo-costal strain.

On August 9, 1978 Dr. Fax diagnosed back pain and sciatica probably due to a bulging lumbar disc with a possible rupture. He found no evidence of any neuropathy at that time. He suggested that claimant continue to rest and begin physical therapy.

By early September 1978 claimant reported to Dr. Fax that his back and leg were both feeling good and that he was really not having any complaints at all. Dr. Fax reported that claimant could bend over and touch his toes and come back up quickly and easily. He reported that claimant could lean back and to the right and left through a full range of motion. Dr. Fax released the claimant for work as of September 11, 1978. On October 2, 1978 Dr. Fax reported that claimant returned to work and was not having any particular problems. Claimant reported that his back and legs were feeling good, however, he occasionally had an ache or pain. Dr. Fax felt the claimant's condition was stationary and the claimant did not have any significant residual disability in his back.

A Determination Order, dated October 23, 1978, awarded claimant compensation for temporary total disability from July 25, 1978 through September 10, 1978.

Dr. Fax reported, on January 24, 1979, that claimant was having some increasing pain in the back with radiation into the upper thigh area. Claimant reported he had gone back to work but was fired shortly after he had returned. He reported that claimant was currently on unemployment and looking for work. Dr. Fax's examination revealed that claimant was still able to bend over and touch his toes and come back up smoothly. He found claimant could lean back and to the right and to the left through a full range of motion. He opined that claimant was having a mild flare-up of his old back problem and that no specific treatment was really indicated at that time.

In February 1979 Dr. Fax reported that claimant's back was still giving him some problems and claimant was receiving chiropractic treatment. His examination revealed that claimant could still bend over and bring his fingertips within about six inches from the floor and was still able to come up quickly and easily. Claimant still could lean back to the right and to the left through a good range of motion. Dr. Fax felt that claimant's condition was unchanged at the present time. He stated that he realized claimant still had some mild residual problems, but he encouraged claimant to try to overcome them as best as possible and go back to work. He felt that claimant could do any job that did not require heavy lifting over 50 pounds, or constant bending or stooping. It was his opinion that claimant could try driving a truck again or try to find some other line of work.

On March 12, 1979 Dr. Don E. Poulson reported that claimant described his pain as constant with remissions and exacerbations of severe pain. Claimant reported that bending and lifting aggravated this pain. Claimant also reported that driving aggravated his condition. Dr. Poulson felt that based on the chronic pain and continued disability that claimant might benefit from surgery. He suggested that claimant undergo a myelogram and possibly a discogram to see if there was any definite organic pathology.

On March 21, 1979 Dr. Edward E. Moore, a chiropractor, reported the claimant had presented himself to his office on January 30, 1979 with complaints and symptoms of tightness in the back and pain in the low back and right leg, nervousness, tension, irritableness, and a feeling of pins and needles in his legs. His diagnosis was acute traumatic lumbosacral sprain with attendant intervertebral disc syndrome and pre-existing spondylolisthesis. He suggested that claimant continue to receive treatment. Dr. Moore reported that the prognosis appeared to be good; that claimant was having periods of remission and exacerbation, depending on the amount of lifting, bending, and twisting he does.

On March 22, 1979 the Orthopaedic Consultants, after examining the claimant, reported claimant was complaining of constant pain in the low back. The claimant reported if he sat for very long the pain became worse and the pain radiated into his left leg. It was their diagnosis that claimant suffered from a chronic low back strain superimposed on degenerative lumbosacral disc. Further, they opined that claimant's condition was stationary and that he had reached the maximum improvement. They recommended no further treatment. They felt that claimant could return to the same occupation with limitations at first and could eventually return to full employment at the same occupation. They rated the disability of the low back as it existed at that time as minimal and they rated his loss function due to this injury as minimal.

On April 10, 1979 Dr. Poulson reported that it was his opinion that claimant's condition and situation would not be solved simply by closing the claim and giving him the minimal disability, especially if claimant had a degenerative protruding disc. He felt the least he could do for the claimant was to complete the diagnostic workup, which would be a myelogram.

On April 23, 1979 Dr. Fax, after reviewing the Orthopaedic Consultants' report, reported that his findings and theirs were quite similar as were his recommendations. He noted that both he and the Orthopaedic Consultants felt that claimant could try going back to work as a truck driver as long as he was cautious with his back. He noted that neither the Orthopaedic Consultants nor himself had found any neurological deficit in the claimant at any time. He reported that he did not contemplate doing a myelogram.

Claimant testified at the hearing that he returned to work at his regular job without any modifications. He stated that he was subsequently fired for failure to call in and for agreeing to pick up a broken down truck in Washington over the weekend which he failed to do. Claimant testified he has been drawing unemployment ever since. Claimant testified that after being advised by the doctors that he may need a myelogram he is not sure if he wants a myelogram.

The Referee found that the claimant should be placed on compensation for temporary total disability as of January 30, 1979 when he came under treatment of Dr. Moore and until he was again found medically stationary and the claim was again closed pursuant to ORS 656.268.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, disagrees with the Referee's awarding of compensation for temporary total disability in this case. The Board finds the preponderance of the medical evidence indicates that the claim was not prematurely closed nor does it support claimant's entitlement to any further compensation for temporary total disability at this time.

The Board, after reviewing all the evidence in the record, concludes that claimant is entitled to an award of compensation for permanent partial disability. Dr. Fax placed limitations on the claimant of avoidance of any jobs that require heavy lifting over 50 pounds or constant bending or stooping. Based on these limitations plus claimant's continuing mild residual problems, the Board feels claimant is entitled to an award of compensation equal to 64° for 20% unscheduled disability for loss of wage earning capacity due to his low back injury.

ORDER

The Referee's order, dated June 17, 1979, is reversed.

Claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for his low back injury.

Claimant's attorney is granted a reasonable attorney's fee of 25% of the increased permanent partial disability awarded by this order, said sum not exceed $3,000.

WCB CASE NO. 79-2521 January 17, 1980

JOHN R. DANIEL, CLAIMANT
Bruun, Green & Caruso, Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which approved the denial of his aggravation claim by the employer.

FACTS

Claimant, 35 years old, sustained a compensable injury to his left knee on September 12, 1974 when he stepped back and fell off a loading dock. Dr. Frank J. Sykes diagnosed an acute strain of the medial collateral ligament of the knee. Claimant was released for light work on September 26, 1974.

In January 1975 Dr. Craig MacCloskey reported that claimant continued to complain of pain in the knee. He found there was heat on the medial side associated with a 3/4-inch atrophy in the left thigh. He felt that he was unable to make a solid diagnosis regarding the etiology of the pain in claimant's knee. He planned to have claimant return to work for a trial period and if he was unable to work claimant would require exploratory surgery on the knee. Dr. McCloskey, in May 1975, because of continued pain, performed an arthrogram which was normal. He felt claimant had Pellegrini-Stiech disease or occult internal derangement of the knee.

On August 19, 1975 Dr. Stanley L. James reported that claimant was working at a job at the mill which did not require extensive use of his knees. Claimant felt that he could not tolerate any type of work which was more vigorous. Claimant still complained of pain over the medial side of the knee which was generally aching in nature but sometimes rather sharp. Claimant reported that the knee stiffened with rest. He stated the knee had very little swelling, however, at times, did feel warm. Dr. James reported claimant had not noted any limitation in straightening the knee, but stated that he could not bend it quite all the way. Dr. James reported that claimant had pain with standing, however was able to work eight hours a day as a tally man at the lumber mill which required him to be up on his feel walking around but not actually doing any heavy labor. Claimant reported the knee ached toward the end of the day. Claimant said he had difficulty walking on rough or uneven ground and had trouble going up or down stairs. Claimant reported the knee felt somewhat weak and had given way on some occasions. Claimant reported he was unable to run and complained of some catching and popping or the sensation that something does occasionally catch within the joint. Dr. James did an arthrogram which he felt was within normal limits. He diagnosed residual stiffness of the left knee, secondary to a ligmentous strain, medial tibial collateral ligament of the left knee. Dr. James stated that the claimant had advised him that he felt his condition stabilized and, in Dr. James' opinion, it would be best to close the claim at this time. Dr. James did not feel that claimant would be able to tolerate heavy labor requiring excessive lifting or squatting and would probably have to continue in his present job assignment or in a similar one.

A Determination Order, dated October 3, 1975, awarded claimant compensation for temporary total disability and compensation equal to 7.5° for 5% loss of his left leg.

In August 1978, Dr. McCloskey stated claimant still had pain on the left knee. He did not feel there was a great change in claimant's knee problems.

On December 20, 1978 the claimant filed a claim for aggravation stating that his condition had worsened since his last adjustment of compensation.

Dr. Russell J. Keizer reported, in February 1979, that claimant had calcific deposits in the left medial collateral ligament which he felt were a result of the injury that claimant sustained in 1974. He also felt that there was a possibility that claimant may have a sustained a torn medical meniscus. Dr. Keizer felt that because of claimant's continuing pain, a possible repeat arthrogram may be needed. He felt that the claimant could benefit from the removal of the calcification of the medial femoral condyle to reduce the chronic major pain that is present in that area.

On February 23, 1979 the employer denied claimant's claim for aggravation. This was on the basis that there was no medical information in their file to indicate claimant's knee condition was any worse than it was at the time the case was originally closed.

Claimant testified that he has continued to work and has lost no time from his job. He further testified that his condition, in his opinion, has worsened. His present complaints are gradual increase in pain, requiring him to occasionally use pain medication and a decrease in knee motion.

The Referee, after reviewing the evidence in the file, found that claimant had not met his burden of proving a worsening of his condition or change therein, and, therefore, found no aggravation claim. The Referee found that claimant may well be entitled to medical treatment under ORS 656.245 which could include surgery to remove the calcification as suggested by Dr. Keizer. The Referee felt that the claim did not need to be reopened to provide treatment pursuant to ORS 656.245. Therefore, the Referee affirmed the denial of the employer of claimant's aggravation claim.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the conclusion reached by the Referee. The Board finds, as the Referee did, that no aggravation has been proven at this time. It is obvious from the evidence in this case that claimant will eventually have to have surgery and the claim will have to be reopened if and when the surgery is performed. The Board feels that it would be futile to go through another aggravation hearing in the future when claimant will have to

have the surgery and, therefore, the Board recommends that if and when claimant has the surgery, the carrier should reopen the claim for the payment of compensation and other benefits. The Board disagrees with the Referee's statement that such treatment can be handled under ORS 656.245. The Board finds that many office procedures can be handled under that statute, but anything requiring compensation for temporary total disability requires the claim be reopened and this cannot be handled under ORS 656.245. Nonetheless, the Board would affirm the Referee on the issue involved in this case.

ORDER

The Referee's order, dated August 10, 1979, is affirmed.

WCB CASE NO. 78-3885 January 17, 1980

MARVIN ERICKSON, CLAIMANT
Jack Polance, Claimant's Atty.
Jack Mattison, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the Determination Order, dated February 1, 1978, which awarded claimant compensation for temporary total disability and compensation equal to 80° for 25% unscheduled disability resulting from the injury to his low back. Claimant contends this award is not adequate.

FACTS

Claimant, a 37-year-old laborer, sustained an injury to his back on September 11, 1975 while removing rock and dirt from a trail. Dr. David Studenberg diagnosed "probable nucleus pulposus".

After a period of conservative treatment, Dr. Stephen Schachner performed a laminectomy on October 14, 1975. A protruding intervertebral disc at the L4-5 level was found on the left and a discectomy performed. Dr. Schachner reported on February 17, 1976 that claimant's condition continued to deteriorate after the surgery and he rehospitalized claimant for a period of traction. His symptoms did not resolve so the doctor performed another myelogram and found a basic annular constriction which he felt was compatible with scarification.

On April 12, 1976, Dr. Donald L. Stainsby reported claimant was complaining of low back pain, pain in the left leg, and numbness in the left leg and foot. Dr. Stainsby, after reviewing the x-rays, felt that claimant probably had persistent recurrent extruded intervertebral disc at the L4-5 level on the left side and felt that claimant should have additional surgery. On April 27, 1976 Dr. Stainsby performed a hemilaminectomy at L4-5 left with removal of a large protruded intervertebral disc. In August 1976, Dr. Stainsby reported that the claimant was progressing satisfactorily, however, he doubted very much that claimant would be able to return to heavy labor in view of the two lumbar back operations. It was his opinion, at that time, that claimant would have no more than a mild or moderately mild permanent disability. He felt, however, it was too early to rate the claimant's disability. He suggested vocational rehabilitation contact the claimant to either retrain him or find another source of employment.

In October 1976, Dr. Stainsby reported the claimant still continued to have some discomfort in his low back and left leg whenever he attempted to do any physical activity. He reported that claimant noticed this especially when he does any lifting or bending in his home. Dr. Stainsby found minimal limitation of lumbar back movements. He opined that claimant's symptoms were probably on the basis of post-operative scar tissue. Claimant advised the doctor that he felt he had improved a great deal since his last surgery. Dr. Stainsby suggested that claimant begin physiotherapy and also continue to wear a lumbosacral support.

On November 19, 1976 Dr. Stainsby reported that claimant felt he was stationary at that time. Claimant reported he had improved a good deal with the surgery and also with wearing a brace and the physiotherapy. Dr. Stainsby opined that the claim could be closed at that point. It was his opinion that claimant had a permanent partial disability and that disability arising from his low back injury was mildly moderate. He advised the claimant to continue to wear his back brace as needed. The doctor did not feel that claimant could return to his previous occupation as a laborer. He suggested that claimant be retrained for some type of bench work, such as business instrument repair or something similar.

A Determination Order, dated February 1, 1978, awarded claimant compensation for temporary total disability and compensation equal to 80° for 25% unscheduled disability resulting from the injury to his low back. The order reported that claimant's condition was found to be medically stationary on November 19, 1976.

On February 5, 1979 Dr. Stainsby reported that he examined claimant and found very little in the way of objective findings. He reported that the claimant actually complained very little about his back. Dr. Stainsby opined that the claim could be closed and no further medical or surgical treatment was indicated. He opined that claimant did have some permanent partial disability and he rated this in the lower range of mild. He reported that claimant also had a thoracic outlet syndrome which had no relationship to his industrial injury.

In November 1976 claimant was interviewed by a rehabilitation counselor. The counselor reported in addition to his two lumbar laminectomies, claimant also suffered from a speech defect with a cleft pallet and a left knee arthrotomy. The counselor reported the limitations on claimant were that he must avoid heavy lifting or excessive bending or stooping and that he was also limited in ambulatory activities and prolonged standing. Claimant's prior work history consisted of construction laborer and a plywood worker. Claimant had completed the 12th grade. The counselor suggested speech therapy to reduce his speech defect. This therapy helped claimant's speech considerably.

Claimant was also enrolled in a community college and took various courses. In December 1977 claimant developed a prostrate infection which required him to be hospitalized. In January 1978 the counselor reported that claimant had discontinued his training program at the community college and was searching for work. The counselor referred claimant to a job developer for job placement assistance.

On July 11, 1978 claimant's wife reported to the counselor that claimant had taken over a service station as a manager.

Claimant testified that he had moved to a different location and bought a filling station which he operated. He testified that he grossed about $15,500 from July to December 1978 and about $6,300 for the first three months of 1979. Claimant testified that he works about 10 hours a day and his wife relieves him and his son also works in the filling station. He said he is able to do some small mechanical work at the station and has learned to live with his back, but has to guard it. Claimant is able to use a tire changing machine if he is careful. In addition to operating a filling station he operates a wrecker service at the station and during a one-week period he made five to six calls. This, however, was for only one week. He also has an interest in taking part in a voluntary fire service, but he is not sure if he can engage in that type of activity or not.

The claimant's wife testified that claimant has to be careful in what he does. He has to squat and cannot bend over and when he does bend over a car to do light mechanical work he often has to take breaks in order to rest his back.

The Referee, after reviewing all the evidence in the case, concluded that the Determination Order adequately compensated claimant for his loss of earning capacity in this case.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the findings of the Referee. The Board finds, as the Referee did, that the Determination Order, dated February 1, 1978, adequately compensates the claimant for any loss of wage earning capacity he may have sustained as a result of his September 1975 injury.

ORDER

The Referee's order, dated July 3, 1979, is affirmed.

WCB CASE NO. 78-5838 January 17, 1980

RONNIE V. HASKINS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Paul Lipscomb, Employer's Atty.
Order Denying Motion

On August 31, 1979 a Referee entered an order reversing the denial of the employer. This order was appealed to the Board.

The employer, by and through its attorney, moved the Board, on January 7, 1980, for an order supplementing the record to include a new medical report from Dr. Baur, dated August 2, 1978. This was in response to comments in the Referee's order and in claimant's brief. Claimant's attorney objected to this motion.

The Board, after thoroughly considering the employer's motion, feels it must deny the motion. The Board feels that any comments made by the Referee or the claimant in his brief are just comments and not a matter of evidence to be considered by the Board in its de novo review. Therefore, the Board denies the employer's motion.

ORDER

The employer's motion to supplement the record is denied.

WCB CASE NO. 79-871 January 17, 1980

EDWARD J. KECK, CLAIMANT
Starr & Vinson, Claimant's Attys.
Luvaas, Cobb, Richards
& Fraser, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which granted claimant compensation equal to 32° for 10% unscheduled disability for his low back injury and an award of an attorney's fee out of this compensation to his attorney. The employer also requested that this case be remanded to the Referee to hear recently discovered evidence which was unavailable at the time of the hearing. The employer contends the award of compensation is not supported by the evidence and the claim should be remanded to the Referee to allow him to receive new evidence and consider it.

FACTS

Claimant, a 27-year-old mechanic, sustained a compensable injury to his low back on July 27, 1978 when, after bending over under the hood of a vehicle, he stood up to get some tools. On July 28, 1978 Dr. C. B. Koch reported he had examined claimant on July 27 and diagnosed a low back strain, questionable right nerve root distribution and questionable early disc problem. He felt claimant was medically stationary, but would be off work one to two weeks or more. He was not sure if claimant would have any permanent impairment.

On September 5, 1978 a myelogram was performed and revealed no defect. However, it did reveal more than the expected distance between the anterior margin of the L5-S1 disc and there was some bulging at that point. This was interpreted as probably representing either a bulging disc or a central herniation of a disc.

On September 7, 1978 Dr. Arthur Hockey was given the following history by claimant: in 1968 while in the service he had a low back problem; over the last 1-1/2 years he had noted a gradual increase in his back problems and had episodes of stiffness in his back; in November 1977 he had back stiffness and was off work two weeks. Claimant stated his work with this employer was primarily heavy work on transmissions. Claimant said his back pain had returned over the last three months prior to the July 1978 incident. Claimant stated that he had tried to return to work, but was unable to do even light work. Dr. Hockey diagnosed a lumbosacral strain and found no evidence of herniated lumbar disc.

Dr. W. C. Robertson released claimant for regular work on November 1, 1978 with a limitation of "no heavy engine work until patient feels up to it".

Dr. George Larson, in December 1978, reported he had treated claimant with ultra-sound, muscle relaxants and manipulations. He felt claimant seemed to respond and was able to return to work on or about October 30, 1978. Dr. Larson last saw claimant on November 6, 1978 when claimant was still working.

A Determination Order, dated January 18, 1979, granted claimant an award of compensation for temporary total disability only.

Claimant testified his employment with this employer terminated in December 1978 and he obtained other employment in January 1979 as an engine mechanic. He has worked full time since then. Claimant stated he had applied with some 20 different employers before finding a job. The new employer has various pieces of equipment which reduce his need for hard physical effort in handling motors, transmissions, and other engine and vehicle parts. Claimant testified that he has been able to do any task assigned to him by his new employer and has not complained of any physical problems or limitations regarding his back. However, claimant testified it takes him longer to perform his work and he feels he must protect his back.

Claimant's complaints now consist of soreness and stiffness in his low back, and a burning sensation alternating between his left and right legs. He feels it is necessary to spend time with his legs up on pillows and to lay flat on his back. He does his back exercises prescribed by his doctor, but does not run, jog, or play racquetball.

The Referee, after reviewing all of the evidence, concluded that claimant had sustained a loss of wage earning capacity and awarded claimant compensation equal to 32° for 10% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board does not find any proof that claimant has sustained any loss of wage earning capacity. The mere fact claimant has a difficult time finding employment is not determinative of any loss of wage earning capacity. The medical evidence likewise does not establish that claimant has any loss of wage earning capacity. Claimant's testimony of his being slower at his work is refuted by his supervisors at both Kendall Ford and Gibson Ford. Therefore, the Board, based on claimant's failure to prove any loss of wage earning capacity reverses the Referee's order and reinstates the Determination Order.

The Board finds, after thoroughly considering the employer's motion to remand, that it would not serve any purpose to remand this case to the Referee. Therefore, the Board denies the motion to remand.

ORDER

The Referee's order, dated May 31, 1979, is reversed.

The Determination Order, dated January 18, 1979, is reinstated.

The employer's motion to remand is denied.

WCB CASE NO. 77-7190 January 17, 1980

DANIEL HILDITCH, CLAIMANT
Malagon & Yates, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which granted him additional compensation for a total award equal to 160° for 50% unscheduled heart disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board finds that claimant is entitled to medical treatment under the provisions of ORS 656.245 contrary to what the Referee stated in paragraph eight of page two. The Board would urge the Field Services Division of the Workers' Compensation Department to get involved in this case and do everything possible to assist claimant in getting a job.

ORDER

The order of the Referee, dated August 14, 1979, and reaffirmed on September 17, 1979, is affirmed.

WCB CASE NO. 78-9510 January 17, 1980

STEPHANIA LYTLE, CLAIMANT
Luebke & Wallingford, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which awarded her compensation equal to 160° for 50% unscheduled low back disability. Claimant contends that she is permanently and totally disabled.

FACTS

Claimant, a 59-year-old janitress, sustained an injury to her low back on May 27, 1977 while lifting a barrel.

Dr. W. E. Winans diagnosed a right sacroiliac strain. His impression was that there would be no permanent impairment. Dr. Winans found claimant medically stationary and released her for work as of June 10, 1977. Claimant had advised Dr. Winans that while sitting on the floor during coffee break she had reached for a can apparently to put out a cigarette and felt sharp pain in her low back. She told him that she had pain in the right hip radiating down the right leg.

On July 5, 1977 Dr. Edward A. Heusch reported that claimant continued to have pain in the low back and right leg. He diagnosed a possible herniated nucleus pulposus L5-S1 on the right and sciatica of the right lower extremity. Claimant advised Dr. Heusch that on May 27, 1977 she had been placed in a new occupation which required her to lift barrels of trash and dump them. She stated that on that date, while sitting down, she experienced the onset of pain in the low back with radiation across the right buttocks. Dr. Heusch found no specific neurological deficit in his examination and suggested a conservative course of treatment be followed. He strongly recommended that claimant not return to her previous occupation which required her to lift trash barrels.

On August 15, 1977 Dr. Heusch performed a myelogram which revealed a herniated intervertebral disc at L4. Dr. Heusch performed a bilateral hemilaminectomy, L4 and L5 bilaterally, with excision of the bulging nucleus pulposus L4-L5 on August 19, 1977.

On November 21, 1977 Dr. Heusch reported that claimant should be rehabilitated. He noted that she had only an eighth grade education and would require some type of job placement where the occupation did not require heavy lifting or require her to stand or sit for prolonged periods of time. In December 1977 Dr. Heusch reported that claimant returned to his office and denied any pain in the right leg, however, she did notice pain mainly in the back with twisting, sitting types of motion. He reported at that point that claimant was using a transcutaneous nerve stimulator and occasionally pain medication.

On March 7, 1978 Dr. Heusch reported that claimant complained of pain in the right lower extremity. He reported that she was not using any pain medication. The claimant reported to Dr. Heusch that she was unable to attend rehabilitative training at the William Callahan Center because of some problem with taxes and having someone watch her home. Dr. Heusch opined that claimant would be unable to return to work.

On March 15, 1978 Dr. Heusch reported that he was not sure if claimant would be able to engage in employment of a light nature. He felt that it was best for claimant to attempt a trial part-time work in order to allow him to better judge her ability to carry out a particular occupation. He was most hesitant about claimant being required to use a vacuum since that caused marked discomfort of her low back problems.

On August 21, 1978 Dr. Theodore Pasquesi reported that she continued to have pain in the right leg and pain in the low back. Dr. Pasquesi found that claimant continued to have chronic low back pain with right sciatic irritation without atrophy or reflex changes. He opined that claimant would probably have to be employed in some capacity not requiring repetitive bending, stooping, twisting or requiring her to lift more than 25 pounds at any single time and not require her to sit or stand without being able to change positions as she felt necessary. He concluded that claimant's condition was stationary. He opined that the total combined impairment that claimant had was 20%. Dr. Heusch concurred with this report.

In October 1978 Dr. Heusch reported that claimant continued to have pain, mainly in the right leg, after activities. He reported that claimant continued to have a significant level of pain.

A Determination Order, dated October 27, 1978, awarded claimant compensation for temporary total disability and compensation equal to 64° for 20% unscheduled disability resulting from her low back injury.

On December 6, 1978 Dr. Heusch reported that the claimant continued to complain of pain mainly in the right leg which occurred after she performed such activities as attempting to do her normal housework. He reported that claimant did notice some relief of the pain in her right leg with physical therapy such as hot packs and ultra-sound. Dr. Heusch concluded that he did not anticipate much improvement regarding the claimant and felt that she would continue to have pain in the back and right leg that would be disabling.

Claimant, at the hearing, testified that she continues to have pain in her low back and right hip which radiated down into the right leg. She stated she is unable to bend, stoop, push or pick up items. She indicated that she no longer does vacumming since that increased her pain. She is also no longer able to dance or to rollerskate. She feels she does have problems with prolonged sitting or standing. She testified she is able to walk for a block and then must sit down and rest. She denied any such physical problems prior to her industrial injury.

Claimant testified that her first symptoms occurred when she was sitting beside the table at work and reached with her right hand to secure something from the table which was on her left. She first felt pain in her low back and hip.

Claimant further testified she now uses pain medication daily and also uses a hot water bottle for relief. She also uses a transcutaneous stimulator for one to three hours per day.

Claimant stated that she has not looked for any work since this injury. She feels she is unable to get around very well and is unable to be on her feet very long.

Claimant stated that she did not attend the treatment as recommended by Dr. Heusch at the William Callahan Center because she had three large dogs to take care of and also she wanted to keep people out of her house. She stated she has one or more sons living with her rent-free at this time. Claimant did state that she would work if she were able to.

The Referee concluded that claimant was not permanently and totally disabled. He found, after considering all of the evidence including the medical evidence, that claimant's disability for loss of wage earning capacity was not in excess of 50% maximum available. Therefore, he awarded claimant compensation equal to 160° for 50% unscheduled low back disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant is now 61 years old and has only an eighth grade education. She has a varied work background consisting of housework, hotel work, machinist work, shipyard work, welding and burning, factory work and janitorial work, all jobs which she can no longer do. Claimant has failed to cooperate with any effort to rehabilitate her. She has not sought or even attempted any type of employment or even trial work as suggested by Dr. Heusch. Therefore, the Board concurs with the Referee that claimant is not permanently and totally disabled. However, the Board concludes, based on all the evidence in this case, claimant is entitled to an award of compensation equal to 208° for 65% unscheduled disability for her low back injury.

ORDER

The Referee's order, dated April 30, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 208° for 65% unscheduled disability for her low back injury. This award is in lieu of any and all previous awards. The remainder of the Referee's order is affirmed.

Claimant's attorney is granted a sum equal to 25% of this increased award as and for a reasonable attorney's fee in accordance with the attorney fee agreement, such fee not to exceed $3,000.

WCB CASE NO. 76-368 January 17, 1980

ALBERT NACOSTE, CLAIMANT
Paul Rask, Claimnat's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which granted him an additional award of compensation equal to 80° for 25% making a total award of compensation equal to 96° for 30% unscheduled disability resulting from his injury to his central nervous system. Claimant contends that he is not now stationary or, in the alternative, if he is stationary that he is permanently and totally disabled as a result of his industrial injury.

FACTS

Claimant, a 26-year-old mill worker, sustained a compensable injury to his head on October 23, 1974 when, while setting stickers and a load of lumber, he was struck on the side of the head by a two-by-six board that had been pulled from the greenchain by another employee. Dr. Gaylord Janzen diagnosed contusion, possible mild concussion and hemorrhage of the right maximal sinus.

On November 16, 1974 Dr. Curtis Hill reported that the claimant had been advised that he had a post-concussion syndrome. Claimant continued to complain of headaches, particularly on the left side, dizziness and some unsteady feeling and blurring of his vision. After reviewing the history of a mild concussion, brain scan, EEG, and skull x-rays which were all normal, Dr. Hill did not see any evidence of any serious injury. It was his opinion that the symptoms of headaches and dizziness were partially related to a mild concussion or to the medication claimant was taking.

In December 1974 Dr. Janzen reported that claimant was complaining of severe headaches. He found muscle spasm and discomforts of the right cervical area which were apparently aggravating headaches to a certain extent. He reported that claimant recently began complaining of loss of feeling in the left distal fingertips associated with recurrent headaches and some mild dizziness.

In March 1975, Dr. J. Cruickshank examined claimant and diagnosed cephalgia of an unknown etiology. Claimant was hospitalized for a cerebral arteriogram. This test was negative. Dr. Cruickshank released the claimant for work as of March 10, 1975.

Dr. Robert Hansen reported in March 1975 that claimant was complaining of frequent nosebleeds since his industrial injury.

Claimant stated that on March 31, 1975 while standing at the top of a staircase, he became dizzy and fell all the way down the steps.

In April 1975 Dr. Theodore Pasquesi examined claimant. The claimant complained of headaches on a daily basis which lasted three to four hours, nosebleeds from the left nostril almost every day, considerable dizziness and loss of balance. Dr. Pasquesi found no orthopedic impairment. He reported that it appeared that claimant's problems are on the basis of a probable concussion. He was unable to form any opinion about the nosebleeds.

In August 1975 Dr. Michael Fleming, a psychologist, reported that the claimant's tests for brain damage offered some positive indicators of left hemisphere impairment both in the parietal and frontal lobes. He reported that claimant was experiencing moderate psychophysiological reaction with depression combined with moderate anxiety.

On September 15, 1975 Dr. Harold Paxton reported that after multiple testing, there were no positive physical findings. He noted that claimant's headaches had not improved. He believed that claimant's claim could be closed with a disability of 10% of an arm on a non-specific disability list. He reported, however, that he did not believe claimant was employable and he thought claimant "would be better suited by returning to an occupation".

On October 7, 1975 Dr. Hussain Sajid reported that claimant continued to complain of headaches and fainting spells. His diagnosis was post-traumatic headaches, headache due to chronic sinusitis, epistaxis probably due to the polyp of the nose, post-traumatic headache with possible functional overlay, and ruled out akinetic seizure disorder of undetermined etiology at this time. Dr. Sajid reported that in light of the clinical and laboratory findings, his final diagnosis was a headache of unknown etiology.

On October 20, 1975 claimant was admitted to the Pain Center program. Claimant was discharged from the Center on October 29 with a final diagnosis of chronic left frontal temporal cephalgia, etiology unknown, occasional blackouts on exertion, hysterical conversion mechanism was suspected and a mild reactive depression.

A Determination Order, dated January 15, 1976, awarded claimant compensation for temporary total disability and awarded claimant compensation equal to 16° for 5% unscheduled disability resulting from a central nervous system injury.

In April 1976 Dr. Janzen reported that claimant continued to complain of recurrent incapacitating headaches, dizziness and nosebleeds. He reported that in the absence of prior similar headaches, coupled with a forceful blow to the head and subsequent persistent and appropriate symptoms without major lab or x-ray findings to the contrary, he concluded the present disabling problem was a direct result of the traumatic head injury of October 23, 1974.

In 1975 claimant had attempted to brush up his math and English skills by attending Portland Community College. However, he was unable to continue with this work. His rehabilitation program was closed in November 1975. Claimant reapplied for vocational rehabilitation services in February 1976. His counselor reported in March 1976 that the claimant, after his claim had been closed, had tried to work for about three days for Joe Fisher Automobile Agency in December 1975, but because of his physical condition he had passed out and lost his job. He reported he still had frequent headaches and dizziness and that the employer could not take the risk of having him work there. Claimant was placed in an extended evaluation program at Portland Community College. Claimant's program was terminated in October 1976 because of low grades.

In March 1977 the Orthopaedic Consultants indicated claimant was complaining of a continuous headache in the left temporal region which was steady in nature. Claimant reported that when he was inactive the headache was of low intensity, but as soon as he did anything strenuous the headache increased and at times was almost completely incapacitating. Claimant also continued to complain of intermittent dizziness and lightheaded spells. It was noted that claimant applied for work at many places and had been turned down because of his medical history. Their diagnosis was post-concussion syndrome and hypertension. They opined that claimant's condition was not yet medically stationary and that his headaches could be explained in part due to the post-concussion syndrome, but it was also felt that the claimant's marked degree of hypertension could also be contributing to his headaches as well as his dizzy spells, nosebleeds and synocope.

On April 11, 1977 Dr. Edward Colbach, a psychiatrist, opined that claimant's condition should be considered stationary in the near future. He felt that claimant's blood pressure should be brought under control and some attempt should be made as a last try to cure his headaches. He opined that claimant's impairment was in the range from 0-5%. He noted that possibly claimant could, with some argument, be placed in a range of impairment of 10-45%. His diagnosis was a psychophysiologic musculoskeletal disorder (tension headache), hypertension, and obesity. He thought there was some possibility that the headache was related to the claimant's significant hypertension. Dr. Colbach found the claimant had no specific psychiatric disorder.

Dr. Sajid, in May 1977, reported he disagreed with Dr. Colbach's finding that claimant was medically stationary. He did not disagree with Dr. Colbach's finding that claimant suffered no psychiatric disorder. He felt because of the obesity and hypertension that claimant should be referred to an internist for better control of the hypertension.

In June 1977, Dr. Sajid reported that claimant's blood pressure was within normal limits and had been since May 1977. He reported this did not alleviate claimant's headaches. This led him to believe that the headaches were not related to the hypertension.

In October 1977 Dr. E. Louise Kremkau reported that due to claimant's size she questioned the accuracy of the many reports of hypertension. She reported the use of a small cuff and a large arm such as claimant had may result in an inappropriate high recording of blood pressure. She had no opinion as to what the cause of the blackout spells were and did not see any need for any further diagnostic evaluation. She opined that she thought the claimant could do any work which did not involve heavy physical activity.

On June 2, 1978 Dr. David Myers, psychologist, indicated he had been treating claimant with hypnosis and reported that this was of great assistance to claimant to reduce his chronic headache problems. Claimant continued to report that with physical exertion his headaches became throbbing and he occasionally got a bloody nose or passed out.

In July 1978 Dr. Colbach reported that he had discussed claimant's case with Dr. Myers and it was Dr. Myers' feeling that secondary gains were considerable. He felt it was appropriate to consider the case stationary. He felt claimant suffered from a neurotic disability which was minor in nature. It was his opinion that once the claim was settled there was a good chance that claimant would again return to work. He felt until the claim was settled it appeared there was no possibility whatsoever that claimant's headaches would get better.

On August 2, 1978 a Determination Order was issued which awarded additional time loss from February 6, 1976 through July 6, 1978 less any time worked.

On August 20, 1978 Dr. Myers reported that it was his opinion that claimant has made progress in the last eight months in getting rid of his headaches, however, he continued to have problems with severe bloody noses and passing out. Dr. Myers felt that given these symptoms there seemed to be no question that claimant was unemployable.

In August 1978 Dr. Janzen reported that claimant was unemployable due to a less than normal recovery from his injury sustained in October 1974. He felt the claimant was also unemployable due to the past employment record which indicates a potential hazard to other employees or employers. It was Dr. Janzen's opinion that some form of permanent compensation should be provided by the Fund to the claimant.

In August 1978, Dr. Myers reported that claimant continued to have periodic blackouts when he was exerting himself. Dr. Myers felt that if claimant was to obtain employment at this time it would pose some serious risk to himself and to his fellow-employees. He strongly recommended that claimant be considered permanently disabled until such time as his symptoms were in remission.

In November 1978 Dr. Myers reported that claimant was making slow progress. However, he reported that claimant continued to experience severe bloody noses and passing out. Based on the account that claimant gave Dr. Myers regarding the circumstances of the blackouts, Dr. Myers felt it would appear that claimant was going to hurt himself extremely seriously if these could not be prevented. In summary, he felt that claimant was much too high of a risk to be employed.

Claimant began in January 1977 an on-the-job search program through Vocational Rehabilitation. He was attempting to find some type of factory assembly work. This program was terminated in August 1977 because claimant stated he was unable to accept work training. In October 1977 claimant began a new program which was designed to provide work for him in his own home. This program was terminated in May 1978 because the rehabilitation counselor found that it was not feasible for homebound employment to continue.

In the file are two letters from two separate employers. The first letter relates the claimant returned to his original job in March 1975. It was reported that claimant worked for a time in March until he suffered a blackout spell, fell and bruised his ribs. During this period of time when claimant was employed working on a light duty job. The employer reported that due to the fact that it had tried a light duty job for claimant and due to his dizziness, blackouts and headaches which prevented him from doing his work they felt they could not provide employment for the claimant. It was their opinion that the work they had was too strenuous for claimant to perform as long as he had his headaches and dizziness.

A second letter from a different employer indicates that because of claimant's prior head injury which resulted in dizziness and blackouts they decided they could not continue to employ claimant. Claimant last worked for this employer in December 1976 for about 10 to 12 days but was terminated when he blacked out driving a car.

Claimant has also attempted a job as a dishwasher but again blacked out and broke dishes. He was also terminated from this job.

Claimant testified that he currently uses medication for his problem and uses a cassette tape to hypnotize himself which was prescribed by Dr. Myers.

Claimant is now 30 years old, has a 10th grade education with a GED, two years of electronic courses at Portland Community College, but failed the CET license examination. His work has consisted of being a car salesman, ranch hand, lot boy, laborer in a door making factory and a lumber mill, and truck driver. Claimant currently feels he would be unable to do any of these jobs because of his headaches. Claimant testified he has looked for a number of jobs but has not been hired after informing the employer that he suffers from blackout spells.

The Referee found that the medical evidence did not support claimant's contention that he has never been medically stationary. As to the issue of extent of disability, the Referee found that considering claimant's age, training, education, low skills, unconscious poor motivation, and past physical disability whether due to organic or non-organic factors, he found that claimant had sustained a loss of wage earning capacity equal to 80° for 25% unscheduled disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reaches a different conclusion than that reached by the Referee. No medical diagnosis of claimant's underlying condition has been made. However, there is no question that the claimant does suffer from blackout spells, nosebleeds, headaches, and that his headaches are to the extent that he has to lie down five times a day to relax and try to relieve them. This information coupled with the opinions of Dr. Janzen, his treating physician, and Dr. Myers, claimant's treating psychiatrist, leads the Board to conclude that claimant is permanently and totally disabled. The Board finds that the other doctors in this case, in their recommendations and analysis of claimant's problems, ignore the barriers claimant has to returning to work, i.e., recurring nosebleed and blackout spells. After claimant's industrial injury his blackout spells, nosebleeds and headaches began. Claimant has attempted to find work he can do, but has been unable to return to work due to his condition. Therefore, the Board concludes that based on all the evidence in the file, claimant's continuing difficulty with nosebleeds, blackout spells and headaches, and his being required to lie down approximately five times per day, there is no gainful and suitable employment claimant is capable of performing and finds that claimant is permanently and totally disabled.

ORDER

The Referee's order, dated April 3, 1979, is modified.

Claimant is hereby granted an award for permanent total disability as a result of the injury to his central nervous system effective the date of this order. This is in lieu of any previous awards for unscheduled disability. The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

CLAIM NO. 502-0263-66 January 17, 1980

WALTER C. PHILLIPS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Newhouse, Foss, Whitty & Roess,
Employer's Attys.
Own Motion Determination

Claimant sustained a compensable injury to his right lower leg on December 1, 1966. His claim was originally closed on December 20, 1967 with an award of compensation equal to 30° for 30% loss of the right foot.

Claimant continued to have problems and eventually had surgery for the removal of scar tissue in February 1972 and a triple arthrodesis in March 1973. Claimant returned to work and his claim was again closed a second time on December 5, 1973 with an award of additional compensation equal to 5° for 5% loss of the right foot. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with the right lower leg and his claim was reopened by an Own Motion Order on May 8, 1979. Claimant had undergone a Charnley compression type talotibial arthrodesis of the ankle on September 26, 1978. The claimant was released for regular work on July 30, 1979. On November 26, 1979 Dr. Anthony J. Smith stated that there was no further treatment planned for the claimant. He reported that an examination showed that all of the fusions were solid and pain-free when stress was applied.

On December 21, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 8, 1980, recommended claimant be granted additional temporary total disability inclusive from September 26, 1978 through July 29, 1979 and an additional award of compensation equal to 30° for 30% loss of the right foot.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 26, 1978 through July 29, 1979, less time worked, and compensation equal to 30° for 30% loss of the right foot. This award is in addition to all previous awards claimant has been granted.

Claimant's attorney has already been awarded a reasonable attorney's fee for the award of temporary total disability granted by the Own Motion Order of May 8, 1979. Claimant's attorney is also entitled to a fee equal to 25% of the increased compensation for permanent disability granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-1056-E January 17, 1980
WCB CASE NO. 79-3601

RONALD RICHARDS, CLAIMANT
Allen, Stortz, Barlow, Fox
& Susee, Claimant's Attys.
Gatti & Gatti, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

On December 14, 1979 claimant, by and through his attorney, moved the Board to remand this case to the Referee due to insufficiencies in the record. The motion was based on the fact that one of the primary issues in this case was the date of the accident. Claimant had conferred with the Oregon Game Commission and verified he was mistaken about the date he used to arrive at the date of his injury. Claimant, in his motion, indicated he did not feel this was going to be an issue at the hearing, but it turned out to be one and he now had additional evidence, including the testimony of witnesses who would corroborate his testimony as to the events between the date of the accident and the date a claim was filed.

The Board, after thoroughly reviewing the motion, would deny it. The motion does not indicate such evidence as claimant now offers was not available prior to the hearing. The Board finds that this case was not improperly, incompletely, or otherwise insufficiently developed or heard by the Referee. Therefore, the Board denies claimant's motion.

ORDER

Claimant's motion to remand is denied.

WCB CASE NO. 78-6594 January 17, 1980

LLOYD SHANK, CLAIMANT
Keith D. Skelton, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant an award of compensation equal to 160° for 50% unscheduled disability for his neck injury. The Fund contends this award is excessive.

FACTS

Claimant, a 39-year-old Oregon State policeman, suffered a compensable injury on March 3, 1976 when he was involved in an automobile accident. Claimant's injuries consisted of a contusion of the chest wall, including the lower rib cage, and a chronic cervical strain.

On October 5, 1976 Dr. J. Roger Curran reported that claimant had undergone a bilateral rib resection in either 1973 or 1974 for what was presumed to be a thoracic outlet syndrome. Claimant, at this time, was complaining of pain in the right shoulder area. The claimant reported to Dr. Curran that he had a osteoma of the right shoulder for the past four years. Claimant also reported pain in his neck, the lower cervical region, occasionally radiating down into the intrascapular region and also pain down the arm.

On November 9, 1976 Dr. Ercil Bowman reported that claimant continued to have cervical pain. Claimant advised the doctor that he thought his cervical pain predated the accident he was involved in in March 1976. Claimant reported that lifting activities aggravated the pain and exertion such as driving did not nor did coughing or sneezing. Somewhat inconsistantly the doctor said the claimant had advised him he had severe episodes of pain while driving.

On December 10, 1976 Dr. N. R. Thrasher reported that in his opinion claimant had a degenerative disc disease, with probable vertical disc herniation. He reported that that condition had been present for at least three years and that the claimant had been carrying on his work activities under considerable handicap.

On March 7, 1977 Dr. Thrasher reported that the claimant, in his opinion, had a probable rotator cuff tear of the right shoulder, with a possible bicepital groove tenosynovitis. He reported the claimant also had a cervical degenerative disc disease and a probable old disc herniation. It was his opinion that claimant probably should be confined to desk work.

On September 22, 1977 the Orthopaedic Consultants, after examining claimant, diagnosed a chronic cervical strain by history which could not definitely be related to the injury of March 3, 1977 [sic], status post bilateral first rib resections, partial, unrelated to the injury and with no apparent residuals, and a chronic strain of the right shoulder by history only which they felt was unrelated to the injury and without any objective abnormalities demonstrated. It was their opinion that claimant's condition was stationary and that his total loss of function based on subjective findings in the neck area was minimal and this was due to the injury in March of 1976. They found no residuals secondary to the chest contusion suffered at the same time as the cervical strain. They reported his right shoulder function was excellent at that time and they felt no further treatment for that condition was needed.

On October 17, 1977 the Fund denied the claimant's claim for his chronic strain of the right shoulder and the chronic cervical strain. It accepted responsibility for the contusions to the chest wall and ribs, however.

On March 23, 1978 Dr. Thrasher reported he performed a myelogram of the entire cervical, thoracic and lumbosacral areas and could find nothing abnormal. He reported, however, that claimant did have a definite grip strength weakness on the right and some demonstratable weakness of the right triceps.

A Determination Order, dated April 21, 1978, awarded claimant no compensation for temporary total disability.

Claimant appealed the denial of the Fund and after a hearing an Opinion and Order was issued which remanded to it for acceptance the cervical condition in addition to the previously accepted rib injury. The denial for the chronic strain of the right shoulder was affirmed.

On August 8, 1978 a Second Determination Order was issued which awarded claimant no compensation for temporary disability and compensation equal to 32° for 10% unscheduled disability resulting from his neck injury.

In late December 1978 claimant was examined again by Dr. Thrasher. Dr. Thrasher reported that claimant continued to have significant and incapacitating distress, aggravated by effort. It was his opinion that claimant had significant cervical spondylosis with degenerative disc disease of the cervical spine and, in addition, that claimant felt he may have some indication of adhesive arachnoiditis following a myelogram which was confined to the lumbosacral area. It was his opinion it was best for claimant to retire since it was understood that he was not a candidate for anything except for patrol duty on a long-term basis.

Claimant is now 43 years old. He has a formal high school education. Claimant has extensive experience other than his training as a patrolman. He was raised in the Republic of Honduras and speaks and writes Spanish fluently. Prior to being employed by the state police he was employed as a corrections officer by the Oregon State Penitentiary and prior to that has worked as an airplane pilot and mechanic, supervisor of a plantation and cattle ranch in Central America and was in the Marine Corp for five years on embassy duty in the Republic of Honduras.

In March 1978, claimant was notified that the Oregon State Police Department considered claimant a physically disabled trooper. They advised that the department could not place such individual on desk duty or any other duty for an indefinite period of time. Claimant was given two options, one being a regular disability retirement at that point, or to go on a desk duty assignment for a limited period of nine months and then apply for regular disability retirement which would be effective December 31, 1978. Claimant elected to go on the desk duty assignment. Claimant was retired on a disability retirement plan effective January 1, 1979.

Since his retirement, which was involuntary, the claimant has attempted to become self-employed as a taxidermist. He reports that this business is, at best, highly speculative. Claimant also reported that his wife currently works and has worked as a supervisor of nurses in a hospital. His wife works on a full time basis. Claimant testified that he currently resides in the Ontario, Oregon area and is not interested in relocating outside of this area. At the time of the hearing claimant was complaining of limitations of motion of his neck, chronic neck pain which radiated bilaterally throughout the shoulders and into the upper back. He reported that this pain was increased by activities. He feels that this neck condition limits his ability to perform such acts as heavy lifting, repetitive bending, repetitive stooping, and prolonged driving or riding. Claimant testified that he has given up some outside activities such as yard work, however, he continues to do his own auto repair work and still continues to do some hunting and fishing. He testified, however, that he has fired his gun while hunting and it caused his neck and shoulder pains to increase.

Two co-workers of claimant's testified at the hearing. Their testimonies clearly indicate that claimant was retired because he was considered by his immediate supervisor to be a hazard not only to himself, but others in the road while driving.

The Referee, after considering all the evidence, concluded that claimant was not permanently and totally disabled based on the medical evidence. He found that claimant had successfully worked as a dispatcher for the Oregon State Police prior to his retirement and that if a job such as this were available claimant could perform it. He noted that claimant was not motivated to return to work, other than his attempt to establish his own taxidermist business and had made no job search efforts with other employers. Claimant, in fact, has indicated he is not interested in looking outside his current residence area. However, the Referee found that based on the same evidence the claimant's disabling neck condition with residuals therefrom were material factors in claimant's job termination as patrolman with the Oregon State Police Department. He found that claimant was precluded from returning to this position and that claimant's disabling neck condition with residuals therefrom would adversely affect his ability to obtain and hold jobs in the general industrial labor market with duties which required heavy lifting, repetitive bending, repetitive stooping, etc. Therefore, considering these factors in connection with claimant's age, education, training and experience and somewhat questionable motivation, he found that claimant was entitled to an award of compensation equal to 160° for 50% of the maximum allowable for unscheduled permanent partial disability, based on the permanent loss of wage earning capacity.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, disagrees with the Referee's conclusions. The Board does not find claimant is entitled to the award granted by the Referee. Claimant has shown no interest or motivation other than trying to establish his own taxidermy business to return to the labor market. Claimant, at most, has a chronic cervical strain which does bar him from certain activities which would require heavy lifting, repetitive stooping, repetitive bending or prolonged driving or riding. These limitations also prevent claimant from returning to his job as an Oregon State Police officer. However, the Board notes that the claimant has various other experiences which he can draw upon in seeking other employment. The Orthopaedic Consultants have rated claimant's total loss of function of his neck as minimal. Therefore, the Board finds that claimant is entitled to an award of compensation equal to 96° for 30% unscheduled disability for his neck injury.

ORDER

The Referee's order, dated July 30, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 96° for 30% unscheduled disability for his neck injury. This is in lieu of any prior awards for unscheduled disability. The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-4835 January 21, 1980

EDWARD BARNES, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Order Denying Bona Fide Dispute Settlement

Claimant, by and through his attorney, on January 3, 1980, requested the Board approve his Bona Fide Dispute Settlement.

Claimant sustained an injury to both knees in March 1977. The claim for this injury was accepted as a non-disabling injury in September 1977. Claimant left this employer in February 1978 and went to work for another employer. In May 1979 claimant began to miss time from work and received medical care for his knees. He requested his 1977 claim be reopened and this was denied on June 15, 1979 by the first employer. That employer contended claimant had sustained a subsequent disabling injury and occupational disease to both knees while employed by the second employer.

The Board, after thoroughly considering the proposed settlement, disapproves it. The 1977 claim was accepted as non-disabling. ORS 656.289(4) requires a bona fide dispute over the compensability of a claim. Such a dispute does not exist in this case. The dispute in this case is over responsibility for claimant's condition and is covered by another provision of the law. Therefore, the Board will not approve this Bona Fide Dispute Settlement.

ORDER

The request for approval of a Bona Fide Dispute Settlement in this case is denied.

WCB CASE NO. 78-7790 January 17, 1980

MARVIN BRUCE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Roger Warren, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed a Determination Order, dated September 15, 1978, which awarded claimant compensation equal to 48° for 15% unscheduled disability for his low back injury. Claimant contends this award is not sufficient.

FACTS

Claimant, a 38-year-old auto line worker in a plywood mill, sustained a compensable injury to his low back on August 13, 1976 while lifting panels of plywood. Claimant had undergone back surgery in 1971 for the removal of a disc by Dr. Robert Steele.

In October 1976 Dr. Steele reported claimant recovered from his 1971 back surgery and was working full time within two months after that surgery. He reported after the August 1976 lifting incident claimant had experienced pain in the back on the left side radiating into the right leg. Dr. Steele diagnosed an acute low back strain. He released claimant for work on November 1, 1976.

In February 1977, the Orthopaedic Consultants reported claimant was not medically stationary. Claimant reported his back pain was aggravated by bending, lifting objects weighing more than 20 pounds, sitting for longer than 10-15 minutes, standing for longer than 30-45 minutes and walking more than two blocks. Their diagnosis was a prior back surgery and a chronic lumbosacral strain without radiculopathy. They suggested further treatment consisting of a back brace, back exercise program, weight reduction and formal physical therapy.

In March 1977, Dr. Steele reported claimant had continued to have back pain and had been unable to take certain medication. He felt that claimant's underlying problem of chronic low back pain was overshadowed by some posterior facet degenerative arthritis, as well as the possibility of L5 radiculopathy. A myelogram done in April 1977 was normal. Claimant was given a back brace by Dr. Steele.

On May 10, 1977, Dr. Steele felt claimant's condition was stable. He reported claimant said he could sit for about 30 minutes, but if he was able to get up and move around, that could be prolonged to two hours; stand for one hour, walk for a half mile and could lift no more than 25 pounds. Dr. Steele felt claimant needed a job change and suggested vocational rehabilitation.

In June 1977, claimant was at the Disability Prevention Center. Dr. James Mason, medical examiner, felt claimant's physical disability was mild and he could tolerate moderate work. He felt claimant should avoid excessive lifting, bending and twisting stresses due to his previous back surgery and subsequent low back strain. Dr. Oda Kent, a psychologist, as Vocation Team Chairperson, reported claimant had a vocational handicap due to physical limitations and that claimant was interested in welding training.

A Determination Order, dated September 15, 1978, awarded claimant compensation for temporary total disability and compensation equal to 48° for 15% unscheduled disability for his low back injury.

On February 9, 1979 the Orthopaedic Consultants reported claimant had finished welding training, but had not worked as a welder. Claimant advised them he started working on December 6, 1978 feeding a plywood dryer. Claimant also had undergone two carpal tunnel release operations. Claimant stated he was able to work if he took his medicine and didn't feel work was aggravating his back. It was their opinion claimant's condition was medically stationary. They noted claimant "could not make a full bend" because of back pain; could carry objects which weighed from 20-50 pounds occasionally; stand/walk 6-8 hours per day; sit 1-3 hours; use hands to push and to pull; operate foot controls; occasionally bend and climb; and frequently squat. It was their opinion the loss of function due to this injury was mild.

Claimant testified he has an 11th grade education and has completed the welding course, but afterwards did not look for employment in that field because of his problems with his hands and wrists. Claimant still is employed as a dryer feeder and also has driven a lift truck and worked as a press operator. He has lost four days from work due to back pain, but is able to work overtime. Claimant still has pain in his low back and legs. This pain is increased by bending, stooping, lifting and twisting. He can lift up to 40 pounds occasionally. He avoids heavy lifting or prolonged walking or climbing, however, still engages in recreational activities. Claimant feels he could not pull on the "green chain" or work on the "auto line" because it requires too much standing in one place. His current job allows him to move around, even though he is on his feet the entire shift.

The Referee, after reviewing all of the evidence, concluded that the Determination Order adequately compensated claimant for his loss of wage earning capacity. Therefore, the Referee affirmed the Determination Order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant recovered from his first back injury and returned to work without any problems until this injury. Claimant subsequently is unable to return to heavy forms of employment and has had limitations placed on him by his doctors. Based on these limitations and claimant's testimony as to continuing difficulty, the Board finds claimant is entitled to a greater award of compensation for his back injury. Therefore, the Board modifies the Referee's order and grants claimant an award of compensation equal to 80° for 25% unscheduled disability for his low back injury.

ORDER

The Referee's order, dated May 31, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his low back injury. This award is in lieu of any and all prior awards for permanent partial disability.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-8434 January 21, 1980

DENISE CORTABERRIA, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The employer seeks Board review of that portion of the Referee's order which reversed the partial denial of October 13, 1978 of the employer and held the employer responsible for claimant's emotional psychiatric condition. The employer contends this is incorrect.

FACTS

Claimant, a 28-year-old food processor, sustained a compensable injury to her left elbow and low back on December 12, 1977 when she fell while running up some stairs.

Dr. Donald Smith, in April 1978, reported claimant complained of pain in her left elbow, in her neck, left lower side, and swelling and pain in the right lower forearm. He diagnosed chronic strain of the muscles and ligaments of the lower neck and dorsal lumbar area and also some nerve root irritation at probably the C5-6 or 6-7 level on the left.

In May 1978, Dr. Smith reported claimant complained of severe headaches and pain in the neck and shoulder. He diagnosed chronic cervical strain with occipital neuritis and dorsolumbar strain.

On May 24, 1978 Dr. Ray Grewe reported claimant probably had thoracic outlet syndrome or other nerve entrapment syndrome. He performed a myelogram in June 1978 which was normal. Also, in June, Dr. Grewe performed a stellate block on the left. Claimant stated this made her symptoms worse. Dr. Grewe felt there was no indication whatsoever of any sympathetic dystrophy or causalgic element to claimant's pain. In July 1978, claimant underwent an EEG which was normal. His final diagnosis was a cervical strain with possible left thoracic outlet syndrome "in an emotionally unsettled, moderately depressed" person.

On July 5, 1978 Dr. Leonard Marcel, a psychiatrist, reported claimant had been under a considerable amount of emotional stress the last two years with her employment, her husband's absence from the home for long periods of time due to his employment and the behavior of her six-year-old daughter.

On August 25, 1978 Dr. Grewe felt there was not any neurologically correctable condition impairing claimant's return to work. He noted Dr. Marcel felt claimant needed additional psychiatric treatment.

The Orthopaedic Consultants, on September 26, 1978, reported they found no evidence of a thoracic outlet syndrome. They diagnosed: cervical strain syndrome, dorsolumbar strain syndrome, resolving rib cage contusion and anxiety neurosis and depression. It was their opinion claimant's condition was stationary and found no objective finding nor any residual loss of function to the rib cage or dorsolumbar portion of the back and only a minimal loss of function of the neck due to this injury. They felt claimant could return to her previous job without limitations. Dr. Grewe and Dr. Smith concurred with this report.

On October 2, 1978 Dr. Grewe indicated claimant's current inability to work was due to her emotional problems. He found claimant was medically stationary as of October 1, 1978.

On October 13, 1978 the employer denied responsibility for claimant's psychiatric condition.

Dr. Hobard Dumke, in December 1978, reported claimant complained of headaches, neck pain, left upper extremity pain, back pain and left lower extremity pain. He found no evidence of an organic neurological disturbance. He felt claimant should be released for work and her case closed.

A Determination Order, dated December 20, 1978, awarded claimant compensation for temporary total disability and compensation equal to 16° for 5% unscheduled disability for her neck injury.

In February 1979 Dr. Grewe, after hospitalizing claimant, diagnosed a left shoulder strain with moderately severe psychophysiological reactions with chronic pain and emotional distress.

Dr. Marcel, on April 17, 1979, opined that the exacerbation of claimant's physical difficulties was related primarily to the ongoing emotional stress present in her life and not to the work incident of December 12, 1977.

In May 1979 Dr. Grewe reported that claimant related her ongoing difficulties with increased problems to her original injury of December 12, 1977.

Claimant testified she felt she did not have any psychiatric problems. She stated she had had a steady work record prior to the December 12, 1977 incident.

The Referee found that the preponderance of the psychological and psychiatric evidence revealed claimant's problems predated her injury of December 12, 1977. Further, the Referee found that the work incident triggered claimant's underlying pre-existing emotional makeup. Therefore, the Referee set aside the denial of the psychiatric condition " . . . to the extent that if and when claimant enrolled in a structured psychiatric or psychological counseling program the payment of TTD compensation shall commence to be paid so long as claimant faithfully cooperates and participates in said program".

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses that portion of the Referee's order which set aside the denial by the employer of responsibility for claimant's psychological condition. The evidence in this case indicates that claimant's psychological problems predated her industrial injury. There is no medical evidence in this case which relates this condition to her injury or which finds her injury aggravated her underlying psychological condition. Dr. Marcel, a psychiatrist,opines that the exacerbation of claimant's physical difficulties was related primarily to the ongoing emotional stress present and was not related to her injury of December 12, 1977. The preponderance of the evidence does not support claimant's claim and the Board finds claimant has failed to meet her burden of proof. Therefore, the Board reverses that portion of the Referee's order which set aside the partial denial.

ORDER

The order of the Referee, dated June 11, 1979, is modified.

That portion of the Referee's order which set aside the employer's denial of claimant's psychological condition, dated October 13, 1978, is reversed.

The remainder of the Referee's order is affirmed.

CLAIM NO. B53-118941 January 21, 1980

MILTON B. DAVIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to his low back on August 8, 1967. The claim was initially closed by a Determination Order, dated October 29, 1973, which awarded claimant compensation for temporary total disability and compensation equal to 16° for 5% unscheduled disability for his low back injury. Claimant's aggravation rights have expired.

On January 4, 1979 claimant requested that his claim be reopened since he had been unable to work since November 8, 1978 due to his low back and left leg problems.

Dr. Robert Rafal, on January 15, 1979, requested the claim be reopened. On February 5, 1979 Dr. Rafal opined this condition was an aggravation of claimant's previous injury in April 1973. On March 24, 1979 Dr. Rafal felt the "recent injury" should be treated as an aggravation of an underlying chronic condition.

On May 4, 1979 Employers Insurance of Wausau (Wausau) denied claimant's request for reopening.

In July 1979, Dr. Lawrence Langston found claimant was suffering from low back pain due to the condition for which he was treated in September 1973 and which was related to his August 1967 injury.

After various correspondence between the Board and the parties, Wausau indicated it objected to the Board issuing an own motion order in this case. This was based on an interview with claimant in which he indicated his back condition had gotten worse after "overdoing" it at his home.

The Board, after thoroughly considering all of the evidence before it, concludes that it would be in the best interest of the parties to refer this matter to the Hearings Division for a hearing on the issue of whether claimant's current condition, resulting in hospitalization in December 1978 and time loss, is related to his August 8, 1967 injury and represents a worsening thereof since the last arrangement and award of compensation or is due to an intervening event.

Upon conclusion of the hearing, the Referee shall cause a transcript to be prepared and submitted to the Board together with his recommendation on claimant's request for own motion relief.

WCB CASE NO. 77-869 January 21, 1980

WESLEY FOULTNER, CLAIMANT
Tom Hanlon, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the denials of the State Accident Insurance Fund (Fund) and Crown Zellerbach for his left elbow condition. Claimant contends he suffered an occupational disease due to his work activity and subsequently needed surgery on his left elbow.

FACTS

On May 4, 1977 claimant filed an occupational disease or injury claim for a fractured left elbow with both Crown Zellerbach and the Fund. Crown Zellerbach became self-insured on July 1, 1976. The Fund had provided workers' compensation coverage for it prior to that date.

Crown Zellerbach denied the claim on May 13, 1977 on the basis that all the incidents relative to the condition for which he claimed benefits pre-existed its becoming self-insured. The Fund also denied this claim.

Claimant, who has been employed by Crown Zellerbach since 1967, sustained a compensable injury to his right thumb on June 25, 1969. Claimant slipped and fell from a log boom. This was diagnosed as a bruise of the right thumb.

On September 11, 1972, claimant lost his footing and fell, catching a safety line with his right arm injuring his right arm and right knee. Claimant indicated he had to shovel chips a week later. Dr. J. B. Delashaw examined claimant in November 1972 relative to this incident. Claimant complained of very sore arms and that his right knee gave way. The diagnosis was traumatic tendinitis of the right forearm and traumatic tenosynovitis of the right knee.

In August 1976, Dr. Paul Hafner reported claimant had had to shovel wet wood chips four years ago for about four days. Claimant stated he began to notice the gradual onset of pain in his left elbow. Claimant reported this condition improved and did not bother him until two years ago when he changed jobs. His new job required heavy pulling on lines on barges and he noticed increasing pain in the right elbow. Dr. Hafner interpreted x-rays as revealing an old healed fracture of the left elbow. His diagnosis was a healed fracture of the head of the left radius with a deformity. Dr. Hafner felt: "It seems very unlikely that the activities as described by the patient would be capable of producing a fracture of the head of the radius." He felt claimant must have had an injury sometime prior to the onset of his present symptoms four years ago.

On September 10, 1976, Dr. C. S. McLaughlin reported claimant stated he had developed pain in both elbows four years ago while shovelling. Claimant denied any severe trauma to either elbow. His diagnosis was a healed mal-union fracture of the right radial head with resultant degenerative changes.

On December 10, 1976 Dr. McLaughlin operated to excise the left radial head and inserted a silastic radial head prosthesis.

In July 1977, Dr. McLaughlin opined that the fracture of the left radial head did occur prior to July 1, 1976. He could not find, absent any injury to the area with such sufficient force to cause a fracture, any work activity of an ongoing nature subsequent to July 1, 1976 which would cause the fracture and the need for surgery on the left elbow.

Claimant testified that from 1972 to 1976 he used his left arm at work to pull large cables, picking up and carrying heavy objects and shovelling wood chips over his shoulder. Claimant alleged that in 1972 when he slipped and fell from the log boom he fractured his left elbow.

The Referee found that the totality of the evidence did not support claimant's claims. He noted that the 1972 incident resulted in injuries to the right forearm and right knee only. The Referee also noted that claimant had really fallen in 1969 and not in 1972. Therefore, the Referee concluded claimant had failed to prove by the preponderance of the evidence that he incurred a fracture of the left elbow.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, agrees with the Referee. Claimant alleges he injured his left elbow in 1972 when he slipped and fell. However, the evidence shows that this incident occurred in 1969 and resulted in injuries to the right forearm and right knee. The Board concludes claimant has failed to prove by the preponderance of the evidence he incurred a fracture of his left elbow as alleged. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated March 13, 1979, is affirmed.

WCB CASE NO. 78-9720 January 21, 1980

DWAYNE E. GUISINGER, CLAIMANT
Edward D. Latourette, Claimnat's Atty.
Charles Paulson, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the employer/carrier's denial of his claim.

FACTS

Claimant, a 24-year-old iron worker, alleges he sustained an injury to his left knee on June 20, 1978 when, while lifting 80-100 pounds of "flashing", his knee gave out.

Dr. John Hazel, on June 8, 1978, reported as the date claimant was injured "duration of last 6 months". Claimant told Dr. Hazel the cause of problems was bending, stooping and being on his knees. Claimant reported intermittent pain in the right knee of one month duration. Claimant told Dr. Hazel he had injured his left knee in a motorcycle accident 3 to 4 years ago and had pain, crepitus and crunching and limited knee flexion in the left knee since his 1971 surgery due to this injury. Dr. Hazel suggested claimant not work as an iron worker.

The employer reported on June 19, 1978 in response to a letter from the carrier, dated June 8, 1978, it felt claimant's injury was not work-related, but rather the result of a motorcycle accident.

On June 29, 1978, Dr. Harry Sirounian, D.O., reported claimant had had surgery on the left knee and had no major problem until three weeks prior to his seeing claimant. Claimant stated he had developed pain and progressive symptoms

in the knee following water skiing. Dr. Sirounian diagnosed progressive degenerative osteoarthritis of the left knee. Claimant also indicated his symptoms of pain and disability in the knee had been "getting worse" while working.

On September 13, 1978 Dr. Donald Slocum diagnosed: "probable torn anterior cruciate ligament; anterolateral rotational instability with recurrent giving way of the knee; tenderness over posterolateral joint line; probable tear, clinically, of lateral meniscus; painful fabella in extension with palpable crepitus at posterolateral articulation". On September 20, 1978, Dr. Slocum performed an arthroscropy, lateral meniscectomy, and Mark 7 lateral reconstruction of the left knee.

On November 13, 1978 the employer/carrier denied claimant's claim. The basis of the denial was that claimant's knee injury did not arise out of or during the course and scope of his employment, but stemmed from his previous motorcycle injury.

On May 14, 1979 Dr. Slocum reported claimant was stationary and complaining of no pain in the left knee. He diagnosed: "1. status post-medial meniscectomy with old torn anterior cruciate ligament, torn lateral meniscus and degenerative arthritis old, and related to injury of 6/20/78. 2. Status post 9/20/78 lateral meniscectomy and lateral reconstruction of the knee". Dr. Slocum reported claimant was now working as a foreman with no heavy lifting being required and felt this was ideal for claimant.

Claimant testified he did not have any problems with his knee until it "went out" on June 8. He stated this occurred before he saw Dr. Hazel. Claimant testified Dr. Sirounian must have been in error about his report of claimant water skiing.

Two other witnesses testified on behalf of claimant and were unable to verify when claimant had been injured.

The Referee, after reviewing all of the evidence, found the denial should be affirmed. The Referee noted the discrepancies in the various reports from the doctors and in the histories of how claimant alleged he injured his left knee. The Referee found that the majority of the medical reports did not mention any industrial injury. Therefore, the Referee affirmed the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's affirmation of the employer/carrier's denial. The Board finds that the medical evidence in this case does not support claimant's claim. These reports, coupled with the testimony of all the witnesses, does not prove by a preponderance of the evidence that claimant sustained an injury as alleged. Therefore, the Board, as the Referee did, would affirm the denial.

ORDER

The Referee's order, dated May 21, 1979, is affirmed.

WCB CASE NO. 78-1883 January 21, 1980

DOROTHY HIGGINS, CLAIMANT
Reiter, Bricker, Zakovics & Querin,
Claimant's Attys.
Gearin, Landis & Aebi, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer-carrier seeks Board review of the Referee's order which found claimant's claim was timely and remanded it to the employer for acceptance and for payment of compensation and other benefits. The employer-carrier contends the claim was not timely filed and that claimant's pre-existing emotional condition was not worsened by her employment.

FACTS

Claimant, a 60-year-old purchasing agent, filed a claim for an occupational disease on January 31, 1978 alleging that her work from 1976 to 1977 aggravated her high blood pressure. This claim was denied by the employer-carrier on February 23, 1978.

Claimant, on July 6, 1977, advised her supervisor that due to health reasons and at her doctor's suggestion, she was going to be on sick leave as of July 1, 1977.

On August 1, 1977 Dr. G. L. Swift reported he had been treating claimant since 1974. He had been treating claimant for high blood pressure, irritable bowel syndrome, and various episodes of situational tension anxiety and depressive reaction. Dr. Swift felt these conditions were directly related to tension and emotional stress. He felt that the majority of claimant's tension and stress arose from her work and her condition would not improve as long as she continued to work. It was noted claimant had ceased working at that time. Dr. Swift felt if claimant stopped working the amount of stress she was experiencing would decrease.

On January 16, 1978 Dr. Swift opined that claimant's poor health was related to the tension and emotional stress claimant incurred in her job. He reported that since claimant had ceased working her blood pressure was easily controlled in the normal range and she had no complaints of abdominal pain or cramps. Dr. Swift advised claimant to retire due to her health.

In April 1978 Dr. Swift indicated claimant's health problems had been diagnosed as: a suspected history of ulcerative colitis, irritable bowel syndrome, hypertension, hypothyroidism (which was controlled) and a situational depressive reaction with chronic tension anxiety state. In August 1975 claimant had began feeling "unwell" with episodes of dizziness, headaches and seeing black spots. Dr. Swift reported that over the next two years claimant continued to complain of vague feelings of fatigue, headaches, nervousness and insomnia. He stated that in April 1977 he discussed with claimant the possibility of her getting out of her high stress employment to see if her condition would improve. Dr. Swift opined claimant's employment did not cause her situational depressive reaction, but did aggravate that condition and was a factor in aggravating her blood pressure and other psychosomatic symptoms. He did not feel claimant had any long term disability that arose out of the emotional stress related to her employment.

In June 1978 Dr. Guy Parvaresh, a psychiatrist, found no evidence of depression, acute anxiety, although he felt claimant could very well be experiencing chronic tension. Dr. Parvaresh opined claimant did not have any psychiatric impairment. He could not determine whether claimant's work had aggravated her pre-existing condition.

On October 2, 1978 Dr. Daniel Voiss, a psychiatrist, opined claimant's physical and emotional problems were not caused by her employment, but were very much aggravated by the work situation and the needs she developed out of it and out of the needs of her employer. He described claimant as a very hard worker, very conscientious, and one who would assume more and more responsibilities, refusing no one's requests.

Claimant testified that in January 1977 Dr. Swift advised her that her problems were entirely caused by the stress and emotional problem of her work.

Claimant testified she applied for Social Security and for private insurance benefits in February 1977. She knew in January 1977 that her employment was a factor in her health problems.

The Referee found that claimant's claim had been timely filed and found that claimant had met her burden of proving that her work situation materially aggravated her anxiety and her hypertension. Therefore, the Referee remanded the claim to the employer.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board finds that the claim was not timely filed as required by ORS 656.807(1). Claimant was advised in January 1977 and knew in January 1977 that her work was causing her problems. However, it was not until January 31, 1978 that she filed a claim. On August 1, 1977 Dr. Swift did report claimant's work was directly related to her health problems. However, the Board does not find that the claimant had filed a claim within 180 days from the date she became disabled or was informed by her doctor that she was suffering from an occupational disease. Therefore, the Board concludes her claim was not timely filed. It does not feel it is necessary to discuss the other issue raised by the employer.

ORDER

The Referee's order, dated April 20, 1979, is reversed.

The employer's denial is hereby approved.

WCB CASE NO. 78-4985 January 21, 1980

RODNEY A. McCOWN, CLAIMANT
Emmons, Klye, Kropp & Kryger,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which awarded claimant compensation equal to 96° for 30% unscheduled disability for his neck and back injury and compensation equal to 38.4° for 20% loss of use of his right arm. The employer contends these awards are not supported by the evidence and asks that the Determination Order, dated June 16, 1978, be restored.

FACTS

Claimant, a 24-year-old mill worker, sustained a compensable injury to his right arm on April 3, 1975 when he was struck by tongs and knocked down. Claimant testified his neck and back were also sore and bruised. Dr. K. Clair Anderson diagnosed a probable cervical sprain and fracture of the right arm. Claimant was also seen by Dr. Holm Neumann who diagnosed fibromyositis.

The employer denied responsibility for any injury other than claimant's right arm injury on June 11, 1975. This denial was subsequently set aside and the claim for the back and neck injury remanded to the employer.

Dr. Neumann reported claimant was medically stationary as of September 27, 1975 and had no significant permanent residuals from his elbow injury.

A Determination Order, dated October 27, 1975, awarded claimant compensation for temporary total disability only.

In April 1976, the Orthopaedic Consultants reported claimant was complaining of pain in the right elbow, pain in the left side of the neck, occasionally radiating pain down the left arm, occasional numbness in the left hand and occasional low back pain. Their diagnosis was: strain of the cervical spine by history; epicondylitis and tendinitis of the right elbow and lumbosacral instability due to a congenital defect. They found that claimant's condition was stationary and that he had no loss of function of the back or neck due to this injury and had a mild loss of function of the right arm. Dr. Neumann concurred with this report, but felt a job modification was needed.

Dr. Norman Hickman, a psychologist, in April 1976, opined claimant could return to his former job, although he did not wish to do so. Dr. Hickman found no reason claimant could not return to work.

Dr. Donald Clibborn, D. C., in October 1975, diagnosed thoraco-cervical strain with paresthesia down the left arm and myofascitis. Left sided cephalgia was noted periodically.

In November 1976, Dr. Chen Tsai reported claimant had returned to work in August 1975 and had continued to work until December 1975 when he quit. Dr. Tsai diagnosed a left C7 radicular irritation and lumbar strain due to his April 3, 1975 injury.

In April 1977, Dr. Charles Kuttner, a psychiatrist, diagnosed "Transient situational disturbance - adjustment reaction of adultlife manifested by anxiety, and related to physical injury".

In August 1977, Dr. Tsai reported claimant complained of left arm and neck pain aggravated by yard mowing or riding a motorcycle. Claimant had riden a 10-speed bicycle for four hours and developed left side pain. Dr. Tsai felt this aggravated his left C7 radicular irritation related to his April 1975 injury.

In December 1977, claimant injured his right knee in a motor vehicle accident. In May 1978 Dr. Neumann performed surgery on the right knee.

Claimant enrolled in a business management program through Vocational Rehabilitation. He completed this program in June 1978. However, he was three hours from receiving his associate degree.

A Second Determination Order, dated June 16, 1978, awarded claimant additional compensation for temporary total disability and compensation equal to 9.6° for 5% loss of his right arm.

On October 17, 1978 Dr. Neumann opined claimant had some permanent partial disability in his neck. He felt claimant would continue to have chronic problems and some intermittent stiffness and spasms if he overstressed his shoulders. Dr. Neumann felt claimant should seek employment which avoided stressing the upper extremities or neck. Dr. Neumann felt claimant should avoid activities which involved frequent lifting, bending, squatting and stooping as well as climbing a ladder or walking over uneven ground.

In March 1979, Dr. Anderson found a full range of motion of the cervical and lumbar spines. He felt claimant had some permanent partial disability in his right arm and neck which was mild and due to his injury. However, he said he agreed with the Orthopaedic Consultants' report of claimant's permanent physical impairment.

Claimant testified he has worked as a roofer, lead man in a mobile home factory, cannery worker and done odd jobs on a car lot. After this injury claimant obtained a job as an experimental biological aide with the State which lasted only six weeks.

Claimant testified he has daily, but intermittent, neck and shoulder pain. If he has severe neck pain, he also gets extreme headaches. With his right arm extended, he is unable to pick up heavy objects. He stated he still has pain in the right elbow. He feels he can stand for one hour, sit for one hour, but has to lay down throughout the day. Claimant stated if he lifts five pounds his left shoulder comes out of its socket and he can only turn his neck to the left 45°. He has taken a 30-mile bicycle ride and spent two weeks in the Bahamas after his injury.

The Referee found claimant was entitled to compensation for 96° for 30% unscheduled disability for his neck and back injury and compensation equal to 38.4° for 20% loss of his right arm.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, agrees with the Referee's award for the right arm, but reverses his award for the neck and back disability. The medical evidence in this case indicates claimant has chronic lumbosacral instability which pre-existed this injury. The Orthopaedic Consultants' report in which they found no loss of function of the back and neck due to the injury was concurred in by all the doctors. Claimant has some chronic back problems related to a congenital defect. However, based on the evidence in this case, the Board is unable to find any permanent partial disability in his back and neck resulting from claimant's industrial injury. Therefore, it reverses the Referee's award in regard thereto.

ORDER

The Referee's order, dated May 23, 1979, is modified.

That portion of the Referee's order which awarded claimant compensation equal to 96° for 30% unscheduled disability for his neck and back injury is reversed. The remainder of the Referee's order is affirmed.

CLAIM NO. TC 383267 January 21, 1980

AUGUST E. STUBER, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his neck and upper back on July 25, 1972. His claim was originally closed by a Determination Order, dated May 15, 1973 which awarded claimant compensation for temporary total disability only. Claimant's aggravation rights have expired.

On February 14, 1979, while descending a ladder, claimant suffered an acute episode of pain which the doctors related to his original injury. His claim was reopened on May 10, 1979 by an Own Motion Order from the Board.

On November 26, 1979 the Orthopaedic Consultants reported that claimant continued to have pain in the low neck radiating to mid and upper back, down to the mid dorsal area and that his arms went to sleep while he was in bed or leaning in a chair. They diagnosed a cervical dorsal strain, mild capsulitis of both shoulders, lateral epicondylitis on the right and functional overlay related to his injury. It was their opinion that the claimant's condition was stationary and that he should not return to his previous occupation but could perform medium duties. They suggested vocational assistance for claimant. It was their opinion that the physical impairment due to the claimant's injury was in the mild category.

Dr. Anderson, claimant's treating physician, indicated on November 19, 1979 that he thought claimant should be declared medically stationary. Dr. Anderson, on December 18, 1979, concurred with the Orthopaedic Consultants' report.

On December 13, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 10, 1980, recommended claimant be granted additional temporary total disability from February 27, 1979 through November 19, 1979 and additional compensation equal to 32° for 10% unscheduled disability for his neck injury.

The Board concurs with the recommendation of the Evaluation Division regarding temporary total disability. However, the Board finds, based on the medical evidence and limitations placed on claimant restricting him to medium work that he sustained a loss of wage earning capacity which entitles him to an award of compensation equal to 64° for 20% unscheduled disability for his neck injury.

ORDER

Claimant is hereby granted additional compensation for temporary total disability from February 27, 1979 through November 19, 1979 and compensation equal to 64° for 20% unscheduled disability for his neck injury.

CLAIM NO. 4-23-4-M-187 January 21, 1980

MURLIN WISE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 11, 1979 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury to his back sustained on April 27, 1974. Claimant's claim was first closed by a Determination Order dated August 2, 1974 which awarded the claimant compensation for temporary total disability only. The claim was again reopened and closed by a Determination Order dated June 18, 1976 which awarded claimant additional compensation for temporary total disability and compensation equal to 64° for 20% unscheduled disability for his back injury. Claimant's aggravation rights have expired.

On December 14, 1979 the Board informed the employer/insurer of claimant's request and asked it to advise the Board of its position.

The employer/insurer advised the Board that it was denying responsibility for the current medical treatment and time loss claimant was suffering. They based this on a medical report received from Dr. Donald Bernson, dated October 18, 1979. Additionally, it received chart notes from Dr. Ray Miller for examinations during the summer of 1979, all of which in their opinion indicated a medically stationary condition. Dr. Bernson reported that the majority of the exacerbated symptoms occurring subsequent to a fishing fall in September 1979 in their opinion indicated a new injury. Therefore, the employer/insurer requested that this claim be set down for a hearing in order that oral testimony could be taken in support of the employer's position.

On December 4, 1979 Dr. Bernson reported that claimant had been seen by him on October 1, 1979 and was complaining of low back pain with radiation into the left hip, posterior thigh and leg on the left. The history given to Dr. Bernson was that claimant had undergone back surgery for removal of a disc on the right side in April 1974. This surgery relieved the right side leg pain, but claimant continued to have a low back ache. A subsequent myelogram performed in October 1976 was normal. Dr. Bernson reported that claimant began work in March 1979 as a millwright and had noted that the pain and symptoms which had previously been on the right side, had switched to the left side. Claimant also began having almost constant left sciatic pain and discomfort. The claimant advised Dr. Bernson in July 1979 that he had slipped while gathering firewood and fell, landing on his left hip. Claimant reported he was stiff and sore for approximately two weeks after this incident, but the symptoms subsided and he continued to work. Claimant also advised Dr. Bernson that he had slipped and fallen on September 15, 1979 while fishing and landed in a sitting position. Dr. Bernson indicated that claimant was inclined to attribute most of his symptoms to this fall on September 15, 1979, however, he noted that the left sciatic pain and left leg pain began some six months earlier in March 1979. Dr. Bernson found that a myelogram done on October 14, 1979 indicated the presence of herniated disc at the lumbosacral level on the left side. It was Dr. Bernson's opinion that the evidence of the herniated disc on the left side of the lumbosacral level was a continuation of the initial injury sustained in April 1974. He believed that claimant's claim should be reopened and authorization approved for the removal of the recurrent herniated lumbosacral disc.

On August 15, 1979 Dr. Ray Miller reported that the claimant complained of no left pain but some pain in the right hip. He reported that claimant continued to work. It was his opinion that any further diagnostic tests were not indicated and that any additional surgery would not benefit the claimant. He did not feel claimant was in need of any additional treatment at that time.

The Board, after thoroughly considering the evidence before it, finds it is unable to determine if claimant's request for own motion relief should be granted. Therefore, the Board feels it must remand this matter to the Hearings Division of the Workers' Compensation Board to conduct a hearing to determine whether claimant in fact has sustained a new injury or if his present condition is due to the worsening of his original injury suffered in April 1974.

ORDER

It is hereby ordered that this matter is referred to the Workers' Compensation Board's Hearings Division for a hearing to determine whether or not claimant has sustained a new injury or an aggravation of his April 27, 1974 injury. If the Referee finds that the claimant has, in fact, sustained a new injury, the Referee shall enter an order approving the denial issued by the employer/carrier on December 12, 1979. If the Referee finds that claimant did not sustain a new injury, but, in fact, his present condition is due to an aggravation of his April 27, 1974 injury, the Referee should enter a recommendation that the denial issued by the employer/carrier be set aside and claimant be granted own motion relief. In either case the Referee shall cause a transcript to be prepared and forwarded to the Board for its consideration along with all the exhibits received at the time of the hearing.

SAIF CLAIM NO. C 373434 January 21, 1980

IRIS YOUNG, CLAIMANT
Doblie & Francesconi, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through her attorney, on December 14, 1979, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained to her back on May 4, 1972. Attached to this request were several medical documents. Claimant's claim had initially been closed by a Determination Order, dated May 15, 1973, which had granted claimant an award of compensation for temporary total disability and an award of compensation equal to 32° for 10% unscheduled disability for her low back injury. Claimant's aggravation rights have expired.

A Second Determination Order, dated July 20, 1976, was issued after claimant's aggravation claim had been found compensable and awarded claimant compensation for temporary total disability only.

On August 24, 1979 Dr. David S. Todd and Harry Danielson reported that claimant had a herniated disc at C5-6 level which required surgical intervention to correct. Dr. Danielson requested authorization to proceed with the surgery. On September 4 claimant requested that her claim also be reopened.

Dr. Danielson, on September 14, 1979, reported that claimant had progressively worsened to the point where it was possible to demonstrate a herniated nucleus pulposus C5-6 by discography and additionally an injection of local anesthetic into the inner space had relieved her pain further pointing out the fact that the offending disc was responsible for her problems.

On November 14, 1979 Dr. R. V. Stevens opined that claimant's current symptoms were directly due and related to the injury which occurred in May 1972. He felt that this claim should be reopened.

On December 19, 1979 the Board informed the Fund of claimant's request and asked it to advise the Board of its position in regard thereto. On January 1, 1980 the Fund responded it would oppose an Own Motion Order reopening the claim. This was based on a report from the Orthopaedic Consultants dated October 16, 1979.

In the October 16, 1979 report, the Orthopaedic Consultants diagnosed a chronic cervical dorsal strain and functional overlay. They felt claimant's condition was still stationary from a neurological standpoint. They found no objective abnormalities to suggest nerve compression. It was their feeling that the main problem that claimant suffered from was symptomatic pain. They indicated they agreed with Dr. Danielson that surgery would probably not completely relieve her pain and therefore it was their opinion that surgery was not needed at the present time. They felt that the inconsistencies in examination suggested some functional overlay and that a psychological examination would also be needed for documentation. It was their opinion that the claimant's previous disability award was adequate. They concluded that claimant's current symptoms were essentially the same as those she described in 1976 and which were felt to be related to the original injury in 1972. The Orthopaedic Consultants did not feel that claimant should return to her previous occupation as a nurses' aide and that she should seek another occupation limited to light work. They felt vocational assistance would be necessary.

The Board, after thoroughly considering the evidence before them, finds it is not sufficient to warrant a reopening of claimant's claim at this time. Claimant still is entitled to treatment under ORS 656.245. The Board would urge that the Field Services Division extend its assistance to claimant for job placement.

ORDER

The claimant's request for own motion relief is denied.

CLAIM NO. KC 330596 January 21, 1980

KENNETH E. ZIMMERMAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back and right leg on August 1, 1971. His claim was originally closed by a Determination Order, dated April 10, 1972, which awarded claimant compensation for temporary total disability and compensation equal to 32° for 10% unscheduled low back disability. Claimant's aggravation rights have expired.

Claimant continued to have difficulties and in March 1978 sought treatment from Dr. Degge and Dr. Franklin. The diagnosis was a possible recurrent disc at the same level which had previously been operated on.

An Own Motion Order, dated June 22, 1978, reopened the claim for benefits commencing on March 23, 1978. Dr. Franklin found claimant had an inherited neuropathy. He felt this disease retarded the regeneration of the nerves following the traumatic injury claimant had sustained and that the original injury was responsible for the initial exacerbation and aggravation of this underlying condition since. On November 15, 1979 Dr. Franklin reported that claimant's condition was stationary although he would continue to experience periodic exacerbations of pain.

Since the original claim closure in 1972 claimant has earned a B.S. degree in Psychology at the University of Oregon and has completed two terms in graduate work. He also has nearly completed two years in a Registered Nurse training program at Lane Community College.

On November 28, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 11, 1980, recommended that claimant be granted additional compensation for temporary total disability from March 23, 1978 to November 15, 1979, but be granted no additional award of permanent disability.

The Board does not concur with the recommendation as to permanent partial disability. Claimant's back pain is increased by sitting, standing, walking and bending. The medical evidence also indicates that his hereditary neuropathy has been aggravated by this industrial injury. This has led to a slower than normal recovery from the initial injury. Based on the evidence, the Board finds that claimant is entitled to an increased award of compensation representing a greater loss of wage earning capacity than that for which he has been awarded previously. Claimant is precluded from work of his previous nature or from work requiring prolonged sitting. Therefore, the Board finds claimant is entitled to compensation equal to 112° for 35% unscheduled disability for his low back injury. The Board does concur with the recommendation of compensation for temporary total disability.

ORDER

Claimant is hereby granted an award of compensation for temporary total disability from March 23, 1978 through November 15, 1979 and an award of compensation equal to 112° for 35% unscheduled disability. This award is in lieu of all previous awards claimant has been granted for unscheduled disability.

WCB CASE NO. 78-6985 January 23, 1980

GALE COEN, CLAIMANT
Gerald A. Martin, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which ordered it to pay $850 in attorney's fees in addition to the compensation awarded. The Fund contends this was in error.

FACTS

Claimant, a 47-year-old carpenter, sustained a compensable injury to his back and right knee on July 1, 1976. This was diagnosed as an acute back strain and splinting tendon of the right knee. Claimant was released for regular work on October 4, 1976 and found medically stationary on October 1, 1976.

A Determination Order, dated December 15, 1976, awarded claimant compensation for temporary total disability from July 1, 1976 through October 3, 1976.

Also, on December 15, 1978 Dr. A.S. Wattleworth reported that claimant's back pain had resolved, but he continued to have problems with his right leg. After an arthroscopic examination of the right knee on January 11, 1977 Dr. Wattleworth performed a medial meniscectomy.

The Fund reopened the claim on January 25, 1977 as of January 11, 1977.

On September 1, 1977, Dr. Ray Miller opined claimant had a lumbosacral strain and maybe a small disc protrusion. He felt claimant should be treated conservatively.

On September 9, 1977, Dr. Wattleworth opined claimant's claim could be closed with a mild permanent partial disability in the form of an absent medial meniscus and mild chronic synovitis.

Dr. Miller released claimant for regular work as of November 1, 1977. In January claimant underwent a lumbar myelogram which was normal.

On February 23, 1978 Dr. Miller reported he would release claimant for work on March 15, 1978 for a three-month period of light work. He felt if claimant could not engage in heavy work he should consider being rehabilitated.

On May 10, 1978, Dr. Wattleworth reported claimant's condition was medically stationary and his claim could be closed. He opined claimant's permanent partial disability of the back was mild to moderate and claimant's permanent partial disability of the right knee was minimal.

A Determination Order, dated June 28, 1978, awarded claimant additional compensation for temporary total disability from January 11, 1977 through March 14, 1978 and compensation for temporary partial disability from March 15, 1978 to March 19, 1978 and compensation equal to 5% loss of his right leg and 10% unscheduled disability for his low back injury.

On September 6, 1978 claimant requested a hearing on the amount of permanent partial disability awarded by this Determination Order.

On October 17, 1978 Dr. Jones advised the Fund claimant could not work and suggested a referral to the Disability Prevention Center. He requested the claim be reopened at that time on the basis of an aggravation.

Claimant was referred to the Disability Prevention Center on November 9, 1978.

On December 29, 1978 claimant requested a hearing based on the refusal of the Fund to reopen his claim as requested by Dr. Jones in his letter of October 17, 1978.

A stipulation, signed on April 17, 1979, provided the claim was reopened for further medical care and temporary total disability effective October 17, 1978 until closed; the parties reserved the right to contest the issue of whether or not the claim should be reopened prior to October 17, 1978; the parties agreed claimant's attorney was entitled to an attorney fee and that the amount of the fee and whether or not it was payable separately by the Fund or out of compensation was left to be decided by a Referee.

Claimant testified he last worked on June 23, 1978.

The Referee found claimant was entitled to compensation for temporary total disability from June 23 through October 16, 1978. The Referee treated the Fund's failure to reopen the claim as a de facto denial and ordered the Fund to pay claimant's attorney the sum of $850 in addition to and not out of the compensation benefits due claimant.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses that portion of the Referee's order which awarded claimant's attorney an attorney's fee in addition to the compensation due. The sole issue before the Referee was the effective date claimant was entitled to compensation for temporary total disability. The issue was not a de facto denial. Claimant had contended he was entitled to compensation for temporary total disability from March 19, 1978 until October 17, 1978. Under the rationale of Smith v. Amalgamated Sugar, 25 Or App 243, 548 P2d 1329 (1976), and Vandehey v. Pumilite Glass and Building Company, 35 Or App 187, _____ P2d _____ (1978), as applied to the facts in this case, claimant's attorney is entitled to an attorney's fee out of the increased compensation but not in addition to the compensation due.

ORDER

The Referee's order, dated July 30, 1979, is modified.

Claimant's attorney is hereby granted, as and for a reasonable attorney's fee, a sum equal to 25% of the increased compensation not to exceed $750, payable out of said compensation. This is in lieu of the attorney's fee granted previously.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-9873 January 23, 1980

SHEILA K. LILE, CLAIMANT
Santos & Schneider, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of her claim.

FACTS

Claimant, a 34-year-old furniture manufacturer employee, alleges she sustained a compensable injury to her back on August 2, 1978 when, while cutting some rolled foam rubber with a hand saw, she straightened up and felt excruciating low back pain. She testified that she advised her supervisor of this fact, but he told her to ignore it and continue to work. She stated that the next day she could barely get out of bed and called her employer and talked to a Mr. Boyer. She said she reported the injury to Mr. Boyer and also filled out a Form 801 on August 3, 1978.

Dr. Gerald King reported he first examined claimant on August 3, 1978. His diagnosis was an acute lumbosacral strain. He was given a history that the claimant had bent over at work and stood up and noticed pain in the low spine area.

On September 27, 1978 Dr. E. L. Burnham reported that he had been treating the claimant and did not feel that she would have any permanent disability.

On October 9, 1978 Dr. Edward A. Heusch reported that claimant had a history of a previous back condition in 1969 when she was struck in the head with an insulated door weighing approximately 100 pounds. Claimant was reportedly off work for two years because of a "compressed spine". She reported that on August 2, 1978 while at work she was cutting foam in a squatted and stooped position and when she stood up she noticed pain in her low back that radiated into both thighs. She stated that the following day she was seen by Dr. Gerald King and later seen by Dr. Burnham. Dr. Heusch diagnosed a probable lumbar strain and felt that claimant would have no permanent partial disability.

On November 2, 1978 the Fund denied claimant's claim. It was their opinion that there was insufficient evidence that her condition was either caused or aggravated by employment on or about August 2, 1978.

At the hearing Mr. Boyer, the production manager, testified that claimant called in and advised him of the injury the day after she said it had occurred. He stated that he then initiated an investigation and found that no one could substantiate claimant's injury.

Claimant's supervisor testified that he did not recall the claimant mentioning any injury to him. He stated that claimant was a good worker and he had never known the claimant to be untruthful.

The Referee did not find the claimant had proved her claim by the preponderance of the evidence. He felt that there were contradictions in the evidence which were not resolved in claimant's favor. He further found that there was no persuasive medical opinion relating claimant's problem to her employment. Therefore, based on all the evidence, the Referee found that claimant had failed to carry her burden of proof and, therefore, affirmed the Fund's denial of November 2, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board finds that the only medical evidence in the file relates claimant's injury to her low back to her employment. Dr. King indicates on August 4, 1978 that the condition requiring treatment was the result of an industrial injury or exposure. There's no question that claimant did report her experiencing back pain on August 2, 1978 to Mr. Boyer on the following day and receiving treatment from Dr. King. Her supervisor testified that he did not recall claimant mentioning any injury to him on August 2, however, he did note that claimant was never known to be untruthful. Claimant has given a very consistent history of what occurred on August 2, 1978 and what events transpired after her injury of that date. Therefore, the Board finds that the preponderance of the evidence indicates that claimant did sustain a compensable injury to her low back on August 2, 1978. The Board concludes that the Referee's order should be reversed.

ORDER

The Referee's order, dated June 7, 1979, is reversed.

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation and other benefits as provided by law until closed under ORS 656.268.

Claimant's attorney is granted as and for a reasonable attorney's fee at both the hearing level and the Board level the sum of $900, payable in addition to and not out of the compensation awarded to claimant.

WCB CASE NO. 79-4656 January 23, 1980

ROBERT NORTHEY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which found claimant was permanently and totally disabled. The Fund contends this award is excessive.

FACTS

Claimant, a 58-year-old service oiler, sustained a compensable injury to his back on October 5, 1978 while lifting the hood of a truck. Claimant had a prior back strain injury in 1972.

On October 18, 1978, Dr. Jack Crosby reported claimant indicated he had back pain since his 1972 incident, but felt it was more severe now. Claimant was insistent that he did not want to return to work. Claimant wanted to retire and draw Social Security and Veteran's benefits and other things he felt he was entitled to. Dr. Crosby felt it was possible claimant had back pain, but claimant's main problem was his decision not to work anymore.

On October 30, 1978, Dr. Ray Miller opined claimant had a protruding disc at the L5-S1 level on the right. He elected to treat claimant conservatively.

A myelogram performed on December 1, 1978 was normal.

On March 13, 1979 the Orthopaedic Consultants reported claimant gave them a history of injuring his back when he was 20 years old and having irregular pain in his back ever since then. He complained of inconstant pain in the right low back and left low back area which radiated into the buttock and thighs. Claimant stated the pain was increased by sitting for 15 to 30 minutes. He reported he could not bend or lift. Claimant walked with a right-sided limp and reported shooting pain in both legs when he walked. Their diagnosis was: chronic lumbosacral sprain, osteoarthritis, minimal, in the lumbar spine, and suspected peripheral vascular insufficiency in the lower extremities, mild in degree. They opined claimant was medically stationary and would be unable to return to his previous employment. They noted that because of claimant's limited education and work skills it would be difficult for claimant to find another job. They opined claimant's total loss of function was mildly moderate and the loss of function due to this injury was mild. The prognosis for claimant's returning to work was very limited and they did not feel claimant would be employable in the near future. Dr. Miller concurred with this report.

On April 13, 1979 Dr. Crosby reported claimant had been totally disabled from October 5, 1978 through the present, however, he had not seen claimant since October 18, 1978.

A Determination Order, dated May 8, 1979, awarded claimant compensation for temporary total disability only.

Claimant testified he has constant pain in his back radiating into his hips and down both legs. He stated he can sit and stand for only 15 to 20 minutes and is unable to walk further than 200 feet. Due to his pain, claimant stated he lays down for an hour about 3 or 4 times a day. Claimant can drive about 15 miles. He is able to pull weeds out of his garden by getting on his hands and knees. Claimant cannot bend and can lift only one piece of firewood at a time. Claimant has worked as a logger and an oiler. He has a 4th grade education.

Further, claimant testified he met with a service coordinator, but was not able to find a job. He said he had submitted one application to a sawmill and went to the employment office on one occasion. Claimant admitted he had no intention of looking for work because he felt it was useless and that no one would hire him.

The Referee concluded claimant was permanently and totally disabled. The Referee's decision was based on the medical reports and the testimony presented at the hearing. It was noted claimant admitted he did not intend to look for work and the Referee found, since that would be useless, claimant did not have to do so.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of permanent total disability. Claimant has not established that he is willing to seek regular gainful employment or that he has made a reasonable effort to obtain such employment. The Orthopaedic Consultants did find it would be difficult to find claimant another job. However, claimant did not reasonably attempt to find employment. He made one contact with the employment division and one contact with an employer. He did "cooperate" with the service coordinator, but not to the fullest of his abilities. Dr. Crosby stated claimant's main problem is not back pain, but his decision not to work.

The Board does not find the medical evidence alone supports claimant's contention that he is permanently and totally disabled. After considering all other factors, such as claimant's age, education, work background, and motivation, the Board does not find claimant is permanently and totally disabled. However, the Board finds claimant has sustained a loss of wage earning capacity. Therefore, the Board finds claimant is entitled to an award of compensation equal to 192° for 60% unscheduled disability for his back injury.

The Board would urge the Field Services Division of the Workers' Compensation Department again attempt to assist claimant in seeking employment.

ORDER

The Referee's order, dated August 21, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 192° for 60% unscheduled disability for his back injury of October 5, 1978. This award is in lieu of any previous awards for unscheduled disability.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-1742 January 23, 1980

BERNETTA ROLL, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which set aside its denial of claimant's claim for a right ankle injury on December 24, 1978. The Fund contends this was in error.

FACTS

Claimant alleges that she slipped and fell and broke her right ankle on December 24, 1978 as the result of her back injury sustained on April 28, 1976. She has suffered four ankle injuries: May 1977-sprain to her left foot in a fall; October 1977-broken right ankle in a fall; January 1978-broken left ankle in a fall; and the December 24, 1978 incident.

A Determination Order, dated April 24, 1977, awarded claimant compensation for temporary total disability and compensation equal to 48° for 15% unscheduled disability for her low back injury.

In August 1977, Dr. Calvin Kiest, an orthopedic surgeon, opined there was probably no connection between claimant's fall in May and her back problem. He felt, based on her history, there was a relationship, but based on objective findings there was not a relationship.

Dr. Wallace Valley, D.C., in February 1978, opined that the January 1978 fall,as the first fall, was related to her low back condition.

On February 10, 1978, Dr. Lewis Van Osdel, an orthopedic surgeon and medical examiner of the William Callahan Center, reported claimant had broken her left ankle, but this was not related to her industrial injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of permanent total disability. Claimant has not established that he is willing to seek regular gainful employment or that he has made a reasonable effort to obtain such employment. The Orthopaedic Consultants did find it would be difficult to find claimant another job. However, claimant did not reasonably attempt to find employment. He made one contact with the employment division and one contact with an employer. He did "cooperate" with the service coordinator, but not to the fullest of his abilities. Dr. Crosby stated claimant's main problem is not back pain, but his decision not to work.

The Board does not find the medical evidence alone supports claimant's contention that he is permanently and totally disabled. After considering all other factors, such as claimant's age, education, work background, and motivation, the Board does not find claimant is permanently and totally disabled. However, the Board finds claimant has sustained a loss of wage earning capacity. Therefore, the Board finds claimant is entitled to an award of compensation equal to 192° for 60% unscheduled disability for his back injury.

The Board would urge the Field Services Division of the Workers' Compensation Department again attempt to assist claimant in seeking employment.

ORDER

The Referee's order, dated August 21, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 192° for 60% unscheduled disability for his back injury of October 5, 1978. This award is in lieu of any previous awards for unscheduled disability.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-1742 January 23, 1980

BERNETTA ROLL, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which set aside its denial of claimant's claim for a right ankle injury on December 24, 1978. The Fund contends this was in error.

FACTS

Claimant alleges that she slipped and fell and broke her right ankle on December 24, 1978 as the result of her back injury sustained on April 28, 1976. She has suffered four ankle injuries: May 1977-sprain to her left foot in a fall; October 1977-broken right ankle in a fall; January 1978-broken left ankle in a fall; and the December 24, 1978 incident.

A Determination Order, dated April 24, 1977, awarded claimant compensation for temporary total disability and compensation equal to 48° for 15% unscheduled disability for her low back injury.

In August 1977, Dr. Calvin Kiest, an orthopedic surgeon, opined there was probably no connection between claimant's fall in May and her back problem. He felt, based on her history, there was a relationship, but based on objective findings there was not a relationship.

Dr. Wallace Valley, D.C., in February 1978, opined that the January 1978 fall,as the first fall, was related to her low back condition.

On February 10, 1978, Dr. Lewis Van Osdel, an orthopedic surgeon and medical examiner of the William Callahan Center, reported claimant had broken her left ankle, but this was not related to her industrial injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of permanent total disability. Claimant has not established that he is willing to seek regular gainful employment or that he has made a reasonable effort to obtain such employment. The Orthopaedic Consultants did find it would be difficult to find claimant another job. However, claimant did not reasonably attempt to find employment. He made one contact with the employment division and one contact with an employer. He did "cooperate" with the service coordinator, but not to the fullest of his abilities. Dr. Crosby stated claimant's main problem is not back pain, but his decision not to work.

The Board does not find the medical evidence alone supports claimant's contention that he is permanently and totally disabled. After considering all other factors, such as claimant's age, education, work background, and motivation, the Board does not find claimant is permanently and totally disabled. However, the Board finds claimant has sustained a loss of wage earning capacity. Therefore, the Board finds claimant is entitled to an award of compensation equal to 192° for 60% unscheduled disability for his back injury.

The Board would urge the Field Services Division of the Workers' Compensation Department again attempt to assist claimant in seeking employment.

ORDER

The Referee's order, dated August 21, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 192° for 60% unscheduled disability for his back injury of October 5, 1978. This award is in lieu of any previous awards for unscheduled disability.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-1742 January 23, 1980

BERNETTA ROLL, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which set aside its denial of claimant's claim for a right ankle injury on December 24, 1978. The Fund contends this was in error.

FACTS

Claimant alleges that she slipped and fell and broke her right ankle on December 24, 1978 as the result of her back injury sustained on April 28, 1976. She has suffered four ankle injuries: May 1977-sprain to her left foot in a fall; October 1977-broken right ankle in a fall; January 1978-broken left ankle in a fall; and the December 24, 1978 incident.

A Determination Order, dated April 24, 1977, awarded claimant compensation for temporary total disability and compensation equal to 48° for 15% unscheduled disability for her low back injury.

In August 1977, Dr. Calvin Kiest, an orthopedic surgeon, opined there was probably no connection between claimant's fall in May and her back problem. He felt, based on her history, there was a relationship, but based on objective findings there was not a relationship.

Dr. Wallace Valley, D.C., in February 1978, opined that the January 1978 fall, as the first fall, was related to her low back condition.

On February 10, 1978, Dr. Lewis Van Osdel, an orthopedic surgeon and medical examiner of the William Callahan Center, reported claimant had broken her left ankle, but this was not related to her industrial injury.

On December 8, 1978, the Orthopaedic Consultants reported claimant complained of weakness in her right leg after walking to the limits of her tolerance. She feared she would fall. The history given to them, by claimant, was a sprained left ankle on May 5, 1977 when she fell while skiing and a fractured right ankle which occurred when she walked out of her house in the dark and missed a step. It was their opinion that the ankle injuries were not related to her previous back injury.

A hearing was held on January 12, 1979 on the Fund's refusal to pay for the medical treatment claimant had had for her falls and foot injuries in May 1977, October 1977 and January 1978. At that hearing Dr. Valley testified it was his opinion these injuries based upon reasonable medical probability were caused by claimant's low back problem of pressure on the sciatic nerve. Claimant testified that on each occasion she was walking along and suddenly her leg gave way. The Referee ordered the Fund to pay for medical treatment claimant had received for her falls and injuries to her foot.

Claimant fell again on December 24, 1978 and injured her right ankle. Dr. Howard Cherry, in April 1979, reported regarding this fall: "As far as the relationship to her back injury is concerned, it would appear to me that it is the same relationship as her previous injuries".

The Board, in an Order on Review, dated September 28, 1979, reversed the Referee's order and found that the three falls were not related to her back condition. The majority of the Board found claimant had failed to carry her burden of proving compensability of the foot injuries of May 1977, October 1977 and January 1978.

A Second Determination Order, dated February 23, 1979, awarded additional compensation for temporary total disability only.

Dr. Steven Hoff, in April 1979, reported claimant had injured her right ankle when her "back caused pain and her legs gave way". He felt that based on the history of claimant's injuries to her ankles, the December 24, 1978 injury was related to her back problems.

The Referee found that the medical evidence revealed claimant's right ankle injury of December 24, 1978 was a direct result of her compensable back injury. Therefore, the Referee set aside the partial denial of the Fund.

BOARD ON DE NOVO REVIEW

The majority of the Board, after de novo review, reverses the Referee's setting aside of the Fund's partial denial. The majority of the Board finds claimant has failed to prove that her fall in December 1978 was a direct result of her back injury. Dr. Valley does feel her fall is related to her back injury, but Dr. VanOsdel, the Orthopaedic Consultants and Dr. Kiest find no relationship between her falls and the resulting foot/ankle injuries and her back injury. Drs. Hoff and Cherry find a relationship between her falls and her back injury based on the history. The majority of the Board finds Drs. VanOsdel, Kiest and the Orthopaedic Consultants' opinions as to the causal relationship between claimant's injury and her back condition more persuasive. Therefore, the majority of the Board finds insufficient medical support in this case and reverses the Referee's order.

The remainder of the Referee's order was not appealed and, therefore, is not discussed.

ORDER

The order of the Referee, dated July 25, 1979, is modified.

That portion of the Referee's order which set aside the denial of claimant's claim for a right ankle injury on December 24, 1978 is reversed. The denial by the State Accident Insurance Fund of claimant's right ankle injury of December 24, 1978 is approved.

The remainder of the Referee's order is affirmed.

Chairman Wilson dissents as follows:

At the time of the earlier review of this matter, the issue of compensability of foot and ankle injuries was in issue and the same issue is again before the Board in this review.

I was persuaded at the time of the earlier review and am persuaded now that these injuries are compensable; that the injuries to the ankles were caused by falls which occur when nerve impingemnet in the back causes giving away and failure of leg function. The matter of the injury to the back being superimposed on a congenital condition and being compensable has been established and is not in issue on this review.

Both Referees who have heard these matters have concluded that the evidence preponderates in favor of compensability and I agree. The order and opinion of Referee Ail in the instant round of litigation should be affirmed.

WCB CASE NO. 79-1481 January 28, 1980

BRENDA BARTON, CLAIMANT
Roger B. Todd, Claimant's Atty.
SAIF, Legal Services, Defense Atty
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which awarded claimant compensation equal to 37.5° for 25% loss of her right forearm. The Fund contends there is no evidence to support an award for the loss of use of a hand or a forearm.

FACTS

Claimant, a 29-year-old mill worker, sustained a compensable injury to her right arm on April 27, 1978 when while taking a piece of veneer out from under the chain, she caught her right hand under the roller of a clipper. This was diagnosed as a laceration of the index finger and thumb of the right hand, which was repaired.

Dr. Peter A. Nathan, in July 1978, indicated claimant had an excellent range of motion in her right wrist with no evidence of limited circumduction or instability. He found the hand was normal, but claimant still had some difficulty with her thumb with "no activity in the extensor pollicis longus" at that time.

On August 1, 1978 Dr. Nathan operated and performed an extensor indicis proprius transfer to the extensor pollicis longus on the right and excision of the hypertrophic scar in the right wrist area.

Dr. Nathan, in December 1978 stated the right hand had excellent range of motion with full extension and strength in the thumb. He found no impairment of the thumb's flexion, opposition or adduction. Dr. Nathan found the hand was within normal limits except for the scars about the right wrist and on the dorsal aspect of the metacarpophalangeal joint. He indicated claimant was medically stationary and found no evidence of permanent partial impairment. However, Dr. Nathan stated that if the scars did not improve they might require additional treatment.

A Determination Order, dated January 16, 1979, awarded claimant compensation for temporary total disability only.

At the hearing, claimant stated she returned to work for her employer but was instructed by her doctor to use her left hand not her right when pulling on the green chain and has done so. Claimant complained of a general loss of grip and strength in her right hand, tiring of the hand after two hours of use, pain in the arm, tightness around the scars, cramping in the right hand up to the shoulder and limited ability to write and to type.

Claimant's supervisor testified since her return to work, she has complained of right arm pain and has difficulty doing her work.

The Referee found claimant had sustained a permanent partial disability to her right forearm and awarded claimant compensation equal to 37.5° for 25% loss of her right forearm.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's award of compensation. The medical evidence indicates claimant has some difficulty with the scarring around the wrist which limits her use of the hand and forearm. Claimant testified she has continuing limitations using her right hand and arm which reflects a loss of function. The Board finds that based on the evidence in this case claimant does have some permanent partial disability in her right forearm, but not to the extent the Referee found. Therefore, the Board modifies the Referee's award of compensation and awards claimant compensation equal to 15° for 10% and not 37.5° for 25% loss of her right forearm.

ORDER

The Referee's order, dated July 20, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 15° for 10% loss of function of her right forearm. This is in lieu of the Referee's award of compensation for loss of function of the right forearm. The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-9953 January 28, 1980

In the Matter of the Compensation
of The Beneficiaries of
RANDALL CANNON, DECEASED
David A. Vinson, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which found that the decedent's wife was a beneficiary of the deceased worker and that she had not been abandoned; ordered the employer to accept the compensability of this claim and to pay widow's benefits effective June 7, 1978; assessed a 10% penalty on all compensation due from June 7, 1978 until December 4, 1978 and awarded claimant's attorney a fee of $1,000. The employer contends this was in error.

FACTS

The deceased worker was fatally injured on June 7, 1978 in an industrial accident. The claimant, decedent's wife, filed a claim on November 8, 1978. A denial was issued by the employer on December 4, 1978 on the basis that claimant had been living in a state of abandonment at the time of decedent's death.

Claimant and the deceased worker were married on December 29, 1973 and this marriage had never been dissolved. They lived as husband and wife continuously until November 1976 and intermittently until March 1977. In March 1977 the deceased worker started living with another woman and lived with her until his death on June 7, 1978. The decedent didn't work until the fall of 1977.

In July 1977 claimant moved to California to begin training as a lab technician. She lived in California until January 1979. She indicated she had limited contact (one phone call regarding the sale of an automobile in April 1978) with the decedent.

Claimant testified she never had any intention of dissolving the marriage. She felt that as soon as their financial matters were resolved they would reunite and live as man and wife. The deceased worker did not contribute to claimant's support.

The decedent indicated as a beneficiary on an insurance policy the woman with whom he was living.

The Referee found that claimant was living in a state of abandonment when she moved to California in June 1977, 11 months prior to the death of her husband. The Referee found that claimant's and the deceased worker's parting by mutual consent did not constitute abandonment. Therefore, the Referee found that the language of ORS 656.005(3), which defines a beneficiary, defined claimant as a beneficiary and claimant was entitled to widow's benefits. Further, the Referee found claimant was entitled to a penalty for the employer's failure to pay compensation within 14 days or issue an acceptance or denial of the claim and granted an attorney's fee to claimant's attorney.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the Referee's finding that claimant was not living in a state of abandonment for one year prior to decedent's death. The Board finds that claimant and the decedent had been separated as husband and wife no later than March 1977 when the decedent began to live with another woman. The decedent, after that date, did not provide any support to claimant. The decedent listed another woman as the beneficiary on an insurance policy. Therefore, the Board finds that claimant had been living in a state of abandonment from at least March 1977 for at least one year prior to the date of decedent's death and is not a beneficiary as defined in ORS 656.005(3) and is not entitled to receive widow's benefits.

Claimant's attorney is entitled as and for a reasonable attorney's fee for obtaining interim compensation and penalties the sum of $500 in lieu of the fee granted by the Referee.

The Board would affirm the remainder of the Referee's order.

The Referee's order, dated June 18, 1979, is modified.

That portion of the Referee's order which referred the claim back to the employer for acceptance and payment of widow's benefits effective June 7, 1978 is reversed.

That portion of the Referee's order which granted claimant's attorney the sum of $1,000 as and for a reasonable attorney's fee is reversed. Claimant's attorney is hereby granted the sum of $500 as and for a reasonable attorney's fee. This is in lieu of the Referee's award of attorney's fee.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-242 January 28, 1980

JIM B. DAVIS, CLAIMANT
Claud A. Ingram, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which set aside its denial of claimant's aggravation claim. The Fund contends this was incorrect and its denial should be affirmed.

FACTS

Claimant, a 44-year-old logger, sustained a compensable injury to his neck and shoulder on October 4, 1973 when he was struck on the head by a falling limb off of a tree. Claimant continued to work.

Claimant continued to complain of pain in the shoulder and neck and was hospitalized in January 1975. A cervical myelogram revealed minimal cervical spondylosis. The diagnosis was a chronic posterior cervical strain.

Dr. Neil Thrasher, in July 1975, diagnosed: " . . . degenerative disc disease, probable underlying disc atrophy or herniation at C5-C6 and C6-C7; some C6 and questionably C5 nerve root compression syndrime [sic] as manifest by mild weakness of biceps, triceps and radial wrist extensors . . .". He stated claimant's condition was stationary. Dr. Thrasher felt claimant was not incapacitated. Dr. Thrasher had reported claimant's condition had improved early in 1974 after being treated.

A Determination Order, dated July 28, 1975, awarded claimant compensation for temporary total disability only.

Dr. Lawrence Green, in November 1978, indicated claimant had stiffness in his neck, shoulders, arms and hips for a number of years which perhaps pre-dated his injury. After reviewing x-rays, he concluded the degenerative disc disease and anterior encroachment pre-dated the injury and were not related to it, but was not prepared to say that with "100% surety". Dr. Green felt that if claimant had these significant changes at the time of his injury, he could have had an exacerbation of discomfort from the accident on this ongoing medical problem. He felt claimant's condition would get progressively worse.

Dr. Joe Much, medical consultant for the Fund, on December 19, 1978, agreed that claimant had degenerative osteoarthritis of the neck which was not the result of his injury.

On December 22, 1978, the Fund denied claimant's aggravation claim.

Claimant testified he had problems with a painful and stiff neck for about a year prior to his injury. He said that from 1975 to 1978 he worked steadily and only occasionally received chiropractic treatment. He feels the pain after his injury was different and worse than it had been before. He stated it never returned to the level it had been before his injury and has gradually increased. He says he continues to have neck and shoulder pain and stiffness. The only time claimant has lost time from work was to visit doctors. Claimant denied any improvement in his condition in 1974.

The Referee found claimant suffered an exacerbation of his underlying pre-existing disc disease which has never returned to pre-injury status. The Referee found claimant's condition had gotten worse and claimant had suffered an aggravation. Therefore, the Referee remanded the claim to the Fund for acceptance and payment of benefits and to be reinbursed for his payments of medical bills incurred since the entry of the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. There is no medical support in this case for the aggravation claim. From 1975 to 1978 claimant did not seek any medical treatment other than occasional chiropractic treatment. Dr. Green felt the degenerative disc disease encroachments pre-dated claimant's injury and could have had an exacerbation of discomfort from the injury on this ongoing process. He felt claimant would continue to get progressively worse, but it could take many years. The Board cannot find that this evidence along with claimant's testimony indicates a worsening of his condition since his last award or arrangement of compensation. The Board finds claimant has failed to carry his burden of proof. Therefore, the Board reverses the Referee's order and would approve the denial. The Board would note that any bills for medical care would be payable by the Fund under ORS 656.245.

ORDER

The Referee's order, dated August 9, 1979, is reversed.

The State Accident Insurance Fund's denial, dated December 22, 1978, is approved.

WCB CASE NO. 79-396 January 28, 1980

LOWELL DENNY, CLAIMANT
Welch, Bruun & Green,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of benefits pursuant to the Oregon Workers' Compensation Law. The Fund contends that this was in error.

FACTS

On November 7, 1978, claimant's doctor reported that he was unable to work from November 7 through November 17, 1978 due to an asthmatic condition which was work related. Dr. M. Goldberg diagnosed this condition as asthma. Dr. Jerome Reich, in December 1978, indicated that claimant may have an industrial or occupational form of asthma.

Claimant, a 29-year-old collator operator, worked making paper bags out of paper tubes which resulted in him breathing "a form of paper dust". Claimant reported that he was almost free of symptoms when he was away from work.

Dr. Reich, in December 1978, had suggested that the claimant schedule "a provocative test using the material that he was exposed to at work to see if his symptoms could be reproduced". However, this was not done. Claimant also reported that there was no history of any allergy such as hay fever or asthma in his family. He also stated he had no history of coughing or wheezing before he began work with this employer. Claimant stated he had smoked cigarettes, but quit six years prior to December 1978. Dr. Reich felt that claimant's asthma was either produced by the exposure or was pre-existent and just exacerbated by the dust exposure and that claimant's work was a causative factor of this condition.

In March 1979, Dr. Don V. Romanaggi reported that claimant had a chronic obstructive lung disease. It was his opinion that claimant's pulmonary functional problems could be related to claimant's past history of smoking, exposure to dust over a four-year period, or due to a recurrent infectious process. Dr. Romanaggi suggested another pulmonary function test be done approximately one-half hour after claimant had been exposed to paper dust. He diagnosed claimant as having recurrent episodes of acute asthmatic bronchitis.

In April 1979, Dr. Goldberg again reported that his diagnosis was an asthmatic condition due to claimant's work environment. He felt claimant was physically unfit to return to his position with his employer and suggested vocational rehabilitation.

On April 18, 1979 the Fund denied claimant's claim for this condition.

In April 1979, an industrial hygienist visited claimant's work site. He found the dust level and the level of formaldehyde were very low. He was advised that the paper being used the day of the sample was not the same as the paper usually used by the employer. The paper usually used, he was told, could sometimes create "dustier" conditions.

Claimant testified that he worked at a bag making machine for approximately three and a half years prior to filing his claim for his condition in late 1978. He stated that he began having breathing progblems in the middle of 1978. Claimant denied any prior problems with breathing until that time. Claimant stated that while at work he developed symptoms which included chest pains, burning sensation in the upper part of the chest and in the back of the shoulder blades area, shortness of breath, dizziness and lack of energy. He testified that while away from work and the dusty environment his condition improved. However, upon his return to his work environment, his symptoms also returned.

The plant manager testified that dust was generated in the process of making the bags. He noted that the dust problem was especially noticeable when the machines were being cleaned.

The Referee stated that neither the claimant nor the insurer had diligently pursued the question of etiology of claimant's condition, but found that claimant had offered sufficient evidence to convince him that claimant's acute condition was occasioned by the conditions of his employment. Therefore, he remanded the claim to the Fund for acceptance and payment of compensation. The Referee did not find it appropriate to award a penalty.

BOARD ON DE NOVO REVIEW

The majority of the Board, after de novo review, reverses the Referee's order. Claimant has the burden of proving that his condition was related to the work environment. In this case, the claimant has not met that burden. Dr. Romanaggi felt that claimant's problem could be due to his history or his past history of smoking, and exposure to dust over a four-year period or due to recurrent infectious processes. He also felt that claimant should undergo additional tests where he was exposed to the paper dust to determine if this was related to changes in his pulmonary function. Dr. Romanaggi did not find a relationship between claimant's work and his condition. Dr. Goldberg, however, does. The majority of the Board finds that the opinion of Dr. Romanaggi is more persuasive in this matter than the opinion of Dr. Goldberg. The majority of the Board finds that it would have been very helpful if claimant had undergone the pulmonary function test to determine the exact cause of his respiratory problems. However, since he has not done this, it is difficult to say what the cause of his respiratory problems are. Therefore, since the claimant has the burden of proving by a preponderance of the evidence his condition is related to his work, the majority of the Board finds that he has not done so. Therefore, the majority of the Board reverses the Referee's order and approves the denial issued by the Fund.

ORDER

The Referee's order, dated June 15, 1979, is reversed.

The denial issued by the State Accident Insurance Fund on April 18, 1979 is approved.

Chairman Wilson dissents as follows:

The issue in this case is the compensability of impairment of pulmonary function. The Referee has found that the record supports compensability and I agree.

The claimant's testimony is unrefuted and establishes that he had no respiratory problems before employment by Western Kraft. At this employment site, he was exposed to dust. Symptoms were especially acute while claimant was at work and when away from the work environment his condition improved. When he returned to work, the symptoms returned and his condition deteriorated. From this uncontroverted evidence, legal causation has been established.

The medical evidence thoroughly establishes the medical causation requirement. Dr. Reich, Dr. Goldberg and other Kaiser physicians have all found pulmonary function changes related to the work environment.

The claimant has established a prima facie case for both legal and medical causation and the evidence preponderates heavily in favor of compensability. If other tests were available to counter this proof, the Fund had the burden of producing such evidence. It has failed to do so.

WCB CASE NO. 79-1944 January 28, 1980

NITA HARRIS, CLAIMANT
Frank J. Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund seeks Board review of the Referee's order which granted the claimant an award of compensation equal to 48° for 15% unscheduled disability for her neck and back injury. The Fund contends this award is not supported by the evidence in this case.

FACTS

Claimant, a 35-year-old secretary and clerk, sustained a compensable injury to her back and neck on December 1, 1975 when while moving a typewriter she slipped and fell. This injury was diagnosed as an acute lumbar disc syndrome with associated neuralgia of the left leg in the back of the knee and other injuries. The claim was at first denied, but then ordered accepted.

Claimant continued to complain of back pain and headaches. Claimant received conservative care.

Dr. J. Rogers diagnosed a chronic lumbosacral strain in March 1977. He felt claimant's condition was not stationary.

In May 1977, Dr. Robert Berselli diagnosed a chronic muscle strain. Claimant complained of tenderness over her neck, thoracic and lumbosacral spine. Dr. Berselli's examination revealed no muscle spasm and a full range of motion with pain at the extremes of motion. He found no motor sensory defects.

Dr. Berselli, in March 1978, indicated claimant's condition was medically stationary as of October 14, 1977. He did not feel claimant had any permanent impairment. He had released claimant for regular work on August 25, 1977.

A Determination Order, dated June 27, 1978, awarded claimant compensation for temporary total disability only.

In October 1978, Dr. Berselli indicated claimant had complained of upper and lower back pain in September 1978. He noted claimant was working as a clerk doing some rather heavy lifting. It was his opinion claimant had a chronic thoracic and lumbosacral spinal strain syndrome and should be retrained for a different type of work.

On October 26, 1978 claimant was notified she was not referred for vocational assistance.

In March 1979, chart notes indicate claimant had complained of dizziness on and off for the last three years. In October 1978 claimant reported severe headaches and gave a history of 3-4 such episodes in the last year. The diagnosis was a migraine variant type headache.

In April 1979, claimant began receiving treatment from Dr. Ralph Hill. Claimant was involved in a motor vehicle accident on May 5, 1979. Dr. Hill indicated claimant would need additional treatment as a result of that injury.

At the hearing claimant testified she graduated from high school and had spent nine months in a business college. Her prior work consists of grocery store work, foundry work, sales-clerking work and some bookkeeping work. Claimant indicated she has severe and disabling headaches which have caused her to miss time from work. She has worked on a full-time basis for her employer from August 29, 1977 through May 5, 1979 and missed no time from work due to back problems.

The Referee, after considering all the evidence, found claimant's headaches were not related to her industrial injury, but that claimant's back and neck pain continued and found claimant was entitled to an award of compensation equal to 48° for 15% unscheduled disability for her neck and back injury of December 1, 1975.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of compensation for unscheduled disability. The evidence in this case indicates claimant may have some permanent impairment. However, the Board finds no evidence of any loss of wage earning capacity. Therefore, the Board reverses the Referee's award of compensation equal to 48° for 15% unscheduled disability for claimant's neck and back injury and reinstates the Determination Order, dated June 27, 1978. The Board agrees with the Referee that claimant's headaches are not related to her industrial injury.

ORDER

The Referee's order, dated August 10, 1978, is reversed.

The Determination Order, dated June 27, 1978, is reinstated.

WCB CASE NO. 79-1289 January 28, 1980

SYLVIA JENKS, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation; ordered a penalty of 5% of the temporary total disability that was due to claimant prior to the issuance of the denial; and granted claimant's attorney the sum of $750. The Fund contends its denial is correct and no penalties or attorney's fees are due. The Fund feels the attorney fee awarded was excessive.

FACTS

At the time of the hearing, the parties entered into the following stipulation. Claimant, a 42-year-old nurse's aide, sustained an injury to her left knee on September 29, 1978 when she tripped and fell while crossing a hospital lot while walking to her car. Claimant filed a claim for this injury on October 16, 1978 and it was denied by the Fund on November 15, 1978. There was no evidence that the Fund paid claimant any temporary total disability within 14 days as it was required to do.

Claimant had left the hospital for her car. She walked to the parking lot where she normally parked her car and fell. She stated when she got to this lot she remembered she had not parked her car there because it had been full when she arrived. She tripped and fell while leaving the lot, injuring her leg.

The lot was owned and controlled by the claimant's employer. It was provided for the benefit of both the employer and the employees.

The Referee found that the coming and going rule applied and that in situations where a parking lot is owned by the employer or maintained by the employer for his employees, Oregon considered it part of the premises whether within the employer's premises or separate from it. Therefore, the Referee concluded claimant had sustained a compensable injury and set aside the Fund's denial and remanded the claim to it for acceptance and payment of compensation. The Referee also awarded claimant's attorney a fee of $750 and assessed a 5% penalty on all temporary total disability compensation due prior to the issuance of the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's finding that this claim was compensable and awarding a 5% penalty. However, the Board finds the attorney's fee awarded was excessive based on facts in this case. The facts were stipulated to and were not complicated. Therefore, the Board finds an attorney's fee of $500 is adequate and reasonable in this matter and would so modify the Referee's order.

ORDER

The Referee's order, dated September 10, 1979, is modified.

That portion of the Referee's order which granted claimant's attorney the sum of $750, as and for a reasonable attorney's fee is modified and claimant's attorney is granted the sum of $500 as and for a reasonable attorney's fee.

The remainder of this Referee's order is affirmed.

WCB CASE NO. 79-534 January 28, 1980

DOYLE LAMBERT, CLAIMANT
David R. Vandenberg, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which granted claimant an award of compensation equal to 22.5° for 15% loss of the left hand/forearm and compensation equal to 16° for 5% unscheduled disability for his neck injury. Claimant contends these awards are inadequate.

FACTS

Claimant, a 43-year-old faller, sustained a compensable injury to his neck and shoulder on December 30, 1976 when a limb of a tree struck him. Dr. Donald Renwick diagnosed a dorsocervical strain. He did not feel claimant would have any permanent impairment from this injury and released claimant for work on January 4, 1977.

Dr. Donald Bernson, in February 1977, opined claimant had spondylosis at C3-4, 4-5, and 5-6. He felt the impact of the falling tree limb on claimant's head and neck made this condition symptomatic. Claimant was complaining of persistent neck ache and stiffness with radiation to the left subscapular area. Claimant also reported intermittent numbness and tingling of the left upper extremity. Dr. Bernson felt claimant could continue to work. On March 8, 1977, Dr. Bernson indicated he restricted claimant to light work and made tentative plans for a myelogram and cervical discography. After a myelogram revealed a defect, Dr. Bernson performed a discectomy and fusion C3-4, 4-5, and 5-6 on March 17, 1977. A pseudoarthrosis developed and was surgically repaired on September 8, 1977. Claimant was released for work on March 8, 1978.

On May 15, 1978 Dr. Bernson indicated claimant returned to work on March 20, 1978 and reported he was getting along fairly well. Claimant was falling trees and indicated his hands and arms occasionally went to sleep on him.

Dr. Bernson, on October 18, 1978, reported claimant had continuously worked since March 20, 1978. Claimant complained of numbness, tingling and a burning sensation in the neck and upper extremities which Dr. Bernson felt was an incomplete or partial thoracic outlet syndrome which might be only indirectly related to claimant's industrial injury. Dr. Bernson found claimant had an excellent range of motion of the neck, about 80% of normal and had grip strength of 210 pounds on the right and 170 pounds on the left. Dr. Bernson felt claimant's permanent partial disability was mild to moderate and felt claimant had no disability related to the thoracic outlet syndrome. He felt the claim could be closed and claimant could return to his original work. Dr. Bernson found no significant sensory deficit or weakness in either upper extremity.

A Determination Order, dated November 17, 1978, awarded claimant compensation for temporary total disability and compensation equal to 5% loss of his left arm, 5% loss of the right arm and 15% unscheduled disability for his neck injury. Both the claimant and the employer appealed this order.

Claimant testified he has returned to work as a timber faller. He says he has a burning pain in his neck and shoulders, running down the arms to the hands, mostly on the left side. He feels he tires faster now than before his injury. Claimant currently uses muscle relaxants and pain pills. Claimant stated that from March through September 1978 he cut fewer trees per day. Claimant's supervisor contradicted this. Since his injury claimant had participated in heavy work off his job. He helped a friend unload feed sacks and carry them 10-15 feet and stack 80-pound hay bales. Claimant also indicated he has cut firewood on several occasions.

The Referee found, after reviewing all the evidence, claimant was entitled to an award of compensation equal to 22.5° for 15% loss of his left hand/forearm and compensation equal to 16° for 5% unscheduled disability for his neck injury. The Referee found claimant had not suffered any loss of use of his right upper extremity; therefore, the Referee made no award for it.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board can find no evidence in this case to support any award of unscheduled disability representing a loss of wage earning capacity. Claimant has returned to his regular job and has been able to do that job. There is no evidence that claimant is unable to do any forms of employment now that he could have done prior to his injury. Claimant does have some permanent impairment, but has not shown that this impairment resulted in any loss of wage earning capacity. Therefore, the Board reverses the Referee's award of unscheduled disability in this case.

The Board finds that the Referee's award for the left hand/forearm should be for the arm. Dr. Bernson indicates claimant has less strength in the left upper extremity than in the right. Claimant testified his left arm is weaker and he is unable to pick up as much weight with it as he can with the right arm. Prior to his injury claimant indicated he could lift equal weights with either arm. Therefore, the Board awards claimant compensation equal to 28.8° for 15% loss of use of his left arm.

The Board finds as the Referee did that claimant is not entitled to any award for loss of function of the right arm.

ORDER

The Referee's order, dated August 15, 1979, is modified.

That portion of the Referee's order which granted him compensation equal to 16° for 5% unscheduled disability for his neck injury is reversed.

That portion of the Referee's order which granted him compensation equal to 22.5° for 15% loss of the left hand/forearm is modified. Claimant is hereby granted an award of compensation equal to 28.8° for 15% loss of his left arm. This is in lieu of any previous awards for the left hand/forearm or left arm.

The remainder of the Referee's award is affirmed.

WCB CASE NO. 78-9250 January 28, 1980

JACK W. MAXVILL, CLAIMANT
Jules Drabkin, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On January 9, 1980, the State Accident Insurance Fund (Fund) moved the Board for an order dismissing claimant's request for review in the above entitled case. The basis of the motion was that claimant had failed to perfect his appeal within the time required by law in that there had been a total failure to serve a copy of his request on the Fund and the employer.

Claimant's attorney responded that the normal practice of serving copies of all important documents to the opposing attorney had been followed in this case. It was argued that the attorney for the Fund received a notice on December 21, 1979 that a request for review had been filed and a transcript had been ordered by the Workers' Compensation Board.

Claimant's request for review of the Referee's order, dated November 20, 1979, was received by the Board on December 18, 1979. The attached affidavit of mailing was signed by an attorney for claimant. It recited that certified copies of the request for review, postage prepaid and addressed to the parties, had been mailed to the then last known place of business or residence as followed without indicating to whom they had been sent. No names or addresses appeared on this affidavit of mailing.

The Board, after thoroughly considering the motion and arguments of the parties, grants the Fund's motion. There is no evidence that the request for review was served on the Fund or the employer as required by law. Therefore, the Board dismisses claimant's request for review.

ORDER

The request for review, dated December 18, 1979, filed by claimant in this matter, is dismissed.

WCB CASE NO. 77-7843 January 28, 1980

STEPHEN H. MOORE, CLAIMANT
Charles G. Duncan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which set aside its denial of claimant's back claim. The Fund contends this was in error.

FACTS

Claimant, a 21-year-old millworker, alleges he sustained an injury to his low back on December 11, 1976 when he got caught in a conveyor belt. Claimant was taken to the hospital and an injury to the low back and head was indicated on the hospital report. Claimant also suffered multiple abrasion, a fractured left wrist and third degree friction burns of the chest and abdomen and a broken tooth. Claimant was released for regular work on January 17, 1977 by Dr. Robert Taylor.

A Determination Order, dated June 7, 1977, awarded claimant compensation for temporary total disability.

On May 1, 1978 Dr. Dwight Freeman indicated claimant noticed low back pain immediately after his injury and again when he returned to light duty. Claimant reported this pain had gradually increased. Claimant indicated he had missed a few days of work in November 1977, because of back pain. Dr. Freeman's examination was normal with slight pain on flexion. He noted that he did not feel claimant's injury would cause any permanent disability. Dr. Freeman opined, accepting claimant's history, ". . . one might have to ascribe the condition to the industrial injury in December, 1976".

Dr. Taylor, in September 1978, indicated the first indication he had of claimant complaining of back pain was on March 31, 1977. He felt there could be a causal relationship between claimant's injury and his back pain. He did not know if claimant had any permanent disability as a result of his injury.

On October 9, 1978 Dr. Donald Stainsby, indicated claimant told him he first noticed low back pain when he returned to work after his injury. Claimant complained of constant low back pain, but was working full time at this time. Claimant indicated using a sledge hammer or repetitive bending activities aggravated his pain. Claimant felt his back would prevent him from doing any heavy work in the future and could cause him difficulty in finding another job. Dr. Stainsby found claimant had a normal range of motion of the lumbar back. Dr. Stainsby found no objective evidence of an injury or impairment of claimant's lumbar spine or cervical spine. He felt based on claimant's subjective complaints, claimant had some permanent partial disability resulting from the December 1976 injury and opined the disability in total for the cervical and lumbar strain would be in the low range of minimal. Claimant indicated he had returned to his regular work on January 17, 1977.

On December 21, 1978 the Fund denied responsibility for claimant's low back condition.

Claimant testified that when he returned to light duty he began to notice low back pain and complained of low back pain. This was corroborated by a co-worker of claimant's and his supervisor. Another co-worker of claimant's testified claimant complained of low back pain while in the hospital and now could not bend over or remain in a bent position as he did before.

The parties stipulated that the Referee could rate claimant's disability.

The Referee, after reviewing all the evidence, found claimant's low back condition was compensable and set aside the Fund's partial denial and remanded the claim to it for payment of compensation and medical benefits. The Referee further found that claimant had not proven any loss of wage earning capacity and affirmed the Determination Order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The doctors in this case all agree claimant's low back condition is related to his industrial injury of December 1976. Claimant and his witnesses all indicate claimant began to experience and complain of low back pain after he returned to work. The Board finds claimant has proven by the preponderance of the evidence his low back condition is related to his industrial injury in December 1976. Therefore, the Board, as did the Referee, would set aside the partial denial issued by the Fund.

The Board further finds as did the Referee that claimant has failed to prove any loss of wage earning capacity. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated August 1, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 78-1697 January 28, 1980
WCB CASE NO. 78-9629

FRED McKINNON, CLAIMANT
Stipulation

This matter coming on regularly for review by Board Members M. Keith Wilson and Robert L. McCallister and the issuance of their Order on Review of December 26, 1979, and inasmuch as the time for appealing to the Court of Appeals for Judicial Review has not expired, the parties hereby stipulate and agree as follows:

1) The Order on Review of December 26, 1979, will stand as written.

2) Claimant foregoes his right for appealing to the Court of Appeals for Judicial Review from the Order on Review of December 26, 1979.

3) Claimant's award of 80% permanent partial disability is to be paid to him in a lump sum, SAIF offsetting the amount previously paid under the Determination Order of February 2, 1978.

The foregoing Stipulation duly coming on for review by the undersigned Board Members of the Worker's Compensation Board,

IT IS HEREBY ORDERED that the foregoing Stipulation be and the same is hereby allowed and the parties shall comply with same within 14 days from the date hereof.

DATED this 28th day of January, 1980.

WCB CASE NO. 78-8449 January 28, 1980

HAROLD MURPHY, CLAIMANT
Leeroy O. Ehlers, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of his claim for a back and neck injury.

FACTS

Claimant, a 57-year-old farm laborer, alleges that he sustained a compensable injury to his back on April 24, 1978 while working with some farm equipment when he was struck from behind by a piece of equipment which caused him to fall forward across the equipment. His lower legs were pinned under a toolbox. Claimant alleges he was dragged in this position for a distance of about 300 feet. Claimant filed a claim for this injury on August 17, 1978.

On July 11, 1978 Dr. Gary Bailey, D.C., reported that he first treated claimant on July 5, 1978. Claimant was complaining of pain in the neck, both arms, between the shoulders, back and both legs. Dr. Bailey diagnosed: " . . . subluxated atlas, 1st dorsal, 5th lumbar vertebra and sacrum". He indicated claimant's condition was the result of an industrial injury or exposure. Claimant advised Dr. Bailey he had been hit by a harrow and had fallen on top of the harrow with the bottom of his leg under the harrow causing an injury to his neck and back.

In June 1978, Dr. Rasmussen reported that he had examined claimant. He did not mention any injury.

On August 29, 1978 the Fund denied claimant's claim for an alleged back injury. The basis of their denial was that there was insufficient evidence that that condition was either caused by or contributed to by the alleged incident of April 24, 1978 while employed by this employer.

On November 15, 1978, Dr. Bailey reported that he had first seen claimant on July 7, 1978 and claimant said his symptoms had been evident for approximately one week. Claimant also stated that he had been experiencing some dizziness for about two weeks. It was Dr. Bailey's opinion that there was no way to determine if the accident referred to was the cause of the condition for which claimant came to his office. He felt the symptoms could possibly be the result of an aggravation of a pre-existing problem. He noted that normally the symptoms of an injury would manifest themselves within a relatively short time after the accident, however, it was possible for the symptoms to appear later on.

On February 27, 1979, Dr. Bailey reported that possibly the injuries for which he was treating claimant were the result of an accident on April 24, 1978 because of the history stated by claimant. Dr. Bailey felt that if claimant experienced symptoms since the related injury, he could only assume that the injuries and symptoms were the result of the accident claimant described. He noted, however, that he would have no way of knowing positively that the injuries were the result of the accident because of the time lapse.

Claimant testified that after the alleged injury he continued to work and did not lose any time from work. He stated, however, that within a few days he had some stiffness in his back. He stated he had a dark discoloration on his right leg right below the knee, where the tool bar allegedly struck him, and a red place on his left leg. He reported that in May of 1978 he started getting a numbness and tingling feeling in his arms and legs.

Mr. Schneider, a co-worker with the claimant, testified that he saw claimant shortly after the alleged incident and observed a bruise on claimant's right leg. He testified that the claimant favored his right leg while walking.

Claimant's wife testified that on the day of the alleged injury she observed the bruise on claimant's leg and that claimant's leg bothered him while walking. She testified that later claimant complained of back pain and the loss of feeling in his arm and leg.

Claimant testified that he had never had any prior back or neck problem. He stated that sometime between June 25 and July 25, 1978 while he was at home he attempted to get up in a chair and something in his back "popped". He first sought medical care on his back, neck and legs on July 5, 1978.

Dr. Kroesing, a chiropractor, testified that in his opinion the fall was very likely the cause of the problem for which the claimant saw a chiropractor for treatment. He further testified it was unusual for a period of three to four weeks to lapse before any degree of pain was felt in the back. Dr. Kroesing testified that the symptoms which were described by claimant normally manifested themselves in a reasonably short period of time and that the period of time existing in this case was not a short period of time. He felt that normally a person would feel pain and discomfort within three to four weeks if not immediately after such an injury.

The Referee, after reviewing all the evidence, found that claimant had not proven by a preponderance of the evidence that he sustained an injury to his back as alleged April 24, 1978. Therefore, the Referee affirmed the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's affirming the Fund's denial. The Board finds that the claimant did sustain an injury on April 24, 1978 to his leg. The Fund is not denying that the claimant injured his leg on that date. However, the Board, after reviewing all the medical evidence and the testimony in this case, finds the preponderance of that evidence is not sufficient to prove that claimant sustained any back injury as a result of the accident which occurred on April 24, 1978. Therefore, the Board concludes the denial of the Fund must be approved.

ORDER

The Referee's order, dated June 8, 1979, is affirmed.

WCB CASE NO. 79-1674 January 28, 1980

ELIZABETH ROCHA, CLAIMANT
Gracey & Roeschlaub, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which awarded claimant compensation equal to 16° for 5% unscheduled disability for her low back injury. Claimant contends this award is not adequate.

FACTS

Claimant, a 32-year-old high school counselor, sustained a compensable injury to her back on June 20, 1978 while lifting heavy boxes from a car trunk. This injury was diagnosed as an acute lumbosacral strain.

Dr. Olwyn Davies, in October and November 1978, indicated claimant was to lose weight and continue to do her back exercises. Claimant complained of back pain which varied with her activities. Housework, or activities involving stooping, lifting, pushing and pulling reportedly caused more pain. Dr. Davies felt that claimant's injury would not prevent her return to work.

In December 1978, Dr. Davies reported claimant felt she could not work as a counselor since this required her to drive which increased her back pain. He stated when claimant did her housework she reported an increase in back pain and had to lay down every two hours to relieve it. Dr. Davies stated claimant did not show much in the way of objective findings.

On December 18, 1978, the Orthopaedic Consultants reported claimant complained of a mild intermittent low back pain which was absent if she controlled her activities. Claimant stated her pain was aggravated by prolonged walking, prolonged sitting, bending or lifting and also to some extent by driving. They diagnosed chronic lumbosacral sprain, by history, and exogenous obesity. It was their opinion that claimant's condition was medically stationary and that the loss of function to claimant's back was in the minimal range and claimant could return to her job without limitations. Dr. Davies concurred with this report.

A Determination Order, dated January 31, 1979, awarded claimant compensation for temporary total disability only.

At the hearing, claimant testified she had worked in a variety of farm labor jobs and has obtained a B.A. degree and studied bilingual education and childhood development. She stated she had worked since 1971 as a counselor during the school year and in canneries in the summer. Claimant said she worked after her injury until the end of the summer session on July 21, 1978 and has not returned to her regular job. Claimant indicated certain activities such as prolonged standing, walking, sitting, driving, lifting and bending aggravate her low back pain. She said she has not tried to return to her former job and has applied for two other jobs. She told one employer she could not do the job because it required extensive driving. In the summer of 1979 claimant tried berry picking, but could not do it as quickly as she could before her injury. She feels she could not do any cannery or farm labor jobs she has done in the past. A friend of claimant's corroborated claimant's testimony.

The Referee found claimant did not have a significant physical impairment as the result of her injury. The Referee felt, based on the Orthopaedic Consultants' use of the term "minimal" to describe claimant's loss of function, it indicated a small degree of impairment. Based upon the evidence in this case, the Referee concluded claimant sustained no more than 5% permanent partial disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award. This case involves an injury to the low back which is in the area of unscheduled disability. The test in determining the amount of unscheduled disability is the loss of wage earning capacity. Impairment is one element that can be considered in determining the loss of wage earning capacity. However, in this case, there is no evidence that claimant has sustained any loss of wage earning capacity. Therefore, the Board concludes claimant does not have any loss of wage earning capacity related to her injury of June 22, 1978 and is not entitled to any award of compensation for unscheduled disability for it. The Board reverses the Referee's award for unscheduled disability.

ORDER

The Referee's order, dated August 24, 1979, is reversed.

The Determination Order, dated January 31, 1979, is reinstated.

WCB CASE NO. 78-9694 January 28, 1980

MARTHA G. YORK, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which found claimant was permanently and totally disabled. The employer contends claimant has not suffered any loss of wage earning capacity.

FACTS

Claimant, a 67-year-old administrative assistant, filed a claim on March 11, 1977 for cardiovascular problems due to the stress and strain of her work. Claimant had been employed with this employer since 1965.

In March 1977, Dr. Herbert Semler reported claimant was unable to work. He found claimant had shown progressive reduction in her cardiovascular function associated with the stress she was experiencing in her work. In August 1977 Dr. Semler reported he had been treating claimant for ten years for a hypertensive cardiovascular disease. He reported claimant had a progressive reduction in her cardiovascular function which was associated with the stress that claimant was experiencing in her daily work activities. Claimant was having recurring chest pains. Dr. Semler opined claimant was not physically able to continue to work and was totally disabled from carrying out any gainful employment. In September 1977, he reported "claimant's occupation could have materially contributed to her present disability".

Claimant was hospitalized in December 1977. Dr. Semler diagnosed angina pectoris, ischemic heart disease, and hypertensive cardiovascular disease. After angiograms, he performed by-pass surgery on claimant.

On February 23, 1978 Dr. Semler opined claimant was permanently and totally disabled due to her coronary heart disease. He noted she was doing fairly well in her post-operative course. Dr. Semler in March 1978, opined claimant's permanent disability was due in part to her job activities.

In May 1978, Dr. Rodney Crislip, a cardiologist, reported claimant had no angina, no dyspnea on exertion, but did get tired with exertion. He reported claimant had worked for this employer for 12 years and had had six bosses and been under a great deal of pressure. Dr. Crislip did not think claimant was having any symptoms related to her heart. He found no evidence of permanent impairment of her cardiac function. It was noted by Dr. Crislip, however, that the nature of coronary disease was such that she could have further impairment at any time.

A Determination Order, dated October 31, 1978, awarded claimant compensation for temporary total disability only.

In December 1978 Dr. Crislip reported: "I don't feel that Mrs. York's cardiac status requires a permanent loss of wage earning capacity. I see nothing about her heart that would prevent her from returning to work as a secretary". He did not feel claimant could return to her former job due to the tension of it. Dr. Crislip felt the emotional impact of the operation and illness on claimant had been considerably greater than in many other people.

Claimant testified she has an 11th grade education and had worked for 20 some years as a cashier and also worked as an office manager for a political campaign office. Claimant's duties with this employer were answering the telephone, opening mail, coordinating with a manager in Seattle, banking money, arranging meetings and banquets to raise money. In 1971 she had found out she had high blood pressure and started seeing Dr. Semler.

She testified that in 1972 more pressure was placed on her at work. She stated that there was a high turnover of managers in the Seattle office and during the absence of a manager, claimant performed that job.

Claimant further testified she had planned to work until she was 70. She stated she now is on Social Security. She feels she is more relaxed now and has no limitation on the amount of sitting she can do. She is able to travel without difficulty.

Dr. Semler testified claimant's work aggravated her high blood pressure and he felt she was unemployable. He stated salt, hardening of claimant's arteries and also her hiatal hernia contributed to her high blood pressure. He described claimant as a hyperactive person and felt she could do sedentary work, but he didn't want her to work. Dr. Semler concurred with Dr. Crislip's conclusion that claimant did not suffer any permanent impairment of her cardiac function.

Claimant testified she has not looked for any other work.

The Referee, after reviewing all of the evidence, found claimant could not be employed. Therefore, he granted her an award of compensation of permanent total disability.

BOARD ON DE NOVO REVIEW

The majority of the Board, after de novo review, reverses the Referee's award of permanent and total disability. It is obvious claimant can not return to her former job. However, it is also obvious that claimant's medical condition is not such that it makes her permanently and totally disabled. There is no evidence claimant has any permanent impairment of her cardiac function. Based on the fact claimant is not totally incapacitated, the majority of the Board must determine if claimant is willing to seek regular gainful employment and if she has made a reasonable effort to obtain such employment.

Drs. Semler and Crislip both agree claimant could perform a sedentary job which did not involve stress. Claimant, however, has not sought any employment. The majority of the Board finds claimant has not shown she is willing to seek regular gainful employment and she has not made a reasonable effort to do so. Therefore, the majority of the Board finds claimant is not permanently and totally disabled. However, the majority of the Board does find that claimant has lost a large portion of her wage earning capacity. The majority of the Board concludes that claimant is entitled to an award of compensation equal to 240° for 75% unscheduled disability for her condition.

ORDER

The Referee's order, dated May 15, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 240° for 75% unscheduled disability for her cardiac and hypertension condition. This award is in lieu of the award for unscheduled disability granted by the Referee's order which, in all other respects, is affirmed.

CLAIM NO. HC 391506 January 30, 1980

MELVIN R. DECKER, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant had filed an aggravation claim for his injury of July 7, 1972 which was denied by the State Accident Insurance Fund (Fund) and claimant requested a hearing on this denial on May 6, 1976. Subsequently, a stipulation, dated July 15, 1976, was entered into and provided claimant with additional compensation. Then, on December 14, 1978, claimant requested that this stipulation be set aside and requested a hearing on the aggravation claim. Claimant's aggravation period lapsed and claimant filed an amended request for a hearing. On May 30, 1979, claimant requested the Board consider this matter under its own motion jurisdiction.

On June 18, 1979, the Board remanded this matter to the Hearings Division to be consolidated with the request for hearing.

A hearing was held on November 26, 1979 and the Referee issued an Own Motion Recommendation and Opinion and Order on December 20, 1979. The Referee recommended the Board not exercise its Own Motion jurisdiction in this case.

The Board concurs with the Referee's recommendation and would adopt it. A copy of the Referee's order is attached to this order and hereby made a part of this order.

ORDER

Claimant's request for own motion relief is denied.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal.

WCB CASE NO. 78-5507 January 30, 1980

ROBERT E. HICKMAN, CLAIMANT
Gracey & Roeschlaub, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which awarded claimant additional compensation equal to 32° for 10% unscheduled disability. Claimant contends this award is not adequate.

FACTS

Claimant, a 37-year-old log truck driver, sustained a compensable injury to his neck on October 27, 1976 when a loader dropped a log onto the cab of the truck he was driving causing claimant to be tossed upwards. This injury was diagnosed as a sprain of the cervical spine. Claimant was released for work by Dr. Mark Melgard after the 1st of January 1977.

A Determination Order, dated May 4, 1977, awarded claimant compensation for temporary total disability only.

On November 10, 1977 Dr. V. E. Pettit requested the claim be reopened. This was " . . . based on severity of injury and type of work and necessity for relief from pain".

On November 22, 1977 Dr. Pettit indicated claimant was having severe headaches. He released claimant for light work on August 19, 1978.

The Fund voluntarily reopened this claim on November 28, 1977.

Dr. Melgard, on November 29, 1977, stated claimant reported he had continued to be troubled with headaches which either increased in frequency or in the amount of pain since December 1976. Claimant indicated they lasted 5-6 hours and usually longer. Dr. Melgard diagnosed chronic cervical tension headaches and hospitalized claimant.

Dr. Harold Paxton, in January 1978, diagnosed claimant as having vascular headaches. He felt they were triggered by tension and were not related to claimant's neck injury.

Dr. Melgard, in March 1978, reported claimant was returning to work. He felt claimant would just have to "wear" out his headaches.

In April 1978 Dr. Pettit indicated claimant was unable to return to truck driving. He suggested vocational rehabilitation to allow claimant to renew his crop duster pilot's license.

On June 1, 1978 Dr. Robert Anderson, reported claimant's condition was stationary. He diagnosed strain of the cervical spine by history and tension headaches. Dr. Anderson felt it was not adviseable for claimant to return to log truck driving. He rated the total loss of function of the neck due to this injury as mild. Dr. Pettit concurred with Dr. Anderson.

A Determination Order, dated July 5, 1978, awarded claimant additional compensation for temporary total disability and compensation equal to 16° for 5% unscheduled disability for his neck injury.

Claimant tried to drive a log truck in March and April 1978 but the jarring and constant head turning aggravated his neck pain and caused headaches. In August 1978 he began work in an automotive shop, but quit at the end of November 1978 because of increasing neck pain and headaches. Claimant reported his left hand shook when he had severe headaches.

Dr. Melgard, in January 1979, indicated he had found no major deterioration or worsening of claimant's condition.

On February 1, 1979 the Fund denied claimant's aggravation claim.

In July 1979 Dr. Mark Kunert indicated claimant continued to have severe headaches. He diagnosed chronic cervical strain and headaches resulting out of musculo-ligamentous strain. Dr. Kunert felt claimant's condition was medically stationary, but he believed claimant should not do work such as a truck driver or machine shop work. He felt claimant could perform lighter types of work.

Claimant is a high school graduate and graduated from jet mechanics school in the service. He has worked as a truck driver and machinist.

At the hearing, claimant testified he has headaches which begin as constant pain at the base of the skull on the right and extend to the temples. These occur every 3-4 days and last up to 1-1/2 days. He indicates that sitting aggravates them and that lying down relieves them. Claimant feels he cannot return to truck driver, heavy bench work, or crop dusting.

Claimant has applied for a job as a dispatcher. He also attended a job seekers workshop and indicated he would like to work as a dispatcher, foreman for a sod company or a bartender. Claimant stated he didn't really want to work for a sod company and has not looked for a job as a bartender. The workshop report indicates claimant was not highly motivated to look for work.

The Referee concluded, based on claimant's disability, trainability, age, education, and his questionable motivation, claimant was entitled to an increased award of compensation for his loss of wage earning capacity and awarded claimant additional compensation equal to 32° for 10%.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's award. Claimant is barred from his former types of employment and all types of heavy work. Claimant's headaches are severe and disabling when claimant has them. The Board finds that claimant has sustained a greater loss of wage earning capacity than that for which he has been compensated. Therefore, the Board concludes claimant is entitled to an award of compensation equal to 80° for 25% unscheduled disability for his neck disability.

ORDER

The Referee's order, dated July 30, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his neck injury. This is in lieu of all previous awards granted for unscheduled disability for claimant's October 27, 1976 injury.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-7498-E January 30, 1980

HERBERT IREY, CLAIMANT
Pozzi, Wilson, Atchinson, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which found claimant was still permanently and totally disabled.

FACTS

Claimant, a 59-year-old carpenter foreman, sustained a compensable injury to his low back on February 3, 1975 while lifting doors. This injury was diagnosed as a lumbosacral strain.

This claim was initially closed by a Determination Order, dated August 7, 1975, which awarded claimant compensation for temporary total disability only.

In December 1975 Dr. F. M. Wade opined claimant had marked degenerative arthritis throughout his lumbar spine and was permanently disabled from the type of work he had done in the past.

A Second Determination Order, dated May 7, 1976, granted claimant an award of compensation for unscheduled permanent total disability effective April 28, 1976. This award was not appealed.

In May 1977 Dr. Robert Done stated claimant was still permanently disabled.

The Orthopaedic Consultants examined claimant in September 1976 and November 1977. They concluded claimant was stationary and capable of light sedentary work. It was their opinion claimant's total loss of function in his back was moderate and due to his February 1975 injury only mildly moderate.

On May 5, 1978 Dr. Done reported he essentially concurred with the report of the Orthopaedic Consultants. He stated he did not feel claimant would ever be able to do hard physical labor.

On September 20, 1978 the employer requested a hearing. The employer contended claimant was not permanently and totally disabled.

On October 26, 1978 Dr. Done again indicated claimant was permanently disabled. He opined claimant was probably worse now than he had been in May of 1976. Dr. Done stated claimant indicated the pain was getting worse. Dr. Done felt the condition was probably going to get slowly, but progressively, worse.

An Administrative Order, dated April 5, 1979, recited claimant's disablity had been redetermined, but no change in it had been found. Therefore, it ordered the Determination Order of May 7, 1976 remain unchanged. On April 10, 1979 the employer requested a hearing on this order and asked it be joined with the hearing set on its first request.

The employer, at the hearing, introduced films showing claimant and a friend roofing a house. Claimant was called as an adverse witness by the employer. The films were introduced to impeach claimant's testimony. Claimant testified he spent three weeks roofing a small house. He said a friend helped him and they took frequent breaks. The films show claimant and another man working on the roof of the house. In addition, claimant indicated he had put up studding and siding and interior paneling, done some rewiring, put together 14 plywood doors and continued to do maintenance work on his house and barn. The employer contends all this activity revealed that there had been a material change in claimant's physical condition which related to his earning capacity.

The Referee found the first request for hearing was untimely and subject to dismissal. However, the Referee found after the redetermination had been done and the Second Determination Order issued, he had jurisdiction to decide if there had been a material change in claimant's physical condition which related to his earning capacity. The Referee, after reviewing all of the evidence, found the employer's insurer had failed to carry its burden of proof of showing a material change in one of the mental or physical factors relating to claimant's earning capacity since the last award of compensation and the permanent total disability status of claimant would remain.

BOARD ON DE NOVO REVIEW

The majority of the Board, after de novo review, concurs with the Referee's conclusion. The real issue before the Referee and the Board was whether there had been a material change, since claimant's last award, in one of the physical or mental factors that relate to claimant's earning capacity. As set forth in Bentley v. SAIF, 38 Or App 473, _____ P2d _____ (1978), the thrust of ORS 656.325(3) is that a worker's compensation should be reduced in the event his disability has been reduced. No reduction in the award is allowed unless there has been a decrease in disability. The statute does not provide an additional appeal right from the original order. The medical evidence in this case indicates that claimant's condition has not changed. The employer or carrier seeking to have the award reduced has the burden or proving the material change. The majority of the Board in this case finds no proof of any change in claimant's condition that relates to his earning capacity. The films offered by the employer do not establish its contention. Therefore, the majority of the Board would affirm the Referee's order.

ORDER

The Referee's order, dated August 7, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $400, payable by the carrier.

Board Member McCallister dissents as follows:

I respectfully dissent from the majority opinion.

I find the employer has proved by "other evidence" that the claimant is not now permanently and totally disabled. [See Bentley v. SAIF, 38 Or App 573,590, P2d 746 (1978)]. The other evidence demonstrates an ability to work at a gainful and suitable occupation were claimant but to try.

The medical evidence establishes the fact that claimant has physical impairment; that fact, coupled with other evidence was the basis upon which the original and subsequent disability determinations were made. The statute, though, contemplates an ongoing obligation by the claimant to reduce the disability affects of the physical impairment. In this case, the claimant's testimony and the surveillance films demonstrate the claimant has met his obligation. He has reduced the disabling affects of the medically established physical impairment. The argument here has little to do with the concept of res judicata; the fact is, the statutory intent is that a finding of permanent total disability does not "fix" the claimant's status for all time. In this case the employer argues the evidence proves the claimant's "disability" status has changed. If the proof (the other evidence) shows only that the claimant has made an adjustment to the physical impairment so as to reduce its disabling affects, then that is enough; so long as the reduction in disability can be said to result in the restoration of work capacity as contemplated under ORS 656.206.

I would reverse the Referee and remand the case to the Field Services Division with instructions to provide job placement assistance. I would rate claimant's loss of wage earning capacity at 75% unscheduled disability.

WCB CASE NO. 78-5164 January 30, 1980

ORVILLE H. MARR, CLAIMANT
Richard L. Gassman, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which granted him additional compensation equal to 80° for 25% unscheduled disability for his head, neck, shoulders and low back injury. Claimant contends he is permanently and totally disabled.

FACTS

Claimant, a 55-year-old cat/truck driver, sustained compensable injuries on June 30, 1976 when the truck he was driving went over the edge of the road. Dr. Patrick Golden indicated claimant had multiple trauma to his head, neck, torso and upper extremities. X-rays revealed a fracture of the left transverse process of L4 and a hairline fracture of the 12th rib. Claimant returned to work on July 26, 1976.

In October 1976, Dr. Golden stated claimant had hypalgesia in the distribution of left supraorbital nerve. He diagnosed a cervical spine strain with possible disc herniation. A myelogram revealed a small defect at C5-6 which was diagnosed as a herniated disc. Dr. Golden performed a cervical laminectomy on claimant on October 14, 1976.

Dr. C. E. Baker, in December 1976, reported claimant stated his symptoms were the same before his surgery as they were after his surgery. Claimant complained of stiffness at the back of the neck and upper shoulders, inability to turn his head and neck, constant dull occipital headaches, midlumbar back pain, and aching discomfort radiating from the left upper trapezius to the left shoulder and left arm. He felt claimant had some residual shoulder and left upper extremity discomfort as the result of his injury, but that claimant magnified them.

Claimant advised the vocational rehabilitation personnel he had an eighth grade education. He gave his prior work experience as a cat skinner, crane operator, policeman, Bos'n Mate and stevedore.

Dr. James Mason, medical examiner for the Disability Prevention Center, reported he felt claimant had only mild physical disability and was "largely a psychological casualty". He felt claimant should not return to truck driving for psychological reasons. Claimant was administratively discharged from the center because his behavior was disruptive and it was felt he was not benefiting from their program.

Claimant continued in his failure to cooperate with Dr. Golden or the personnel at the Disability Prevention Center. Claimant was referred for vocational assistance in August 1977 and this referral was withdrawn on October 6, 1977.

On August 29, 1977 Dr. Golden indicated claimant's neurologic functions were entirely within normal limits.

The Orthopaedic Consultants, in October 1977, indicated claimant told them he had no plans to return to work at his previous occupation or any other occupation. Claimant felt his condition was gradually worsening. The diagnosis was: multiple facial and scalp lacerations, concussion, left mastoid temporal fracture, anterior fracture C6, hairline fracture, left 12th rib and fracture of the transverse process L4. They felt claimant's condition was stationary and claimant could not return to the same occupation, with or without limitations, but could return to some other occupation. They felt the total loss of function of the lumbar spine due to this injury was minimal and the total loss of function of the head and cervical spine due to this injury was moderately severe. Dr. Golden concurred with the report.

A Determination Order, dated December 6, 1977, granted claimant an award of compensation for temporary total disability and an award of compensation equal to 160° for 50% unscheduled disability for his neck, shoulders, low back and head injury.

In February 1978, Dr. Hockey indicated claimant stated his pain was worse and when he moved his left arm he had pain across the shoulder and in the neck. Dr. Hockey felt that during his examination claimant voluntarily tensed his neck muscles and felt claimant's condition was unchanged.

At the hearing claimant testified he had numbness in the top of his head, worsened eyesight, ringing in his ears, a stiff neck, and pain in his shoulders, left arm, low back and left leg. Claimant has not worked since September 30, 1976 and has made no effort to become employed. Claimant feels he is unable to do any of the jobs that he knows.

The Referee gave little weight to claimant's testimony. The Referee found claimant was not permanently and totally disabled. The Referee noted claimant had made no effort to obtain employment as required by ORS 656.206(3). Further, the Referee found no evidence to support an award of permanent partial disability to either claimant's left arm or left leg, as well as his eyesight or hearing disability. However, based on the evidence, the Referee found claimant was entitled to an additional award of compensation equal to 80° for 25% unscheduled disability for his injuries based on claimant's loss of wage earning capacity.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee that claimant is not permanently and totally disabled. However, claimant is barred from returning to his former job or similar jobs and considering this along with claimant's age, education, work background, and other factors, the Board concludes claimant has sustained a loss of wage earning capacity which would entitle him to an award of compensation equal to 192° for 60% unscheduled disability for his injuries to his neck, shoulders, low back and head. This is in lieu of any previous awards. The Board agrees with the Referee's finding that claimant had no permanent partial disability to his left arm, left leg, eyesight or hearing due to his industrial injury.

ORDER

The Referee's order, dated March 5, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 192° for 60% unscheduled disability for his neck, shoulders, low back and head injuries. This is in lieu of any previous awards for unscheduled disability for his June 30, 1976 injury.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

CLAIM NO. C 357427 January 30, 1980

DONALD A. MEYERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 29, 1979 claimant requested his claim for his March 1, 1972 back injury be reopened. Claimant delivered to the Board copies of medical reports from Dr. Nealy and Dr. Buza. Claimant's aggravation rights have expired.

On October 10, 1979, Dr. Buza indicated claimant stated he had pain in his left leg for two months. The diagnosis was L5 radiculopathy on the left. After a myelogram revealed a large defect at L4-5, Dr. Buza performed a laminectomy at L4-5 level, foraminotomies bilaterally, with removal of the cicatrix and midline disc protusion, L4-5. Dr. Buza felt this condition was a "reoccurance" of his 1972 injury. He noted this incident occurred while claimant was changing a light bulb in his trailer.

In November 1979, Dr. Nealy reported he believed claimant's condition was an exacerbation of his old injury.

On December 27, 1979, the Board forwarded this information to the Fund and requested it advise the Board of its position relative to claimant's request.

The Fund, on January 16, 1980, indicated it opposed the reopening of claimant's claim. This was based on Dr. Buza's report of October 10, 1979 which mentioned a "new injury" while changing light bulbs. Further, the Fund indicated the original complaints were of low back and right leg pain and in 1979 were of low back and left leg pain. It indicated no medical bill from the original claim closure until August 1979 had been submitted to it.

The Board, after thoroughly reviewing the facts in this case, finds it would be in the best interest of the parties if the Board remanded this case to the Hearings Division for

a hearing on the issue of whether claimant's current condition and his surgery of December 1979 are related to his original injury and represents a worsening thereof since his last award and arrangement of compensation or to a new injury.

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 on claimant's request for own motion relief.

WCB CASE NO. 78-5720 January 30, 1980

EUGENE F. MILLER, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which found claimant to be permanently and totally disabled.

FACTS

Claimant, a 50-year-old house mover, suffered a back and left knee injury on November 12, 1974 when a jack fell striking claimant's left knee causing him to fall onto a steel beam. Dr. Schultheis diagnosed acute post traumatic cervical, dorsal, and lumbar strain with persistent cervical myositis. He felt claimant would suffer no permanent disability due to his injury.

On May 27, 1975 the Orthopaedic Consultants indicated claimant had a laminectomy in 1963, but had returned to work. After the injury of November 12, 1974, claimant complained of constant low back pain. He indicated any lifting increased his pain. He also stated he had left leg pain, neck pain, a little pain in the mid dorsal area and occasional discomfort in the left knee. They concluded claimant was not stationary and could not return to his former occupation.

A Determination Order, dated August 18, 1975, awarded claimant compensation for temporary total disability.

Claimant was hospitalized in October 1975 because of increasing low back and sacroiliac pain. Dr. Heusch indicated the prognosis of the low back was rather poor and claimant would probably continue to have periodic pain and stiffness, secondary to fibrotic and arthritic changes that had developed.

On December 3, 1975 the Orthopaedic Consultants found claimant's condition stationary. They felt claimant could not return to his usual job, but could do some other type of work not requiring lifting, bending, or straining. They felt the total loss of function of the neck was minimal and of the back was mild. Their diagnosis was: status post-laminectomy, lower lumbar area with good results, chronic recurrent lumbosacral strain, chronic minimal upper dorsal and lower cervical strain essentially resolved, hypertension and hypochondriacal neurosis. Dr. Julia Perkins, a psychologist, diagnosed the later condition. Dr. Perkins felt claimant's injury, as far as emotional factors were concerned, was very significant and prevented claimant from functioning normally in a number of areas. It was Dr. Perkins' opinion the psychopathology was due to chronic personality characteristics, also previous back injuries and mildly influenced by his current injury.

On October 22, 1976 a vocational rehabilitation counselor reported he did not feel claimant could benefit from their services due to his back problem and a heart condition which required surgery.

After a hearing, an Opinion and Order, dated March 31, 1977, remanded claimant's aggravation claim to the Fund. Claimant testified at that hearing that on September 16, 1975, while descending a stairway he had a sudden severe onset of low back and left leg pain which caused him to fall. Claimant underwent back surgery in March 1976 which Dr. Tahir related to claimant's original injury. This order was affirmed by the Board on November 18, 1977 and no further appeal was taken.

On November 29, 1977 Dr. Theodore Pasquesi reported claimant had had a heart attack and in March 1977 had open heart surgery. Claimant also indicated that in July 1977 he had a cervical fusion. Claimant complained of constant low back pain, left leg pain, his leg sometimes gave way, and neck and left arm pain which had been improved by the cervical fusion. Claimant indicated he had retired from former employment with a fire department because of high blood pressure. Dr. Pasquesi felt claimant's condition was stationary and claimant would have to work at a job which was predominantly sedentary, not requiring repetitive bending, stooping and twisting. He felt the total impairment claimant had was 37% of the whole man.

On March 31, 1978 Dr. David Rollins, a vocational rehabilitation cousultant, felt claimant had a number of occupational capabilities but could not visualize himself applying them to the current day work world. He found claimant had a limited education and had been employed as an aerial photographer, postal worker, fireman and policeman, welder and general construction worker. Dr. Rollins indicated claimant was a pessimist, dejected and discouraged as far as his vocational future was concerned.

A Determination Order, dated June 22, 1978, granted claimant additional compensation for temporary total disability and compensation equal to 160° for 50% unscheduled disability resulting from his back and neck injury.

On February 15, 1979 Dr. C. Hill indicated claimant had no real problem with his heart, but still had a good deal of arthritis in his back and back pain. He felt claimant would be unable to return to any sort of active employment because of his medical situation.

Dr. Aftab Ahmad, in March 1979, felt claimant could start doing some kind of work.

Ms. Kathleen Germain, a rehabilitation consultant, in June 1979, reported claimant had an average level of intellectual ability. Claimant indicated he had the following limitation, which Dr. Hill concurred with: walk up to 20 minutes only, standing up to 15 minutes at one time, sitting 1/2 hour at a time and no lifting. Dr. Ahmad limited claimant to lifting 15-20 pounds and no excess stress. Ms. Germain indicated claimant had worked for himself as a house mover. She felt, after surveying various possible employers, that there were no positions available in keeping with claimant's limitations.

At the hearing, claimant testified he has not worked since 1974 and has only 2-3 years of high school education. Claimant feels he could not do any of his prior jobs. He draws a disability pension from the Veteran's Administration, the fire department and from Social Security. Claimant indicated he has constant back pain increased by lifting and bending. He stated he does not have any neck pain, but his arms and hands go to sleep and his neck is painful if he lifts. His left leg aches and occasionally gives way. Claimant said he can walk for 15-20 minutes, drive an automobile if he can shift around for 30 minutes, stand still 2-3 minutes, carry light grocery bags and mow his yard if he takes his time with a riding lawn mower. Claimant has applied for employment with three different employers.

The Referee, after reviewing all the evidence, concluded claimant was permanently and totally disabled. The Referee did not consider claimant's heart condition in arriving at this finding.

BOARD ON DE NOVO REVIEW

The majority of the Board, after de novo review, concurs with the Referee's finding that claimant is permanently and totally disabled. Dr. Hill reported claimant did not have any problem with his heart and felt claimant could not return to any sort of active employment because of his medical situation. Claimant obviously cannot return to any of his previous forms of employment. The consensus of the vocational consultants is that claimant is not employable because there are no jobs available that are within his limitations. The majority of the Board finds claimant's medical condition as related to his injury coupled with his attempts to return to work, his cooperation with the vocational consultants, establishes that claimant cannot regularly perform work at a gainful and suitable occupation which he has the ability and the training or experience to perform. Claimant has shown he is willing to seek regular gainful employment and he has made reasonable efforts to obtain such employment. Therefore, the majority of the Board finds claimant has met his burden of proof he is permanently and totally disabled.

ORDER

The Referee's order, dated July 9, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

Board Member McCallister dissents as follows:

I respectfully dissent from the majority opinion of the Board and find claimant has not carried his burden of proving he is entitled to an award of permanent total disability.

I find claimant has not satisfied the requirements of ORS 656.203(3) and has not shown a willingness to seek regular and gainful employment, nor has he made a reasonable effort to obtain such employment.

I further find that the medical evidence indicates claimant is physically capable of sedentary employment. The vocational rehabilitation reports reveal he has a number of excellent aptitudes, skills and work experience draw from and that their program was quite willing to assist him if he were motivated to help himself. However, claimant has retired himself permanently from the labor market and for these reasons, has not satisfied the requirements of the statute.

I feel claimant would be adequately compensated for his loss of wage earning capacity by an award of 75% unscheduled disability.

WCB CASE NO. 79-504 January 30, 1980

KAREN SUE MORGAN, CLAIMANT
Olson, Hittle, Gardner
& Evans, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed a Determination Order, dated September 8, 1979, which awarded claimant no additional permanent partial disability for her right knee. Claimant contends she has more disability than that for which she has been compensated.

FACTS

Claimant, a 31-year-old dry cleaner employee, sustained a compensable injury to her right knee on June 6, 1971 when she tripped on wire mesh on the floor and fell on her right knee twisting it. This injury was diagnosed as a sprained right knee. Claimant was released for regular work on June 12, 1979 and found medically stationary on June 10, 1971.

The right knee continued to bother claimant. Dr. F. Fitch performed an arthrotomy on the right knee and an excision of the medial meniscus on August 19, 1971. He released claimant for regular work on October 4, 1971.

On December 17, 1971 Dr. Fitch indicated claimant had fallen on December 8, 1971 because her right knee gave out. The diagnosis was a strain of the medial ligament of the right knee. Dr. Fitch felt claimant was permanently disabled and would be so for 5-6 weeks. He related this condition to the original injury.

On February 3, 1972, claimant underwent an arthrotomy of the right knee and had the lateral meniscus removed and the patella debrided. Dr. Fitch released claimant for regular work on April 5, 1972.

On August 2, 1972, Dr. Fitch reported claimant's condition was medically stationary. He felt she had some permanent partial disability in her knee joint because of moderate instability of the knee.

A Determination Order, dated August 16, 1972, awarded claimant compensation for temporary total disability and compensation equal to 45° for 30% loss of the right leg. This was appealed and after a hearing claimant was granted compensation equal to 65° for loss of the right leg in lieu of the award granted by the Determination Order.

On April 4, 1975, Dr. Grant Lawton stated claimant reported continuing giving way of the knee. He felt claimant had chondromalacia of the patella and early patella-femoral arthritis.

In August 1977 Dr. Lawton indicated claimant continued to have difficulty with the knee in the form of pain, swelling, and catching. He felt she had post-traumatic and degenerative arthritic changes in the knee.

On September 19, 1977 claimant underwent an arthrotomy of the right knee with exploration, lateral retinacular release and a pes anserinus transfer.

Dr. Lawton, on October 7, 1977, opined claimant's condition was due to a gradual worsening of her original injury.

Claimant returned to work in early 1978. She was doing sewing.

On March 28, 1978 Dr. Lawton found claimant had a full range of motion of the knee with mild tenderness along the medial joint line and a very slight valgus instability. He felt her condition was medically stationary. Dr. Lawton noted claimant had arthritis involving the patello-femoral and medial knee joint which would possibly progress and continue to cause relatively mild symptoms and which would prevent claimant from doing any strenuous activity. In May 1978 Dr. Lawton reported claimant's knee had given out and he again stated he didn't think claimant " . . . because of her arthritic changes would be able to tolerate any work which requires prolonged standing or lifting".

An Own Motion Order, dated July 14, 1978, awarded claimant compensation for temporary total disability only, however, this order was rescinded on August 11, 1978 and the claim referred to the Evaluation Division of the Workers' Compensation Department.

In September and December 1978, Dr. Lawton stated claimant was stationary. He released claimant for light work if available in September 1978.

A Determination Order, dated September 8, 1978, awarded claimant additional compensation for temporary total disability from September 17, 1977 through January 29, 1978 and temporary partial disability from January 30, 1978 through February 28, 1978.

On January 12, 1979 the Board issued an Own Motion Determination granting compensation for temporary total disability from May 10, 1978 through August 25, 1978.

At the hearing, claimant testified she still has swelling in the knee, can stand only for short periods of time, has pain and a burning sensation in the knee and limited movement of the right leg. She stated her knee gives way more now than prior to her surgery with the catching and locking worsening. She indicated she cannot squat, kneel or do her household chores. At the time of the hearing, claimant was employed in the laundromat performing light jobs. She feels she could not return to dry-cleaning because it required her to be on her feet for prolonged periods of time.

The Referee, after considering all the evidence, found it was insufficient to establish that claimant had suffered a greater permanent partial disability and affirmed the Determination Order dated September 8, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's conclusion. The medical evidence indicates claimant has developed arthritis in her right knee, but does not indicate this has resulted in any increased loss of function. Therefore, the Board would affirm the Referee's order.

ORDER

The Referee's order, dated August 28, 1979, is affirmed.

WCB CASE NO. 78-6925 January 30, 1980

VITTORIO PANCIARELLI, CLAIMANT
Galton, Popick & Scott,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which granted him additional compensation for unscheduled disability. Claimant contends he is permanently and totally disabled.

The employer contends the issue of extent of claimant's disability was not properly before the Workers' Compensation Board and if it was the award granted by the Referee was excessive.

FACTS

Claimant, a 48-year-old foreman with this employer, sustained a compensable injury to his back on November 30, 1973 while moving a drum filled with iron parts. This injury was diagnosed as low back strain.

Dr. G. P. Adlhoch, in April 1974, opined claimant was probably permanently disabled and unable to return to any heavy or strenuous work.

In February 1975, Dr. Theodore Pasquesi reported claimant complained of constant low back pain. Claimant indicated he could walk for 1/2 hour and then had to lie down and could not stand more than 1/2 hour. Claimant reported he was using no medication, but was using a back brace. Claimant stated he drove, but didn't do any work around his home. Dr. Pasquesi diagnosed lumbosacral mechanical instability with chronic pain and felt claimant's total impairment was 24%. Dr. Pasquesi felt claimant's condition was medically stationary and felt there was a strong emotional overlay in this case which was just as important as the impairment.

Dr. Howard Dewey, a psychologist, in June 1975, indicated claimant could not write or read English to any appreciable extent. Claimant reported he had not worked since his injury.

A Determination Order, dated September 3, 1975, awarded claimant compensation for temporary total disability and compensation equal to 128° for 40% unscheduled disability resulting from his low back injury.

In October 1975, Dr. David Rollins, a vocational rehabilitation specialist, opined that no suitable employment opportunity was available for claimant in the Portland area because of "the contingent variables he presents, i.e., limited education, training, and work experiences".

Dr. Arlan Quan, a psychiatrist, in November 1975, found claimant had no significant psychiatric disorder or impairment. Claimant, an Italian, indicated he was born in Rumania and lived there 25 years and had seven years of education. Claimant told Dr. Quan he drove his wife to work and still goes fishing. Claimant denied doing anything around his home except watching television and walking around the block.

Dr. Howard Cherry, in December 1975, diagnosed a severe chronic back strain. He felt claimant could not return to his previous job and probably could not be retrained because of a language barrier and physical disability. Therefore, he concluded claimant was permanently and totally disabled from a gainful occupation in the foreseeable future.

The Orthopaedic Consultants, also in December 1975, diagnosed a lumbar strain, by history, and atherosclerosis of the abdominal aorta, not related to claimant's injury. They opined claimant's condition was stationary. Claimant complained of constant aching in his low back and pain in his legs if he walked too much. During their examination they felt claimant limited his movement voluntarily. It was their opinion claimant could do more than he admitted and had no motivation for work. They felt claimant could return to his previous job with some limitation and the total loss of function of the back due to this injury was mild. They felt claimant may not return to work due to lack of motivation or effort.

An Interim Order, dated January 27, 1976, provided claimant was to submit to an examination and tests by Dr. Langston and the carrier for the Employer was to pay for them and provide copies to all parties and the Referee. Further, claimant was to be interviewed by the Disability Prevention Division or the Division of Vocational Rehabilitation. On May 18, 1976, after a hearing, an Opinion and Order ordered the claim be reopened for additional medical care and treatment and payment of all other benefits until closed.

In November 1977 Dr. L. R. Langston reported claimant's condition was stationary as of November 1, 1979.

The Orthopaedic Consultants examined claimant again in January 1978. Claimant still complained of a constant back ache which was aggravated by lifting, stooping or sitting for prolonged periods of time. The diagnosis was "1. Status post L-4, S-1 fusion; 2. No evidence of radiculopathy". They felt claimant's condition was stationary and the total loss of function was moderate less claimant's previous award. Dr. Langston agreed with this report and indicated he felt claimant could do more than he does, but his motivation was to not do more than he was currently doing.

A Determination Order, dated April 27, 1978, awarded claimant additional compensation for temporary total disability.

In February 1979, Dr. Joseph Amato opined claimant was still unable to return to his former occupation, but claimant's condition was stationary.

Vocational Rehabilitation contacted claimant in 1974 and indicated claimant had returned to this employer, but eventually, according to claimant, had to quit because it aggravated his back pain. In May 1978 claimant refused vocational rehabilitation services because he considered it a form of welfare.

At the hearing claimant testified he would "love" to go back to work, but had made no effort to do so since 1974. Claimant drives his wife to work, reads magazines, watches T.V. and walks to the store.

The Referee found that claimant had protected his right to appeal on the issue of extent of disability.

The Referee found claimant was entitled to an additional 35% unscheduled disability for his low back injury, making a total award of 75% unscheduled disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would affirm the Referee's order. The Board agrees with the Referee that claimant was entitled to a hearing on the extent of his permanent partial disability for the reasons set forth by the Referee. Further, the Board finds that claimant has sustained a greater loss of wage earning capacity than awarded by the Determination Order. Claimant has not shown any motivation or effort to return to any work. Nonetheless, based on the total record, the Board would agree with the Referee's assessment of additional compensation equal to 112° for 35% unscheduled disability, making a total award of compensation equal to 240° for 75% unscheduled disability for his back injury.

ORDER

The Referee's order, dated June 18, 1979, as amended on June 25, 1979, is affirmed.

WCB CASE NO. 78-6282 January 30, 1980

JAMES D. PUTMAN, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
Velure & Heysell, Employer's Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which approved the denials of Employers Insurance of Wausau (Wausau) and Industrial Indemnity (Industrial). Claimant contends he suffered either an aggravation of his original injury or a new injury.

FACTS

Claimant, a 28-year-old press-helper with Roseburg Lumber Company, sustained a compensable injury to his low back on June 30, 1976. Wausau provided workers' compensation coverage for the employer. On July 1, 1976, Industrial became the provider of workers' compensation insurance for the employer. The June 1976 injury was diagnosed as bilateral lumbosacral strain and did not cause claimant to miss any time from work.

Claimant stated that in May 1977 he began a spreader job which caused a flare-up of his back condition. Dr. Keith Woolpert, in May 1977, diagnosed discogenic disease of the low back which appeared to be related to claimant's work and a hip problem which was unrelated to his back.

On September 19, 1977, claimant indicated to Dr. Woolpert he had been lifting and turning at work which increased his back pain. Dr. Woolpert diagnosed "aggravation of underlying back strain". Claimant stated he was unable to finish his shift and asked his foreman if he could go home since he'd injured his back. Claimant returned to work for two hours per night for three weeks which was the company policy. He spent his time at work sitting in a chair at the nurse's station. At the end of this period, claimant couldn't return to work and at the time of the hearing was still unemployed.

On December 27, 1977, Wausau denied claimant's claim. The basis of the denial was that claimant had "sustained new and subsequent injuries in May or June 1977, and again on September 11, 1977". This denial was not appealed. A second denial of claimant's claim was entered by Wausau on January 24, 1978. This denial was not appealed.

A myelogram was done on March 23, 1978 and revealed no significant findings.

On March 16, 1978 claimant's attorney advised Wausau it represented claimant with regard to his June 30, 1976, August 1977 and September 19, 1977 injuries and requested all medical reports, records, chart notes and other pertinent information.

On March 30, 1978 Dr. Woolpert indicated he felt claimant was capable of doing most work activity with the exception of heavy lifting or repetitive bending, ladder climbing or working overhead.

On April 19, 1978 claimant's attorney again requested the file materials from both Wausau and Industrial.

Claimant filed a claim for an alleged strained back sustained on September 17, 1977. This claim was filed on June 27, 1978 and denied by Industrial on August 21, 1978.

Dr. Woolpert, in August 1978, indicated claimant's difficulty in respect to his back, dated back to his original injury of June 30, 1976. He felt the problem claimant had in September 1977 was an aggravation of the previous and underlying problem.

Claimant requested a hearing on August 8, 1978 and sent a copy of the request to Industrial. This was received by the Hearings Division on August 14, 1978.

Wausau was joined as a necessary party by an order dated October 20, 1978.

On August 23, 1978 Dr. Woolpert stated: "The aggravations that the patient [claimant] has had in respect to his back would appear to be primarily aggravations and not any change in the overall status of the patient's [claimant's] back condition".

At the hearing, Wausau moved that the claim against it be dismissed for claimant's failure to timely request a hearing on its denial of January 24, 1978. The Referee found the request had been filed outside of the 180-day period after Wausau's denial and barred by statute. Therefore, the Referee granted Wausau's motion.

The Referee further found that claimant had not sustained a new injury, but an aggravation of his June 30, 1976 injury. In arriving at that decision the Referee relied on the Weller v. Union Carbide, 35 Or App 355, _____ P2d _____ (1978), case and found that the work incident in September 1977 did not result in a permanent change in claimant's condition was not compensable. The Referee noted this case was on review by the Supreme Court.

Threfore, since claimant's aggravation claim against Wausau was barred and claimant's claim for a new injury was found not to be compensable, the Referee approved the denials of Wausau and Industrial.

BOARD ON DE NOVO REVIEW

The majority of the Board, after de novo review, affirms the Referee's order. The majority of the Board concurs with the Referee that claimant did not timely appeal from Wausau's denial of his aggravation claim. As to claimant's claim for a new injury, the majority of the Board finds the medical evidence does not support a new injury and would affirm Industrial's denial of it. The majority of the Board does not reach the application of the Weller case, as decided by the Supreme Court of Oregon, because of the lack of medical proof of a new injury.

ORDER

The Referee's order, dated August 20, 1979, is affirmed.

Board Member Kenneth V. Phillips dissents as follows:

I would respectfully dissent from the majority opinion of the Board and find claimant's claim for a new industrial injury is compensable.

The original injury occurred on July 1, 1976 and was accepted as a non-disabling injury requiring no time loss and claimant continued to be regularly employed.

The incident occurring on September 19, 1977 brought on pain severe enough that claimant could not complete his shift and subsequently time loss became necessary. Claimant's treating physician, thereafter, recommended that he find lighter employment not requiring heavy lifting, repetitive bending, ladder climbing or overhead work.

The Court's holding in Smith v. Ed's Pancake House, 27 Or App 361, defines the application of the "last injurious exposure" rule. That case held that if the second incident contributes independently to the injury the second insurer is solely liable even if the injury would have been much less severe in the absence of the prior condition.

In my opinion this case falls within the "last injurious exposure" rule. It is generally held that where a prior work connected disability is aggravated as a result of a subsequent job connected incident, the subsequent incident is treated as a new industrial injury.

In the case at bar, the incident of September 19, 1977 was, in and of itself, a new and independent injury bringing about a period of total disability requiring time loss, medical services and claimant's now total preclusion from his regular occupation. I find that on September 19, 1977 the claimant sustained a new compensable industrial injury and that the responsible carrier is Industrial Indemnity.

WCB CASE NO. 79-1007 January 30, 1980

VIRGIL YOUNG, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the denial of his aggravation claim by the employer. Claimant contends his claim is still open.

FACTS

Claimant, a 56-year-old oiler, sustained a compensable injury to his back on June 30, 1977 while setting up a barrel of oil. This injury was diagnosed as a lumbosacral and sacroiliac strain by Dr. Frank White, M.D.

On October 2, 1978 Dr. Joseph White, D.C., reported claimant was complaining of left leg pain, left lumbar and left dorsal spine pain. He felt this was related to claimant's industrial injury.

On November 22, 1978 Dr. Richard Benson indicated claimant was complaining of constant low back, mid-back and leg pain. He diagnosed chronic severe lumbar and cervical sprain with muscle spasm myositis and radiculitis.

Dr. Edward Rosenbaum, on December 20, 1978, indicated claimant denied any problems with his back. His examination of claimant's back revealed claimant had some minimal osteoarthritis which he considered normal for a man of claimant's age. Dr. Rosenbaum concluded claimant's ongoing symptoms were not related to his back sprain suffered on June 30, 1977.

On December 26, 1978, Dr. Frank White stated claimant had degenerative arthritis in the lumbosacral area and as a result of the arthritis and degenerative disease, claimant had experienced some symptoms which were compatible with his age.

On January 18, 1979, the employer denied claimant's claim for aggravation.

On May 18, 1979 Dr. Benson indicated that claimant's low back problems were in his opinion: ". . . . due to the numerous years of wear and tear, while employed by Hines Lumber Company". He felt that claimant's back had "worn out" due to the physical labor and that claimant had developed a very chronic low back instability.

On June 14, 1979, the employer's attorney advised claimant's attorney that no Determination Order had been issued in this case "since the injury was a medical only non-disabling injury".

At the hearing, claimant testified he received a copy of the form 801 for his June 30, 1977 injury. He said his back is still painful and he has trouble sleeping at night. Claimant indicated he has never received a notice from the employer indicating that it was going to close his claim as non-disabling, and telling him he had a right to a hearing and he had a time limit on the time within which to request a hearing.

Claimant's attorney argued at the hearing that the employer failed to comply with ORS 656.262(5), and advise claimant of his hearing and aggravation rights, including the right to object to a decision that his injury was non-disabling by requesting a Determination Order. It was argued that because of this failure by the employer, the claim was still open.

The Referee found that the running of claimant's aggravation rights was not an issue. The Referee indicated since the claim had never been closed, claimant or the employer were entitled to have the claim closed by making a proper request. The Referee further found that the issue at the hearing was an aggravation claim and found claimant had failed to meet his burden of proof relating his current condition to the original injury. Therefore, the Referee approved the denial of the employer.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. There is no evidence in this case that the employer advised claimant in writing that his claim was accepted, that his claim was considered non-disabling or informed claimant of his hearing and aggravation rights concerning a non-disabling injury including his right to object to the decision that his injury was nondisabling by requesting a determination of it. As a result of the employer's failure to so notify claimant, his claim is still open. The employer has the duty to process the claim. In this case the employer has failed to do so. Since there has never been a closure of claimant's claim, the Board finds it is not possible to rule on an aggravation of the original injury. Therefore, the Board modifies the Referee's order and would remand the claim to the employer for processing of the claim and payment of benefits due under Oregon Workers' Compensation Law.

Since claimant prevailed and his attorney was successful in getting his claim remanded to the employer for processing, claimant's attorney is entitled to the sum of $1,000 as a reasonable attorney's fee, payable in addition to and not out of the compensation granted.

ORDER

The Referee's order, dated August 22, 1979, is reversed.

The claim is hereby remanded to the employer for processing and payment of benefits under the Oregon Workers' Compensation Law.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at the hearing and at Board review a sum equal to $1,000, payable by the carrier.

WCB CASE NO. 77-7695 January 31, 1980

JOHN BOGLE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
G. Howard Cliff, Employer's Atty.
Amended Order On Review

The Board issued an Order on Review, dated January 17, 1980, which ordered:

> "Claimant is hereby granted an award of compensation equal to 240° for 75% unscheduled disability for his back injury. This award is in lieu of any and all prior awards for unscheduled disability."

The Board hereby amends this portion of its order to read:

> "Claimant is hereby granted an award of compensation equal to 240° for 75% unscheduled disability for his back injury. This is in lieu of the awards for unscheduled disability granted by the Determination Order, dated February 23, 1979, for claimant's September 25, 1975 injury."

IT IS SO ORDERED.

WCB CASE NO. 78-8137 January 31, 1980

DAROLD DENNIS DURGEE, CLAIMANT
Malagon & Yates, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

A hearing was held on May 22, 1979 and an Opinion and Order was issued by the Referee on September 11, 1979. Claimant requested Board review of this order on October 3, 1979. Claimant, in his brief, indicated that a report, dated June 25, 1979, by Dr. William Streitz, and a report, dated May 23, 1979, by the Orthopaedic Consultants, were not part of the record.

The Board finds that these two reports should have been part of the record in this case and considered by the Referee. The Board feels the case was improperly or inadequately developed in the hearing. Therefore, the Board, pursuant to ORS 656.295(5), remands this case to the Hearings Division to Referee Mark Braverman to reconvene a hearing to receive the above reports into the record and for any comments or other evidence the parties wish to offer regarding these reports and issue another Opinion and Order or if the parties would so stipulate the Referee can consider them and then issue another Opinion and Order.

IT IS SO ORDERED.

WCB CASE NO. 79-1837 January 31, 1980

LEE R. FORSYTHE, CLAIMANT
Flaxel, Todd & Nylander,
Claimant's Attys.
Paul Roess, Employer's Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which affirmed the Determination Orders, dated July 27, 1978, December 7, 1978 and December 28, 1978, required it to reimburse claimant for his broken glasses and awarded claimant's attorney a fee of $200. It contends claimant should not be granted any award for loss of visual acuity and that it should not be responsible for claimant's broken glasses and that no attorney's fee was appropriate in this case.

FACTS

Claimant, a 49-year-old block splitter, sustained a compensable injury to his right eye on March 1, 1978 when a piece of wood flew out of a chipper and hit him in the right eye. Dr. Hoewing diagnosed this injury as a severe contusion right orbit and rio intraocular injury. Claimant returned to work on March 15, 1978.

On May 26, 1978 the Fund denied responsibility for claimant's broken glasses.

A Determination Order, dated July 27, 1978, granted claimant an award of compensation for temporary total disability.

In September 1978, Dr. Arthur Steele indicated when he first saw claimant, claimant had marked edema and ecchymosis. Dr. Steele stated claimant complained of headaches and flashes of light in his right eye. Claimant had recurring abscess in the right eye. Dr. Steele could find no retinal pathology. His final diagnosis was a severe contusion injury to the right upper eyelid with a laceration and abscess that had completely healed and photopsia, O.D., etiology undetermined. Dr. Steele noted claimant had some numbness in his right forehead.

On October 18, 1978 Dr. Steele stated claimant continued to complain of intermittent styes in his eyes, numbness over the right forehead, occasional photopsia, and mattering and discharge of both eyes, with the right eye being worse. His exam revealed claimant had corrected visual acuity of 20/30 in the right eye and 20/25 in the left eye. Dr. Steele found no internal injury to the right eye. He felt claimant had no significant residual occular damage from his March 1, 1978 injury. It was Dr. Steele's impression claimant had a residual external irritation due to a dust allergy following the injury. Claimant also had hyperopia which was correctable with glasses.

A Determination Order, dated December 7, 1978, granted claimant an award of compensation equal to 10° for 10% loss of vision in the right eye. A Determination Order, dated December 28, 1978, corrected the monetary value of this award.

On January 22, 1979, Dr. Steele stated he found no physical evidence for the slight decrease in the vision in claimant's right eye. He assumed it was due to his industrial injury, but could not say it was, since he had no record of his pre-accident vision.

At the hearing, claimant testified he has a 10th grade education and has worked in various occupations involving manual labor. He complained of matting and discharge in the right eye, intermittent blurred vision, some pain over the lid when exposed to bright lights, sensitivity to light, watering of the right eye, getting 2-3 styes a week, numbness above the right eye, swelling of the right eyelid and headaches. He has to wear sunglasses when he works outside. Claimant uses aspirin for temporary relief of some of these conditions. He says he must now wear his glasses to watch television, work on his car, drive nails, work with screws, bolts and doing other close work. Prior to his injury, he said he wore his glasses occasionally for reading.

The Referee found claimant had not proven, by the preponderance of the evidence, any loss of wage earning capacity and did not award claimant any compensation for unscheduled disability. The Referee further found claimant had been adequately compensated for his right eye injury as far as scheduled disability was concerned and affirmed the Determination Orders. The Referee decided he did not have jurisdiction to order reimbursement of claimant's attorney for his cost in obtaining medical reports and found the Fund was responsible for the cost of replacement of claimant's glasses and awarded an attorney's fee to claimant's attorney for prevailing on the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The testimony and medical evidence indicates claimant has lost some visual acuity in the right eye and supports the award granted by the Determination Order. The evidence does not support an award for unscheduled disability since it does not establish claimant has sustained any loss of wage earning capacity.

As to the issue of the eyeglasses and attorney's fee, the Board would also affirm the Referee's order. The Fund is responsible to provide prosthetic devices, such as eye glasses. Since this was denied by the Fund and claimant's attorney prevailed in having the denial set aside, he is entitled to a fee.

ORDER

The Referee's order, dated August 10, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 79-2069 January 31, 1980

DONALD L. WILLIAMS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the denial of his aggravation claim. Claimant contends this was in error.

FACTS

Claimant, a 41-year-old truck driver, sustained a compensable injury to his left knee on May 25, 1976 when while taking the spare tire off a truck, the tire slipped and struck him in the knee. This injury was diagnosed as a transverse fracture of the left patella and was surgically repaired.

In August 1976, Dr. N. J. Wilson reported claimant felt the knee was still weak and noted some draining, crepitus and crunching in the subpatellar area. Dr. Wilson felt this represented some patello-femoral incongruity, secondary to post-traumatic changes in the left patella. He felt claimant should be observed and if he got along and was able to work, would not need additional surgery. On November 5, 1976 Dr. Wilson, because claimant continued to have difficulty, performed a patellectomy on claimant's left knee.

On December 6, 1977 Dr. Wilson stated claimant's condition was medically stationary. He reported claimant had tried to return to truck driving, but could not tolerate the operation of a large truck. Claimant reported his leg felt weak and he had pain over the front of the knee. Dr. Wilson indicated the medial, lateral and anterior posterior stability of the left knee were within normal limits. He found no effusion. The knee extended to 175° and flexed to 80°. Dr. Wilson felt claimant would be unable to return to truck driving and would need vocational assistance.

A Determination Order, dated March 20, 1978, awarded claimant compensation for temporary total disability and compensation equal to 75° for 50% loss of his left leg. A stipulation, dated June 13, 1978, increased this award by 22.5° for 15% loss of the left leg.

On January 7, 1979, Dr. Alan Whitney reported claimant said he had continued to have difficulty with his left knee giving way and his knee had given out on this day, causing claimant to fall forward, bending his knee and striking the lateral femoral condyle on the pavement. Dr. Whitney diagnosed a bruising and mild tearing of the lateral retinaculum.

On February 14, 1979 the Fund denied claimant's request to reopen his claim.

In August 1979, Dr. Wilson indicated claimant had a history of a giving way sensation in the knee since his left patellectomy and he felt claimant's fall in January 1979, in all probability, was connected to the 1976 injury.

Mr. Jim Morgan, an investigator for the Fund, reported that claimant stated he'd fallen in early January 1979 while doing some carpentry work and reinjured his knee. Claimant also stated his knee gave out when he went to get into a car after leaving a friend's house. He denied any other falls, slips, or injuries.

Claimant testified he drove a chip truck for about one month in 1978 and then became a self-employed carpenter. Claimant and his wife stated he fell leaving the home of a friend early on the morning of January 7, 1979. Claimant testified there was frost on the ground. Claimant's wife indicated claimant's knee frequently gave way.

Mr. Morgan, in his investigation, found some evidence that claimant may have been involved in a fight on January 6, 1979 at a tavern and reinjured his knee.

The Referee found no material, progressive worsening of the original condition which required medical treatment. The Referee found claimant's fall and reinjury of the knee was a new injury. The Referee affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. Claimant has not proven that the injury to his knee in January 1979 was a compensable consequence of his May 25, 1976 injury. The preponderance of the evidence in this case establishes that claimant fell on some frosty ground while leaving a friend's house. The Board finds that this slip and fall and reinjury of the knee is a new and intervening incident. Therefore, the Board affirms, as did the Referee, the denial issued by the Fund on February 14, 1979.

ORDER

The Referee's order, dated September 19, 1979, is affirmed.

WCB CASE NO. 79-4497 February 1, 1980
WCB CASE NO. 79-6913

HAROLD BACHMAN, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF Legal Services, Defense Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order Denying Request To Vacate

On January 17, 1980, the Board denied the State Accident Insurance Fund's (Fund) motion to dismiss the above matter. The Fund, on January 24, 1980, requested the Board to vacate this order and remand this matter to a Referee for the purpose of conducting an evidentiary hearing on its motion.

The Board, after considering this request, would deny it for the reasons set forth in its order of January 17, 1980 denying the Fund's motion. The Board notes that the cases of Oliver Hanna & EBI Company v. McGrew Brothers & Argonaut Insurance Company, _____ Or App _____, _____ P2d _____ (1980), decided January 28, 1980, and Calder v. Hughes & Ladd, 23 Or App 66, 541 P2d 152 (1972), are on point in this matter and support the Board's decision.

ORDER

The Fund's request to vacate the Board's order, dated January 17, 1980, and remand this matter to a Referee for an evidentiary hearing is denied.

WCB CASE NO. 78-7445 February 1, 1980
WCB CASE NO. 78-8910

JESSIE BELISLE, CLAIMANT
Coons & Anderson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which awarded her additional compensation for her allergy and for her back condition. Claimant contends she is permanently and totally disabled.

Claimant, a 53-year-old self-employed hairdresser, sustained a compensable injury to her back on October 8, 1974 while vacuuming the carpet in her business. Dr. Stanley Richmond released claimant for modified work on October 29, 1974, for regular work on November 12, 1974, and found claimant's condition was medically stationary on that date. His diagnosis was a lumbosacral sprain.

A Determination Order, dated May 9, 1975, awarded claimant compensation for temporary total disability and temporary partial disability.

Claimant continued to have difficulty with lumbosacral back pain and radiation of pain into the right leg. Claimant was hospitalized in February 1976. Claimant continued to work, but due to continued difficulty underwent a myelogram on May 24, 1976 which revealed a protruded intervertebral disc at the L4-5 level. On May 25, 1976, Dr. John Serbu performed a bilateral lumbar laminectomy.

In November 1976, Dr. Serbu indicated claimant continued to complain of low back pain and some bilateral leg discomfort. He felt claimant should continue to try to work.

In December 1976, Dr. Donald Stainsby stated claimant complained of low back pain, pain in both legs, possible weakness of the right leg, pain in the upper back, soreness in the neck and headaches.

In January 1977, Dr. Serbu indicated claimant continued to have pain, but was running her business three days per week. By May 1977, he found claimant's condition was medically stationary. Claimant stated she was working 30-40% of her time in her business. She reported she could work for 2-3 hours, but if she stayed bent over, she developed low back discomfort with aching down her right leg. Dr. Serbu felt claimant had moderate permanent partial disability and felt claimant's work hours would be restricted.

A Determination Order, dated June 14, 1977, awarded claimant additional compensation for temporary total disability and compensation equal to 96° for 30% unscheduled disability for her back injury.

In December 1977, Dr. Stainsby, reporting on her back condition, felt claimant has permanent partial disability in the moderate range at about 40%. He felt claimant had some functional overlay. He noted claimant's business as a self-employed beautician was very difficult for her with her bad back.

Claimant quit her business in late 1977 and continued to have pain in her back and both legs.

In February 1978, Dr. Stainsby indicated claimant was wearing a transcutaneous stimulator and that claimant's allergy had cleared since she no longer worked in her beauty shop. Claimant continued to complain of pain.

Claimant was referred for vocational rehabilitation in August 1978.

In August 1978, the Orthopaedic Consultants, reporting on her back injury, opined claimant's condition was stationary. They felt claimant could not return to her former employment and was poorly motivated to return to work. It was their opinion claimant's loss of function of her back due to this injury was moderate. Dr. Stainsby concurred with this report.

Dr. Edward Colbach, a psychiatrist, indicated in October 1978 he felt there was not much that could be done to get claimant back to work. He felt claimant had no motivation to return to work. Dr. Colbach concluded that from a psychiatric point of view claimant's disability should be considered minor.

A Determination Order, dated October 27, 1978, for the 1974 injury, granted claimant additional compensation for temporary total disability.

Dr. William McConochie, a psychologist, in June 1979, indicated testing and his examination suggested claimant suffered from an adjustment reaction to adult life (nearly psychotic reactions to her multiple marital problems) and depressive neurosis. He felt claimant's pain exacerbated her neurotic tendencies and vice versa.

In November 1977 claimant filed a claim for an occupational disease because she had developed a sensitivity to beauty supplies and chemicals which affected her hands. Dr. L. W. Stauffer diagnosed chronic eczematous contact dermatitis with secondary infection. This claim was accepted.

Dr. John Minor, in June 1978, indicated claimant had vasomotor rhinitis and a history of contact dermatitis. He felt claimant's contact dermatitis prevented claimant from working in her beauty salon. Also, he felt the fumes from products used in the salon, besides causing claimant's dermatitis, also aggravated her vasomotor rhinitis.

In July 1978, Dr. Stauffer indicated due to claimant's sensitivity to chemicals used in her business, she could not return to work in it. Claimant tried to wear gloves and tried different preparations, but could not continue to work. Dr. Stauffer did not feel claimant's reactions would change markedly in time. He felt claimant was permanently impaired because she had become sensitized to many chemicals and if she came into contact with them, it would produce dermatitis.

A Determination Order, dated September 19, 1978, granted claimant compensation for temporary total disability and compensation equal to 96° for 30% unscheduled disability for her allergy.

At the hearing, claimant testified she graduated from high school and had worked in a variety of jobs until the early 1960's when she began working as a beauty operator. She eventually ran her own shop and after her husband became disabled she became the main provider for her family. Claimant performed all household chores and managed a fourplex. Claimant now complains of constant back pain aggravated by any activity. Claimant now does light house work in spurts. Prior to her injury, claimant was described as being petite, energetic and without back limitations or problems. Claimant is now described as moving as an old woman. Claimant testified she is sensitive to multiple agents, tints, citrus peelings, ultraviolet light, soaps, detergents, etc. She says even being in stores where these items are produces irritation. Contact with items she is allergic to causes blistering and swelling of the hands, forearm, elbows, stomach, scalp, etc. lasting up to three weeks.

Dr. Stauffer stated the only suitable work for claimant would be that not requiring use of her hands.

The Referee, after reviewing all of the evidence, found claimant was entitled to the maximum of 320° for 100% unscheduled disability for her conditions. Therefore, the Referee increased the award for her back injury and her allergy by 64° for 20% unscheduled disability each.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board finds claimant is permanently and totally disabled as a consequence of the allergy condition. Claimant is precluded from ever returning to her previous employment because of her back condition. Because of her allergy, claimant is barred from doing any work requiring use of her hands or exposure to numerous chemicals and other agents. In this regard Dr. Stauffer's testimony stands uncontradicted. The Board finds that claimant is permanently incapable of regularly performing work at a gainful and suitable occupation. In the Board's opinion there is no suitable occupation at which claimant has the ability and training or experience to perform. Claimant has made efforts to return to work after her back injury and after her allergy developed she tried unsuccessfully to continue to work. If it were not for claimant developing the allergy condition, she would be capable of some work. Therefore, the Board finds claimant is permanently and totally disabled because of her allergy condition.

The Board did not consider the additional medical exhibits offered by claimant and would deny claimant's request to remand this case to the Referee.

ORDER

The Referee's order, dated July 6, 1979, is modified.

Claimant is hereby granted an award of compensation for permanent and total disability effective the date of this order.

Claimant's request for remanding the claim to the Referee or, in the alternative, for the Board to consider additional evidence, is denied.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in an amount equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-868 February 1, 1980

DAVID GROTBERG, CLAIMANT
Franklin, Bennett, Ofelt & Martin,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which awarded claimant additional compensation equal to 48° for 15% unscheduled disability and compensation equal to 20.25° for 15% loss of use of the right foot. The employer contends these awards are not supported by the evidence.

FACTS

Claimant, a 32-year-old truck driver, sustained a compensable injury to his right foot and ankle on September 21, 1977 when he jumped from his truck load and hit a hole in the deck of the trailer. This injury was diagnosed as a sprain of the right foot and ankle and a chip fracture of the tarsal cuboid of the right foot. The right foot was casted.

On December 19, 1977, Dr. James Haven indicated claimant continued to have foot pain and some back pain and pain down the right leg. Claimant told him he had had back pain for about two months. Dr. Haven felt the back pain was related to claimant's injury in September 1977. Claimant was hospitalized and treated conservatively.

On January 24, 1978, Dr. Gottlieb indicated claimant had no previous back injuries. Claimant had undergone a myelogram on January 17, 1978 which showed a defect at the L4 level. Claimant complained of weakness in the right foot and catching his foot when walking, causing him to trip. Dr. Gottlieb diagnosed an extruded lumbar disc and lumbosacral strain.

On February 8, 1978, Dr. Gottlieb performed a right bilateral L4 and L5 partial hemilaminectomy and removed bilaterally the L4 and L5 protruded disc.

On October 10, 1978, Dr. Gottlieb stated claimant's condition was stationary. He indicated that prior to claimant's surgery, claimant had displayed weakness in the right foot, manifested by foot-drop. After the surgery, claimant returned to work in a printing shop and apparently was able to sit, stand or walk. Claimant did some driving. Claimant told Dr. Gottlieb he could sit for an hour and a half, walk for about 20-30 minutes, and stand for about 20-30 minutes. The diagnosis was chronic lumbosacral strain, residuals low lumbar disc degeneration and low back surgery. Dr. Gottlieb felt claimant should avoid repetitive heavy lifting, prolonged bending and prolonged car riding. He felt claimant's permanent impairment as far as the back was concerned was very moderate. Dr. Gottlieb found claimant had no right ankle jerk.

A Determination Order, dated November 8, 1978, awarded claimant compensation for temporary total disability and compensation equal to 32° for 10% unscheduled disability for his low back injury.

Claimant, a college graduate, testiifed he has continuous back pain which extends into both legs, more severe on the left leg. Claimant said he is unable to lift, bend or stoop because of his back condition, his right foot hangs and he has numbness in the foot. He says he has difficulty moving or running because of his foot condition. Claimant has taught school. He has driven a truck on and off for the past 15 years. Claimant said he tried after his injury to drive a truck, but quit because it aggravated his back. Claimant also tried to work as a traveling salesman, but quit for the same reason. Claimant currently works as a maintenance man and works on trucks.

The Referee, after reviewing all the evidence, concluded that claimant had lost a greater portion of his wage earning capacity and increased claimant's award of compensation by 48° for 15% unscheduled disability for his low back injury. Further, the Referee found, based on the impairment of claimant's right foot, he was entitled to an award of compensation equal to 20.25° for 15% loss of the right foot.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's awarding of additional compensation for unscheduled disability reflecting claimant's loss of wage earning capacity. However, the Board finds claimant does not have the degree of impairment in the right foot for which the Referee granted him compensation. Claimant told Dr. Gottlieb he had no complaints and the range of motion of the ankle was unremarkable except for an absent right ankle jerk. Claimant complained of no pain or swelling. At the hearing, claimant complained of pain in both legs, numbness in the right foot, and difficulty in running and moving because of the foot. The Board finds, based on these impairments, claimant is entitled to an award of compensation equal to 6.75° for 5% loss of function of the right foot.

ORDER

The Referee's order, dated August 2, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 6.75° for 5% loss of function of the right foot. This is in lieu of the award granted by the Referee.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-1944 February 1, 1980

NITA HARRIS, CLAIMANT
Frank J. Susak, Claimant's Atty.
SAIF, Legal Serivces, Defense Atty.
Amended Order On Review

On January 28, 1980 the Board entered is Order on Review in the above entitled matter. An error in the order has been brought to the Board's attention which should be corrected. On page three, paragraph two, the date "August 10, 1978" should be changed to read "August 10, 1979". The remainder of the Board's order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 79-3170 February 1, 1980

PETER JORGENSEN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which granted him additional compensation equal to 16° for 5% unscheduled disability for his low back injury. Claimant contends this award does not adequately reflect his disability.

FACTS

Claimant, a 38-year-old baker, sustained a compensable injury to his low back on November 25, 1977 while unjamming a French pan. Dr. Ted Morse, D.C., diagnosed this injury as a lumbosacral strain with degenerative disc at L5-S1.

Dr. Morse indicated in January 1978 that claimant continued to have low back pain which radiated down into the buttock and leg. His diagnosis was "(1) gross lumbosacral muscular spasm, (2) lumbosacral sprain, and (3) underlying degenerative disc disease, with radiculopathy". It was Dr. Morse's opinion that it was doubtful if claimant would be able to return to his former type of employment.

In January 1978, Dr. William Carr, an orthopedic surgeon, diagnosed degenerative disc disease with radiculopathy and a possible facet syndrome L5-S1 on the right.

Dr. Theodore Pasquesi, on February 17, 1978, stated claimant continued to complain of constant low back pain. This pain was increased by bending, stooping, or attempting to lift and occasionally the pain radiated down the left leg. Dr. Pasquesi found claimant was markedly obese and on a subjective basis appeared to have chronic lumbar instability. He noted claimant had had prior back problems from an injury sustained in 1976. He felt claimant should seek another type of employment to avoid repetitive stooping, bending and twisting. In his opinion, claimant had sustained a 10% impairment.

Dr. Daniel Halferty, medical examiner at the William A. Callahan Center, reported claimant had been employed since he was 16 years old as a baker. Claimant reported he had an 11th grade education. Dr. Halferty felt it was advisable claimant not return to bakery work due to lifting of 40-60 pound racks of bread from floor level.

Dr. Morse, in June 1978, indicated claimant had tried to lift a light object at home and experienced difficulty. He noted claimant had returned to work at the bakery. Dr. Morse felt if claimant continued this work he would eventually require surgery. Dr. Howard Cherry concurred that claimant should not return to his bakery work.

In October 1978, the Orthopaedic Consultants indicated claimant had returned to bakery work on April 6, 1978 and on May 10, 1978 he tried to unjam some bread pans, resulting in increased pain in his back. Claimant had not returned to work after that incident. It was their opinion claimant's condition was stationary and he could return to the same occupation with some limitations. They rated the "degree of disability" due to claimant's October 1977 injury as minimal.

In November 1978, Dr. Morse indicated he felt claimant's condition would be medically stationary within two months. He felt claimant would have possibly a 7-10% permanent partial disability.

A Determination Order, dated March 28, 1979, awarded claimant compensation for temporary total disability and compensation equal to 48° for 15% unscheduled disability for his low back injury.

Claimant, in November 1978, began a vocational rehabilitation program to obtain a GED and to be trained as a salesman. He finished this training in February 1979. Claimant has tried various sales jobs, but was unable to continue them because the standing or sitting increased his pain or due to low wages.

On April 4, 1979, Dr. Morse indicated claimant was not to work where he was required to stand for prolonged periods of time since that increased his back pain. He felt claimant's condition was medically stationary and claimant had permanent partial disability of 10-12%.

On June 12, 1979, Dr. Pasquesi felt claimant's condition was medically stationary and claimant had a 10% impairment. However, he noted claimant, at that time, probably had greater impairment, but it was not expected to continue.

The Referee, after reviewing all the evidence, found claimant had sustained a loss of wage earning capacity which entitled him to compensation equal to 64° for 20% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant cannot return to bakery work. He is also barred from employment requiring twisting, stooping, bending, heavy lifting, prolonged sitting or standing. Claimant attempted to do his job as a baker after this injury but could not perform it. Now he is beginning a new career as a salesman. He worked as a baker for 20 some years before this injury. The Board feels that claimant has sustained a greater loss of wage earning capacity than that for which he has been compensated. The Board finds claimant should be awarded compensation equal to 96° for 30% unscheduled disability for his low back injury. This is in lieu of all previous awards for unscheduled disability.

ORDER

The Referee's order, dated August 21, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 96° for 30% unscheduled disability. This award is in lieu of all previous awards for unscheduled disability for his November 25, 1977 injury. The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-8166 February 1, 1980

BEVERLY H. MANGUN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Jerry K. McCallister, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which approved the employer's denial of her claim for an occupational injury or disease. Claimant contends this was in error.

FACTS

Claimant, a 37-year-old shrimp picker, filed a claim on September 19, 1978, alleging her work requiring her to stand caused her pain in the right hip and leg. Claimant had started working for the employer on April 25, 1978. She began work in a quality control position and after two weeks moved to the shrimp line. This required continuous standing and lifting and carrying of containers weighing 5 to 30 pounds. In September 1978, claimant went to work in the laundry where she handled bags of wet clothing weighing 5 to 35 pounds and carried them up and down stairs. Claimant indicated she also worked in the fillet department which required a lot of bending in addition to the laundry. Claimant left work on September 5, 1978. Claimant stated she had experienced pain in the back of her right hip and leg in May 1978.

Dr. R. Hayter saw claimant in August 1978 and could make no diagnosis.

In September 1978, Dr. Jacob Wilson indicated claimant stated she had had right low back pain which had increased in September due to claimant's standing picking shrimp and going up and down stairs. Claimant stated this pain was present when she stood or sat. Dr. Wilson found no objective neurological findings, but found some indication of sciatic nerve irritation. He felt claimant's job change aggravated claimant's problem. In November 1978, Dr. Wilson reported due to claimant's continuing problems a myelogram was needed.

A myelogram done on November 13, 1978, revealed a large extradural defect at the L4-5 level on the right. On November 14, 1978, claimant underwent a lumbar laminectomy at L4-5 on the right.

Dr. Wilson felt the herniated disc was related to her employment. He indicated claimant did not have a specific on-the-job injury, but did have an aggravation in August 1978. He did not feel claimant's condition pre-existed her employment with this employer.

On October 13, 1978 the employer denied claimant's claim.

The Orthopaedic Consultants, in February 1979, did not indicate whether claimant's injury was related to her work. Claimant stated that on or about May 25, 1978 she began developing cramps in her right calf. She said she was employed on the shrimp line and had to stand most of the time and bend forward and lift weights up to 35-40 pounds. Claimant stated she had been given a different job which required her to run up and down stairts. Dr. Wilson was a member of this panel.

Dr. Wilson, in his deposition, stated he first saw claimant in September 1978 and claimant's history was that she had experienced an increase in right hip pain one week before seeing him which increase occurred with a job change from picking shrimp to where she had to go up and down stairs. He felt claimant's problem was aggravated by the job change because claimant related her symptoms were aggravated by her employment and it seemed to correlate with the change in her job. He felt claimant's work of lifting laundry bags and going up the steps would have aggravated her back and could have caused the protrusion of the disc.

The Referee found inconsistencies in the history given Dr. Wilson and the Orthopaedic Consultants and found the medical opinions were based on inaccurate histories. Therefore, the Referee did not find Dr. Wilson's opinion persuasive on the issue of causation and concluded claimant had failed to meet her burden of proving that she had sustained a compensable injury and affirmed the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the Referee's order. The Board finds that inconsistencies in the histories given the doctors are not significant. Dr. Wilson has repeatedly related claimant's condition to her work. There is no evidence contrary to his opinion. Therefore, the Board concludes that claimant has met her burden of proving, by a preponderance of the evidence, that she sustained a compensable injury to her back and sets aside the employer's denial.

ORDER

The Referee's order, dated July 6, 1979, is reversed.

The denial, dated October 13, 1979, is set aside and the claim is remanded to the employer for acceptance and payment of compensation and other benefits until it is closed pursuant to ORS 656.268.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services both before the Hearings Division and at Board level a sum equal to $800, payable by the carrier.

WCB CASE NO. 79-3599 February 1, 1980

MRS. EDDIE S. PURVIS, CLAIMANT
Welch, Bruun, & Green, Calimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of that portion of the Referee's order which granted her an increased award of compensation equal to 48° for 15% unscheduled disability for her low back injury. Claimant contends this award does not adequately compensate her for her loss of wage earning capacity due to her injury.

FACTS

Claimant, a 54-year-old retail clerk, sustained a compensable injury to her low back on September 13, 1975 when she lifted a heavy grocery box. This injury was diagnosed as a sprain of the lumbar spine with pain radiating down the left hip and leg. Claimant was released for modified work on October 7, 1975 with a limitation of no heavy lifting. Dr. Robert Sullivan opined claimant's condition was medically stationary on November 10, 1975.

A Determination Order, dated January 6, 1976, awarded claimant compensation for temporary total disability only.

Claimant was hospitalized in January 1978 and indicated she had continued to have low back pain. Dr. Sullivan diagnosed a chronic back sprain and strain with sciatic nerve root compression. It was suggested claimant be treated with conservative care including weight loss, abdominal muscle strengthening, back exercises and posture program. Claimant also has hypertension. The final diagnosis was an acute and chronic low back strain with sciatic nerve root compression, early degenerative disc disease and peripheral vascular disease.

On August 17, 1978, Dr. Theodore Pasquesi indicated claimant continued to complain of low back pain, increased by bending, stooping, and twisting, as well as vacuuming or making her beds. He diagnosed chronic lumbar instability and arteriosclerotic peripheral vascular disease. Dr. Pasquesi felt claimant could, from an orthopedic standpoint, work in a predominantly sedentary occupation, but that this might not be possible due to her arteriosclerotic changes. He felt claimant had a 10% impairment on the basis of chronic pain.

A Determination Order, dated October 20, 1978, awarded claimant additional compensation for temporary total disability and compensation equal to 32° for 10% unscheduled disability for her back injury.

Dr. Pasquesi, in March 1979, indicated claimant continued to report low back pain with sharp pains radiating into the right buttock area. She also reported cramping in her legs after walking a block, which caused cramps and pains in the upper portion of her legs and thighs and a burning sensation in her feet. He diagnosed chronic moderate lumbar instability with no restricted motion, but with pain. He felt the leg condition was due to a very serious arteriosclerotic problem. It was his opinion that but for the arteriosclerotic problem claimant probably would be able to work in a position that did not require repetitive bending, stooping, twisting or lifting of more than 30 pounds.

In August 1979, Dr. Sullivan indicated claimant's hypertension and peripheral vascular disease were not related to her back injury. He felt claimant was not employable at her old job.

Claimant has a high school education and has worked as a waitress, bartender, and from 1961 until she last worked as a retail clerk. She returned to her previous work in October 1975 after her claim was first closed. Claimant testified she had not been successful in losing weight, is unable to sit or stand very long, unable to walk very far, and cannot straighten up after she bends over. She uses pain medication and medication for her other conditions. Claimant said she has not looked for work because she cannot do anything.

The Referee, after considering all the evidence, felt claimant was entitled to additional compensation for her injury and modified the award, granting claimant compensation equal to 80° for 25% unscheduled disability in lieu of the award previously granted.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant cannot return to her previous types of employment due to her injury. The Board notes claimant has not attempted to seek any gainful employment since she last worked. However, based on her testimony as to her limitations and continuing pain, coupled with the medical evidence, the Board concludes claimant is entitled to an increased award of compensation. Therefore, the Board modifies the Referee's order and grants claimant an award of compensation equal to 128° for 40% unscheduled disability for her low back. This is in lieu of all previous awards.

ORDER

The Referee's order, dated September 10, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 128° for 40% unscheduled disability for her low back injury of September 13, 1975. This is in lieu of any previous awards for unscheduled disability for this injury.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-2617 February 1, 1980

VERNARD ROCKOW, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of the Referee's order which granted him increased compensation for a total award equal to 90° for 60% loss of the right leg. Claimant contneds he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

The Board approves of the procedure followed by the Referee in the development of this case. At the time of the first hearing, the employer indicated that there were a number of jobs available which claimant could perform. The hearing was recessed to allow claimant and the employer to investigate available employment. At the second session of the hearing, the evidence established that none of the jobs were available and none were offered by the employer to claimant. The Board strongly disapproves of the position taken by the employer in this case; on the one hand, representing that suitable work was readily available for claimant, and when put to the test, conceding that in truth, no such work was available. It thus appears to the Board that the employer either was deliberately attempting to mislead the Referee, or to be more charitable, did not have accurate knowledge of whether suitable jobs were available. In either case, such tactics are not within the spirit and intent of the Workers' Compensation system, nor do they reflect favorably on the employer and its management personnel.

ORDER

The order of the Referee, dated July 26, 1979, is affirmed.

WCB CASE NO. 78-5725 February 1, 1980

GLADYS RUSSELL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which found claimant was permanently and totally disabled effective the date of the order, April 6, 1979.

FACTS

The Board would adopt the findings and opinion of the Referee as set forth in his order, a copy of which is attached hereto.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would affirm the Referee's finding that claimant is permanently and totally disabled. However, the Board finds that claimant was permanently and totally disabled as of June 2, 1978, the date claimant's condition was determined to be medically stationary, and would so modify the Referee's order.

ORDER

The Referee's order, dated April 6, 1979, is modified.

Claimant is hereby awarded compensation for permanent total disability effective June 2, 1978. The Fund is allowed to offset the award granted for permanent partial disability by the Determination Order, dated July 10, 1978.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-9257 February 1, 1980

JACK H. SANDSTRUM, CLAIMANT
Willner, Bennett, Bobbitt &
Hartman, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks Board review of that portion of the Referee's order which refused to grant penalties and attorney's fees for the State Accident Insurance Fund's act of withholding benefits pursuant to a wage assignment pursuant to ORS 23.777.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated September 12, 1979, is affirmed.

Board Member Phillips dissents as follows:

The only issue appealed to the Board in the instant case was the refusal of the Referee to grant penalties and attorney fees to claimant. That refusal is upheld by the majority of the Board following the logic of the Referee and I would respectfully dissent.

This case follows exactly the issues and circumstances of Jones v. SAIF, 40 Or App 311 (1979).

The Referee and the majority of the Board hold that the Fund was entitled to rely on Calvin v. Calvin at the time that decision by the carrier was reached. The Court found no merit in that argument when it reached its decision in Jones v. SAIF and I find no merit in it now.

I believe the instant case rests on all fours with Jones v. SAIF and would reverse the Referee on the issues appealed.

WCB CASE NO. 78-6703 February 1, 1980

JERRY R. SMITH, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
Edward V. O'Reilly, Employer's Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which granted claimant an award of additional compensation equal to 64° for 20% unscheduled disability resulting in a total award of compensation equal to 96° for 30% unscheduled disability for his back injury. The employer contends this is excessive.

FACTS

Claimant, a 34-year-old pizza cook, sustained a compensable injury to his back on May 6, 1975 when he lifted 45-50 pounds of dough out of a bowl. This was diagnosed as an acute back strain.

On May 14, 1975 Dr. Stanley Young stated claimant had a preexisting juvenile epiphysitis or Scheuremann's disease of the dorsal spine with a bilateral spondylolysis. He felt this condition was aggravated by claimant's injury and that any heavy use of the back would cause further difficulty.

Claimant returned to work, but could not work more than two hours because of pain and fatigue in his back. This pain radiated into his lower extremities. Claimant was hospitalized in September 1975 for back pain.

In February 1976, Dr. Young indicated claimant had continued to slowly improve and again indicated he felt claimant's chance for return to any significant or heavy use of his back was unlikely.

After a myelogram revealed an extradural impression at the L5 level on the right, Dr. Young performed a Gille decompression and posterior lateral fusion with right iliac bone graft on March 31, 1976.

Claimant returned to light work in his business in late 1976. In March 1977, Dr. Young indicated claimant was working with few problems and released claimant for regular work on March 17, 1977.

On September 20, 1977, Dr. Young stated claimant still complained of low back pain and intermittent leg pain, which was 1/4-1/3 as great as prior to his surgery. Claimant indicated he stood at work for 3-4 hours and then had to lie down for relief of his back pain for a short period of time and then could again stand to walk about. Claimant could bend and lift, but limited these activities. Dr. Young felt claimant had a mildly moderate disability because of his inability to stand for prolonged periods of time, use his back for heavy work with extensive lifting or bending. Dr. Young felt claimant's headache problems were unrelated to his back injury. Claimant was working in his own business and Dr. Young felt claimant's condition was medically stationary.

In March 1978, Dr. Jim Norris-Pearce indicated claimant had reported he experienced head and neck pain in January 1977. Claimant stated he had a high school education and a Bachelor of Arts Degree from a college. Dr. Norris-Pearce felt that claimant's headaches may have been precipitated by " . . . the very definitely associated post-traumatic neurosis". He felt this post-traumatic neurosis was the most serious residual of claimant's injury.

A Determination Order, dated June 21, 1978, awarded claimant compensation for temporary total disability and compensation equal to 32° for 10% unscheduled disability for his low back injury.

In February 1979, Dr. Norris-Pearce indicated claimant complained of aching and numbness in his legs and numbness on his right side. He indicated his headaches had improved. Dr. Norris-Pearce felt many of claimant's complaints were bizarre and that claimant had a significant emotional aspect to his condition. He felt claimant should be referred to the Pain Clinic.

At the hearing, claimant testified he can work in his own restaurant business 6-8 hours per day. He limits his standing, bending, and lifting and lays or sits down to rest frequently. He indicated he has had to hire more work done in his business because he is unable to do it.

The Referee, after reviewing all the evidence, concluded claimant was entitled to 30% of the maximum allowable compensation for unscheduled permanent partial disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The medical evidence indicates claimant cannot perform any activity requiring heavy use of his back and has to limit his standing, bending and lifting. However, claimant is 38 years old, has a college education, runs his own business, and is able to do the physical work required in that business. Claimant's work experience has been in the restaurant field. The Board finds that after considering all the evidence in this case that the Referee's award was excessive. Therefore, the Board would modify the Referee's award and grant claimant an award of compensation equal to 64° for 20% unscheduled disability for his back injury. This is in lieu of any previous awards.

ORDER

The Referee's order, dated August 23, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for his back injury. This is in lieu of any previous awards of unscheduled disability for his May 4, 1975 back injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-2718 February 1, 1980

LOUISE M. SMITH, CLAIMANT
Elden Rosenthal, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (SAIF) seeks Board review of the Referee's order which ordered it to accept responsibility for claimant's cervico-dorsal claim and reopened her claim as of February 10, 1976 until it was again closed. The Referee also ordered an amount equal to 5% of medical compensation due for the treatment by Dr. Miller of claimant's cervico-dorsal spine as a penalty for the Fund's unreasonable conduct in failing to accept or deny Dr. Miller's request for reopening. An attorney's fee of $600 was awarded. The Fund contends the awarding of penalties and attorney's fees was in error.

FACTS

Claimant, a 42-year-old bank clerk, sustained various injuries when she was struck by a car on June 4, 1974. These injuries consisted of a brain concussion, sprain of the right knee, multiple contusions of the scalp and chest, both arms and legs. Claimant returned to work after approximately two weeks. The claim was accepted. Claimant's condition was found to be medically stationary on September 11, 1974 by Dr. Orville Jones.

On November 13, 1974, Dr. Jones indicated claimant was complaining of renewed neck pain which radiated into the upper dorsal spine and into the right arm and forearm.

A Determination Order, dated December 19, 1974, awarded claimant compensation for temporary total disability and compensation equal to 7.5° for 5% loss of her right leg. A Second Determination Order, dated July 18, 1975, indicated additional medical information had been considered which did not change the original award.

In August 1975 a third party settlement was made. Part of this settlement provided claimant received a balance of the settlement equal to $1,181.14 and recited: "This amount will operate as a bar to further compensation under this claim, exclusive of his rights under ORS 656.273 and ORS 655.278".

Dr. Douglas Miller, in February 1976, diagnosed claimant had chronic post-traumatic cervico-dorsal myalgia with secondary intermittent muscle spasms and bilateral brachial neuralgia. Claimant indicated that her motor vehicle accident in June 1973 was the cause of this condition.

On March 22, 1976, a representative of the Fund wrote claimant and indicated claimant had been paid certain sums of money under the third party settlement and recited: "This claim will not pay for any medical treatment until you have paid out and have receipts amounting to $1,181.14 for your medical bills". The letter further stated since claimant's condition had not worsened to the extent of her losing time from work, the Fund would have to wait until claimant had paid $1,181.14 before it would start paying her medical bills.

On June 17, 1976 Dr. Miller indicated claimant's symptoms had been increasingly worsening over the past several months and requested her claim be reopened. He indicated claimant was still working and had had no time loss.

Dr. George Harwood, medical consultant for the Fund, in July 1976, opined claimant's condition had not worsened nor had it changed.

In September 1976, Dr. Robert McKillop felt claimant had had an aggravation of her problems in February 1976. He felt it was reasonable to assume that claimant had some minimal to mild degree of "impaired function".

Dr. Frances Nash, in February 1979, diagnosed cervical myofascial injury, signs and symptoms that were compatible with a preforiminal compressive neuropathy L5 on the right. He performed a myelogram which revealed defects at C5-6, C6-7 and L4-5. Dr. Nash opined claimant's worsening condition was a natural progression of symptomatology following her original injury and claimant had a ruptured disc at the L4-5 level.

Dr. Joe Much, medical consultant for the Fund, felt the lumbar condition was unrelated to claimant's original injury. The Fund denied claimant's aggravation claim on March 23, 1979.

The Referee remanded claimant's cervico-dorsal claim to the Fund and ordered it reopened as of February 10, 1976 until again closed, assessed a 5% penalty for the Fund's unreasonable acts and awarded claimant's attorney a fee of $600.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would affirm the Referee's order. The letter sent to claimant on March 22, 1976 did not advise claimant she was entitled to further treatment and that the Fund would pay for medical treatment. ORS 656.593(1)(c) provides that the paying agent shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital services and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the claim, exclusive of any compensation which may become payable under ORS 656.273 or 656.278. ORS 656.593(1)(d) provides that the balance of the recovery shall be paid to the injured worker forthwith. Sub-paragraph two provides that amounts retained by the injured worker shall be in addition to the compensation or other benefits to which he is entitled. In this case, the Fund released the sum of $1,181.14 to claimant and did not retain any money for future claim costs. Therefore, when the Fund wrote to claimant and advised her she had to expend the sum of $1,181.14 for medical bills before it would pay for any medical treatment or care, it was in error. Claimant was entitled to medical care and treatment under ORS 656.245 at that time and did not have to expend $1,181.14 for medical care and treatment before the Fund would pay such costs. The Fund should have so advised claimant. As a result of the Fund's failure to so advise claimant and their handling of the claim, the claim was not correctly processed. The Board would suggest that correspondence from the Fund to claimant be clearer and that the processing of claims by it be better coordinated.

Therefore, the Board finds the acts of the Fund were unreasonable, as found by the Referee, to warrant the awarding of penalties and an attorney's fee and affirms the Referee's order.

ORDER

The Referee's order, dated July 9, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 79-1914 February 1, 1980

JEFFREY VAN HORN, CLAIMANT
Nikolaus Albrecht, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which awarded him compensation equal to 40° for 12-1/2% unscheduled disability for his low back injury. Claimant contends this is not adequate.

FACTS

Claimant, a 21-year-old mechanic trainee, sustained a compensable injury to his back on March 1, 1978 when he slipped and fell while getting up on a piece of machinery. This injury was diagnosed as a lumbosacral strain and contusion of the right knee. Claimant received conservative treatment. Claimant developed pilonidal cyst which was surgically removed. A myelogram was postponed until this condition had cleared.

On November 6, 1976, a myelogram was performed and was normal.

Dr. Peter Smiley, in December 1978, opined that claimant's injury aggravated and caused the infection of the pilonidal cyst which necessitated the surgery.

On January 24, 1979 Dr. Martin Johnson indicated claimant had good range of motion of the lumbosacral spine and had no residual symptoms which suggested nerve root irritation or compression. He found claimant could not bend, twist, or turn repetitively. He opined claimant could be released to return to work in a light duty type of employment where no lifting over 20 pounds was required. Dr. Johnson felt claimant's permanent impairment would probably consist of some restriction on lifting and repetitive bending or twisting. His diagnosis was "residuals of chronic lumbar, strain, minimal". He found claimant's condition to be medically stationary on January 24, 1979.

A Determination Order, dated February 21, 1979, granted claimant compensation for temporary total disability and compensation equal to 16° for 5% unscheduled disability for his low back injury.

In June 1979, Dr. John Thompson indicated claimant was complaining of low back pain. Claimant stated he had returned to work as a janitor in a bowling alley on a part-time basis in January or February 1979. He had increased his hours at work and felt his low back pain had increased with radiation down into the left foot. Dr. Thompson diagnosed chronic lumbosacral strain.

Claimant has approximately 11 years of education. He has worked in a sawmill, bowling alley, and on a construction job. Claimant was offered assistance by the Field Services Division, but indicated he did not like the jobs and pay suggested. He found his present job on his own. Claimant stated he uses muscle relaxers and other medication for his back pain and has difficulty sleeping. Claimant's wife testified that when he returns from work he has pain and muscle spasms. She stated claimant does not engage in the physical activities he "used to do".

The Referee, after reviewing all the evidence, concluded claimant was entitled to compensation equal to 40° for 12-1/2% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Dr. Johnson felt claimant's permanent impairment would be restrictions on lifting, repetitive bending and lifting due to his injury. Claimant will not be able to return to a heavy form of employment, such as heavy construction or mill worker, due to this injury. The Board finds based on his limitations, age, education and other factors, claimant has sustained a greater loss of wage earning capacity than that for which he has been compensated. Therefore, the Board finds claimant is entitled to an award of compensation equal to 64° for 20% unscheduled disability for his low back injury. This is in lieu of any previous awards.

ORDER

The Referee's order, dated July 12, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for his low back injury. This is in lieu of any previous awards for unscheduled disability for his low back injury of March 1, 1978.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

SAIF CLAIM NO. PA 564720 February 8, 1980

SYBIL A. AIKEN, CLAIMANT
Gatti, Ward & Gatti, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her low back on August 29, 1956. Claimant had two back surgeries after this injury. Her claim was initially closed by an order, dated August 30, 1963, which granted her an aggregate of 80% loss of function of an arm for unscheduled disability. Claimant's aggravation rights have expired.

Claimant requested own motion relief and the Board found conflicting medical evidence was present and referred the matter for hearing. A hearing was held and the Referee concluded that claimant's condition had worsened since the last arrangement or award of compensation and that this worsening was the result of the spinal fusion which was required by claimant's 1956 industrial injury. The Referee recommended the claim be reopened. The Board, by an Own Motion Order, dated September 28, 1979, remanded the claim to the State Accident Insurance Fund for acceptance and payment of compensation to which claimant was entitled commencing on the date of the order and until closed pursuant to ORS 656.278.

On November 7, 1979 the Orthopaedic Consultants examined claimant and indicated that her condition was medically stationary and that the only changes present were those related to slow progression of degenerative arthritic changes unrelated to the original injury. They opined the total loss of function from the original injury, as well as it existed today, would be in the severe range with respect to the lumbosacral spine and they noted that claimant had previously been given a permanent partial disability in that range. Their final diagnosis was spondylolisthesis L4-5 and L5-S1, status post-operative total decompressive laminectomy L4-5 (1957), lumbar fusion L4 to sacrum (1961), and repeat fusion L4-5 for pseudoarthrosis (1962), and lumbar spondylosis L1, L2 and L3.

On December 10, 1979, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 17, 1980, recommended that claimant be granted additional temporary total disability from September 28, 1979 through November 7, 1979 and no further amount of permanent partial disability. The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 28, 1979 through November 7, 1979, less time worked. The record indicates that this award has already been paid to claimant.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of September 28, 1979.

CLAIM NO. YC 437109 February 8, 1980

NANCY L. ALLEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order Denying Own Motion Relief

Claimant, by and through her attorney, on January 15, 1980, requested the Board exercise its own motion jurisdiction to reopen her claim. A Determination Order, dated September 14, 1976, awarded claimant compensation for temporary total disability and compensation equal to 48° for 10% unscheduled disability for her low back injury of February 27, 1973. This was amended by a Determination Order, dated September 29, 1976, which granted her compensation equal to 48° for 15% unscheduled disability for her low back injury.

On November 7, 1979, claimant was referred for a vocational rehabilitation program. A note on the bottom of this letter advised the insurer: "Reimbursable temporary total disability will be authorized when worker is enrolled and actively participating in an approved rehabilitation program, per notice to follow".

On December 31, 1979, a vocational coordinator advised claimant that vocational rehabilitation could not authorize time loss while she was in training, because her injury was prior to January 1, 1974.

Claimant, in her request, asked the Board to grant her compensation for temporary total disability during the time she was in the vocational rehabilitation program and to determine that the matter subsequent to vocational rehabilitation should be submitted to Closing and Evaluation for a new Determination Order.

The Board, after thorougly considering claimant's request, denies it. The Board finds this matter does not fall under its own motion jurisdiction. The Board feels claimant's remedy it to request a hearing on the issues set forth in her request.

ORDER

Claimant's request for own motion relief is hereby denied.

WCB CASE NO. 78-7786 February 8, 1980

JOSEPH A. ANDERSON, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant an additional award of compensation equal to 48° for 15% unscheduled disability and compensation equal to 22.5° for 15% loss of use of his left leg. The Fund contends these two awards are in error.

FACTS

Claimant a 44-year-old service station attendant, sustained a compensable injury to his low back on November 4, 1976 when he slipped and fell off of a ladder, landing on his tailbone. This injury was diagnosed as a severe low back strain and fracture of the distal sacral segment. Claimant returned to work on January 5, 1977.

A Determination Order, dated March 31, 1977, awarded claimant compensation for temporary total disability only.

In September 1977, Dr. Richard James indicated claimant had had an injury to his low back in 1968. Claimant complained of low back pain and left leg pain after his 1976 slip and fall. Claimant had had no surgery on his back after the 1968 injury. Dr. James compared the myelograms done in June 1977 and September 1977 and felt the S1 nerve root was still somewhat "amputated". His diagnosis was: "Left lower extremity radiculities and nerve root irritation, with some element of mechanical low back pain. Suspect some psychophysiologic musculoskeletal reaction in this individual as well". Dr. James stated that in June 1977 Dr. Dunn had performed an extensive foraminotomy and laminectomy.

Claimant was hospitalized in January 1978 for extreme low back pain which radiated down his left leg.

Dr. Howard Ferguson, on June 1, 1978 reported claimant had squatted down and as he tried to get up, heard something in his back snap and had extreme pain. He diagnosed "an acute lumbar spinal musculature and tendon strain on the left". Further conservative care followed.

On August 14, 1978 the Orthopaedic Consultants reported that in June 1978 claimant said his left leg gave away and he fell. He complained of back pain and pain down both legs. The Orthopaedic Consultants diagnosed: chronic lumbosacral sprain, status post-operative laminotomy-discectomy L4-5 and L5-S1 with left radiculopathy, prostatitis, (probably not related to his injury,) and functional overlay. They opined that claimant's condition was medically stationary and that he needed a job change. They felt the loss of function of claimant's back due to this injury was mildly moderate.

A Second Determination Order, dated September 26, 1978, awarded claimant additional compensation for temporary total disability and compensation equal to 64° for 20% unscheduled disability for his back injury.

In October 1978 claimant was enrolled in an approved rehabilitation program. He was attending community college classes on blueprint reading and mathematics. He completed the program on February 23, 1979.

A Third Determination Order, dated March 29, 1979, awarded claimant additional compensation for temporary total disability for the period he was in the above program.

Claimant was rehospitalized in April 1979 by Dr. Ferguson, who diagnosed acute lumbar spinal muscular and tendon strain and spondylolysis on the right side at L5.

Dr. Michael Narus, in April 1979, indicated claimant's left lower extremity had a collapsing give-way functional weakness in all of the muscle groups. He diagnosed chronic low back pain and marked functional overlay.

Claimant, in May 1979, began an on-the-job training program learning spray painting and welding.

At the hearing claimant testified that he was off work eight months after his 1968 injury, but recovered without any difficulties. He said he had become a certified welder through the vocational rehabilitation program after that injury. He said he has worked in mills, as a commercial fisherman, choker setter, jackhammer operator, service station attendant, automotive mechanic, carpenter's helper and painter. Claimant stated he found the on-the-job training program himself and is learning spray painting and welding, but had done only spray painting, which included the preparatory grinding. He said at this job he was not required to lift over 10 pounds nor do excessive bending or stooping. He stated he could not reach over to pick up objects from the floor and has to boost himself with his hands on his thighs to rise from a squat.

Claimant's wife testified that he is extremely tired when he comes home from work, limps badly, complains of back and leg pain and retires early three out of five nights on the days he works.

Films were introduced which show claimant at work doing more than he testified to.

The Referee noted the films led him to believe claimant was exaggerating his limitations. The Referee concluded that based on the give-way weakness in claimant's left leg, the loss of sensation and occasional severe pain, he was entitled to an award of compensation equal to 22.5° for 15% loss of the left leg.

The Referee found claimant had sustained a greater loss of wage earning capacity than he had been awarded and granted claimant additional compensation equal to 48° for 15% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, disagrees with the Referee's findings. The Board finds no medical evidence of any impairment of the left leg. Dr. Narus does find a give-way weakness in the muscles of the leg, but does not indicate if this results in any impairment. The other doctors only report what claimant has told them and, as noted by the Referee, claimant's testimony is not entirely credible. Therefore, the Board would reverse the Referee's award for the left leg in its entirety.

Further, based on the medical evidence and the testimony and other factors, such as claimant's age, education, other training or work experiences, etc., the Board concludes the Referee's award for unscheduled disability is too high and would modify it to 80° for 25% unscheduled disability for claimant's low back injury.

ORDER

The Referee's order, dated July 11, 1979, is modified.

That portion of the Referee's order which granted claimant compensation equal to 22.5° for 15% for loss of his left leg is reversed.

That portion of the Referee's order which granted claimant compensation equal to 112° for 35% unscheduled disability for his low back injury is modified and claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his low back injury. This is in lieu of any previous awards for unscheduled disability for claimant's low back injury.

The remainder of the Referee's order is affirmed.

SAIF CLAIM NO. A 593543 February 8, 1980

JERRY J. BOWEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 10, 1979 claimant requested his claim be reopened under the Board's own motion jurisdiction. Claimant had sustained an injury to his right forearm on November 26, 1956. His claim was initially closed by a Determination Order, dated October 1, 1957, which awarded claimant compensation for temporary total disability and compensation equal to 79-1/5° for 60% loss function of the right arm. Claimant's aggravation rights have expired.

On November 6, 1979 Dr. John Erkkila removed a four-hole plate and screws from claimant's right forearm and irrigated and debribed and removed metallic corrosion debris from the right forearm. Claimant indicated that the steel plate was put in the right forearm and his work caused the screws to loosen resulting in an abscess. Dr. Erkkila felt that claimant's current condition, which required surgery on the right forearm was a continuation of the injury occurring in 1956.

Claimant, in May 1979, began an on-the-job training program learning spray painting and welding.

At the hearing claimant testified that he was off work eight months after his 1968 injury, but recovered without any difficulties. He said he had become a certified welder through the vocational rehabilitation program after that injury. He said he has worked in mills, as a commercial fisherman, choker setter, jackhammer operator, service station attendant, automotive mechanic, carpenter's helper and painter. Claimant stated he found the on-the-job training program himself and is learning spray painting and welding, but had done only spray painting, which included the preparatory grinding. He said at this job he was not required to lift over 10 pounds nor do excessive bending or stooping. He stated he could not reach over to pick up objects from the floor and has to boost himself with his hands on his thighs to rise from a squat.

Claimant's wife testified that he is extremely tired when he comes home from work, limps badly, complains of back and leg pain and retires early three out of five nights on the days he works.

Films were introduced which show claimant at work doing more than he testified to.

The Referee noted the films led him to believe claimant was exaggerating his limitations. The Referee concluded that based on the give-way weakness in claimant's left leg, the loss of sensation and occasional severe pain, he was entitled to an award of compensation equal to 22.5° for 15% loss of the left leg.

The Referee found claimant had sustained a greater loss of wage earning capacity than he had been awarded and granted claimant additional compensation equal to 48° for 15% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, disagrees with the Referee's findings. The Board finds no medical evidence of any impairment of the left leg. Dr. Narus does find a give-way weakness in the muscles of the leg, but does not indicate if this results in any impairment. The other doctors only report what claimant has told them and, as noted by the Referee, claimant's testimony is not entirely credible. Therefore, the Board would reverse the Referee's award for the left leg in its entirety.

Further, based on the medical evidence and the testimony and other factors, such as claimant's age, education, other training or work experiences, etc., the Board concludes the Referee's award for unscheduled disability is too high and would modify it to 80° for 25% unscheduled disability for claimant's low back injury.

ORDER

The Referee's order, dated July 11, 1979, is modified.

That portion of the Referee's order which granted claimant compensation equal to 22.5° for 15% for loss of his left leg is reversed.

That portion of the Referee's order which granted claimant compensation equal to 112° for 35% unscheduled disability for his low back injury is modified and claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his low back injury. This is in lieu of any previous awards for unscheduled disability for claimant's low back injury.

The remainder of the Referee's order is affirmed.

SAIF CLAIM NO. A 593543 February 8, 1980

JERRY J. BOWEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 10, 1979 claimant requested his claim be reopened under the Board's own motion jurisdiction. Claimant had sustained an injury to his right forearm on November 26, 1956. His claim was initially closed by a Determination Order, dated October 1, 1957, which awarded claimant compensation for temporary total disability and compensation equal to 79-1/5° for 60% loss function of the right arm. Claimant's aggravation rights have expired.

On November 6, 1979 Dr. John Erkkila removed a four-hole plate and screws from claimant's right forearm and irrigated and debribed and removed metallic corrosion debris from the right forearm. Claimant indicated that the steel plate was put in the right forearm and his work caused the screws to loosen resulting in an abscess. Dr. Erkkila felt that claimant's current condition, which required surgery on the right forearm was a continuation of the injury occurring in 1956.

Claimant stated he returned to work on December 10, 1979 and that he had lost 23 days from work. Dr. Erkkila warned the claimant that a severe twisting injury or severe blow to the arm could cause claimant further difficulties.

On January 29, 1980 the State Accident Insurance Fund advised the Board that it would not oppose an Own Motion Order reopening the claim for the surgery and the time loss.

The Board, after thoroughly considering the evidence before it, finds it sufficient to warrant a reopening of claimant's claim at this time. The Board concludes that the claim for the November 26, 1956 should be reopened as of the date claimant was hospitalized for the surgery by Dr. Erkkila and until his claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-87 February 8, 1980

JAMES A BRENNAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which granted claimant compensation for temporary total disability from October 4, 1977 through April 11, 1978 and compensation equal to 16° for 5% unscheduled disability.

FACTS

Claimant, a 19-year-old mechanic, sustained a compensable injury to his back on April 8, 1977 while lifting a counterweight to open a door. Dr. R. Atcheson diagnosed muscle spasm of the back. X-rays were negative for any defects.

On June 14, 1977, Dr. John Harris indicated claimant still complained of intermittent pains and muscle spasms in his low back aggravated by bending, stooping, lifting and prolonged standing. The diagnosis was lumbosacral sprain. Dr. Harris felt claimant would be able to return to his previous job within a month and did not anticipate any permanent disability as a result of this injury.

On September 6, 1977, Dr. Mary McVay stated claimant's condition was medically stationary and no further treatment was recommended. Dr. McVay found no objective evidence of lumbosacral strain or impairment. It was her opinion claimant was employable in his usual occupation.

On October 6, 1977, Dr. Richard Davis indicated he had seen claimant on August 16, 1977 and had sent him to Dr. Duckler to get his opinion on whether claimant would be benefited by a back brace and to have him referred to a physiatrist. Dr. Davis reported claimant indicated he felt better, but still had low back pain. He did agree with Dr. McVay's assessment of claimant.

A Determination Order, dated January 9, 1978, awarded claimant compensation for temporary total disability from April 8, 1977 through July 20, 1977 and from August 2, 1977 through October 3, 1977.

On June 5, 1978, Dr. Lawrence Duckler stated he had seen claimant on September 15, 1977. Claimant had a severe lumbosacral strain. He referred claimant to Dr. Gerhardt, a physiatrist. Dr. Duckler had last seen claimant on April 11, 1978 and suggested he return to his regular work. On July 18, 1978, Dr. Duckler stated Dr. Davis had transferred claimant's case to him and he was the treating physician. Dr. Duckler did not find claimant was medically stationary until April 11, 1978.

At the hearing, claimant testified that his activities are limited somewhat by the constant dull ache and pain in his low back. He stated it is increased by repetitive bending, standing or sitting. He says he can lift up to 50 pounds and has no problems with walking or squatting. Claimant currently resides in Tempe, Arizona and drove to Portland by himself without difficulties arising from this drive.

The Referee found no objective evidence of permanent partial disability, but found claimant's pain was disabling. Therefore, the Referee granted claimant compensation equal to 16° for 5% unscheduled disability for his April 8, 1977 low back injury.

Further, the Referee found claimant was entitled to compensation from October 3, 1977 to April 11, 1978. The Referee found claimant was not released by a treating or attending physician until April 11, 1978 and entitled to his additional temporary total disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board cannot find any evidence in this case which indicates claimant's pain is disabling. Therefore, the Board finds claimant is not entitled to any award of unscheduled disability. The Board would affirm the remainder of the Referee's order.

ORDER

The Referee's order, dated July 17, 1979, is modified.

That portion of the Referee's order which granted claimant compensation equal to 16° for 5% unscheduled disability for his low back injury is reversed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-2624 February 8, 1980

MARJORIE BROUGHER, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Cavanaugh & Pearce, Employer's Attys.
Order Denying Motion To Augment

On January 2, 1980, the employer moved that the Board augment the record in the above entitled matter. The employer stated it had a report relating to claimant's psychological problems which was an issue on appeal. It stated this report was not available at the time of the hearing and represented new evidence relating to this claim. Claimant opposed this motion.

The Board, after thoroughly considering this motion, denies it. The evidence the employer seeks to have added to the record was not before the Referee and, therefore, cannot be properly considered by the Board on de novo review.

ORDER

The motion to augment is hereby denied and the Board will proceed to review this case.

CLAIM NO. C 383397 February 8, 1980

RICHARD C. CHILDRESS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to his left knee on July 18, 1972. The claim was originally closed by a Determination Order, dated November 7, 1973. Claimant's aggravation rights have expired.

On November 15, 1979, Dr. Robert E. Manley reported claimant had continuing difficulty with his left knee and dislocation of the patella tendon. Claimant indicated he was having more pain in the knee area and that the patellar tendon seemed to be dislocating. He stated he had difficulty walking and his knee was giving way. Dr. Manley scheduled claimant for an arthrotomy of the joint as needed. The arthroscopy revealed a post-operative patellectomy and chondromalacia left knee. Dr. Manley felt that no further surgical procedures should be done without discussing the matter with claimant as it was felt claimant would need a Trillot procedure with lateral retinacular release and possibly prolonged immobilization and rehabilitation as a result.

The State Accident Insurance Fund, on January 14, 1980, referred this matter to the Board for its consideration. It advised the Board that it would not oppose an Own Motion Order reopening this claim for claimant's recent surgery.

The Board, after giving consideration to the medical reports in this file and reviewing the past medical reports, concludes the claim should be reopened as of the date claimant was hospitalized for the arthroscopy, November 15, 1979, and until his claim is again closed pursuant to the provisions of ORS 656.278.

II IS SO ORDERED.

SAIF CLAIM NO. ZC 251934 February 8, 1980

JAMES D. COLLIER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left leg on June 23, 1970. His claim was initially closed by a Determination Order, dated March 29, 1973, which awarded claimant compensation for temporary total disability and compensation equal to 97.5° for 65% loss of the left leg. Claimant's aggravation rights have expired. A stipulation, dated January 16, 1974, granted claimant an additional 20° for his left leg disability. A Determination Order, dated August 24, 1976, awarded claimant additional compensation for temporary total disability.

In October 1978, Dr. Stanley James indicated claimant walked with a limp on the left and continued with a foot drop on the left. He found there had been a progression of the degenerative changes in the left knee. Claimant had returned to heavy construction work. Dr. James felt claimant would, at some time, seek a sedentary type of occupation.

Claimant also was seen by Dr. Embick who felt claimant's continuing problems of recurrent pain and swelling of the left leg were due to claimant's original injury.

The Board, by an Own Motion Order, dated July 6, 1979, amended on January 15, 1980, reopened the claim effective May 2, 1979.

Dr. James, in August 1979, indicated a tomogram revealed multiple well-defined ossified fragments involving the anterior aspect of the medial tibial plateau which appeared to be of longstanding. He did not feel claimant would be capable of returning to work in construction and would probably have to seek other forms of employment.

On October 3, 1979, Dr. James stated claimant had an extreme degree of traumatic arthritis in his left knee and would require a completely sedentary type of job with minimal weight bearing and walking and certainly avoiding any rough, uneven ground, squatting, lifting, or climbing. On November 7, 1979, Dr. James indicated claimant's condition was medically stationary. He felt claimant might eventually need additional surgery.

On December 12, 1979, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 23, 1980, recommended claimant be granted additional compensation for temporary total disability from May 2, 1979 through December 12, 1979.

The Board concurs with this recommendation, but also finds claimant is entitled to an increased award of permanent partial disability. Based on the reports of the doctors, which indicate claimant has lost more function of his leg since his last award or arrangement of compensation, the Board finds claimant is entitled to additional compensation equal to 10° for 6-2/3% loss of his left leg.

ORDER

Claimant is hereby granted compensation for temporary total disability from May 2, 1979 through December 12, 1979, less time worked, and compensation equal to 10° for 6-2/3% loss of the left leg. These awards are in addition to any previous awards claimant has been granted.

CLAIM NO. 168-008 February 8, 1980

STUART J. DAVIS, CLAIMANT
Malagon & Yates, Claimant's Attys.
J.W. McCracken, Employer's Atty.
Own Motion Order

On December 12, 1979, claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury to his left leg on April 22, 1968. Claimant's claim was initially closed by a Determination Order, dated June 6, 1969, which awarded claimant compensation for temporary total disability and compensation equal to 20% loss of the left foot. A Second Determination Order, dated September 20, 1973, granted no additional compensation. Claimant's aggravation rights have expired. Attached to this request was a report from Dr. Robert Larson, dated November 13, 1979. Dr. Larson indicated claimant was having enough disability to warrant a fusion of the left ankle. He related this to claimant's original injury.

On December 17, 1979, the Board informed Weyerhaeuser Company of claimant's request and asked it to advise the Board of its position. On January 14, 1980, Weyerhaeuser Company advised the Board claimant had had his left ankle fused on December 13, 1979 and it would not oppose an Own Motion Order reopening the claim.

The Board, after thoroughly reviewing all the evidence, finds it is sufficient to reopen claimant's claim under its own motion jurisdiction effective December 13, 1979 for payment of compensation and other benefits as provided by law until closed under ORS 656.278.

ORDER

Claimant's claim is hereby remanded to Weyerhaeuser Company for acceptance of payment of compensation and other benefits as provided by law from December 13, 1979 until closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 78-9859 February 8, 1980
WCB CASE NO. 78-9860

ALLEN EARLE, CLAIMANT
A.J. Morris, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

An order approving a stipulation was entered in the above matter on December 10, 1979. On December 12, 1979, the State Accident Insurance Fund (Fund) requested that the Referee reconsider that portion of the order which provided for an attorney's fee separate from the compensation awarded. The Referee, on January 4, 1980, issued an order denying the motion for reconsideration and did not stay the first order.

The Fund, on January 14, 1980, requested Board review of this case.

Claimant moved for an order of dismissal on January 16, 1980 on the grounds that the Fund's request for Board review was not timely.

The Board, after thoroughly considering this issue, concurs with claimant that the Fund's request was not timely filed and would grant the motion.

ORDER

IT IS HEREBY ORDERED that the State Accident Insurance Fund's request for Board review in this case is dismissed.

CLAIM NO. 315-172-72 February 8, 1980

DALE L. FLEMING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his low back on November 16, 1972. His claim was originally closed by a Determination Order, dated September 19, 1973, which granted claimant compensation for temporary total disability, temporary partial disability, and compensation equal to 32° for 10% unscheduled disability for his low back injury. Claimant's aggravation rights have expired.

Claimant returned to work and developed back pain. The claim was reopened on August 18, 1978 and closed on January 29, 1976 by a Determination Order which awarded claimant compensation for temporary total disability and compensation equal to 32° for 10% unscheduled disability for his low back injury.

The claim was again voluntarily reopened on May 29, 1979 because of claimant's continuing low back pain. A myelogram done on June 4, 1979 was normal.

On November 18, 1979, Dr. Donald T. Smith indicated claimant was disabled from physical work due to his emphysema and abdominal obesity, but not due to back complaints or as the direct result of claimant's working injuries. He felt claimant's back condition was stationary.

On December 31, 1979, Dr. Gary Franklin stated he did not feel claimant's disability in regards to his low back would exceed the 20% he had been awarded in the past. He released claimant from his care at that time.

On December 20, 1979, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 18, 1980, recommended claimant be granted additional compensation for temporary total disability from May 30, 1979 through December 31, 1979.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from May 30, 1979 through December 31, 1979, less time worked. The record indicates that most of this award has already been paid to claimant.

WCB CASE NO. 79-1837 February 8, 1980

LEE R. FORSYTHE, CLAIMANT
Flaxel, Todd & Nylander,
Claimant's Attys.
Paul Roess, Employer's Atty.
Amended Order On Review

On January 31, 1980, the Board issued an Order on Review in the above entitled matter. The Board's order, on page three, in the second paragraph of the de novo review section, stated:

> "As to the issue of the eyeglasses and attorney's fee, the Board would also affirm the Referee's order. The Fund is responsible to provide prosthetic devices, such as eyeglasses. Since this was denied by the Fund and claimant's attorney prevailed in having the denial set aside, he is entitled to a fee."

Claimant waived appealing the denial of May 26, 1978 for his broken eyeglasses at the time of the hearing. Therefore, the Board amends its order by deleting the above quoted portion of its order since this issue was not correctly before the Referee or the Board. Further, the Board would modify the Referee's order in accordance with the above decision.

ORDER

The Board's Order on Review, dated January 31, 1980, is amended by deleting the third paragraph on page four. Further, that portion of the order which granted claimant's attorney an attorney's fee of $250 is reversed.

The Referee's order, dated August 10, 1979, is modified. That portion of the Referee's order which ordered the State Accident Insurance Fund to reimburse claimant for his glasses and granted an attorney's fee of $200 is reversed.

The Determination Orders, dated July 27, 1978, December 7, 1978 and December 28, 1978, are affirmed in all respects.

WCB CASE NO. 79-871 February 8, 1980

EDWARD J. HECK, CLAIMANT
Starr & Vinson, Claimant's Attys.
Luvaas, Cobb, Richards & Fraser,
Employer's Attys.
Order Denying Motion For Reconsideration

On January 17, 1980, the Board issued an Order on Review which reversed the Referee's award of compensation equal to 32° for 10% unscheduled disability for claimant's low back injury. The Board concluded that the evidence in this case did not establish that claimant had sustained any loss of wage earning capacity.

On January 28, 1980, claimant requested the Board reconsider its order and issue a new order. Claimant contended the Board had not correctly applied legal principles in reaching its decision.

The Board, after thoroughly reviewing claimant's motion and the facts and evidence in this case, denies his motion. The Board's application of legal principles in this case was correct. The Order on Review is consistent with the legal principles and the facts in evidence in this case.

ORDER

Claimant's motion for reconsideration is denied.

SAIF CLAIM NO. EODC 3607 February 8, 1980

LESTER JOHNSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left and right knees on March 13, 1970. Claimant's claim was first closed by a Determination Order, dated June 4, 1970. A Determination Order, dated January 27, 1972, granted claimant compensation for temporary total disability and compensation for permanent partial disability of 23° for partial loss of his right leg. A Determination Order, dated September 27, 1974, granted claimant compensation equal to 52.5° for 30% loss of his left leg and compensation equal to 7.5° for 5% loss of his right leg. This is in addition to the prior award granted. This order also set forth that the original date which commenced claimant's aggravation period was January 27, 1972. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with his right leg. The Board, by an Own Motion Order, dated April 4, 1979, reopened the claim effective March 6, 1979, the date surgery had been performed on the leg. On March 6, 1979 Dr. George McNeill performed a tibial osteotomy. Claimant returned to work with his employer on July 16, 1979.

On October 14, 1979 Dr. George McNeill found claimant's condition was medically stationary. He reported that claimant was working full time and that the pain that claimant had previously had had seemingly been eliminated.

On December 11, 1979 Dr. Theodore Pasquesi reported that claimant's condition was stationary. He felt the osteotomy claimant underwent resulted in approximately 10% more impairment in the lower extremity than he had previously been compensated for.

On January 10, 1980 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 18, 1980, recommended that claimant be granted additional compensation for temporary total disability from March 6, 1979 through July 16, 1979 and that he be granted no additional award for permanent partial disability.

The Board concurs with the recommendation of the Evaluation Division regarding the award of additional compensation for temporary total disability. However, the Board disagrees with the recommendation of the Evaluation Division that claimant be granted no additional award for permanent partial disability. Dr. Pasquesi, in his opinion, finds that claimant has a 10% impairment of the right lower extremity. Therefore, the Board feels that claimant is entitled to additional compensation equal to 15° for 10% loss of the right leg.

ORDER

Claimant is hereby granted an additional award of compensation for temporary total disability from March 6, 1979 through July 16, 1979 and granted an additional award of compensation equal to 15° for 10% loss of his right leg.

CLAIM NO. AJ53-109217 February 8, 1980

HAROLD L. JONES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 23, 1980, Employers Insurance of Wausau (Wausau) advised the Board claimant had undergone additional surgery on January 14, 1980. Claimant sustained a compensable injury to his right upper extremity on February 23, 1966. A Determination Order, dated October 29, 1974, awarded claimant compensation for temporary total disability and compensation equal to 130.5° for 90% loss of the right arm. This was amended by a Determination Order, dated December 10, 1975, which indicated the award was for the loss of use of the right arm. Claimant's aggravation rights have expired.

Claimant has undergone 50 operations on his right upper extremity. On January 16, 1980, Dr. Mary McVay indicated claimant had been hospitalized on January 13, 1980 and on January 14, 1980 surgery was performed consisting of capsuloplasties of the ring and little finger metacarpal phalangeal joints.

The Board, after reviewing the documents submitted to it, concludes that the claim should be reopened with compensation for temporary total disability to commence on January 13, 1980, the date claimant was admitted to the hospital for the surgery performed by Dr. McVay and other benefits until the claim is closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. 484704 February 8, 1980

CLARENCE LOVING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left leg on January 1, 1934. The claim was initially closed by an order, dated February 15, 1935, which awarded claimant compensation equal to 8-4/5°. A second order, dated January 28, 1936, awarded compensation equal to 35-1/5°. The total award was equal to 44° for 50% loss of the left leg.

On June 4, 1979, Dr. William Streitz performed a total left knee arthroplasty. Dr. Streitz related the need for this surgery to claimant's original injury in 1934.

The claim was reopened by a Board's Own Motion Order, dated December 5, 1979.

Dr. Streitz, on January 4, 1980, indicated claimant's condition was medically stationary. Claimant felt his condition was improved by the surgery.

On January 14, 1980, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 29, 1980, recommended that claimant be granted compensation for temporary total disability from June 4, 1979 through January 4, 1980 and compensation equal to 50% loss of the leg in lieu of any and all prior awards, not in addition to.

The Board concurs in the recommendation with respect to compensation for temporary total disability. It finds that claimant's condition has not worsened and he received adequate compensation for his disability in 1935 and 1936 by the awards totalling 50%. Therefore, claimant is entitled to no additional compensation for permanent disability.

ORDER

Claimant is hereby granted compensation for temporary total disability from June 4, 1979 through January 4, 1980, less time worked.

WCB CASE NO. 8-4744 February 8, 1980

ROBERT MOOSE, CLAIMANT
Taggart & Taggart, Claimant's Attys.
Yturri, Rose & Burnham, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which set aside its denial of claimant's left shoulder condition. The employer contends this was incorrect.

FACTS

Claimant, a 49-year-old frozen food worker, slipped and fell on February 23, 1976 injuring his left leg and right shoulder. This injury was accepted.

Claimant, on February 11, 1976, had gone to the hospital complaining of pain in his right arm, extending into his right chest, shoulder, and neck of two weeks' duration. This was diagnosed as epicondylitis.

Dr. N. Gregory, on February 24, 1976, reported claimant had pain in his left leg, right hip, right shoulder, neck and groin. Claimant told the doctor he had fallen at work and rolled onto his right shoulder and sommersaulted. The diagnosis was "muscle/ligamentous strain, cervical area, abrasion left lower leg".

On October 19, 1976 claimant injured a finger on his right hand. He was treated by Dr. A. M. Tanaka. Claimant eventually had surgery on the finger, but no mention of a left shoulder condition was made until March 1977 when claimant complained of left shoulder pain to Dr. Tanaka.

Claimant was involved in a motorcycle accident in August 1977. He reported to the emergency room personnel he had pain in the left shoulder, right jaw, left ankle and a laceration to the left leg below the knee.

In November 1977, Dr. N. Thrasher reported claimant complained severely of left shoulder pain. He diagnosed a probable rotator cuff tear and tenosynovitis of the long head of the biceps tendon.

In March 1978, Dr. Thrasher hospitalized claimant who still complained of left shoulder pain and restricted motion of the shoulder. Dr. Thrasher stated this dated from last August or September 1977 when the shoulder became painful in association with his work. Claimant underwent surgery on March 22, 1978. Dr. Thrasher's diagnosis after the operation was bicepital groove tenosynovitis and chronic subdeltoid bursitis of the left shoulder which he related to claimant's February 23, 1976 injury.

In May 1978, Dr. Thrasher indicated he had been treating claimant since April 1976 for left shoulder problems. Also, in May 1978, Dr. Michael O'Brien stated claimant had complained of both left and right shoulder pain when he had first seen claimant in February 1976.

On June 2, 1978 the employer denied claimant's claim for his left shoulder condition.

At the hearing claimant testified he had told the doctor in the hospital he had fallen on his left side and injured his left shoulder which hurt immediately after the fall and progressively got worse. Claimant stated he had told the doctors he has seen that the left shoulder condition arose from his injury at work. Claimant denied a motorcycle accident in 1977. Claimant and his wife testified that after his injury claimant's left shoulder did bother him.

The Referee found the left shoulder condition was related to his industrial injury of February 23, 1976.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's finding of the claimant's left shoulder condition being compensable. The medical reports filled out immediately after the slip and fall do not indicate claimant sustained any injury to his left shoulder. Dr. Gregory indicates an injury to the right shoulder. Claimant stated he had fallen forward and rolled onto his right shoulder. Dr. Gregory found right trapezius muscle spasm and ordered treatment for the right shoulder. The first mention to any doctor, after his fall, by claimant of a left shoulder problem was in March 1977. Claimant's testimony also has inconsistencies in it. He denies any motorcycle accident. Based on the history of injury in the initial medical reports, the subsequent medical reports, opinions of the doctors and the testimony, the Board finds claimant failed to meet his burden of proof. Therefore, the Board finds claimant's left shoulder condition is not related to his February 23, 1976 injury and reverses the Referee's finding.

ORDER

The Referee's order, dated September 7, 1979, is reversed.

The employer's denial of June 2, 1978 is approved.

SAIF CLAIM NO. KA 963813 February 8, 1980

NATHAN S. RANDALL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his left leg as a result of a logging accident on November 9, 1962. The claim was initially closed by an order, dated October 21, 1966, which granted compensation for 50% loss of the left leg. Claimant's claim subsequently has been reopened and closed resulting in claimant receiving a total award of compensation equal to 75% loss of the left leg. Claimant's aggravation rights have expired. Claimant continued to have recurring cellulitis of the left leg related to the original injury.

Dr. W. Courogen reported that claimant was hospitalized from October 4, 1979 through October 6, 1979 for recurrent cellulitis of the left leg. Claimant was again hospitalized for this condition from November 6, 1979 through November 12, 1979.

In late October 1979, claimant wrote the Fund requesting that he be compensated for time he had missed from work because of cellulitis of his left leg. He indicated he had been off work from September 11 through 13, September 17 through September 21, and from October 8 through October 12, 1979 because of the cellulitis condition in his left leg. He indicated he had returned to work on October 15, 1979.

Dr. Courogen released the claimant for regular work on December 17, 1979 indicating, however, that claimant was released for modified work for six hours a day. He found claimant's condition medically stationary as of December 17, 1979.

The State Accident Insurance Fund, on January 29, 1980, indicated it did not oppose an Own Motion Order allowing time loss for the periods of September 11-13 and 17-21, 1979, October 4-12 and 17-19, 1979 and November 6 through December 16, 1979, in addition to the periods claimant was hospitalized from October 4 to October 6, 1979 and November to November 11, 1979.

The Board, after giving consideration to all the evidence in this case and reviewing the past medical history of claimant, concludes the claim should be reopened as of September 11, 1979 until his claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED

CLAIM NO. C604-13353 February 8, 1980

ARNOLD R. REYNOLDS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right shoulder on February 16, 1972. His claim was initially closed by a Determination Order, dated August 8, 1972, which awarded claimant compensation for temporary total disability only. Claimant's aggravation rights have expired. This claim was subsequently opened and closed four more times and one stipulation has been entered. Claimant has been granted a total award of compensation for his right shoulder injury equal to 192° for 60% unscheduled disability.

The Board ordered the claim reopened on August 15, 1979 under its own motion jurisdiction. The Board found claimant's condition had worsened since his last arrangement or award of compensation and that this worsening was attributable to his 1972 industrial injury. The claim was ordered reopened effective April 1, 1979.

On October 31, 1979, Dr. Robert Berselli indicated claimant's condition was medically stationary as of April 1, 1979. He indicated claimant had an increase in his subjective complaints, but the underlying objective physical findings were unchanged.

On November 7, 1979, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 21, 1980, recommended claimant be granted additional compensation for temporary total disability from April 1, 1979 through October 30, 1979.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 1, 1979 through October 30, 1979, less time worked. The evidence in the file indicates claimant has already received this award.

WCB CASE NO. 78-7004 February 8, 1980

DONN REYNOLDS, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly
& Barnett, Claimant's Attys.
Gearin, Landis & Aebi, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which approved the employers' denial. Claimant contends his fall and subsequent injuries resulted from the conditions of his employment.

FACTS

Claimant, a 43-year-old security guard, alleges he sustained a compensable injury on August 13, 1978. Claimant indicated he had riden to the guard station in the back of a pick-up and he remembered swinging his leg over the tailgate to get out and then the next thing he remembered was regaining consciousness at the nurse's station.

The employer denied this claim on August 28, 1978.

Chart notes from the hospital indicate claimant had multiple abrasions and contusions on his face, the knuckles of his right hand were swollen and bruised and the left hand was swollen.

Dr. Clinton Faber, on August 29, 1978, stated he had been told claimant had been walking around a pick-up and just fell down after having a seizure. He hospitalized claimant because of his slightly elevated blood pressure and questionable history of seizures. Claimant denied any history of seizures or black-outs. Dr. Faber diagnosed multiple abrasions and contusion. Claimant told Dr. Faber all he remembered was standing up in the back of a pick-up, when it lurched forward and he fell over the side onto the pavement. Later, Dr. Faber was told claimant fell onto some rocks. Dr. Faber did not feel this fall had caused claimant's injuries, but

a fall onto rocks of various sizes, perhaps, could have caused these injuries.

In September 1978, claimant was hospitalized and he indicated that since January 1978 he had had spells of dizziness and occasionally falling over after standing up. He also indicated he had tremors. The doctor indicated these were anxiety tremors and affected his face, hands, arms and legs. Claimant also has hypertension. The records reflect claimant had begun having trouble with dizziness in 1975.

Claimant's co-workers testified that prior to his fall, his breathing was not normal. All of them stated claimant had gotten off the truck and fell over onto the pavement.

Mr. Garrett, a co-worker, testified he saw claimant standing and he started to shake, his hands were down by his side and shaking "real bad" and then claimant fell straight forward on the pavement.

The Referee found that claimant had not been able to substantiate that there was any relationship, including that of location, between the nature of his employment and his fall. The Referee found there was an abundance of medical information to account for claimant's fall on this basis of an idiopathic condition. Therefore, the Referee approved the employer's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's conclusion. There is no evidence in this case relating claimant's "seizure" and his work, other than his presence on the employer's premises at the time it occurred. In order for an injury to be compensable it must occur during the course of, and arise out of, the employment. Claimant's "seizure" occurred during the course of his employment, however, it did not arise out of his employment. No connection or linkage between the employment and the conditions of his employment and his seizure has been established.

The Board finds and concludes there was no causal connection between claimant's work and his fall and injury and that the applicable rule of law is that an unexplained or idiopathic fall to level pavement from a "seizure" is not compensable under the facts in this particular case. The preponderance of the evidence does not support claimant's claim.

Further, claimant, in this case, was not placed in a position of greater risk due to his employment. Claimant was standing on pavement when he fell. There is no evidence his employment and standing on the pavement placed him in a position of greater risk then would be the case in similar off-the-job circumstances.

Therefore, the Board would affirm the Referee's order.

ORDER

The Referee's order, dated June 29, 1979, is affirmed.

SAIF CLAIM NO. KC 405304 February 8, 1980

TONY H. SMITH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his neck and right shoulder on October 24, 1972. His claim was originally closed by a Determination Order, dated April 24, 1973, which awarded claimant compensation for temporary total disability only. A stipulation, dated July 11, 1974, granted claimant compensation equal to 48° for 15% unscheduled disability for his injury.

Claimant continued to have difficulty and on October 1, 1975 underwent a decompression of the nerve root, C6-7 and C5-6 on the right with a foraminotomy. The claim was reopened and then closed by a Determination Order, dated June 18, 1976, which awarded claimant additional compensation for temporary total disability. This Determination Order was appealed and, after a hearing, claimant was granted compensation equal to 96° for 30% unscheduled disability for his right shoulder in lieu of the previous award.

An Own Motion Order, dated February 26, 1979, found the Fund was only responsible for claimant's cervical condition. Drs. Emmons and Springer indicated claimant's condition had worsened and he was in need of surgery in the shoulder and neck area. The claim was reopened the date claimant underwent this surgery.

Claimant underwent an anterior cervical discectomy at the C4-C5 and C5-C6 levels on April 25, 1979. Dr. Emmons indicated he would release claimant for work on October 1, 1979.

On December 4, 1979, the Orthopaedic Consultants examined claimant and indicated his condition was stationary. They felt claimant could perform light to medium physical employment. It was their opinion claimant had mildly-moderate impairment with respect to the cervical spine and right arm symtpoms.

On January 2, 1980, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 21, 1980, recommended claimant be granted additional compensation for temporary total disability from April 25, 1979 through December 4, 1979.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 25, 1979 through December 4, 1979, less time worked. The record indicates that this compensation has already been paid to claimant.

WCB CASE NO. 79-6887 February 8, 1980
WCB CASE NO. 79-8070

WENDELL WELCOME, CLAIMANT
Noreen Saltveit, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

The State Accident Insurance Fund requested Board review of the Referee's order, dated December 28, 1979. This request was dated January 25, 1980 and received by the Board on January 28, 1980, a Monday. The appeal time expired on Sunday, January 27, 1980, a non-judicial day. Therefore, since the appeal was filed in a timely manner, the Board would deny claimant's motion to dismiss, dated February 1, 1980.

IT IS SO ORDERED.

WCB CASE NO. 78-5805 February 10, 1980

AHMAD NOOR KOJAH, CLAIMANT
Malagon & Yates, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer and claimant both seek Board review of the Referee's order which granted claimant an award of compensation for temporary total disability from March 31, 1978 through January 7, 1979 and credited the employer for those benefits paid through June 9, 1978. The Referee further assessed an additional amount equal to 20% of the compensation payable to claimant in the period from June 10, 1978 through June 23, 1978 as a penalty and awarded claimant's attorney an attorney's fee.

The employer contends that the Referee erred in awarding time loss from March 30, 1978 through January 8, 1979.

Claimant's cross-request for Board review was dismissed as not being timely filed.

FACTS

Claimant, a 34-year-old mill worker, was struck by a large piece of board at work on September 7, 1977. This injury was diagnosed as a contusion of the lumbar spine and posterior thigh. Dr. William Robertson, in September 1977, indicated that claimant continued to complain of pain in the low back and in the left thigh. By October 1977 Dr. Robertson felt that claimant was either malingering or was hysterical. He referred claimant to Dr. Ronald Lechnyr, a psychiatric social worker, for testing and additional care.

Dr. Lechnyr began treating claimant with biofeedback therapy and exercises. He was advised by claimant's wife that claimant was from Afghanistan and his people tended to remain in bed if they were ever ill. In January 1978, Dr. Lechnyr reported that claimant continued to have pain in his back. He reported there was some difficulty explaining to claimant what the treatment prescribed for him was and what claimant was supposed to do.

On February 18, 1978, the Orthopaedic Consultants reported that claimant continued to complain of pain in the middle back and pain in the left knee. Their diagnosis was a contusion and sprain of the low back and functional overlay. They did not feel that claimant's condition was stationary and felt that he needed continuous encouragement with local heat, massage, supervised exercises, and attention to the cultural differences which claimant exhibited. They felt claimant would improve with further treatment.

On March 9, 1978, Dr. Lechnyr indicated he agreed with the Orthopaedic Consultants' report. He felt that claimant was making some progress although it was slow.

On March 30, 1978, Dr. Lechnyr reported that claimant stated he continued to have pain in the shoulder, neck and low back. Dr. Lechnyr also reported that claimant was making plans to discontinue treatment because he needed to return to Afghanistan to see his brother who had been seriously injured in an automobile accident.

On April 5, 1978, claimant left for Afganistan. He stated that while there a revolution took place and he was unable to leave until the first week of August 1978. He indicated that while in Afghanistan he received a few injections and a massage which were of some assistance to him. He said he was unable to advise the insurance carrier of his condition or anything else because he could not get any letters out of the country.

The insurance carrier was informed by claimant's wife that she was trying to contact claimant by checking with the U. S. Embassy.

The insurance carrier paid temporary total disability benefits to June 10, 1978.

The insurance carrier requested a determination of the claim since claimant was no longer under active medical treatment for his injury. A Determination Order, dated June 27, 1978, indicated that the information in claimant's file was not adequate to support a determination on the issue of permanent partial disability and that one would be made when adequate information was received. The order granted claimant compensation for temporary total disability from September 6, 1977 through March 30, 1978.

Claimant returned to the United States on August 6, 1978 and was seen by Dr. Lechnyr on August 7, 1978. Claimant continued to indicate that he had pain in his leg and that his overall condition was a little bit better. Dr. Lechnyr referred claimant for evaluation by Dr. Bond.

On August 8, 1978 Dr. Daniel Bond indicated that his examination revealed claimant's symptoms were complex and strongly suggestive of a lumbar disc compression syndrome. He suggested that claimant be evaluated by a neurosurgeon and have a lumbar myelogram performed to rule out a herniated disc.

On August 16, 1978, Dr. Patrick Golden examined claimant. He felt the claimant had significant psychosomatic response to injury. He did not find any evidence of herniated disc or a nerve root compression.

Dr. Lechnyr, on September 1, 1978, indicated that claimant still considered himself very disabled and "unable to try or attempt anything". It was his recommendation that the claim be closed. He did not feel that there was any treatment that could be offered to claimant. He felt that closure of claimant's claim would probably help stop the claimant from continuing to look for further disability and continuing to have to be disabled.

On September 7, 1978, the insurance carrier advised claimant that based on the medicals they had received, they were not going to reopen his claim.

Dr. Scott G. Fechtel, D. C., in October 1978, diagnosed a traumatic lumbosacral sprain superimposed upon a chronically strained lumbosacral spine. He suggested claimant begin a six-month trial manipulative and corrective exercise therapy.

On January 14, 1979, Dr. Donald Smith indicated that claimant continued to complain of back and left lower extremity pain. It was his opinion that claimant had evidence of an aggravation of his previous condition, that is, either a severe back strain associated with claimant's working injury or perhaps a herniated lumbar disc. Dr. Smith believed that claimant might have a lumbar herniated disc or "other cause" of nerve root compression of the lower lumbar spine. He suggested that claimant have a myelogram. A myelogram was performed on January 18, 1979. This test demonstrated "a central bulging and herniation of the disc centrally and to the right at L2-3". Dr. Smith's final diagnosis was "herniated disc at the L2-3 level, central, a possible herniated disc or other lesion, L4-5 sacrum of indeterminate nature". Dr. Smith suggested that claimant undergo an epidural venogram to determine whether the lower lumbar spinal canal, in fact, did have a lesion of any significance. If the venogram was negative he would then recommend claimant undergo surgical exploration of the L2-3 level for the presumed herniated disc.

Dr. Fechtel, in February 1979, indicated that it was his opinion that claimant had been totally disabled since September 25, 1979. In June 1979, the Orthopaedic Consultants indicated that they felt claimant would be able to return to work but could not predict when that would be possible. Also, in June 1979, Dr. William Robertson indicated that he authorized time loss from September 6, 1977 until January 23, 1978. Dr. Smith indicated he had first treated claimant on January 8, 1979 and authorized time loss from that date through the present. Dr. Golden indicated he did not authorize any time loss.

The Referee concluded that claimant was entitled to an award of compensation for temporary total disability from March 31, 1978 through January 7, 1979. The Referee further awarded claimant an additional amount equal to 20% of the compensation payable to him for the period from June 10, 1978 through June 23, 1978. The Referee also awarded claimant's attorney an attorney's fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the Referee's order. Claimant, in this case, voluntarily withdrew himself from medical care and treatment when he returned to Afghanistan in April 1978. In such cases where claimant so acts, the insurance carrier is entitled to request a closure. The insurance carrier in this case did request a closure and a closure was made on June 27, 1978. This closure awarded claimant compensation for temporary total disability until March 30, 1978. Claimant subsequently returned to the United States on August 6, 1978 and resumed treatment with Drs. Lechnyr and Bond and eventually Drs. Golden and Smith. The carrier was authorized to terminate compensation for temporary total disability when the Determination Order was issued on June 27, 1978. However, it had unilaterally terminated compensation for temporary total disability on June 10, 1978, which was incorrect. The Board finds claimant is entitled to compensation for temporary total disability from June 10, 1978 through June 27, 1978 and an amount equal to 25% of the compensation due as a penalty for the carrier's unreasonable act of unilaterally terminating claimant's compensation. Further, the Board finds that claimant is entitled to an award of compensation for temporary total disability from the date he returned for medical care and treatment on August 6, 1978 until the date he was examined by Dr. Smith, January 8, 1979. Therefore, the Board would modify the Referee's order and award time loss from June 10, 1978 through June 27, 1978 and an amount equal to 25% of this compensation as a penalty for the carrier's unreasonable act, and from August 6, 1978 through January 7, 1979.

ORDER

The Referee's order, dated September 7, 1979, is modified.

Claimant is hereby granted an award of temporary total disability from June 10, 1978 through June 27, 1978; an amount equal to 25% of this compensation as a penalty for the carrier's unreasonable conduct; and compensation for temporary total disability from August 6, 1978 through January 7, 1979. This is in lieu of the award granted by the Referee for temporary total disability.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-9939 February 15, 1980

OTIS ABERNATHY, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which remanded the claim to TLM Contractors, Inc. for acceptance and payment of compensation. The Fund contends that claimant was not an employee, but a student, at the time he was injured.

FACTS

Claimant, 27 years old, sustained an injury to his left hand on November 29, 1978 when it was jammed into a table sawblade. This injury was diagnosed as a traumatic amputation of the mid-shaft level middle phalanx left second finger, open fracture of the left long and ring fingers.

At the time of his injury, claimant was enrolled in a CETA sponsored program. Portland Opportunities Industrialization Center (POIC) contracted with the City of Portland to manage this CETA program. PIOC contracted with TLM Contractors, Inc. (TLM) to develop the program. This program had two stages. Stage one was a 16-week period of classroom and shop instruction for which the participants were paid the minimum wage as a stipend. No deductions or withholdings were taken from this money. Stage two was a 16-week period of the on-the-job training for which they were paid a wage and were to be covered by Workers' Compensation insurance. Claimant was injured while in stage one of the program.

Claimant testified he assisted one of his instructors install cabinets, but was not paid for this. Claimant indicated he also erected partitioned walls, hung a door and built a bookcase. He stated the participants could use TLM's equipment for their own projects. At the time of the injury, claimant stated he was making a box in which to keep his personal drill bits. These drill bits were used by other CETA personnel when they assisted in a project to construct fixtures to be installed at a local business establishment.

On January 16, 1979, the Fund denied this claim on the basis that claimant was not an employee of TLM at the time of his injury.

The Referee concluded claimant was entitled to benefits under the Workers' Compensation Law of Oregon and remanded his claim to the Fund for acceptance and payment of compensation. The Referee found that although claimant was near the end of the first stage, he was under the direction and control of TLM and that TLM received the benefit of his services in building partitioned walls, installing cabinets, and constructing a countertop. The Referee found the agreement between PIOC and TLM provided TLM could terminate it and would comply with all applicable laws.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order.

TLM allowed the CETA participants to use its equipment for their own projects as part of the training. When injured claimant was making a drill box to hold drill bits for his personally owned drill. Claimant, at the time of his injury, was still in stage one of his program. The Board concludes claimant was still a student at the time of his injury and not an employee of TLM. Therefore, the Board would reverse the Referee's order.

ORDER

The Referee's order, dated May 15, 1979, is reversed.

The denial issued by the State Accident Insurance Fund, dated January 16, 1979, is affirmed.

WCB CASE NO. 79-1924 February 15, 1980

FRED A. BILLINGS, CLAIMANT
Don Swink, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant compensation equal to 64° for 20% unscheduled disability for his head injury. The Fund contends that this award is not supported by the evidence and asks that the Determination Order be reinstated.

FACTS

Claimant, a 33-year-old roofer, sustained a compensable injury to his head on January 26, 1978 when he was struck in the head by a steel plate which was attached to a section of hose which had fallen off a roof. This injury was diagnosed as a depressed fracture of the skull in the occipital area. On January 27, 1978, Dr. James Cruickshank surgically repaired this fracture. On March 14, 1978, Dr. Cruickshank performed a cranioplasty. Claimant was released for work on April 3, 1978 and returned to his same job with this employer on that date.

Dr. Cruickshank, in May 1978, reported the claimant stated he was having a considerable amount of headaches affecting the left side of his head. A CAT Scan was normal. Dr. Cruickshank reported the headaches were apparently controlled with aspirin and he advised the claimant to continue to take Tylenol for his problem and to continue to work and this problem would clear up with time.

On January 19, 1979, Dr. Cruickshank reported that claimant continued to complain of headaches. Claimant

reported they were not as severe and well controlled with medication such as aspirin or Tylenol. It was reported that claimant had slight tenderness to palpation over certain areas of the incision that coincide with underlying stainless steel sutures. No sensory or motor deficits were found. The diangosis was a status post-operative cranioplasty of the left occipital area for an open depressed comminuted fracture of the skull. Dr. Cruickshank opined that claimant's medical condition was stationary.

A Determination Order, dated February 23, 1979, awarded claimant compensation for temporary total disability only.

Dr. Wilbur Larson, in May 1979, indicated that claimant continued to complain of headaches in the left occipital to frontal to retro-orbital area on a daily basis. Claimant indicated that on some occasions he went for a period of three days without headaches and at the end of that time he usually had a severe headache which would last for an entire day and would be extremely severe and produce nausea. Claimant indicated that the headaches would appear and then subside only to reappear. Claimant was using about 20 aspirin a day until four to five months prior and now is using about 10 aspirin a day. Claimant indicated he occasionally felt woozy, unsteady, and a seasick-like feeling when he had severe headaches. Dr. Larson indicated that claimant was still tender around the bur hole areas. He also found there was diminished appreciation of pinpoint over the mid portion of the scalp flap area. He opined that claimant had a vascular headaches involving the left side of his head that appeared following his cranioplasty. Dr. Larson noted that this was a typical vascular headache that has occurred on a daily basis, rising and falling, with some days of severe headache producing nausea. He believed that this vascular headache was associated with injury and the subsequent repair of the skull defect and would respond to appropriate management of a vascular headache. In June 1979 Dr. Larson indicated that the history of claimant's headaches suggested that there was a possibility that the headache could be managed and eventually would subside with medical therapy.

Claimant testified at the hearing that he had headaches every day which occasionally lasted throughout the day. He indicated that he currently uses 6-10 aspirin a day and sometimes becomes nauseated after a headache. He indicated that the aspirin he takes does not always give relief. Claimant testified that he has not missed any work since returning to his current job, but feels he is not able to work as well now as he could before his injury.

Claimant's wife testified that prior to the injury claimant was healthy and active. She indicated that since his injury he has limited some of his activities and given up some, such as motorcycling.

The Referee, after thoroughly considering the evidence, found that based on claimant's need to interrupt his work to take medication, making his work slower; his employer's awareness of his condition and sympathy towards him that claimant was permanently precluded from a segment of employment opportunities. Therefore, the Referee found claimant had suffered a decrease in his future earning capacity. The Referee granted claimant an award of compensation equal to 64° for 20% unscheduled disability for his head injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. Claimant has received medical treatment for his compensable injury. He also has returned to his regular job and has been working on a full time basis without any time loss due to the headaches. There is no evidence in this case that claimant's headaches are disabling. Therefore, the Board finds that based on all the evidence in this case that claimant has not proven by a preponderance of the evidence that he sustained any loss of wage earning capacity for permanent disability resulting from his head injury. Therefore, the Board reverses the Referee's order.

ORDER

The Referee's order, dated July 30, 1979, is reversed.

The Determination Order, dated February 23, 1979, is reinstated.

CLAIM NO. C 242435 February 15, 1980

RICHARD A BULT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 12, 1979 Dr. Don E. Poulson requested that claimant's claim be reopened. Claimant had originally sustained an injury to his back on April 28, 1970. The claim was originally closed by a Determination Order, dated June 11, 1971, which awarded claimant compensation equal to 32° for 10% unscheduled low back disability. Claimant's aggravation rights have expired. Claimant's injury was originally diagnosed as a lumbodorsal strain.

In May 1972, claimant was diagnosed as having early degenerative arthritis. The State Accident Insurance Fund (Fund) denied responsibility for this condition on May 30, 1972.

On October 10, 1979 Dr. Poulson indicated that claimant had lumbar pain, the onset of which went back to his April 28, 1970 injury. He felt claimant had a degenerative disc. On October 29, 1979 Dr. Poulson felt that claimant's present complaints were related to the original injury. He said this was a case of a typical history of degenerative lumbar disc. On December 19, 1979 Dr. Poulson performed a laminotomy and partial removal of the lumbosacral disc. The diagnosis was a degenerative lumbosacral disc.

On January 16, 1980, the Fund advised the Board that claimant had requested that his claim be reopened and that they were opposing a reopening of the claim. The basis of their opposition was that the original claim was for a low dorsal spine and rib cage sprain. They indicated claimant had had no treatment from 1972 until 1979. They noted the most recent surgery was at the lumbosacral level. The Fund reported that claimant had originally been diagnosed as having a congenital problem and, in 1972, was diagnosed as having degenerative arthritis. It was noted that claimant continued to work at a job that required heavy lifting and

in 1979 had been involved in an automobile accident. Therefore, the Fund did not feel that the need for the recent surgery was the result of the injury for which the claim was established and opposed an Own Motion Order reopening this claim.

The Board, after thoroughly considering the evidence before it, finds that it is not sufficient to warrant a reopening of claimant's claim at this time. The request by claimant for own motion relief should be denied.

IT IS SO ORDERED.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal.

CLAIM NO. C 323765 February 15, 1980

BERNARD CASPER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a broken right leg and arm on May 14, 1971. This claim was accepted and initially closed by a Determination Order, dated April 3, 1974. Claimant's aggravation rights have expired.

On October 17, 1979, Dr. Richard Pettee reported that claimant had continued to have increasing pain and discomfort in his right lower leg, particularly the ankle. He felt that claimant should undergo an arthrodesis of the ankle. Dr. Pettee performed the arthrodesis of the right ankle with cortical graft on December 18, 1979. Claimant returned to work after the procedure in a walking cast on January 14, 1980.

Because the claimant's aggravation rights have expired, the Fund forwarded the medicals to the Board for its consideration pursuant to its own motion jurisdiction. The Fund stated it was not opposed to reopening the claim for the surgery and the payment of time loss compensation from noon of December 17, 1979 to January 14, 1980.

The Board, after giving consideration to the medical reports and the reviewing the past medical history of claimant, concludes that the claim should be reopened as of the date claimant was hospitalized, December 17, 1979 for the surgery and until his claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. C 193764 February 15, 1980

ALLAN W. DAVIS, CLAIMANT
A.C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to his back on July 9, 1969. The claim was initially closed by a Determination Order, dated November 13, 1970, which granted him compensation for temporary total disability and compensation equal to 48° for 15% unscheduled low back disability. Claimant's aggravation rights have expired. The claim has been reopened and closed on different occasions resulting in claimant being granted a total award for his low back injury equal to 272° for 85% unscheduled low back disability.

On December 27, 1978 Dr. Calvin Keist performed a laminectomy and fusion on claimant's low back. Dr. Keist related the 1978 surgery to the 1969 injury.

On December 21, 1979, claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction and reopen his claim for the July 9, 1969 injury.

On December 26, 1979, the Board informed the State Accident Insurance Fund (Fund) of claimant's request and asked it to advise the Board of its position with regard thereto. The Fund, on January 30, 1980, indicated to the Board that it would not oppose an Own Motion Order reopening this claim for the surgery that was performed in December 1978.

The Board, after considering all the information and medical reports in this claim, concludes that the claim should be reopened as of the date claimant was hospitalized for his surgery in December 1978 and until his claim is again closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is entitled to an attorney's fee equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

IT IS SO ORDERED.

WCB CASE NO. 79-1407 February 15, 1980

GILES L. FLETCHER, CLAIMANT
Ann Morgenstern, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant & WCD

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund), the Workers' Compensation Department and claimant all seek Board review of the Referee's order which awarded claimant additional compensation of $960.56 and his attorney an attorney's fee. The Fund contends this award was in error.

The Workers' Compensation Department contends it is not a party to these proceedings and that the Referee incorrectly interpreted ORS 656.209.

Claimant contends he is entitled to additional compensation, penalties and attorney's fees for the Fund's processing of this claim.

FACTS

Claimant has been granted an award of compensation equal to permanent total disability. This case concerns the application of ORS 656.209 as passed by the 1977 Legislature. There is no dispute that the Workers' Compensation Department correctly calculated the amount of the Social Security offset in this claim.

Claimant had been receiving Social Security benefits since 1974 and was awarded permanent total disability under the Oregon Workers' Compensation Law in March 1977. The offset provision of ORS 656.209 applied to claimant in July 1, 1978. From July 1974 to May 1979 claimant was overpaid by the Social Security Administration 32 times, underpaid 19 times and correctly paid 8 times. Claimant did not receive any Social Security payments from July 1978 through October 1978 and only received a partial payment in November 1978 because he had been previously overpaid.

The Fund paid claimant his July 1978 payment. It paid claimant compensation as if he had been receiving Social Security benefits for August, September, October and November 1978 even though he had not. It took the offset on these payments. In August 1978, the Fund advised claimant it had overpaid him and would commence to recover the overpayment. Claimant was refunded a portion of this money.

The Referee interpreted ORS 656.209 as requiring the injured worker to actually receive the Social Security benefits for the month the offset is claimed. The Referee concluded the Fund was not authorized to assert an offset during the months claimant did not actually receive Social Security benefits and awarded claimant the sum of $960.56. However, the Referee did not find the action by the Fund required the awarding of penalties and attorney's fees. The Referee did not decide the issue of whether or not the Workers' Compensation Department was a party.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board does not agree with the Referee's interpretation of ORS 656.209. Claimant, in this case, has been paid all the compensation he is entitled to. Claimant was overpaid or "paid in advance" his Social Security benefits. The Social Security Administration acted by withholding payment of additional benefits from July 1978 through October 1978 and made only a part payment of benefits in November 1978 to balance out what claimant had been paid with what he was entitled to. The end result was that claimant was paid for this time in advance and the Fund was entitled to treat this claim as if claimant had been paid these Social Security benefits during this period. Therefore, the Board concludes the Referee was incorrect in his interpretation of ORS 656.209 and reverses his order.

ORDER

The Referee's order, dated September 6, 1979, is reversed and claimant's claim for compensation representing the money held by the State Accident Insurance Fund for the offset is dismissed.

WCB CASE NO. 78-1157 February 15, 1980

CLAUDIA A. GEORGE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Samuel R. Blair, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of that portion of the Referee's order which awarded her compensation equal to 32° for 10% unscheduled disability for her upper back and neck injury. Claimant contends this award is not adequate.

FACTS

Claimant, a 31-year-old part-time waitress, sustained a compensable injury to her back and neck on June 19, 1977, while cleaning tables at the Fireside Cafe (Fireside).

Dr. John Chester diagnosed a ligamentous injury to the cervical spine and/or discogenic syndrome of the cervical spine. He felt claimant had some residual potential for impairment. Dr. Chester, on November 15, 1977, felt claimant's condition was medically stationary.

A Determination Order, dated December 9, 1977, granted claimant compensation for temporary total disability.

In April 1978, Dr. Chester reported claimant had continued physical therapy and was using a transcutaneous nerve stimulator unit to help her with her more or less chronic pain syndrome. Claimant indicated she had returned to part-time waitress work in January 1977 and that her symptoms, according to Dr. Chester, ". . . seemed to wax and wane as dictated by both her working conditions and the life stresses which she was undergoing at that time". Claimant complained of some right arm symptoms. Dr. Chester found no objective signs of nerve root impingement and subjective diminution of right arm strength. His diagnosis was intervertebral disc syndrome without rupture of the nucleus pulposis with referred pain into the intrascapular region and radicular symptoms in the right shoulder and arm. Dr. Chester felt claimant had a 60-70% functional incapacity based on the number of hours claimant could work and the heavier aspects of her waitress work.

A stipulation, dated November 20, 1978, for a back injury of May 2, 1978, resulted in claimant being granted compensation equal to 64° for 20% unscheduled disability for this injury. This injury occurred while claimant was working for a different employer as a waitress. This employer testified claimant worked on a part-time basis from January to March and on a full-time basis from March 1978 until her injury on May 2, 1978. The employer indicated she observed no evidence of any disability while claimant worked.

Claimant testified her work with her last employer was lighter than most waitress work. Claimant stated she had difficulty with this work and wore a transcutaneous nerve stimulator while she worked and had assistance from other employees in doing the heavier work.

At the hearing, claimant said she has worked as a waitress, cook and cannery worker. She indicated her work with Fireside was on a full-time basis. Claimant has an eighth grade education. She complains she now has nearly constant pain in her neck and shoulder which is aggravated by repetitious use of the arm, lifting, bending of the neck, etc.

A representative of Fireside testified claimant was not a full-time employee. Claimant had worked on three days at the time of her June 1977 injury.

The Referee found claimant was a full-time employee and ordered her to be paid compensation for temporary total disability on the basis of a full-time employee from June 19, 1977 through November 15, 1977. Further, the Referee found claimant had suffered a loss of wage earning capacity and granted claimant an award of compensation equal to 32° for 10% unscheduled disability for her June 19, 1977 injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board finds that the employer's testimony along with the notation on the Form 801 that claimant was a part-time employee, persuades it that claimant was a part-time employee at the time of her injury, on June 19, 1977, contrary to her assertion. The Board finds that evidence preponderates in favor of the employer that claimant was a part-time employee when she was injured. Therefore, the Board modifies the Referee's order to reflect this finding.

ORDER

The Referee's order, dated May 24, 1979, is modified.

Claimant is hereby awarded compensation for temporary total disability on the basis of a part-time employment, from June 19, 1977 through November 15, 1977, less credits for amounts actually paid. This is in lieu of the award for temporary total disability granted by the Referee.

The remainder of the Referee's order is affirmed.

CLAIM NO. C 449993 February 15, 1980

DELBERT D. GRAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 17, 1979 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on July 3, 1973. The claim was initially closed on July 25, 1974 and claimant's aggravation rights have expired. Attached to claimant's request were two medical reports from Dr. Ray V. Grewe indicating claimant had been unable to work since May 22, 1979 due to back complaints.

On December 20, 1979 the Board advised the State Accident Insurance Fund (Fund) of claimant's request and asked it to inform the Board of its position within 20 days.

Claimant was examined by Dr. Borman on January 5, 1980 during a hospital stay. The diagnosis was mild residuals of lumbosacral strain and lumbar disc herniation which was surgically treated. Dr. Borman recommended exercises and indicated there was a possibility of surgery in the future.

The Fund, on January 29, 1980, stated that it had insufficient information upon which to base an opinion and advised that it had made arrangements for claimant to be examined by the Orthopaedic Consultants. Claimant was examined by the Orthopaedic Consultants two days later; he was complaining of low back and left leg pain with intermittent numbness of the left lower extremity at that time. They recommended that claimant's claim be reopened for further evaluation and treatment. They felt claimant was a poor candidate for surgery and recommended pain clinic evaluation and treatment of drug dependency. A trial period of immobilization in a flexion plastic body jacket which was recommended by Dr. Borman was also felt to be a good idea. They felt that after discharge from the pain clinic claimant would need to be assisted to return to light work.

On February 11, 1980, the State Accident Insurance Fund advised the Board that it did not oppose a reopening of claimant's claim for an injury sustained in 1973.

The Board, after thorough consideration of the evidence before it, concludes that claimant's claim for the July 3, 1973 industrial injury should be reopened with benefits to commence on May 22, 1979, and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-2081 February 15, 1980

JOHN HALBERG, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On January 12, 1979, the Board entered its Order on Review in the above entitled matter which affirmed the order of the Referee, dated July 26, 1978, which ordered this claim to be accepted for compensation for medical services and temporary total disability from April 16, 1977 through September 22, 1977.

The State Accident Insurance Fund requested judicial review of the Board's order and on December 3, 1979 the Court of Appeals rendered its decision and opinion which reversed the Board's order with instructions to enter an order denying compensation.

On January 31, 1980, the Board received a copy of the Judgment and Mandate from the Court of Appeals reversing the Board's decision and remanded the claim to the Board with instructions to enter an order in conformance with its decision of December 8, 1979.

Accordingly, IT IS SO ORDERED that the Board's Order on Review, dated January 12, 1979, is reversed and claimant's request for compensation is denied.

WCB CASE NO. 78-2995 February 15, 1980

MILTON MINOR, CLAIMANT
Tooze, Kerr, Peterson, Marshall
& Shenker, Claimant's Attys.
Rankin, McMurry, Osburn,
Gallagher & VavRosky, Employer's Attys.
Order On Remand

On May 15, 1979, the Board issued its Order on Review which affirmed the Referee's order, dated November 5, 1978. The Referee had found that claimant's dissatisfaction with the award of compensation made by a Determination Order must be held in abeyance pending either the termination or completion of his authorized program of vocational rehabilitation.

Claimant requested judicial review of the Board's order on May 18, 1979. On November 5, 1979, the Court of Appeals held that ORS 656.283(3) requires that: " . . . the board shall refer the request for hearing to a referee for determination as expeditiously as possible" and that claimant was entitled to his hearing.

On January 23, 1980, the Board received a copy of the Judgment and Mandate from the Court of Appeals remanding this claim to it for further proceedings pursuant to its decision of November 5, 1979.

Accordingly, IT IS HEREBY ORDERED that the Board's order, dated May 15, 1979, is set aside and this claim is remanded to its Hearings Division to conduct a hearing to determine the extent of claimant's disability.

WCB CASE NO. 80-559 February 15, 1980
WCB CASE NO. 80-560
WCB CASE NO. 80-857

THEODIS E. POE, CLAIMANT
Evans, Hall & Brebe, Calimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury on July 17, 1966. Claimant, by and through his attorney, on January 25, 1980, requested the Board to exercise its own motion jurisdiction and reopen this claim. Attached to this request was several documents. Claimant had episodes of severe pain on December 24, 1976, April 17, 1979 and November 21, 1979. Claimant contends this last exposure is an aggravation of his 1966, 1976, or April 17, 1979 injury.

On January 23, 1980, the State Accident Insurance Fund (Fund) denied the claim for the December 24, 1976 injury on the basis it was a new injury and not an aggravation or worsening of the prior claim.

Claimant has requested hearings on the denial of the December 24, 1976, the April 17, 1979 and the November 21, 1979 alleged injuries.

The Board, after reviewing the facts, finds it would be in the best interest of the parties to remand claimant's request for own motion relief to the Hearings Division to be consolidated with the claimant's other three requests for a hearing for the Referee to determine if claimant's last alleged injury is the result of his 1966 injury and a worsening thereof or is due to an injury of December 24, 1976, April 17, 1979 or November 21, 1979. If the Referee finds claimant's condition is the result of the 1966 injury and a worsening thereof since the last award or arrangement of compensation, the Referee shall enter a recommendation that own motion relief be granted.

If the Referee finds claimant's alleged injury of November 21, 1979 is a new injury or an aggravation of his December 24, 1976 or April 17, 1979 injuries, the Referee shall enter an appropriate order and recommend that own motion be denied.

In either event, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board with his recommendation.

WCB CASE NO. 79-2369 February 15, 1980

KERMIT O. REINHART, CLAIMANT
E.U. Sims, Claimant's Atty.
SAIF, Legal Services, Defense Atty
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed a Determination Order, dated December 21, 1978, which did not grant claimant any award of compensation for permanent partial disability. Claimant contends he is permanently and totally disabled.

FACTS

The claimant, a 61-year-old park ranger, sustained a compensable injury on April 17, 1978. He alleges he sustained a heart attack on that date while working on special assignments for extended periods of time which required a great deal of physical labor. The original diagnosis by Dr. P. Klosterman was an acute myocardial infarction. It was noted claimant also had hypertension.

On April 27, 1978 Dr. Klosterman reported claimant had been hospitalized on April 19, 1978 with a history of two days of chest pain. He indicated claimant had had a previous episode of myocardial ischemia in 1973. Dr. Klosterman indicated that the electrocardiograms were suggestive of an acute inferior myocardial infarction. His diagnosis was an acute myocardial infarction and hypertension. In May 1978 Dr. Klosterman indicated that there was a relationship between the stress of claimant's work and his myocardial infarction.

On July 7, 1978, Dr. Frank Kloster indicated that claimant had a serious pre-existing narrowing of his coronary arteries. He felt that claimant had had an acute ischemic cardiac event on or about April 18, 1978 which was probably provoked in part by strenuous work activity on that date, but he did not feel that claimant suffered a very large myocardial infarction or any substantial permanent damage to his left ventrical. On July 26, 1978, Dr. Kloster indicated that if claimant did have an acute inferior infarction it probably was limited based on the lack of any elevation in the serum cardiac enzymes and was therefore unlikely to produce significant residual disability due to myocardial dysfunction. He noted that claimant had developed electrocardiographic changes which were suggesting an infarct and that it would seem most reasonable to him to give claimant the benefit of the doubt and assume that he did have a limited myocardial infarction. He recommended again that claimant not return to significant or stressful physical activity based on claimant's responses to the treadmill exercise test and the episodes of dizziness and palpitations that claimant had recently experienced.

In August 1978, Dr. Klosterman reported that claimant still had angina with moderate exertion. He indicated that claimant's condition was medically stationary on or about June 1, 1978. His diagnosis was still an acute myocardial infarction. He indicated in August 1978 that claimant was again hospitalized and his condition was not stationary. In September 1978, Dr. Klosterman reported claimant had hypertension and arteriosclerotic heart disease. He indicated claimant had an acute myocardial infarction in April 1978. He reported that at that time claimant was left with hypertension, abnormal exercise cardiogram and clinically angina pectoris. He felt the claimant's condition was essentially stable and classified him as a class II or III based on the American Heart Association classifications.

On October 20, 1978 a Determination Order awarded claimant compensation for temporary total disability from April 19, 1978 through September 30, 1978 and granted claimant an award of permanent total disability effective October 1, 1978. A Second Determination Order, dated October 26, 1978 rescinded the first order in its entirety and granted claimant compensation for temporary total disability from April 19, 1978 through September 28, 1978 only. Claimant requested that his claim be reconsidered.

On December 7, 1978 Dr. Klosterman reported that claimant complained of dizziness and he had referred the claimant to the ENT Department for consideration. He indicated the ENT consultant felt the dizziness was secondary to mild cerebral insufficiency which was related to the arteriosclerotic heart disease and previous myocardial infarction.

A Determination Order, dated December 21, 1978, recited that claimant's request for reconsideration had been received and that the Department had reviewed the information presented and found nothing that would modify the Determination Order of October 26, 1978 and, therefore, affirmed that Determination Order.

On April 6, 1979, Dr. Klosterman stated that he had reviewed his records and it was his opinion that it was medically probable that claimant does have permanent disability as a result of the cardiac episode which occurred in April 1978.

Dr. Kloster, in May 1979, reported that when he had examined claimant on June 26, 1978 claimant was experiencing episodes of lightheadedness or dizziness associated with palpitations and claimant had premature ventricular contractions on his resting electrocardiogram which increased, in Dr. Kloster's opinion, rather alarmingly with mild exercises. He interpreted this combination of symptoms and findings as very suggestive that claimant was having symptomatic ventricular arrhythmias related to his coronary heart disease. Dr. Kloster could not say these episodes of dizziness were related to his heart condition. However, he felt that since claimant was having similar symptoms associated with ventricular arrhythmias, he thought there was a reasonable probability that his continued dizziness may be on the same basis.

The Referee found that considering the evaluation of claimant made by the medical doctors in this case, he considered claimant's permanent disability to be at least in the moderately severe range. The Referee stated that it had not been proved that the disability resulted from the compensable injury. The Referee found that the preponderance of the expert medical evidence supported the last determination of this claim. Therefore, the Referee affirmed the Determination Order of Reconsideration, issued December 1, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The only issue before the Board is the extent of claimant's unscheduled disability resulting from the compensable heart condition. Dr. Klosterman indicated that claimant should not return to any significant or stressful physical activity based on claimant's response to a treadmill exercise test and the episodes of dizziness and palpitations which claimant experienced recently. Dr. Klosterman in September 1978, indicated that claimant had hypertension, he had a normal exercise cardiogram, and clinically a class II or III angina pectoris.

Dr. Kloster indicated that claimant's premature ventricular contractions increased rather alarmingly with mild exercise. He interpreted these combinations of symptoms and findings as very suggestive that claimant was having symptomatic ventricular arrhythmias related to his coronary heart disease. Dr. Kloster was concerned about the possibility of frequent ventricular ectopic beats and ventricular arrhythmias increasing with exercise may still be present, may be causing claimant's symptoms and are potentially very serious or fatal.

Claimant, prior to this episode in April 1978, had been able to carry on a fairly active physical work pattern without limitations and pain free. Claimant testified that since this incident he has been unable to engage in even light physical activity. The medical evidence indicates claimant has been unable since this event to engage in even light work activities. The Board finds that based on all the evidence in this case, including claimant's age, work experience, and other factors that he has proven by a preponderance of the evidence that he is permanently and totally disabled from regularly performing work at a gainful and suitable occupation and finds that claimant is entitled to an award of compensation f r permanent total disability effective October 1, 1978.

ORDER

The Referee's order, dated July 25, 1979, is reversed.

Claimant is hereby granted an award of compensation for permanent total disability effective October 1, 1978.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-4652 February 15, 1980

DOUGLAS ROBBINS, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the award of compensation for temporary total disability from October 27, 1977 through November 2, 1977 and awarded claimant additional compensation equal to 32° for 10% unscheduled disability for his back injury. Claimant contends he is entitled to additional compensation for temporary total disability and permanent partial disability.

FACTS

Claimant, a 20-year-old custodian, sustained a compensable injury to his back on October 25, 1977 when he lifted a floor scrubbing machine. This injury was diagnosed as a strain to the lumbar spine and right sacroiliac joint. Claimant returned to regular work on November 3, 1977. Dr. F. Goodwin fitted claimant with a lumbosacral corset to be worn at work.

In May 1978, Dr. Goodwin indicated claimant continued to complain of pain over the low back and some left leg pain. He noted claimant had an absent left ankle kick. It was his opinion, claimant's condition was stationary.

On May 9, 1978, Dr. Theodore Pasquesi indicated claimant complained of consistent low back pain radiating into his thighs. Claimant felt he was being carried by his co-workers and could not do his share of the work. Dr. Pasquesi diagnosed chronic lumbar instability. He felt claimant should seek work not involving repetitive bending, stooping, and twisting or lifting more than 30 pounds and not requiring him to have to sit or stand without changing positions as he felt necessary. Dr. Pasquesi opined claimant's condition was medically stationary and placed him "in the category of moderate pain without additional limitation of motion or impairment over and above the pain factor". Dr. Thomas Utterback and Dr. F. Goodwin concurred with this report.

A Determination Order, dated June 14, 1978, awarded claimant compensation for temporary total disability from October 27, 1977 through November 2, 1977. A Determination Order, dated July 14, 1978 indicated additional information had been considered and granted claimant an award of compensation equal to 16° for 5% unscheduled disability for his low back injury.

In October 1978, Dr. Lawrence Cohen indicated claimant continued to complain of constant low back pain with some radiation into the upper lumbar and lower dorsal area and left lower extremity pain. Claimant reported difficulties with sleeping. Dr. Cohen's neurological examination revealed no evidence of atrophy or weakness of the lower extremities, but found claimant's left Achilles reflex was weaker than the right. He felt claimant should not engage in any heavy lifting.

Claimant was treated at the William Callahan Center in December 1978. Claimant stated he had completed the 11th grade and six months in an automobile mechanics class at a community college. Claimant indicated he wished to become an electronics engineer. Dr. Louis Loeb, a psychologist, felt claimant was an average candidate for eventual reemployment. Claimant stated he could not sit, stand or walk more than 15-30 minutes at a time.

Dr. Cohen, in April 1979, indicated he felt claimant's condition was medically stationary sometime in September or October 1978. He felt claimant had some permanent partial disability of the back characterized by pain and some weakness and limitation for work that involved much lifting and bending.

Claimant testified he worked under a CETA program working on cars from 1973 to 1975 and from 1975 until his injury as a custodian. Claimant said he had not worked since May 1978 and has been seeking reemployment and vocational training, but has not been successful.

The Referee found that the medical evidence clearly established claimant was medically stationary and not enrolled in an approved vocational rehabilitation program when claimant's compensation for temporary total disability was terminated and did not grant any additional compensation for temporary total disability. However, the Referee found claimant was entitled to an increased award of compensation for permanent partial disability and granted him compensation equal to 32° for 10% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's affirming the award of compensation for temporary total disability. However, the Board finds claimant is entitled to an increased award of permanent partial disability. Claimant has worked as a mechanic and custodian. The consensus of the medical doctors is that claimant should not be employed in an occupation which requires heavy lifting, repetitive bending, stooping and twisting or lifting more than 30 pounds and not requiring him to have to sit or stand without changing positions as he felt necessary. Claimant still has low back pain and has had to limit his activities. Based on these facts, coupled with claimant's age, education, and other factors, the Board concludes claimant has lost more of his wage earning capacity than he has been compensated for. Therefore, the Board concludes claimant is entitled to an award of compensation equal to 80° for 25% unscheduled disability for his low back injury. This is in lieu of all previous awards.

ORDER

The Referee's order, dated April 19, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his low back injury. This is in lieu of any previous awards for unscheduled disability for claimant's low back injury of October 25, 1977.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-2503 February 15, 1980

EDWARD FALLIS RUSSELL, CLAIMANT
Maurice Engelgau, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order of Dismissal

A request for review was received by the Board on January 4, 1980 from claimant seeking review of the Referee's order entered in the above entitled matter.

Although the request for review was timely, a copy of said request was not mailed to the employer or its carrier as required by ORS 656.295(2). Because of this, the employer, in a motion dated January 24, 1980, requested that claimant's request for review be dismissed. The Board, after thoroughly considering the employer's motion and claimant's response thereto, concludes claimant's request for review should be dismissed.

THEREFORE, claimant's request for Board review is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 78-6015 February 15, 1980

JOHN R. SETZER, CLAIMANT
Galton, Popick & Scott,
Claimant's Attys.
Bullivant, Wright, Leedy, Johnson,
Pendergrass & Hoffman, Employer's Attys.
Request for Review by Calimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which approved the denials of the employer of claimant's claim. Claimant contends he has proven he sustained an occupational disease in the course and the scope of employment.

FACTS

Claimant, a 51-year-old loss control consultant, alleges he sustained a compensable injury to his left and right ankles due to "repeated trauma".

Dr. Clinton McGill, in July 1978, indicated he had treated claimant for the past five years. He indicated claimant's chief disability was a recurrent multiple joint rheumatoid arthritis. Dr. McGill advised claimant he should not work at a job which required prolonged walking, especially on uneven surface, carrying objects heavier than 20 pounds, lifting and bending. He noted claimant's rheumatoid arthritis pre-existed claimant's employment, but he felt claimant's job duties brought about an exacerbation. He advised claimant to quit his current job.

This claim was denied on July 27, 1978.

On August 11, 1978, the personnel director of the fire department stated claimant had been retired for a service connected disability in 1967. He reported claimant had had nine sprains to his left ankle and 10 claims for an illness diagnosed as arthritis or osteoarthritis. Claimant had been awarded 39% permanent disability due to the stress and strain of his job and multiple injuires which had activated a congenital deformity of his feet.

On September 5, 1978, Dr. Edward Rosenbaum reported claimant had had swollen joints as a child and was retired for disabilities from the fire department. He felt claimant had had juvenile rheumatoid arthritis.

Dr. McGill, on September 6, 1978, indicated claimant's longstanding, pre-existing rheumatoid arthritis of multiple joints and had been aggravated by the nature of his work.

In late September 1978, Dr. Rosenbaum indicated he had not found anything that he could attribute to an occupational injury.

On November 2, 1978, Dr. McGill opined claimant's condition had deteriorated more rapidly due to claimant's job. Later, in November, Dr. McGill indicated claimant had juvenile rheumatoid arthritis with multiple joint involvement with more recently considered liver damage due to the medication claimant was taking. He felt his opinion relating the work to claimant's worsening condition was equivocal. He felt it was difficult to differentiate between the worsening of an underlying condition or a mere worsening of the symptoms of the condition.

On March 6, 1979 a second denial of claimant's claim was issued.

At a hearing on his claim with the fire department, claimant testified he had a low grade pain in both ankles, about 50% of the time in the left ankle and 25% of the time in the right ankle. Claimant said he experienced stiffness and swelling and his ankle felt tired at the end of the day. He said he had difficulty walking up stairs, was unable to move heavy equipment, climb ladders, walk over debris or move swiftly. Claimant also indicated he stumbled when he ran.

At this hearing, claimant testified his condition improved between the time he left the fire department and started work with this employer. He felt his condition was worse when he left this employer. Claimant indicated part of his duties with this employer was to inspect work places which required prolonged walking over uneven surfaces, climbing ladders and carrying 20-pound video taping kits in and out of those premises. He stated he occasionally would bump his ankles on objects. Claimant began employment with this employer in 1972.

The Referee, after reviewing all the evidence, concluded claimant had failed to prove his claim by a preponderance of the evidence. This was based on Dr. McGill's equivocal statment and Dr. Rosenbaum's statement that found no evidence of anything which he could attribute to an occupational injury. Therefore, the Referee affirmed the denials of the employer.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's conclusion. The preponderance of the evidence does not establish that claimant's condition arose out of or in the scope of his employment with this employer. Neither Dr. Rosenbaum or Dr. McGill in their reports indicate to a degree of medical probability that claimant's condition is due to his work. The Board cannot find from the evidence presented in this case that claimant has proven by a preponderance of the evidence that claimant's work activity and conditions caused a worsening of his underlying disease resulting in an increase in his pain to the extent it produces disability or requires medical services. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated September 5, 1979, is affirmed.

SAIF CLAIM NO. A 541870 February 15, 1980

ALTON DEMPSEY SIMONS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on May 19, 1956. Claimant underwent a laminectomy after this injury and his claim was initially closed by a Determination Order, dated April 1, 1958, which awarded claimant compensation for temporary total disability and compensation for permanent partial disability equal to 66° for 50% loss of function of an arm for unscheduled disability. Claimant's aggravation rights have expired. The first Determination Order was set aside and the claim reopened as of November 19, 1958. The claim was reclosed by a Determination Order, dated December 20, 1961, which granted claimant an aggregate award of permanent partial disability equal to 90% loss function of an arm for unscheduled disability.

Claimant continued to have difficulty with his back and also with recurring infections in the area of his spinal fusions performed in 1956 and 1957. Claimant also continued to have difficulty with pain. In January 1978, Dr. Curtis Adams performed a myelogram which revealed a spinal stenosis at the L3-L4 levels secondary to posterior spinal fusion from L3 to the sacrum. Dr. Adams, on January 13, 1978, performed an extensive decompression laminectomy at the L3-L4 mid-line levels extending out to the lateral gutters. Exploration of the L4 and L5 roots on both sides was also done as well as excision of some disc material between the L3 and L4 interspaces. Claimant, after his surgery, again developed infection. In July 1978, Dr. Adams reported that claimant had not been helped by the surgery. He referred the claimant to the Pain Clinic but claimant indicated he did not want to go. Claimant subsequently changed his mind and requested he be sent to the Northwest Pain Center.

On October 31, 1978, Dr. Adams again drained some infection from the area of the decompressive laminectomy and removed infected bone from the fusion mass. He diagnosed osteomyelitis of the lumbar spine secondary to the multiple surgeries over the past 15 years.

In March 1979, claimant was admitted to the Pain Center for treatment. Dr. Leonard Joseph, a psychologist, felt that the prognosis for claimant returning to any form of gainful employment was considered to be extremely guarded. Claimant has a 7th grade education and worked for 11-1/2 years in veneer mills and in construction for 8 years. Claimant complained of back pain while in the Center but Dr. Joel Seres found no evidence of any true nerve root compression or relation.

In November 1979, the Orthopaedic Consultants indicated that claimant's condition was medically stationary. They felt claimant should return to some other occupation which should be sedentary and not to an occupation which he had previously had. They felt that claimant would need vocational assistance. They rated the total loss of function of the back as severe. Claimant is now 45 years old.

On November 19, 1979, the State Accident Insurance Fund (Fund) requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on February 7, 1980 reported the majority of the panel felt that claimant should be granted additional temporary total disability from June 1, 1977 through October 24, 1979 inclusively with no additional permanent partial disability award in excess of that granted by the order dated December 18, 1961. The other member of the panel felt that based on claimant's low back condition being severe and considering his educational level and his work history that claimant was unemployable. Therefore, it was that Disability Determination Specialist's recommendation that claimant be granted an award of compensation for permanent total disability.

The Board, after reviewing the entire file, concurs with the recommendation of the one Disability Determination Specialist that claimant be granted an award of compensation for temporary total disability from June 1, 1977 through October 24, 1979 and be granted an award of permanent total disability effective October 25, 1979.

IT IS SO ORDERED.

CLAIM NO. 922605 February 15, 1980

WALTER G. SMITH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on April 26, 1962. His claim was originally closed by a Determination Order, dated August 15, 1962, which granted claimant compensation for temporary total disability. This order was appealed and claimant was granted compensation for permanent partial disability equal to 40% loss of function of an arm for unscheduled disability. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with his back and his claim was reopened by a Board's Own Motion Order, dated September 12, 1978.

On January 23, 1979, Dr. David McGee performed an extensive decompressive laminectomy with "clean out" of the lateral aspect of the spinal canal at the L5-S1 level bilaterally with foramenotomies performed over the L5-S1 nerve roots.

On November 13, 1979, Dr. Lewis Krakauer reported he had prescribed quinine and Keflex for conditions related to claimant's back problem.

The Orthopaedic Consultants found claimant's condition medically stationary on November 29, 1979.

On December 20, 1979, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 14, 1980, recommended claimant be granted compensation for temporary total disability from January 23, 1979 through November 29, 1979 and no additional permanent partial disability.

The Board concurs with this recommendation. The Board also would order the Fund to pay for the quinine and Keflex prescribed by Dr. Krakauer.

IT IS SO ORDERED.

WCB CASE NO. 79-2711 February 19, 1980

DARVIN D. MILLER, CLAIMANT
Velure & Heysell, Claimant's Attys.
Lindsay, Nahstoll, Hart, Neil
& Weigler, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of that portion of the Referee's order which struck its denial and the testimony of one of its witnesses, awarded claimant additional compensation equal to 80° for 25% unscheduled disability and granted claimant's attorney as and for a reasonable fee a sum of $700 payable in addition to, and not out of, claimant's compensation for prevailing on the issue of compensability. The employer contends that the striking of its denial and the testimony of its witness was in error. The employer further contends that the award of permanent partial disability was excessive as was the award of attorney's fees.

Claimant, a 34-year-old cut off saw feeder, alleges that he hurt his low back and left knee cap on February 9, 1978. He claims a piece of board broke when he "was bringing it up to the chain". He climbed onto the "chain" to lay the broken board "flat" so he could get on with his job. As he "hopped off" the "chain" he alleges he twisted his right foot; this threw him off balance causing him to strike his left kneecap against "a piece of wood sticking out" and causing a pain in his low back. The injury was diagnosed as a paraspinal muscle spasm. On March 3, 1978 claimant underwent a lumbar myelogram and the final diagnosis was lumbar spondylosis L2-L3.

On February 28, 1978 Dr. R. J. Saez reported that claimant continued to complain of low back pain with radiation into the left sacroiliac area. Claimant also had noted some discomfort in the left leg which was associated with pressure and cramping sensation when standing, walking or sitting for prolonged periods of time. The diagnosis was "lumbar 5 root compression on the left, secondary to suspected herniated lumbar disk". Conservative treatment was continued by Dr. Saez.

On April 24, 1978, Dr. Saez reported claimant continued to complain of low back pain, however, denied any leg pain. Dr. Saez diagnosed a mechanical back pain secondary to lumbar spondylosis, post-traumatically aggravated. In May, Dr. Saez noted claimant was also suffering from a situational depression. In July 1978, claimant complained of pain in his low back, a "pressure pain" which prevented him from turning or bending, and pain in his legs with the right leg giving way at times. Dr. Saez prescribed a lumbosacral corset for claimant.

Dr. William E. Matthews, in September 1978, reported he found the claimant's condition to be medically stationary and that he felt claimant could proceed with a rehabilitation program. He noted that claimant might need some occasional symptomatic medication in the future. Dr. Matthews' diagnosis was a chronic low back strain superimposed on mild to moderate degenerative changes. He found no evidence of nerve irritation or impairment.

In November 1978, Dr. Saez indicated he concurred essentially with Dr. Matthews' report and he felt that the claimant was a candidate for light to moderate work. He did not feel that in view of claimant's persistent complaints and the obvious risk of re-injury that he should return to heavy work. He felt that claimant's subjective complaints and subjective disability outweighed the objective impairment and felt that claimant suffered from a superimposed situational depression created by his prolonged illness, chronic pain, and his unemployed status. He felt that claimant should enroll in some vocational rehabilitation.

The Field Services Division reported that claimant had returned to work with the same employer at a lighter job on December 14, 1978.

A Determination Order, dated December 11, 1978, awarded claimant compensation for temporary total disability and compensation equal to 32° equal to 10% unscheduled disability for his back injury.

On December 29, 1978 Dr. Saez reported that claimant complained of severe constant back pain and indicated he was unable to stand a full day at work because his back gave out and his pain was so great that he could not walk straight. Claimant also indicated that he had fallen at work. The diagnosis was a chronic lumbar strain secondary to occupational aggravation of degenerative disc disease of the lumbar spine and moderate psychogenic overlays suspected. Dr. Saez felt it would be best if claimant stopped working and that vocational counseling and retraining be provided to him.

On February 27, 1979, Mr. Bill Moberly, a job developer, reported that he had met with the employer and that a modified job had been made for claimant operating a rip saw. The employer was willing to let claimant work a partial shift of four hours or, if he felt he could handle it, an eight-hour shift. Claimant was contacted and he indicated that it would not be worth his while to drive from his home to the work site for a four-hour shift and he was unable, in his opinion, to work an eight-hour shift. Claimant also advised Mr. Moberly that he had started his own vinyl repair business. Dr. Saez felt that after being provided a job description that was within claimant's physical abilities to perform it. He noted, however, that he still would suggest vocational rehabilitation because he felt claimant was psychologically closed to the idea of returning to his previous job.

In May 1979 Mr. Rodney Isom, a vocational rehabilitation counselor, indicated that claimant had still refused to return to his former employer in the modified position. He also reported that claimant had had very little success in his vinyl repair business.

In June 1979 Dr. Darrell T. Weinman indicated claimant complained of low back and right leg pain. Claimant gave as a history of his injury that he had climbed up on a chair to get a piece of wood unstuck from the saw and a board hit him in the left knee and he fell backwards, landing on his right foot and twisting his back. His diagnosis was a probable mechanical back pain rather than a neurological back pain although claimant did have some radiation into the right leg. He thought the distribution of numbness in the right foot was confusing because claimant had a plantar neuromata

removed from the right foot. Dr. Weinman noted the musculo-ligamentous sprain involved in claimant's injury of February 1978 had long since healed and any remaining subjective complaints that claimant had in his opinion were psychological. He found no limitations of physical activity on a physical basis.

At this hearing, claimant testified that his vinyl repair business has not produced very much income. He indicated he has sought other jobs since then including a full-time position as a forklift driver in a wood products mill. Claimant denied any prior back injury. The claim was then denied by the employer on the basis that claimant's injury did not arise out or in the course of employment. The employer then had a co-worker of claimant's testify. This co-worker testified he recalled claimant had cut his knee on that shift on February 9, 1978, but claimant had said nothing about injuring his back. He indicated that when claimant first came to work he told this witness that he hurt his back at home while working on his car. Claimant's attorney then moved to strike the denial and the testimony of this witness relying upon Frasure v. Agripac, Inc., 41 Or App 7, 649 P2d _____ (1979). Claimant's attorney argued that the employer was estopped from asserting the defense of nonliability more than 18 months after the injury since the employer and carrier had voluntarily accepted a claim and paid compensation. Claimant contended that he was prejudiced by the carrier's conduct. The Referee concluded, at the hearing, that the Frasure case rationale was applicable to the instant case and granted claimant's motion to strike the denial and related testimony.

The Referee further found that claimant was entitled to further treatment for his psychopathology as recommended by Dr. Weinman. This issue was not appealed by the employer and will not be discussed by the Board.

The Referee found that based on the evidence before him at the time of the hearing that claimant was entitled to an award of compensation equal to 112° for 35% unscheduled disability based on his loss of wage earning capacity for his low back injury. He further awarded claimant's attorney a sum of $700 in addition to and not out of claimant's compensation for prevailing on the issue of compensability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board does not find that the Frasure case is

applicable to the facts in the current situation. The Court, in that case, applied it to protect the claimant. Here the claimant has not been adversely affected by the employer/carrier's action. The employer/carrier originally accepted the claim and paid benefits and compensation under the claim to claimant until it was closed. Therefore, the Board does not find that claimant has been adversely affected and that the rationale of the Frasure case does not apply. However, based on the totality of the evidence, the Board would find that claimant has proved he sustained a compensable injury to his back. The Board considers the testimony of a co-worker in reaching this conclusion. The Board finds that the preponderance of the evidence indicates that claimant had the accident as he described on February 9, 1978. The Board does not find that the incident at home caused any injury or disability to claimant. Therefore, the Board would find that claimant has sustained his burden of proof of proving a compensable injury on February 9, 1978 to his back and knee.

As to the issue of unscheduled disability, the Board would modify the Referee's award and award claimant compensation equal to 80° for 25% unscheduled disability. Dr. Matthews felt that based on claimant's poor response to the back strain plus the evidence of degenerative changes that claimant would be best confined to light-to-moderate types of work. Dr. Saez concurred in this recommendation. Dr. Saez felt that in view of claimant's persistent complaints and the obvious risk of reinjury he should not return to heavy work. At the hearing claimant testified he has a high school education and has had some experience welding and driving farm equipment and driving heavy equipment in general. Claimant also has worked as a forklift driver and pulling on a green chain as well as various other jobs in the lumber mill industry. The Board concludes that based on the limitations claimant's, age, education, work background, and other factors, that he is entitled to an award of compensation equal to 80° for 25% unscheduled disability.

The Board finds that the award of attorney's fees in this case was excessive. This is not a complicated case nor a difficult case which justified the award of $700 attorney's fees. Therefore, the Board would reduce the attorney's fee granted claimant's attorney to the sum of $500.

ORDER

The Referee's order, dated September 17, 1979, is modified.

The employer/carrier's denial, entered at the time of the hearing, is set aside and the claim for claimant's back injury is ordered accepted.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his back injury. This is in lieu of any previous awards for unscheduled disability for the back injury.

Claimant's attorney is hereby granted as a reasonable attorney's fee for prevailing on the issue of compensability the sum of $500. This is in lieu of any previous award of attorney's fees for prevailing on the issue of compensability.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-9147 February 20, 1980

BILL E. JONES, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 78-7402 February 21, 1980

CINDY MARIE CRAMPTON, CLAIMANT
Myrick, Coulter, Seagraves & Myrick,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by Maria Bullis

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant and Maria C. Bullis seek Board review of the Referee's order which found claimant was an employee of Maria C. Bullis and that claimant was continuing her employment duties at the time she was injured. However, the Referee found claimant had not timely filed her claim and approved the State Accident Insurance Fund's (Fund) denial. Claimant contends Mrs. Bullis had actual knowledge of the injury and was not prejudiced by the delay. Mrs. Bullis contends claimant was not an employee.

FACTS

Claimant, 15 years old, alleges she had been employed by Maria Bullis in June 1976 to work as a horse trainer and to perform clean-up work on Mrs. Bullis' ranch. On June 28, 1976, claimant, while riding a horse for a neighbor, Mr. Hodges, the horse fell and claimant suffered a broken foot. She filed her claim for this injury on June 29, 1978. Mrs. Bullis had knowledge of the injury on the same day it occurred.

Claimant testified she was hired by Mrs. Bullis to work on the ranch and help with the horses. She was hired to clean stalls, groom, feed and exercise the horses. She was to receive in exchange room and board and $10 per week plus she would be outfitted with show clothes to wear at horse shows. Claimant said she moved into the Bullis' home in June 1976. Claimant indicated Mrs. Bullis paid her $10 at the end of the first week. Claimant indicated she usually went home on the weekends.

Mrs. Bullis testified claimant was never hired to do anything. She said claimant did spend some time at the ranch and did stay overnight, but because she was being a "good neighbor" in allowing claimant to stay overnight. Mr. Bullis indicated he may have given claimant $10, but if he did it was for spending money and not for wages.

Ms. Davin Wilson testified she worked for Mrs. Bullis in exchange for riding lessons. She testified she saw claimant groom horses and claimant gave her orders as to what to do.

On the day of claimant's injury, a Sunday, she was exercising a horse for Mr. Hodges, a neighbor rancher. Mr. Hodges testified he had gone to the Bullis ranch and talked to Mrs. Bullis about needing someone to exercise his horses. There was testimony claimant volunteered to exercise Mr. Hodges' horses. Mrs. Bullis did take claimant to Mr. Hodges' ranch. Claimant's injury occurred on the second day she was exercising horses for Mr. Hodges. There was no conversation between claimant and Mr. Hodges about claimant's being paid for her services.

Claimant testified she considered this activity as an extension of her duties with Mrs. Bullis.

The Fund denied the claim on August 23, 1978.

The Referee found claimant was an employee of Mrs. Bullis and was within the course and scope of her employment at the time of her injury. The Referee found that Mrs. Bullis had direct knowledge of the injury, but had been prejudiced by claimant's late filing. Therefore, the Referee affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would affirm the Fund's denial. The Board concurs with the Referee's finding that claimant was an employee of Mrs. Bullis. However, the Board does not find that at the time of the claimant's injury, claimant was an employee of Mrs. Bullis. At the time of the injury, claimant was a volunteer for Mr. Hodges. The injury did not occur within the course and scope of claimant's employment with Mrs. Bullis. Claimant was not on Mrs. Bullis' ranch or under the control or direction of Mrs. Bullis when claimant was injured. Mr. Hodges testified claimant asked him if she could ride his horses. There was no agreement between Mr. Hodges, Mrs. Bullis and claimant regarding compensating claimant for her exercising Hodges' horses. Therefore, the Board concludes the Fund's denial must be approved.

ORDER

The Referee's order, dated June 22, 1979, is affirmed.

SAIF CLAIM NO. KC 180017 February 21, 1980

ANN JANE FOSTER, CLAIMANT
Leeroy O. Ehlers, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 3, 1979 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on April 18, 1969. Claimant's aggravation rights have expired. Claimant was examined by the Orthopaedic Consultants at the request of the Fund on June 25, 1979. They indicated claimant's condition was stationary and there was no objective evidence that her condition resulting from the industrial injury had deteriorated. Based on this report the Board referred the matter to its Hearings Division with instructions for it to hold a hearing and determine whether claimant's condition was directly related to her industrail injury and, if so, whether it constituted a worsening thereof.

A hearing was held on January 22, 1980 before Referee Mongrain. After thoroughly considering the evidence before him, the Referee concluded that claimant's condition has not worsened to any significant degree and it was doubtful that any worsening was really related to the industrial injury of April 18, 1969. The Referee recommended the Board deny claimant's request for own motion relief.

The Board, after considering the evidence before it together with a copy of the transcript of the proceedings, agrees with the conclusion of the Referee. The Board would affirm and adopt the findings of fact as set forth by the Referee in his opinion, a copy of which is attached hereto.

ORDER

Claimant's request for own motion relief for an injury sustained on April 18, 1969 is denied.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal.

WCB CASE NO. 78-6308 February 21, 1980

DAVID R. HAUCK, CLAIMANT
Myrick, Coulter, Seagraves & Myrick,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of his claim for an injury he sustained on May 15, 1978. Claimant contends he sustained a new injury on that date.

FACTS

Claimant, a 27-year-old lumber handler, sustained a compensable injury to his low back and right shoulder on December 3, 1971 when he fell while trying to hold some lumber. This injury was diagnosed as a right shoulder sprain and acute lumbosacral sprain.

In July 1972, Dr. Darrell Weinman reported that claimant was released for light work which did not involve lifting over 50 pounds. He felt that claimant should be rehabilitated to some other job other than pulling on the green chain.

On August 24, 1972 Dr. Weinman reported that claimant's condition was stable. He reported that claimant had returned to work and reported occasional back pain if he lifted the wrong way, but most of the time claimant was pain free.

A Determination Order, dated September 15, 1972, granted claimant an award of compensation for temporary total disability and an award of compensation equal to 16° for 5% unscheduled disability for his low back injury. This Determination Order was appealed and, after a hearing, claimant's award was increased by an additional award of compensation equal to 48° for 15% unscheduled disability for his low back injury. The total award claimant was granted for this injury was equal to 64° for 20% unscheduled disability for his low back injury.

In May 1974, Dr. Weinman reported that claimant had developed low back pain in the same location he had when the doctor had seen him for his problem in 1972. Claimant reported he was doing a clerical job at that time and was not doing any heavy lifting. He reported the pain was worse when he sat than when he stood. He indicated the pain radiated down both posterior thighs at times. Dr. Weinman's examination revealed a normal range of motion of the lumbar spine, but he felt that claimant had pain in the low lumbar area on forward flexion and on hyperextension.

On August 20, 1974, Dr. Daniel Halferty, medical examiner at the Disability Prevention Center, indicated claimant's condition was medically stationary and that his present disability was considered mildly moderate. He did not feel that the claimant would be able to return to the type of work that he was doing at the time of his original injury. Dr. Weinman concurred with this evaluation of claimant's impairment.

On September 26, 1974, Dr. Weinman reported that claimant's condition was stable and claimant was in need of rehabilitation. He felt claimant could not return to his former job. Dr. Weinman indicated claimant had a mildly moderate loss of function of the back and due to his injury had a mild loss of function.

A Determination Order, dated November 21, 1974, awarded claimant additional compensation for temporary total disability.

Dr. Alan Meyers reported on May 16, 1978 that claimant was disabled due to acute exacerbation of his chronic low back injury. On May 29, 1978, Dr. Meyers indicated that claimant's back pain had begun 14 days prior to the 29th while moving some type of bench at work. Dr. Meyers, in December 1978, opined that claimant's chronic back condition had become aggravated and worsened since his claim was last closed.

On December 12, 1978, Dr. Weinman reported that he again was seeing claimant as a result of claimant's continuing back pain. He indicated that on "May 12, 1978" claimant was helping move out a table saw in the place of his employment when claimant's back snapped and claimant's left leg became sore again. The diagnosis was "degenerative joint disease, L4-5, aggravated by the lifting episode in May, 1978, initially begun in 1971, on December 3rd". Dr. Weinman felt a myelogram should be performed to clarify claimant's condition. On December 19, 1978 claimant underwent a myelogram which revealed a small anterior extra-dural defect at L4-5, consistent with some disc protrusion at that level. Dr. Weinman's notes indicated that claimant had a mild herniated L4-5 disc and that he felt claimant should engage in no bending, lifting or stooping.

On January 25, 1979, Dr. Weinman indicated claimant's condition was stationary and that he had a bulging disc which, at times, became more symptomatic. He did not feel that claimant's impairment was any greater than that awarded on January 29, 1973. Dr. Weinman opined that the pain claimant had had, intermittently, since December 3, 1971, was an aggravation of his pre-existing condition of a mildly bulging disc. He felt that the incident of lifting the table saw probably aggravated claimant's condition. Dr. Weinman concurred with Dr. Meyers that claimant's problem was aggravated by the "May 12, 1978" injury. He disagreed that it was made worse by it.

Claimant filed a claim on May 18, 1978 alleging an injury to his back while lifting a table on May 15, 1978. The claim indicates that this was a recurrence of an old injury.

In June 1978, Dr. Shames, after examining the claimant, diagnosed an acute exacerbation of chronic low back pain.

On June 26, 1978, the Fund denied the claim filed May 18, 1978.

At the hearing claimant testified that he was employed as a sander by this employer. He indicated that he was required to do finish sanding of cabinet doors of various sizes while standing at a table some 38 or 40 inches high, stack the finished product from the floor level to various heights, and carry stacks to the painting room for additional processing by the employer. He indicated that his back had always continued to bother him since the 1971 injury, but the activity on the job with this employer caused an intensification of pain greater than he had had when he was not working. Claimant stated that near the end of his work shift on May 15, 1973, he and about half a dozen other employees were carrying a table some 26-feet long by 2-feet wide, constructed of plywood and 2' x 4's, on which a large saw was mounted. He felt that he was bearing an estimated 60-70 pounds of the weight of this table. He stated that as they were moving the table through the shop door he felt a sharp pain in his back and had to release his hold on the table. A co-worker of claimant's corroborated claimant's testimony. The president of the company was present at the time of the table moving incident and indicates that there was not any injury reported on the day of the alleged occurrence. Claimant stated that he did not report the back pain on the day it occurred because he had had sharp pains from time to time before and thought that these pains would go away and he would be all right.

The Referee found that the alleged injury occurred on May 15, 1978 and that the confusion between May 12 and May 15 was not significant. The Referee further found, under the Weller v. Union Carbide case as decided by the Court of Appeals, claimant's work activity did not originally cause or materially and permanently worsen his condition. Therefore, the Referee affirmed the denial of the Fund.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, reverses the Referee's order. The Weller case, relied upon by the Referee, was affirmed by the Supreme Court. Weller v. Union Carbide, 28 Or 27, ____ P2d ____ (1979). However, the Court held in that case that claimant must prove by a preponderance of the evidence that his work activity and conditions caused a worsening of his underlying disease resulting in an increase in his pain to the extent that it produces disability or requires medical services. The Court further held that if a temporary worsening of the underlying disease requires medical services or results in temporary disability the claim is compensable. The Board finds, in this case, that claimant's work activity caused a worsening of his underlying disease which resulted in an increase in his pain to the extent that it produced temporary disability and required additional medical services. Therefore, the Board finds that under the rationale of Weller (supra.), the claim of the new injury is compensable.

ORDER

The Referee's order, dated June 7, 1979, is reversed.

The claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation and other benefits as required by law until the claim is closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is granted as a reasonable attorney's fee the sum of $500 for his services at the hearing level.

WCB CASE NO. 79-2857 February 21, 1980

JAMES G. LANGLEY, CLAIMANT
Gary J. Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which remanded claimant's claim for a hearing loss to his right ear to it for acceptance and payment of compensation and other benefits under the Workers' Compensation Law. It contends this was in error.

FACTS

Claimant, a 61-year-old construction laborer, alleges he sustained a hearing loss to his right ear from his work exposure from March 13 to March 19, 1978. Claimant's job involved servicing four generators once each hour (total time was about 12 to 20 minutes per hour). Approximately four feet from the generators the noise level was 87 decibels.

In May 1978, Dr. Robert Stuart reported claimant had a hearing loss and tinnitus. Audiograms revealed claimant had a 10% hearing loss to the left ear and a 40% hearing loss to the right ear. Dr. Stuart did not indicate this was related to an industrial injury or exposure.

In January 1979, Dr. K. B. Garland indicated claimant reported he had a sudden loss of hearing in his right ear after a one-week exposure to intensive noise in March 1978. Claimant had a consistent high pitched tinnitus in the right ear. Dr. Garland felt claimant's hearing loss in the right ear was considered to be primarily sensorineural and more tests were needed to determine whether the loss was noise induced or whether it was a sudden onset type of loss.

On February 16, 1979, Dr. Joseph Petrusek indicated claimant denied any noise exposure prior to the week from March 13 to March 19, 1978. Claimant said on the third day he began to notice a roaring in his right ear. Dr. Petrusek stated claimant had sustained a moderately severe sensorineural hearing loss in the right ear. He felt the test results and resulting type of curve were not associated with a noise induced hearing loss. Dr. Petrusek stated it was more closely associated with a type of hearing loss which was often called ". . . Sudden Idiopathic Sensorineural hearing loss". He felt that the fact "it occurred on the job should be taken into account".

On March 6, 1979, the Fund denied this claim.

The Referee concluded that based on Dr. Petrusek's report and claimant's history that this claim was compensable. Therefore, he set aside the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The medical evidence in this case raises an inference that claimant's work might have caused his hearing loss. The medical evidence does not establish that it was probable that claimant's hearing loss was related to his job. The Board finds it difficult to understand how claimant's intermittent exposure to such noise levels could result in claimant's hearing loss. Dr. Petrusek's diagnosis of sudden idiopathic sensorineural hearing loss and his remarks that claimant's hearing loss were not characteristic of noise induced hearing loss supports the Board's conclusion that this claim is not compensable. Therefore, the Board, based on the entire record, finds that this claim is not compensable and reverses the Referee's order.

ORDER

The Referee's order, dated August 31, 1979, is reversed.

The denial, dated March 6, 1979, is approved.

SAIF CLAIM NO. KA 734855 February 21, 1980

HOWARD O. MANSKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right wrist on May 31, 1959. This claim was accepted and closed. Claimant's aggravation rights have expired.

On October 10, 1978, Dr. Keith Woolpert reported that claimant had had continuing difficulty with his right wrist and that he had been treating the claimant since March 1978. Dr. Woolpert related these ongoing right wrist problems to the 1959 injury. On February 7, 1979, Dr. Woolpert performed a median and ulnar nerve release. This claim was reopened by the Board under its own motion jurisdiction on June 14, 1979, effective February 7, 1979.

In December 1979, the Orthopaedic Consultants found claimant's condition medically stationary. They found the physical impairment of the right wrist was mildly moderate and related this impairment to the original injury of May 31, 1959. On January 9, 1980, the Fund forwarded a copy of this report to Dr. Woolpert and asked if he concurred with this report. It advised Dr. Woolpert that if it did not hear from him within two weeks it would assume that he concurred with the report. No response was received from Dr. Woolpert.

On January 21, 1980 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on February 7, 1980, recommended that claimant be granted additional compensation for temporary total disability from February 7, 1979 through January 14, 1980 and an award of compensation of 15% scheduled disability of the right wrist in lieu of and not in addition to any previous awards for this injury.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 7, 1979 through January 14, 1980, less time worked.

Claimant is also granted an award of compensation of 15% scheduled disability for injury to the right wrist. This award is in lieu of all previous awards claimant has been granted for this injury.

CLAIM NO. AC 381887 February 21, 1980

HOWARD D. NICHOLSON, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his low back on July 18, 1972. His claim was initially closed by a Determination Order, dated January 16, 1973, which awarded claimant compensation for temporary total disability and compensation equal to 32° for 10% unscheduled disability. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with his low back condition. The Board reopened this claim by its Own Motion Order, dated July 11, 1979, effective April 5, 1979 for treatment to include surgery as recommended.

On August 17, 1979, after a myelogram, Dr. J. Wilson performed a channel type decompression from L3 to the sacrum. Dr. Wilson, in October 1979, reported claimant felt he had good relief of his leg pain, but continued to have intermittent aching in his back and limitation of movement of his back.

On December 6, 1979, Dr. Wilson indicated claimant's condition was medically stationary. Claimant reported his leg pain had been almost entirely relieved bilaterally, but that continued to have some aching and discomfort in his low back with activity. However, claimant felt his condition was improved by the surgery.

On December 28, 1978, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 18, 1980, recommended claimant be granted compensation for temporary total disability from April 5, 1979 through December 6, 1979 and no additional compensation for permanent partial disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 5, 1979 through December 6, 1979, less time worked.

Claimant's attorney has already been granted an attorney's fee by the Own Motion Order of July 11, 1979.

CLAIM NO. 05 X 010442 February 21, 1980

RICHARD A. REPIN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Gray, Fancher, Holmes & Hurley,
Employer's Attys.
Own Motion Determination

Claimant sustained a compensable injury to his low back on October 13, 1969. His claim was originally closed by a Determination Order, dated September 27, 1972, which granted claimant an award of compensation for temporary total disability and compensation equal to 96° for 30% unscheduled low back disability. Claimant's aggravation rights have expired. Claimant's claim was subsequently reopened and closed on two different occasions and a stipulation entered into, all of which resulted in claimant being granted a total award of compensation equal to 240° for 75% unscheduled disability for his low back injury. Claimant has undergone four surgical procedures on his back.

Dr. Thomas L. Gritzka, in December 1979, indicated he began treating claimant in April 1979. He indicated claimant had been given a body cast and a lumbosacral brace. He reported the brace appeared to fit well and helped claimant stabilize his lumbosacral spine. Dr. Gritzka opined that claimant's condition was medically stationary on November 7, 1979.

On January 12, 1979 the Board issued an Own Motion Order reopening the claim. On July 11, 1979 the Board amended its order ordering that the claim be reopened for the payment of compensation, as provided by law, commencing on July 9, 1979, the date claimant was hospitalized with procedures recommended by Dr. Gritzka and until the claim was again closed pursuant to ORS 656.278.

On January 15, 1980 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on January 30, 1980, recommended claimant be granted additional temporary total disability compensation from July 9, 1979 through November 7, 1979. They did not recommend any additional compensation for permanent partial disability in excess of that which he had been previously granted.

The Board concurs with this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from July 9, 1979 through November 7, 1979, less time worked. This award is in addition to any awards claimant has been granted in the past.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of January 12, 1979.

CLAIM NO. C604-9967 February 21, 1980

DELORES A. SKIDMORE, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to her back on September 28, 1969 when she slipped on a wet floor and fell, straining her back. The claim was initially closed by a Determination Order, dated August 3, 1972. Claimant's aggravation rights have expired. Claimant's claim has been reopened and closed several times resulting in claimant being awarded a total award of compensation equal to 240° for 75% unscheduled low back disability.

On January 21, 1980, claimant, by and through her attorney, requested the Board exercise its own motion jurisdiction and reopen her claim. Attached to this request was a copy of a report from Dr. Thomas Boyden, dated January 17, 1980, stating that claimant had been hospitalized on January 7, 1980 as a result of an increase in her pain problem. Dr. Boyden stated that claimant's present condition had worsened subjectively since September 1979. It was his opinion that claimant was permanently and totally disabled from gainful employment and that this condition was related to her original injury of September 28, 1969.

On January 24, 1980 the Board informed Liberty Mutual of claimant's request and asked it to advise the Board of its position with regard thereto. On February 4, 1980, Liberty Mutual responded that claimant's aggravation period had expired and that it had received no medical reports indicating the purpose or extent of the care claimant was receiving.

The Board, after considering the report of Dr. Boyden and reviewing this matter, concludes the claim should be reopened as of the date claimant was hospitalized, January 7, 1980, and until the claim was closed pursuant to the provisions of ORS 656.278.

Claimant's attorney should be granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said order as paid, not to exceed $750.

IT IS SO ORDERED.

CLAIM NO. HB 139488 February 21, 1980

LAWRENCE W. WELLS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left knee on May 4, 1965. His claim has been closed and his aggravation rights have expired.

Claimant continued to have difficulty with his left knee and in June 1975 Dr. Paul Campbell performed an arthroscopy and a valgus producing proximal tibial osteotomy. In October 1976, claimant's condition was found to be medically stationary and the claim again closed with an award of compensation for temporary total disability and compensation equal to 50% permanent partial disability of the left knee.

In September 1978, claimant's left knee began to swell acutely and his claim was reopened by the Board under its own motion jurisdiction, on January 29, 1979, effective the date claimant was hospitalized in September 1978.

In May 1979, claimant was hospitalized and underwent an arthroscopy of the left knee and lateral meniscectomy, partial posterior horn, with chondroplasty of the patella, performed by Dr. Campbell.

On January 2, 1980, Dr. Campbell indicated claimant's condition was medically stationary. He stated claimant had not returned to work and felt claimant could perform lighter work, but with claimant's level of education and training it would be difficult for him to find this type of employment.

On January 15, 1980, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on February 7, 1980, recommended claimant be granted additional compensation for temporary total disability from September 28, 1978 through January 2, 1980 and no additional permanent partial disability.

The Board concurs with the recommendation of additional compensation for temporary total disability. However, the Board finds that reports submitted to them do not supply any information concerning claimant's current disability. Therefore, the Board would order the Fund to obtain additional information concerning claimant's disability now as compared to October 1976.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 28, 1978 through January 2, 1980, less time worked.

The State Accident Insurance Fund is hereby ordered to obtain information on claimant's current disability as compared to his disability at the time of the closure in October 1976 and submit it to the Evaluation Division for its consideration and to allow it to make a recommendation to the Board.

WCB CASE NO. 79-20 February 25, 1980

JOAN D. COLE, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Lee Davis Kell, Employer's Atty.
Settlement Stipulation

IT IS HEREBY STIPULATED AND AGREED by and between the above-named claimant, acting by and through HAROLD W. ADAMS, her attorney; the STATE ACCIDENT INSURANCE FUND, acting by and through JAMES BLEVINS, its Chief Trial Counsel, and CAPITAL INTERNATIONAL CORPORATION, aka TIKI LODGE, the employer, by and through its attorney, LEE DAVIS KELL, as follows:

That the claimant sustained an injury on or around January 27, 1976, while employed at the Tiki Lodge in Salem, Oregon and received a Determination Order on her accepted claim for compensation on September 8, 1978. No award for permanent disability was made by that Determination.

That claimant filed a request for hearing and received, by Opinion and Order dated November 23, 1979, a partial disability award of 50% unscheduled disability, equal to 160 degrees.

That, while appeal has been filed in this matter, the parties are now desirous of settling the case without the necessity of further litigation and, therefore, stipulate and agee herein that the respective rights for de novo review upon appeal will be closed and that claimant will receive in a lump sum payment the remainder of the amount due and owing pursuant to the award rendered by the Order and Opinion of November 23, 1979; counsel for claimant to receive the unpaid remainder of the attorney's fee at 25% of that permanent partial disability award, as specified by the Opinion and Order, also im lump sum.

This Stipulation is hereby approved and the claimant's request for review on appeal is hereby dismissed.

WCB CASE NO. 79-1983 February 27, 1980

BILLY J. DORRENBACHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 79-2243 February 27, 1980

DAIVD L. GALT, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the employer's denial of claimant's aggravation claim. Claimant contends this was in error.

FACTS

Claimant, a 19-year-old carpenter apprentice, injured his back on his first day on the job on May 17, 1978. Dr. Richard Lindquist diagnosed this as a lumbar spine sprain and released claimant for regular work and found claimant's condition medically stationary on June 12, 1978. He did not find claimant had any permanent impairment from his injury.

A Determination Order, dated August 25, 1978, awarded claimant compensation for temporary total disability from May 25, 1978 through June 11, 1978.

On January 2, 1979, Dr. Lindquist indicated claimant had developed a "sore back" driving back and forth to the beach. Claimant stated he wasn't working since no work was available, but was doing "side jobs". Claimant reported he had been playing squash with his father and receiving some physical therapy. Dr. Lindquist felt claimant was "really not disabled". Dr. Lindquist saw claimant on January 4, 1979 and gave him a work excuse slip. On January 18, 1979 Dr. Lindquist indicated claimant continued to complain of a sore back.

Also, on January 18, 1979, Dr. Lindquist wrote the State Accident Insurance Fund (Fund) and "asked" the claim be reopened because claimant had "aggravated his back problem since returning to work". On January 19, 1979, he again wrote the Fund requesting reopening of the May 17, 1978 claim due to claimant's aggravation of his back after returning to work. Dr. Lindquist indicated he had seen claimant on January 2, 1979.

On February 19, 1979, Dr. Robert Post diagnosed chronic lumbar pain. He felt this related to an injury in May 1978. Dr. Post felt claimant could return to his previous employment. Dr. Lindquist agreed with this report.

The Fund, on February 20, 1979, denied claimant's claim for reopening.

In March 1979, Dr. Lindquist indicated he had felt claimant had recovered sufficiently by June 12, 1978 to return to work. He felt there were other factors, in addition to claimant's work activities, such as claimant's body build and physical condition, inconsistent exercise and prolonged driving, which contributed to claimant's low back discomfort. Dr. Lindquist felt claimant's continued complaints of low back pain were "because of continuous aggravating factors".

Dr. Lindquist, in May 1979, indicated claimant had continued to work up to November 1978, but hadn't really recovered from his injury.

At the hearing, claimant testified he had no back problems prior to May 17, 1978. He said he returned to work on June 12, 1978 and felt fine except when he performed overhead work he was sore in the evening. He indicated that he noticed back pain more often the longer he worked. Claimant received physical therapy after he returned to work.

The Referee found claimant had failed to sustain his burden of proof that his condition worsened subsequent to June 12, 1978. The Referee found no medical evidence to support claimant's claim. Therefore, the Referee affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board agrees with the Referee that claimant failed to meet his burden of proving his condition had worsened since his last arrangement or award of compensation and would affirm the Fund's denial. Claimant is entitled, under ORS 656.245, to medical services for conditions resulting from his May 17, 1978 injury.

ORDER

The Referee's order, dated August 21, 1979, is affirmed.

WCB CASE NO. 79-24 February 27, 1980
WCB CASE NO. 79-25

DARREL W. GOFF, CLAIMANT
Malagon & Yates, Claimant's Attys.
Luvaas, Cobb, Richards & Fraser,
Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motions

On February 12, 1980, the Board issued its Order on Review which affirmed and adopted the Referee's Opinion and Order which approved the denial on behalf of Island Drywall Company (Island), denied enhanced temporary total disability compensation against Royalty Drywall Company (Royalty), approved the aggravation claim against Royalty and awarded claimant's attorney a fee of $800. Royalty had requested Board review of that portion of the order which affected it. Claimant had sought Board review of that portion of the Referee's order which denied his request for increased rate of temporary total disability, penalties and attorney's fees. The Board, in its order, did not award claimant's attorney a fee, because claimant's attorney failed to file a brief on the issue appealed by Royalty and did not prevail on his cross-appeal.

On February 19, 1980, Royalty requested reconsideration of the Board's order based on its brief and additional medical reports received by it after the date of the Board's order. The Board is unable to consider these reports and, therefore, would deny Royalty's request for reconsideration.

On February 21, 1980, claimant requested reconsideration of the Board's order contending claimant's attorney was entitled to a fee for prevailing. For the reasons set forth above, the Board denies this request.

ORDER

The motions for reconsideration submitted by both Royalty Drywall Company and claimant are hereby denied.

WCB CASE NO. 79-6124 February 27, 1980

JIMMY E. MARTIN, CLAIMANT
Malagon & Yates, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

SAIF CLAIM NO. ZC 391545 February 27, 1980

PATRICIA M. PANKRATZ, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her low back on August 30, 1972. Her claim was initially closed by a Determination Order, dated February 28, 1973, which awarded her 5% of the maximum allowable by statute for unscheduled low back disability. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with her back and indicated she had been unable to work since September 7, 1978. The Board, by an Own Motion Order, dated January 9, 1980, reopened claimant's claim as of September 7, 1978.

On September 8, 1978 claimant underwent a myelogram which revealed a herniated disc at the L4-5 level. Dr. Chen Tsai performed a laminotomy at the L4-5 level on the left on October 23, 1978, a discectomy and left L5-S1 neurolysis via the left L5-S1 laminotomy. He related the need for this surgery to her injury of August 30, 1972. Dr. Tsai reported that on March 8, 1979 claimant continued to complain of some aching in the right side of the hip but that she was on no medication for pain and that his neurological examination was essentially within normal limits.

On October 29, 1979, the Orthopaedic Consultants reported that claimant's condition was medically stationary and that her claim could be closed. It was their opinion that claimant was limited to lighter sedentary work because of her physical impairment. They estimated the physical impairment of the lumbosacral spine as mild to moderate and attributed this limitation to her 1972 injury.

Dr. Tsai, on January 24, 1980, indicated he considered claimant's condition to be medically stationary as of March 8, 1979. He concurred with the report of the Orthopaedic Consultants and agreed with them that the claim could be closed.

On February 5, 1980, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on February 12, 1980, recommended claimant be granted an additional 5% unscheduled low back disability in addition to that granted by the Determination Order, dated February 28, 1973, and compensation for additional temporary total disability from September 7, 1978 through March 8, 1979 and for October 29, 1979 and January 24, 1980.

The Board concurs with the Evaluation Division's recommendation as to the compensation for temporary total disability. However, the Board finds that based on the limitations and rating the impairment contained in Dr. Tsai's and the Orthopaedic Consultants' reports that claimant has sustained a larger loss of her wage earning capacity than that which she had been compensated for. The Board finds that claimant is entitled to additional compensation for her unscheduled disability equal to 64° for 20% unscheduled disability for her low back injury.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 7, 1978 through March 9, 1979 and for one day each on October 29, 1979 and January 24, 1980. Claimant is also granted compensation equal to 64° for 20% unscheduled low back disability. These awards are in addition to any awards claimant has previously been granted.

Claimant's attorney has already been awarded a reasonable attorney's fee for the increased award of compensation for temporary total disability by the Own Motion Order of January 9, 1980. Claimant's attorney is also granted a reasonable attorney's fee equal to 25% of the increased compensation granted by this order for permanent disability, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-6027 February 27, 1980
WCB CASE NO. 79-6516

WILLIAM VAN WINKLE, CLAIMANT
Coons & Anderson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury on February 14, 1972. The claim was accepted and closed. Claimant's aggravation rights have expired. Claimant requested the Board exercise its own motion jurisdiction and reopen his claim on the grounds that his condition had worsened. The State Accident Insurance Fund (Fund), on July 10, 1979, denied the request on the grounds that the medical report from Dr. Bert, dated May 25, 1979, indicated a new incident had occurred on March 26, 1979. Claimant requested a hearing on this denial and also requested a hearing on the refusal of the Fund to continue to furnish claimant medical care and treatment for conditions relating to his 1972 claim. These two requests were consolidated for a hearing.

On October 24, 1979, the Board, after giving full consideration to the documents submitted to it, remanded the request for own motion relief received by the claimant to its Hearings Division with instructions that said request be set for hearing at the same time with the issue of whether claimant suffered an aggravation of an old injury or sustained a new injury on March 26, 1979 was set.

A hearing was held on November 13, 1979. The Referee found that the work activity on March 26, 1979 contributed independently to the condition requiring treatment thereafter and concluded that claimant had established a valid claim for a new injury. Therefore, the Referee recommended to the Board that claimant's request for own motion relief under the 1972 claim be denied.

The Board concurs with the findings and recommendations of the Referee a copy of which is attached hereto and, thereby incorporated.

ORDER

Claimant's request for own motion relief is hereby denied.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal.

WCB CASE NO. 78-123 February 27, 1980

DAVID E. WILBURN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Remand

The majority of the Board, on June 7, 1979, affirmed the Referee's Opinion and Order in this case which affirmed a Determination Order, dated November 16, 1977, which granted claimant compensation equal to 32° for 10% unscheduled disability for his neck injury. Claimant appealed the Board's order to the Court of Appeals.

In an opinion filed December 10, 1979, the Court of Appeals reversed and remanded this claim to the Board with instructions to enter a new order determining claimant to be permanently and totally disabled and for further proceedings consistent with their opinion. The Court remanded the issue of claimant's entitlement to temporary total disability and payment of medical expenses for his hospitalization treatment which were related to claimant's psychosis. The Board received the judgment and mandate issued on February 13, 1980.

The Board finds that claimant's hospitalization at Woodland Park Hospital from January 13, 1978 to January 31, 1978 was related to his compensable injury and claimant is entitled to an award of compensation for temporary total disability for that period and to have his medical expenses for this hospitalization paid.

The Board further finds that claimant is entitled to an award of compensation for permanent total disability effective November 16, 1977 and the State Accident Insurance Fund can credit any payments of temporary total disability or permanent partial disability paid against this award.

ORDER

Claimant is hereby awarded compensation for temporary total disability from January 13, 1978 through January 31, 1978 and is entitled to have his medical expenses for his hospitalization at Woodlawn Park Hospital during this period paid.

Further, claimant is hereby awarded compensation for permanent total disability effective November 16, 1977 and the State Accident Insurance Fund can credit any amounts paid for temporary total disability or permanent partial disability against this award.

WCB CASE NO. 78-1273 February 28, 1980
WCB CASE NO. 78-1274

JERRY CROWLEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the employer's denial of his claim for an occupational respiratory disease.

FACTS

Claimant, a 51-year-old veneer patcher, alleges he sustained an occupational disease due to his inhaling of dust, smoke and gases while working in a sawmill for 11 years from October 4, 1965 through February 7, 1977. This claim was denied by the employer on January 23, 1978.

On August 24, 1970 Dr. Don Romanaggi reported that claimant indicated he had worked in a pulp mill and had felt "chest congestion" with wheezing and coughing. He indicated that he had stopped working in the pulp mill five years prior to 1970 and had done well until two years ago when he had recurrent chest symptoms. Claimant realized that he had a worsening of the symptoms during the winter months. Dr. Romanaggi reported at that time claimant was working at a plywood mill and it was questionable that claimant was having any increasing symptoms at work. He diagnosed perennial allergic rhinitis and possibly asthmatic bronchitis. Dr. Romanaggi felt that claimant had chronic nasal and pulmonary problems and if he did not watch his environment, take medication as prescribed, and stop smoking, that most likely as time progressed he would have increasing symptoms.

In December 1972, Dr. William Laidlaw reported that claimant had been having difficulty in hot and in cold weather with bronchial spasms and that claimant had never responded well to the medication prescribed. He indicated that claimant had been under stress and tension and he felt that part of claimant's asthmatic component was due to the stress reaction. Dr. Laidlaw indicated that he had been treating the claimant on and off for a period of several years for this condition.

In January 1973, Dr. John Tuhy reported that claimant indicated he had intermittent episodes of wheezing and dyspnea from 1965 on, more frequent in the winter months, and since about 1970, occurring about one-third of the days sometimes lasting all day. Claimant indicated these tended to be precipitated by exertion, exposure to cold air, smoke at the plywood mill, household sprays and sometimes by cigarette smoke. Claimant indicated he had quit smoking in June of 1972. Dr. Tuhy felt that the tests revealed that claimant had a fairly mild ventilatory impairment of the obstrutive type, with improvement in the airway obstruction after use of the bronchodilator. He felt if it was possible it would be best for claimant to be in a situation where he was not exposed to smoke and other respiratory irritants.

In April 1977, Dr. Tuhy reported that claimant's employer had closed its mill on March 18, 1977. Claimant indicated he obtained a job as a custodian for a school, but worked only about one week, quiting because of "asthma due to dust and chemical smells in the lab". Dr. Tuhy diagnosed a probable reactive airway disease (chronic bronchitis with bronchospasm), which by history was worse by exposure to certain respiratory irritants; probable chronic obstructive lung disease of mild to moderate degree. He felt it was wise to advise claimant to get a job in a situation in which the exposure to lung irritants, such as dust, fumes, extremes of temperature, were minimal. He felt the claimant could do moderate physical work in a protective environment, but not heavy physical work judging from the test results. He treated claimant with medication.

In April 1978, Dr. Laidlaw reported that he had treated claimant over a period of 12 years and that claimant had intermittent episodes of asthmatic bronchitis. He indicated the initial episodes were always associated with upper respiratory infections. He reported that in 1971 claimant began having symptoms of bronchial spasms that were unrelated to upper respiratory infections and that he had treated the claimant for asthmatic bronchitis. He reported that he had not seen the claimant since October 1977, but had seen a report from an associate of Dr. Tuhy to the affect that claimant was still being followed for his irritant bronchitis and that at the present time was on medication. Dr. Laidlaw stated that during the time claimant was under his care claimant did relate that the fumes and dust of his employment appeared to make the symptoms more pronounced.

On April 18, 1978 Dr. Tuhy reported he concluded that claimant had mild chronic bronchitis with bronchial spasms, a so-called reactive airway disease, associated with mild allergic rhinitis. He reported that claimant's breathing test on his visit in 1972 revealed mild ventilatory impairment of the obstructive type which had improved after the use of a bronchodilator. Dr. Tuhy stated that in April 1977 a breathing test showed somewhat more ventilatory impairment of the obstructive type than in 1972. He felt claimant very likely had some degree of anatomic emphysema, which he felt was commonly seen in smokers or ex-smokers with chronic bronchitis and reactive airway disease. He felt the deterioration of claimant's breathing test between 1972 and 1977 was of the magnitude commonly seen in the natural progression of that disease. Dr. Tuhy did not feel that it was medically probable that claimant's work exposure with this employer ending in March 1977 resulted in any permanent impairment of lung structure or function. He stated that exposure to respiratory irritants in the plywood mill, such as smoke from the dryers, would be expected temporarily to increase claimant's cough and wheezing from time to time, just as would exposure to other things apart from his work, such as cold air, household sprays, cigarette smoke.

On September 18, 1978 Dr. James Mack advised claimant that he had lost about 40% of his breathing ability. He indicated that claimant's condition appeared to improve when he was on a consistent steady program of medicines. He felt the test results indicated that claimant had a form of emphysema called reactive airway disease and that is why claimant continued to cough and wheeze. He stated this type of illness associated with eosinophilis was not related to the industrial exposure. Dr. Mack indicated that claimant's respiratory symptoms dated as far back as 1965 which reinforced his previous diagnosis that the job was only a temporary non-permanent aggravating factor. He opined that the job did not cause a reactive airway disease and that he anticipated that the job was responsible for a transient partial irritation with the resulting increased cough without permanent residual effect.

In December 1978, Dr. Emil J. Bardana, Associate Professor of Medicine, Acting Head, Division of Immunology, Allergy and Rheumatology at the University of Oregon Health Sciences Center, reported that he found no evidence that claimant had an occupational lung disorder caused by his employment with this employer. He reported that the various medical reports in claimant's medical history as related to him did not corroborate a precise date of the onset of his illness as it relates to his lung problem. He reported that Dr. Romanaggi dated the onset of wheezing in 1961 well before claimant's work began with this employer in 1965. Dr. Bardana felt that if the reports of the prior physicians were correct, claimant's lung condition began between 1961 and 1965 and was worse in the winter and had no relationship to his work exposure and was usually associated with acute upper respiratory infection. He noted it was undoubtedly intensified by his smoking and improved a great deal when claimant had stopped smoking in June 1972. Dr. Bardana reported that claimant was perfectly capable of working if he wanted to. He found claimant had no evidence of a compensable occupational disorder, but did appear to have asthma which would limit his work conditions to a clean work environment.

At the hearing, claimant testified that there were a number of machines and pieces of equipment in his work area which caused considerable dust and fumes. The smoke fumes bothered him more than anything else, causing his eyes to run, plugged up his nose, caused him to cough and caused him breathing difficulties. He stated that he took various medications which allowed him to continue to work. He indicated that since he has ceased working with this employer he is unable to tolerate exposure to cleaning fluids, solvents, and other chemicals, however he felt his condition had improved. Claimant stated he first noticed a lung problem in 1959 while working for another employer at a pulp mill. He indicated he left that employment because of a breathing difficulty. Claimant worked after this as a carton machine operator, joint operator in a plywood mill, paper finishing worker and had no respiratory problems.

The Referee found that the weight of the medical evidence was that claimant's work environment did not cause his respiratory disease. The Referee noted that while such evidence indicates claimant's work environment increased his symptomatology, it also indicates the increase was merely temporary and did not result in any permanent impairment. Therefore, the Referee affirmed the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board finds that the medical evidence in this case indicates that claimant's condition was not caused by his work. The Board does not find that claimant has proven by a preponderance of the evidence that his work activity and condition caused a worsening of his underlying disease which resulted in an increase in his pain to the extent that it produced disability or required medical services. Claimant has failed to show that a temporary worsening of his underlying condition required any medical services or resulted in any temporary total disability due to his work exposure. Therefore, the Board, applying the test set forth in the case of Weller v. Union Carbide, 288 Or 27, _____ P2d _____ (1979), concurs with the Referee that the denial of the employer must be affirmed.

ORDER

The order of the Referee, dated August 27, 1979, is affirmed.

CLAIM NO. C 275638 February 28, 1980

DONALD C. SCHMIDT, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his left foot on November 2, 1970. His claim was initially closed by a Determination Order, dated September 16, 1971. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with his left foot and his claim was reopened by a Board's Own Motion Order, dated December 20, 1978, for additional surgery. The claim was then closed by an Own Motion Order, dated December 11, 1979, which awarded claimant additional compensation for temporary total disability.

On January 31, 1980, claimant was hospitalized for additional treatment of the left leg condition. Dr. John Corson had indicated that claimant would have to undergo an amputation for relief of the foot pain claimant continued to experience.

On February 13, 1980, the State Accident Insurance Fund advised the Board that it would not oppose an Own Motion Order reopening the claim.

The Board, after reviewing the evidence in this file, finds it is sufficient to order the reopening of claimant's claim for his November 2, 1970 injury to his left foot effective January 31, 1980. Therefore, the Board concludes the claim should be reopened as of the date claimant was hospitalized, January 31, 1980, for the surgery proposed by Dr. Corson and until his claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. GC 49505 February 29, 1980

FRANKLIN C. BARNETTE, CLAIMANT
SAIF, legal Services, Defense Atty.
Amended Own Motion Determination

On October 30, 1979 the Board entered its Own Motion Determination which granted claimant compensation for temporary total disability from June 3, 1977 through September 9, 1977 and from June 1, 1978 through June 2, 1979. Claimant, on February 4, 1980, advised the Board that he had attempted to return to work in September 1977 but was able to work only a total a 23 hours the entire month due to his disability. He had a physical examination on September 15, 1977 and was hospitalized for further treatment on September 19, 1977. Claimant has been unable to work since this hospitalization. The Fund, on February 12, 1980, advised the Board that since claimant was unable to work between September 10, 1977 and May 31, 1979 it had been paying claimant time loss benefits for that period of time.

The Board hereby amends its October 30, 1979 Own Motion Determination to include the payment of compensation for temporary total disability from September 10, 1977 through May 31, 1978, less time worked, in addition to that granted by its order.

IT IS SO ORDERED.

WCB CASE NO. 79-10,025 February 28, 1980

URSULA A. BOOTHBY, CLAIMANT
Velure & Heysell, Claimant's Attys.
Thomas D. Melum, Employer's Atty.
Order of Dismissal

On February 12, 1980, the employer requested Board review of the order of Referee Danner wherein it was directed to pay to claimant's attorney the sum of $75.00 per hour for his necessary appearance at the deposition, not to exceed $200.

The Board finds that Referee Danner's order is not a final order and, therefore, is not appealable. The Board concludes that the employer's request for review should be dismissed.

IT IS SO ORDERED.

CLAIM NO. C 384145 February 29, 1980

ROBERT T. BULLIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right small toe on July 31, 1972 when he crushed it while splitting wood. The claim was first closed on December 8, 1972 and claimant's aggravation rights have expired.

Claimant's claim was reopened by a Board's Own Motion Order, dated November 29, 1979, for surgery recommended by Dr. Anderson. On December 5, 1979, Dr. Harding performed an excision of the tip of the distal phalanx of the right fifth toe with revision of the soft tissue. Dr. Harding released claimant for work on January 4, 1980.

The State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted compensation for time loss from December 5, 1979 through January 3, 1980 and compensation for 50% loss of the right small toe.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 5, 1979 through January 3, 1980, less time worked, and compensation equal to 50% loss of the right small toe. These awards are in addition to any previous awards claimant has been granted, although the record indicates that the temporary total disability has already been paid.

WCB CASE NO. 79-104 February 29, 1980

CLIFFORD GILINSKY, CLAIMANT
Velure, Heysell & Pocock, Claimant's Attys.
Thomas J. Mortland, Employer's Atty.
Order Denying Motion For Remand

The Referee issued an Opinion and Order in this case on June 28, 1979 which awarded claimant compensation equal to 320° for 100% unscheduled disability. On July 19, 1979, the employer requested Board review of this order. On February 13, 1980, the employer advised the Board claimant had entered an approved program of vocational rehabilitation and requested the case be remanded to the Referee to allow it an opportunity to present evidence concerning the vocational rehabilitation program and its affect on claimant's unscheduled disability or, alternatively, to present such evidence to the Board.

The Board would deny the employer's request. The Board does not find that the case was improperly, incompletely or otherwise insufficiently developed or heard by the Referee to require it be remanded to him. Further, the Board cannot consider evidence which was not part of the record at the time of the hearing unless agreed upon by the parties. There being no such agreement in this case, the Board will not consider the evidence offered by the employer.

ORDER

The employer's motion to have the Board consider additional evidence or alternatively to have the case remanded to the Referee for consideration of the additional evidence is denied.

WCB CASE NO. 79-2224 February 29, 1980

ORA L. HALL, CLAIMANT
Allen Drescher, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant an additional award of compensation equal to 96° for 30% unscheduled disability. The Fund contends this award is excessive.

FACTS

Claimant, a 25-year-old timber faller, sustained a compensable injury to his head on April 27, 1978, when he was struck on the top of the head by a 3' x 4' log. Claimant's injuries were diagnosed as a C1-C2 fracture; central cord syndrome, mild to minimal, upper cervical segments; superficial ecchymosis and abrasions; and laceration of the left parietal area. Claimant was treated with traction for approximately two weeks. Dr. Nicholas Yamodis indicated that claimant initially had a temporary loss of feeling in the upper and lower extremities. Claimant felt a burning sensation of the skin in the upper extremities from the neck to approximately the nipple area. Dr. Yamodis found a weakness in the upper extremities.

On October 31, 1978 Dr. Yamodis indicated that claimant was medically stationary as of October 9, 1978. He reported that claimant still had tightness of the left side of the neck which was quite painful and that cold weather did increase the stiffness of the neck. He reported claimant had no other complaints of numbness or tingling. He felt claimant should be able to return to some light duty work, but would be unable to return to his previous employment. In November 1978, Dr. Yamodis felt that it would be in claimant's best interests to work in an environment which did not require heavy lifting and suggested that claimant lift a maximum weight of 50 pounds.

In January 1979, Dr. Yamodis reported that claimant was still improving, but had occasional neck stiffness and tilting of the head to the right in the presence of cold weather. Claimant denied any numbness, tingling or weakness in the hands. Claimant reported that he had attempted to lift 25 pounds, but this caused difficulties with the neck. Dr. Yamodis felt that it was imperative that claimant not return to activities in the timber industry and "in the woods". He felt claimant should be involved in a semi-sedentary type of environment and advised vocational rehabilitation.

Also, in January 1979, Dr. Don Schmiesing diagnosed a premature presbyopia which he felt was probably traumatically induced from the history of the head trauma claimant had suffered. He recommended that claimant be provided with reading glasses to aid him in the correcting of his reading difficulties. He felt that perhaps claimant may have some improvement in this condition in the next six months to two years.

On March 2, 1979 Dr. David Jones, claimant's family physician, indicated that claimant's entire work history consisted of timber falling. Dr. Jones indicated that claimant was medically stable, but for him that meant neck and shoulder pain with activity. He felt claimant was not able to engage in strenuous physical work. He noted that claimant did not know any other type of work.

In April 1979, the Orthopaedic Consultants indicated that claimant continued to complain of persistent stiffness and irritability of the left side of the neck. Claimant also indicated that any movement of the neck produced pain and that he had occasionally noticed muscle spasms in the left sternocleidomastoid region. Claimant indicated he was also bothered by persisent hyperesthesia over the entirety of the left temporoparietal scalp and the neck to the tip of the left shoulder. He also indicated his left arm was occasionally tender in the axillary region over the deltoid. He stated that the shoulder felt stiff with movement and occasionally he had sharp pains in it. He said lifting tended to produce pain in the shoulder and over the trapezius.

He stated he could no longer carry his chain saw and felt that the left arm was not as strong as it used to be. The Orthopaedic Consultants felt that claimant's condition was stationary from a neurological and orthopedic point of view. They felt claimant could not return to his previous job and needed a new occupation. They indicated that claimant had been receiving training in gardening and had a very positive outlook about this type of employment. However, they felt some reservations about the claimant's ability to pursue the heavier aspects of gardening work, and felt it might be necessary to consider some alternatives. They felt the functional impairment as it currently existed with respect to the neck and upper back, was mild to moderate (25%), all of which was due to the claimant's injury in April 1978. Dr. Yamodis concurred with this report.

A Determination Order, dated February 8, 1979, awarded claimant compensation for temporary total disability and compensation equal to 32° for 10% unscheduled disability for his neck and upper back injury.

On May 14, 1979, Dr. R. C. Peterson, D.M.D., indicated that he had treated claimant in June 1978 for fractured teeth as a result of the work-related injury. He had extracted two teeth in June 1978 recommended porcelain gold bridges for replacement of the extracted teeth.

Claimant became enrolled in a rehabilitation program consisting of landscape maintenance. The program was to run from April 1, 1979 to December 1, 1979. A description of the requirements of this job was forwarded to Dr. Yamodis who felt that claimant would be able to engage in this type of activity.

Claimant testified at the hearing that he has complaints of persistent stiffness of the head, left side of the neck, persistent numbness over the left side of his head and next to the tip of his shoulder, tenderness in the shoulder and some stiffness. He says that lifting tends to cause more pain in the shoulder and feels that he no longer could carry a chainsaw or other equipment necessary to buck and fall trees. He said this problem exists only with his left arm and he had no trouble with his right arm at all. Claimant has a high school education and worked as a timber faller for approximately five years prior to his injury. He stated that after his release for light work in October 1978 he was unable to find any work as a timber faller and indicated an interest in retraining. He said at the current time he was working learning a landscaping business. He said he had some

difficulty doing a lot of the work that was necessary for a landscaper and did not perform any of the extremely heavy work. Claimant also stated he had been receiving acupuncture treatments from Dr. Jones and had been billed $150.50 for these treatments and the Fund had not paid them. Claimant also testified that he had received $50 from the Fund and was not sure what the $50 was for.

The evidence indicated the $50 sum was for the dental bills that the Fund had received from Dr. Peterson for the initial work done on claimant. The Fund sent a check for $50 to claimant and did not designate what the money was for.

The Referee found that the Fund should pay for all the acupuncture treatment furnished claimant as of May 9, 1979, represented by the billing, and should pay for any future acupuncture treatment as authorized by claimant's family doctor. The Referee ordered the Fund to assume all payment for dental treatment and to pay any dental treatment that is required to restore claimant's teeth that were damaged in his injury. Further, the Referee found that the award of temporary total disability, as set forth in the Determination Order, was correct. However, the Referee found that based on all the evidence claimant was entitled to an increased award of unscheduled disability. The Referee felt that based on claimant's work background, education, some doubt as to his ability to continue his current rehabilitation program, indicated a loss of earning capacity that was equal to 128° for 40% unscheduled disability. Therefore, the Referee granted claimant an award of compensation equal to 128° for 40% unscheduled disability for his neck and back injury in lieu of and not in addition to that granted by the Determination Order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would affirm the Referee's order. The Board notes that the Fund, in its brief, argued that the Referee had incorrectly disallowed its motion for postponement. The Fund argued that the claimant was entitled to a hearing, but if the matter had been postponed it could have developed some additional facts from which to determine the extent of claimant's disability. The Board finds the Referee correctly denied this motion based upon statutory and case law. Further, the Board finds that the Referee correctly determined all the issues that were before him and would affirm his order.

ORDER

The Referee's order, dated August 15, 1979, is affirmed.

Claimant's attorney is hereby granted a sum of $350 as and for a reasonable attorney's fee for his work at the Board level.

WCB CASE NO. 79-3359-E February 29, 1980

DERRAL D. KELLEY, CLAIMANT
Steven C. Yates, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On February 15, 1980, the Fund requested Board review of the order of Presiding Referee Daughtry which denied its motion to depose claimant.

The Board finds that Mr. Daughtry's order is not a final order and, therefore, is not appealable. The Board concludes that the Fund's request for review should be dismissed.

IT IS SO ORDERED.

CLAIM NO. HC 140764 February 29, 1980

KENNETH S. LAWSON, CLAIMANT
Tom Hanlon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Morion Order

Claimant suffered a compensable injury to his left leg and left shoulder on July 25, 1968 when he was struck by a log. His claim was originally closed by a Determination Order, dated June 26, 1970, and his aggravation rights have expired. Claimant has been granted awards totalling 75% partial loss of the left leg, 10% partial loss of the left arm and 10% unscheduled disability.

Claimant's claim was reopened by a Board's Own Motion Order, dated July 10, 1978, for further surgery which was done on June 25, 1978. Claimant's condition was found to be stationary by Dr. McLaughlin on September 18, 1979 and his claim was closed by an order of the Board dated December 10, 1979.

On February 19, 1980 the State Accident Insurance Fund forwarded new medical reports to the Board indicating it was not opposed to reopening claimant's claim for medical treatment and time loss benefits commencing November 29, 1979. Dr. McLaughlin, in his October 25, 1979 report, stated that he was still seeing claimant but claimant's condition remained stationary. In his December 3, 1979 report, Dr. McLaughlin indicated he had seen claimant on November 29, 1979 and, in an attempt to restore his muscle tone, made arrangements for claimant to be treated by a physical therapist in Seaside, Oregon. Claimant was again seen on January 23, 1980 and Dr. McLaughlin stated that his earlier recommendation that claimant's claim be closed was in error. Claimant's condition had worsened and further orthopedic care was necessary with the possibility of a total knee joint replacement in the future.

The Board, after considering the medical reports before it, concludes that claimant's claim should be reopened as of November 29, 1979 for further treatment and time loss benefits relating to his industrial injury of July 25, 1968 and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-5466 February 29, 1980

ROBERT V. MAGEE, CLAIMANT
Alan L. Ludwick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks review by the Board of the order of the Referee which remanded claimant's claim to it for acceptance and the payment of compensation as required by law.

FACTS

Claimant was in a partnership in a business called Gooden Magee which did concrete work.

On the date of the injury, December 7, 1977, claimant and his wife were driving down Main Street in Springfield in their own personal automobile and were stopped for a school bus and were rear-ended by another vehicle which severely injured claimant causing "enormous paralysis" and which put him in a wheelchair.

Claimant and his wife were on their way to a Eugene engineering firm to sign papers on a sub-division owned exclusively by claimant and his wife and not a part of Gooden Magee. They were then going to the Fund's office on a business call to check into materials they had received from the Fund regarding a workers' compensation claim of one of their employees whose back injury was denied by the Fund.

Claimant testified that he and his wife left their residence on 57th Street in Springfield at around 8 a.m. The engineering firm was located on Willamette and 14th Streets in Eugene. Thereafter they were going to the Fund's office because of their concern over an employee named Luse's attorney fee agreement which indicated Gooden Magee would pay attorney fees win or lose. Claimant testified he had discussed this claim with Gooden but Gooden was not concerned about it.

Claimant testified that they would have gone to the Fund's office even if they had not had to go to the engineering firm. Claimant testified in December 1977 he thought the Fund's office was on 13th and Willamette but the morning of the injury his wife informed him it was located on Centennial Loop.

Claimant testified that their plan after visiting the Fund's office was to go home as there was no work to do in his business that day.

Upon cross-examination, claimant testified that his house was located about one block from freeway I-105, which was probably a more convenient and quicker route into Eugene.

Claimant's wife, who had been excluded during claimant's testimony, testified she had correspondence regarding the Luse case on her lap at the time of the injury. She turned this correspondence over to Mrs. Gooden at the hospital. The correspondence had been addressed to Mr. Gooden's house, which was the business address. She further testified she had talked to the Goodens the night before and they were not at all concerned about the claim, but she had questions and was concerned and that was why they were going to the Fund's office. Claimant's wife was not involved in claimant's business.

Mrs. Magee further testified that she thought the Fund office was located at 13th and Willamette but on the morning of the injury her husband informed her it was located on Centennial Loop.

A Fund's claims consultant testified that the file on Luse was sent to the Salem office on October 6 and Mr. Luse's request for hearing was dated October 7, 1977.

A Fund claim adjustor testified there was no claims adjustment office in Eugene until February 1978.

The Referee found claimant and his wife were credible witnesses and found this trip was a dual purpose trip in that claimant was going to the engineering firm on a personal mission and then to the Fund's office for a purpose related to his business.

He remanded the claim to the Fund for acceptance and an attorney's fee of $1,250.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, finds that the evidence indicates a number of things that cause concern. The Luse request for hearing and attorney fee agreement must have been received by claimant in October or November at the latest. It, therefore, is difficult to understand, if claimant was so concerned about this agreement, why an earlier contact was not made with the Fund's office either by phone or personal visit.

Another concern is that claimant testified he and his wife left their residence about 8 a.m. and the police report indicates the accident occurred somewhere around 8:55 (claimant testified 8:30 or 9:00 a.m.). It is obvious that in that amount of time they would have gone much further than Main Street in Springfield.

Further, the route chosen was by personal choice and was unreasonable when considered in light of claimant's testimony that they were to be at the engineering firm shortly after 8 a.m. and yet they chose to go through Springfield, Glenwood, etc., rather than to take I-105 a block or so from their residence, which is the quickest and the most convenient route.

The last point is that despite the accident which occurred, the engineering firm got the signature of claimant's wife the following day but investigating their employee's claim was never completed.

For the foregoing recitals, the Board concludes that the dual purpose rule has not been satisfied in this case and that the preponderance of the evidence does not establish the purported business purpose of the trip. The Board, therefore, concludes that the injury occurred while the claimant was engaged in a personal mission, unrelated to the employment.

ORDER

The order of the Referee, dated August 6, 1979, is reversed.

The Fund's denial, dated May 24, 1978, is affirmed.

WCB CASE NO. 78-7125 February 29, 1980

DAVID L. MARTIN, CLAIMANT
David R. Vandenberg, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which ordered it to pay interim compensation from January 30, 1979 until claimant's left hip and low back claim was denied, assessed of 25% penalty and an attorney's fee of $150. The Fund contends this was in error.

FACTS

Claimant, a 27-year-old choker setter, sustained a compensable injury to his left knee on August 4, 1972, when he jumped to avoid a falling limb and twisted his left knee. This injury was diagnosed as an internal derangement, left knee, with a tear of the medial collateral ligament mechanism, tear of the medical meniscus and tear of the anterior cruciate ligament. On August 8, 1972, Dr. Gilsdorf surgically repaired the knee. Claimant continued to experience difficulty with his left knee and on January 8, 1974, Dr. Gilsdorf performed an arthrotomy with excision of osteophytes femoral condyle and reconstructed the medial capsule. Claimant developed a complication in his lungs after this surgery.

On October 9, 1974, Dr. Gilsdorf indicated claimant's condition was stationary. He felt claimant was restricted to light ambulatory activities and was not able to walk on uneven terrain, jump or run. Dr. Gilsdorf felt the loss of function of the knee was moderate.

During the course of treatment for the knee injury claimant developed a respiratory problem diagnosed as bronchial asthma which Dr. O'Toole reported on December 16, 1974 would likely remain symptomatic "to a greater or lesser degree for the rest of his life". The respiratory condition was determined to be causally related to the injury of August 4, 1972.

A Determination Order, dated January 22, 1975, awarded claimant compensation for temporary total disability, compensation equal to 60° for 40% loss of the left leg and compensation equal to 48° for 15% unscheduled disability for his respiratory condition.

Claimant continued to have difficulty with his left knee and was referred to Dr. Donald Slocum. On March 11, 1976, Dr. Slocum performed a lateral reconstruction of the knee and a lateral meniscectomy. On October 19, 1976, Dr. Slocum performed an arthrodesis of the left knee. Steinmann pins and screws were removed on November 29, 1977.

In June 1978, Dr. Slocum indicated claimant had constant mild pain in the knee joint area with activity and occasional mild muscle spasms. He stated claimant had limitations on his activity because of pain in his hip and back due to the stiffness of the knee joint. Dr. Slocum felt claimant's condition was stationary and that claimant had permanent partial disability because of the arthrodesis of the knee plus additional disability because of the back ache caused by the knee arthrodesis.

A Determination Order, dated August 28, 1978, awarded claimant additional compensation for temporary total disability and an additional 15% loss of his left leg.

On December 15, 1978, the Orthopaedic Consultants reported claimant's main complaint was of back pain which claimant related to his knee arthrodesis. The Orthopaedic Consultants felt this back condition was contributed to by the knee problems of shortening of the leg and arthrodesis of the knee, but was not related to claimant's original injury. Somewhat inconsistently, they rated the loss of function of the back due to this injury as mild.

Dr. Gilsdorf, in March 1979, indicated claimant's surgeries to his left knee resulted in significant shortening of the leg and caused claimant to have an abnormal gait. This resulted in claimant having chronic mechanical lumbar strain. Dr. Gilsdorf disagreed with the Orthopaedic Consultants in that he felt the back condition was related to claimant's original injury. He felt the loss of function of the left leg was "major" and of the back "moderate".

Claimant continued to complain of tenderness in the left hip and in July 1979, Dr. Daniel Roberts and Dr. Gilsdorf opined claimant was permanently and totally disabled.

At the hearing on the issue of extent of disability, the Referee asked if the left hip and low back conditions were related to the original injury. Claimant's attorney indicated that the Fund had paid all the medical bills regarding these conditions and that claimant was proceeding on the basis that these conditions had been accepted. The attorney for the Fund stated it denied the left hip and low back were injured in the accident on August 4, 1972, but would take no position as to whether or not it was causally related to the left knee injury. Claimant's attorney then claimed surprise and that he would not proceed and requested the hearing on the issue of extent of disability not proceed, but that the Referee resolve the issue of compensability of the left hip and low back problem.

The Referee indicated the Fund's position prevented the hearing on the extent of disability. The Referee felt the Fund's approach would be to lay back and only after the determination of claimant's disability, challenge the findings and conclusions on the basis that the hip and back problem were not causally related. Therefore, the Referee entered the order requiring the Fund to pay interim compensation until the claim for the left hip and low back problem was denied, assessed penalties and attorney fees for the Fund's unreasonable refusal to accept or deny.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the Referee's order and remand the claim to the Referee for a hearing on the extent of claimant's disability. The Fund's acts at the hearing amounted to a de facto denial of claimant's left hip and low back condition. The Board finds that the medical evidence clearly indicates that the left hip and low back condition are related to claimant's original injury. Dr. Gilsdorf repeatedly has so stated. Even the Orthopaedic Consultants find claimant has some loss of function of his back related to his original injury.

The Board finds the Referee should have treated this matter as a de facto denial and based on the evidence before the Referee found the left hip and low back condition related to the original injury and then proceed to rate the extent of disability. Therefore, the Board reverses the Referee's order and remands the claim to the Referee to conduct a hearing to determine the extent of claimant's disability.

ORDER

The Referee's order, dated August 13, 1979, is reversed.

The left hip and low back conditions are ordered accepted as being causally related to claimant's original injury of August 4, 1972.

The claim is remanded to Referee Braverman to conduct a hearing to determine the extent of claimant's disability due to his injury of August 4, 1972.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 79-5492 February 29, 1980
WCB CASE NO. 79-5493
WCB CASE NO. 79-5494

JAMES F. SULLIVAN, CLIAMANT
Cheney & Kelley, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 5, 1980 claimant, by and through his attorney requested the Board to exercise its own motion jurisdiction and reopen his claim for a back injury sustained on May 21, 1973. Claimant's claim was first closed on May 23, 1974 by a Determination Order and his aggravation rights have expired.

A summary of claimant's claim, in addition to three other claims pending before the Hearings Division, was given in his request for own motion relief. Claimant apparently injured his right knee on July 19, 1976; this claim was accepted by the State Accident Insurance Fund (Fund). A hearing is pending on this claim on the issue of extent of disability. Claimant then suffered an exacerbation of the knee injury which also caused back problems. Claimant filed a claim with the Fund which accepted the knee aggravation claim but has not responded to claimant's back claim. Claimant has been suffering from back symptoms even before this fall in July 1976 which he feels are the result of either the 1973 back injury or related to the knee injury by way of a change in gait. All of the above matters have been consolidated for hearing and claimant requests that his 1973 back claim be either reopened or set for hearing with the other claims.

The Board, after throughly considering the evidence before it, concludes that it would be in the best interest of the parties to consolidate claimant's request for own motion relief of the 1973 back injury with the claims presently pending before the Hearings Division. Therefore, claimant's own motion request is remanded to the Hearings Division to be consolidated for hearing with WCB Case Nos. 79-5492, 79-5493 and 79-5494. The Referee shall take evidence on all the claims and make a determination of whether claimant's current condition represents an aggravation and worsening of his May 21, 1973 injury since the last award or arrangement of compensation or is related to his other injuries. He shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation as to claimant's request for own motion relief. All other issues should be handled in the normal manner with an Opinion and Order written by the Referee.

WCB CASE NO. 78-1307 February 29, 1980

LEON G. WHITE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Reiter, Bricker, Zakovics
& Querin, Employer's Attys.
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer and claimant both seek Board review of the Referee's order which granted claimant an award of compensation for permanent total disability, effective January 14, 1978. The employer contends claimant is not permanently and totally disabled. Claimant contends he is permanently and totally disabled.

FACTS

Claimant, a 49-year-old truck driver, injured his back on September 3, 1974, while closing the door of a van. This injury was diagnosed as a herniated disc at the L5-S1 level. Dr. Richard Cronk performed a hemilaminectomy left L4-5 and L5-S1 and left L5-S1 disc excision on October 24, 1974. On April 4, 1975, Dr. Cronk felt claimant would be able to return to work at his regular work without restrictions and that claimant's condition was stationary. However, on April 30, 1974, Dr. Cronk indicated claimant had had an acute exacerbation of low back pain and advised claimant to avoid lifting, bending over and prolonged sitting for two weeks. He did not feel it was advisable for claimant to return to truck driving. Dr. Cronk released claimant for work on May 15, 1975. He prescribed a back brace for claimant and suggested claimant change his line of work.

In September 1975, Dr. Robert Steele found claimant's condition stable. He felt claimant should not return to truck driving and should avoid any jobs requiring prolonged sitting or prolonged lifting, twisting or turning. He felt claimant was highly motivated. Dr. Cronk agreed with this report.

Claimant was contacted by the Field Services Division in September 1975. He indicated he had a 10th grade education and had worked as a truck driver and done some carpentry work.

A Determination Order, dated December 2, 1976, awarded claimant compensation for temporary total disability and compensation equal to 64° for 20% unscheduled disability for his low back disability.

A Determination Order, dated January 23, 1976, reopened this claim effective January 2, 1976 because claimant was in an authorized program of vocational rehabilitation. Claimant began a vocational rehabilitation program with the vocational objective of an agricultural field supplies man and to obtain a GED. Claimant discontinued this program due to physical problems and his inability to keep up with the course material. The program was terminated on August 3, 1976.

On October 7, 1976, Dr. Steele reported claimant continued to complain of low back pain. He felt claimant's condition had changed little over the past year and that claimant should not return to driving a truck or in a job requiring lifting over 20 pounds, sitting in one place for more than 1/2 hour and that claimant would require frequent changes in position. Dr. Cronk agreed with this report.

Claimant was referred to the Disability Prevention Center in January 1977. Claimant indicated he had an eighth grade education. He stated he had driven a truck for 20 years, worked as a laborer in construction, done farm work, and worked as a shipping clerk for 4-5 years. Claimant stated he had last worked on September 9, 1974. Testing revealed claimant had a low-average intelligence. Psychologically, claimant was felt to over-reacting and over-focused on his injury. Claimant's stay at the Center was interupted by another medical condition and claimant was re-referred to the Center in May 1977.

Vocational Rehabilitation terminated its services on April 5, 1977.

During his second stay at the Center, claimant complained of constant low back pain with radiation into the left foot. He indicated the pain was aggravated by bending, lifting, sitting, walking and standing. Claimant said he could sit 20 minutes, stand 30 minutes, and walk one mile. Dr. Carl Holm, medical examiner, felt claimant had a moderate physical impairment and a moderately severe anxiety reaction. He felt claimant was qualified for light-medium work.

Dr. Cronk, in August 1977, reported claimant had some objective evidence of impairment represented by limited forward flexion of the lumbosacral spine. He found no neurological impairment in the lower extremities. He considered claimant's condition as medically stable. In his opinion claimant could be employed in a type of work which did not require prolonged sitting or standing, repetitive bending, or heavy lifting.

A Determination Order, dated February 2, 1978, awarded claimant additional compensation for temporary total disability and additional compensation equal to 112° for 35% unscheduled disability for his low back injury.

Also in February 1978, Dr. Cronk indicated claimant continued to experience almost daily back pain which radiated occasionally into the left leg. He felt claimant's limitations were permanent and the prognosis for future recovery was quite guarded.

Dr. Steele, in May 1978, felt claimant had permanent physical impairment of lifting no more than 20 pounds, required a position change every 30 minutes and that claimant could perform light work which included a position change every 1/2 hour.

In November 1978, the Field Services Division advised claimant it considered him employable in the areas of sales, light janitorial work or as a security guard. Mr. R. E. Adolph, a vocational consultant, felt claimant had the vocational background and experience to perform these jobs. Mr. Adolph listed 19 jobs he felt claimant could perform.

Dr. George Throop, in January 1979, reported claimant had a normal EMG study. He found no evidence of a continuing nervous system dysfunction. Dr. Throop felt claimant's pain was musculoskeletal with a "strong psychological component".

In March 1979, Dr. Cronk indicated he felt claimant was still "permanently impaired with respect to do work requiring repetitive bending over heavy lifting or prolonged sitting but otherwise he could be employed in a job not requiring those specific activities".

Mr. Charles Maddox, a vocational specialist, in March 1979, opined claimant was not feasible for job placement, nor for a rehabilitation or retraining program. Mr. Adolph disagreed with this report.

Claimant testified he has made a few efforts to seek employment. He turned down two jobs from this employer; one in 1975 as a belt inspector and clean-up man and the other as a short haul truck driver. Claimant felt he could not physically perform either of these jobs. He stated he has constant low back pain which occasionally radiates into his groin and left leg. He indicated he cannot sit for more than 30 minutes, stand more than 45 minutes, ride in a vehicle for more than 20-25 minutes and could lift up to 20 pounds. Claimant testified he has frequent spells of depression, perhaps twice a week.

The Referee found claimant was entitled to permanent total disability compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of permanent total disability. The consensus of all the medical doctors is that claimant is capable of light to moderate work. The medical evidence alone does not establish that claimant is permanently and totally disabled. The evidence indicates claimant has not sought assistance for vocational rehabilitation, retraining or job placement. Further, the evidence indicates claimant has not shown that he is willing to seek regular gainful employment and that he has not made reasonable efforts to obtain such employment. The Board does not find that claimant's injury plus his resulting psychological condition and other relevant factors, such as his age, education and work background, establishes by a preponderance of the evidence that claimant is permanently and totally disabled. Therefore, the Board would reverse the Referee's finding that claimant is permanently and totally disabled. However, based on these same factors, the Board finds claimant is entitled to compensation equal to 240° for 75% unscheduled disability for his low back injury. This award is in lieu of and not in addition to all previous awards for unscheduled disability awarded claimant for his September 3, 1974 injury.

ORDER

The Referee's order, dated June 20, 1979, as amended on July 9, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 240° for 75% unscheduled disability for his low back injury. This is in lieu of and not in addition to all previous awards of unscheduled disability for claimant's September 3, 1974 injury.

The remainder of the Referee's order is affirmed.

Claim No. NY 985C1702 March 3, 1980

LARRY W. BRUCE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his low back on August 21, 1971. His claim was initially closed by a Determination Order, dated April 26, 1972. Claimant has been awarded compensation totalling 70% unscheduled disability as a result of this injury and an earlier one in June 1970. His aggravation rights have expired.

Claimant's back condition became aggravated on on September 17, 1979 and the carrier voluntarily reopened the claim. On October 1, 1979, Dr. Robert H. Post indicated claimant aggravated his earlier condition while moving some pipe at work. He felt claimant would have time loss for possibly as much as six weeks. Surgery was not recommended. Dr. Post released claimant for work on December 19, 1979 and found no change in his permanent disability. Claimant returned to work on December 18, 1979.

The carrier requested a determination of claimant's current disability on January 29, 1980. On February 22, 1980 the Evaluation Division of the Workers' Compensation Department recommended claimant be granted additional compensation for temporary total disability from September 17, 1979 through December 18, 1979, less time worked.

The Board concurs.

ORDER

Claimant is hereby granted additional compensation for temporary total disability from September 17, 1979 through December 18, 1979, less time worked.

WCB CASE NO. 78-9996 March 3, 1980

TED CAMPBELL, CLAIMANT
Velure, Heysell & Pocock,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant an award of compensation equal to 32° for 10% unscheduled disability for an upper back injury. The Fund contends this award is excessive.

FACTS

Claimant, a 20-year-old laborer in a plywood mill, was struck by a jitney on May 26, 1978 and sustained an injury to his right heel, left shoulder, neck and right hip. Claimant was struck from behind by the jitney. These injuries were originally diagnosed as a muscle strain of the right shoulder and neck. Claimant was initially treated by Dr. Malcolm Byers and then by Dr. N. J. Wilson, who found claimant had pain in his upper back with movement of his arms and pain in his entire back. Dr. Wilson felt all claimant's symptoms were secondary to a dorsal spine strain of the contusion type.

In August 1978, Dr. Paul Bray, a chiropractor, diagnosed a severe sprain of the thoracic spine with probable disc damage at T6-T7.

On August 29, 1978, Dr. John Melson, a neurologist, reported that he had examined the claimant and diagnosed a possible cervical dorsal muscle strain and found "little evidence to support the diagnosis of a thoracic disc or ankylosing spondylitis, etc". Dr. Melson interpreted the x-rays of the thoracic area and the cervical spine as being normal.

On November 16, 1978, Dr. Melson opined that claimant's condition was stationary and there was no indication that claimant should not return to work. He reported that claimant had undergone a lumbar, cervical and dorsal myelogram on October 30, 1978, all of which were normal. Dr. Melson found that the back motions were all full except in the forward flexion where, there was a limitation from hamstring tightness. The sensory examination was intact throughout the trunk and lower extremities including the sacral area. Dr. Melson did not feel continual chiropractic treatment would be able to successfully relieve claimant's continuing dorsal pain.

In November 1978, Dr. Bray opined that in view of his findings and claimant's slow healing, it was his impression that a disc or other lesion was present as a result of claimant's injury. He suggested that the claimant be examined by Dr. Wayne Kelley of the Western States Chiropractic Clinic.

In December 1978, Dr. Bray asked the Fund for reasons of rehabilitation and strengthening the tissues of claimant's back and neck so that he could eventually return to work, permission for claimant to use his gold dredge for one or two hours of time as often as claimant felt like it. Claimant indicated he was able to do this work for one or two hours before his back became sore. Claimant indicated on one occasion he had been able to use the dredge for four hours and found the pain did not bother him the next day.

A Determination Order, dated December 12, 1978, awarded claimant compensation for temporary total disability only.

On January 22, 1979, Dr. Wayne Kelley, a chiropractor, reported that he had thoroughly examined the claimant and concluded that the subjective complaints far outweighed the objective findings. He was unable to correlate the objective findings to claimant's subjective complaints and his contention that he was unable to perform any type of work. He noted that it was inconceivable claimant was able to continue with his gold dredging which necessitated long periods of bending over and also contending he was unable to work. It was his recommendation that claimant return to his regular employment as soon as possible and that no further treatment was necessary. He felt any further treatment would only serve to reinforce claimant's disability. Dr. Kelley also found that no ratable residuals existed as a result of the alleged industrial injury of May 26, 1978 and recommended closure with termination of all benefits. Dr. Melson concurred with these recommendations.

In February 1980, Dr. Melson felt that claimant could in an eight-hour work day, stand, walk, sit, drive an automobile for eight hours a day, lift occasionally 100 pounds, frequently 50 pounds and continuously 40 pounds. He felt claimant could use his arms for imperative pushing and pulling, repetitive grasping. He felt claimant could use his hands for repetitive fine manipulations and use his feet for repetitive movements. He felt the claimant was able to frequently bend, squat and climb.

The depositions of Dr. Kelley and Dr. Melson were taken. In these depositions they both reaffirmed their earlier opinions.

At the hearing, Dr. Bray testified that his treatment of claimant was curative and recovery would take approximately "six months". He continued to feel that the claimant's condition had been misdiagnosed by Dr. Kelley.

At the hearing, claimant testified he was now 21 years old and has a GED. He indicated he had worked in a packing house, a car wash, and a rubber factory. Claimant continued to complain of pain between the shoulder blades. He indicated he could no longer engage in karate, work on vehicles, play golf and that his ability to walk had been reduced because of pain and discomfort. He indicated he was currently taking no medication. Claimant testified that his hobby of gold dredging requires that he load his dredging equipment into his car, drive one hour to the river, unload the equipment, carrying it down to the water and then beginning to dredge. He indicated he usually dredged for about two hours. While dredging, he bends down for periods of 15 minutes putting his face in the water. He indicated he takes occasional breaks to clean out the blocked suction tube and to survey the contents of the sluice box. After dredging for two hours, he then reverses the process, reloads the equipment into his car and drives back home and unloads into a storage area. His wife indicated that he had reported that he was stiff in the low back area after doing this activity.

The Referee, after reviewing the evidence, found that claimant did have minimal permanent partial disability. Therefore, the Referee awarded claimant compensation equal to 32° for 10% unscheduled upper back permanent disability and awarded claimant's attorney a fee of 25% of and from the increase in compensation not to exceed $2,000.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. There is no evidence that claimant has suffered any loss of wage earning capacity or permanent disability as a result of this injury. Dr. Melson and Dr. Kelley so state. The Board finds that the preponderance of the medical evidence indicates that claimant does not have any permanent disability related to his May 26, 1978 injury. Therefore, the Board would reverse the Referee's order in its entirety.

ORDER

The Referee's order, dated July 16, 1979, is reversed in its entirety.

The Determination Order, dated December 12, 1978, is affirmed.

WCB CASE NO. 78-2984 March 3, 1980

DEWEY GILKEY, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
Newhouse, Foss, Whitty & Roess,
Employer's Attys.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 78-5838 March 3, 1980

RONNIE HASKINS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Paul Lipscomb, Employer's Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which set aside its denial and ordered it to accept the claim and pay all benefits due under the Workers' Compensation Act and awarded claimant's attorney a sum of $1,200.00 as a reasonable attorney's fee. The employer contends that the Referee erred in setting aside its denial and that the award of attorney's fees was excessive.

FACTS

Claimant, a 38-year-old mobile home worker, alleges he sustained an injury to his low back on January 4, 1978 while assisting in moving some mobile home sections for his employer. Claimant filed a claim for this condition on January 9, 1978. The claim was originally accepted by the employer.

In March 1978, claimant was treated for an impotency problem. In April 1978, Dr. George Throop indicated that the impotency condition, the back pain, and the exercise-induced weakness in the legs and numbness of the feet were possibly related to a vascular problem. X-rays revealed a transitional partial L6 vertebra. Dr. Throop indicated a myelogram should be performed to determine the cause of this condition.

On April 4, 1978 Dr. Ronald Clibborn indicated claimant had been seen in his office on January 1, 1978 for back pain which was brought on by lifting boxes and pushing coaches at his employer's place of business. Dr. Clibborn diagnosed lumbosacral sprain and upper thoracic strain.

On April 6, 1978 Dr. Throop performed a myelogram which revealed no definite deformity in the lower lumbar area. He indicated that the results from this examination were not too satisfactory and there was some difficulty determining if there were any defects in the space between L1 and L2 or the cervical area. Dr. Throop felt these results revealed that there were no large lesions in the lumbosacral area and no blockages in the thoracic area. Finally, in May 1978, Dr. Throop indicated he felt that claimant's symptoms did not have a neurological etiology and that he was very suspicious of a psychogenic cause. He indicated that in addition to a normal myelogram, a normal EMG of the left leg had also been obtained, however, he had found a decreased left ankle jerk.

On June 23, 1978, the Orthopaedic Consultants reported their examination revealed no evidence of intrinsic low back disorder or low back strain. They diagnosed a probable intermittent claudication in the left lower extremity secondary to a vascular insufficiency. It was their opinion that claimant had minimal to no low back difficulty; that his principle problem was related to the pain in the left lower extremity which was associated with walking or other muscular activity. They felt there was no reasonable probability that claimant's left lower extremity complaints were due to an injury or in any way related to his work. They felt a referral to a diagnostic center such as the vascular clinic at the University of Oregon Medical School Hospital should be considered.

On July 17, 1978, the employer denied claimant's claim. The basis of this denial was that there was insufficient showing that claimant sustained an injury or occupational disease within the provisions of the Oregon Workers' Compensation Law.

On August 4, 1978, Dr. Gerald Baur, Assistant Professor of Surgery at the University of Oregon Health Sciences Center, reported that their testing had revealed claimant probably had a mild obstructive disease in his left lower extremity.

In September 1978 Dr. F. Harold Nickila diagnosed multiple vertebral subluxations. He related claimant's condition to an industrial injury or exposure as described by the claimant as occurring on January 4, 1978 when he was lifting and pushing some coaches. Claimant advised Dr. Nickila that he had experienced low back pain, hip pain, sore legs, thoracic pain and headaches after this incident.

On November 16, 1978, Dr. Clibborn diagnosed a moderate to severe lumbosacral sprain with moderate thoracic sprain and paravertebral muscle spasms. He indicated he had first treated claimant on January 4, 1978 for low back pain associated with pain in the left hip and groin radiating down the thigh into the leg and foot. Claimant had indicated this was related to an episode of lifting boxes and pushing coaches at his place of employment. Dr. Clibborn felt that claimant probably would have permanent impairment as a result of his injuries.

Dr. Richard Lafrance, a neurologist, in December 1978, began to treat claimant. Dr. Lafrance indicated that claimant was allegedly injured in a work accident at his employer's on January 4, 1978. Claimant admitted he did not have any pain in any direct relationship to the times when he had been pushing one of the coaches. Claimant said he was not sure whether he did push a coach on his last day at work, January 4, 1978. Dr. Lafrance found low back pain with reflex asymmetry, but without evidence of muscle or sensory nerve damage. He felt this may represent a small herniated disc with some nerve root compression. He felt there was at least a historical connection between claimant's work and the onset of his back pain, but that it would be difficult in determining the exact causation and etiology of claimant's condition.

In March 1979, Dr. Lafrance indicated that he had performed another myelogram which did not demonstrate any evidence of herniated disc or other abnormalities within the spinal canal. He felt that claimant had had back problems in the past that were essentially stable. He felt that while the claimant was at work he developed an exacerbation of back pain with some radiation into the left leg. Dr. Lafrance was unable to tell the exact time this condition had occurred. Historically, he indicated, claimant's complaints would tend to suggest that the event occurred in early 1978. He felt one could not disprove clinically that this had not been present for a number of years prior to early 1978 and, indeed, could have been the result of an injury four years ago. It was his opinion that the testing revealed some

vascular disease as well as an L5 or adjacent nerve root lesion. Dr. Lafrance felt that the claimant's numbness in the left leg was "slightly" related to the vascular lesion rather than a neurogenic lesion. He felt it was highly unlikely that the vascular lesion had caused the change in the ankle reflexes. He believed the vascular lesion and the problem with impotency were directly related. He noted that in April 1978 Dr. Throop found depressed left ankle jerk. Claimant complained at this time of a chronic low back pain with acute exacerbations related to the amount of exercises claimant did. Dr. Lafrance felt claimant should avoid repetitive bending, twisting, and lifting of more than 25 pounds.

In his deposition, Dr. Lafrance indicates claimant advised him that he had probably injured his back at work in one or two ways. First, claimant felt that pushing the coaches with other workers placed a great strain on his back and may have caused injury to his back, but he was unable to recall any specific time that he may have pushed particularly hard. Secondly, claimant felt that his picking up of heavy boxes of aluminum siding may have caused his back injury, but he was not aware of any particular episode of picking up a box which precipitated pain in his back. Claimant told Dr. Lafrance that he had had an episode four years prior to January 1978 when he was bending down and pulling open a refrigerator door when his left hip and back had "went out". Clinically, Dr. Lafrance had found an abnormal left ankle reflex. He felt that his objective findings combined with the "other symptoms" were consistent with claimant's history of pulling his back out at work. Dr. Lafrance felt claimant should limit his lifting and should avoid activities that overstressed his lower spine, such as repetitive bending and twisting. He felt these limitations were permanent in nature. He did not know whether the objective findings, the depressed ankle reflex and the straight leg raising discrepancy, predated the January 1978 incident.

In a statement given to an investigator, claimant said that he did not know when he had injured his back, but that it just started to hurt and kept getting worse and worse. He indicated that he then sought treatment from Dr. Clibborn. Claimant stated that he was not sure he had hurt his back while with this employer since his pain had developed gradually.

At the hearing, claimant indicated that he first started having problems with his back while climbing a ladder and later his left hip started to bother him. On the 801 Form claimant signed he indicated he allegedly injured his back while attempting to move a mobile home with other co-workers. Claimant testified further he is not sure how his back was injured, "it just began to get worse and worse".

The Referee found, after considering all the evidence, and finding claimant to be a credible witness, that claimant's back complaints were the result of either a single or cumulative on-the-job injuries, and found that claimant had met his burden of proof and remanded the claim to the employer for acceptance and payment of benefits, setting aside its denial of July 17, 1978 and awarded claimant's attorney the sum of $1,200.00 as a reasonable attorney's fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the Referee's order. Claimant, in this case, had a gradual onset of symptoms over a period of time while working for this employer. The Board finds that claimant has not proven by a preponderance of the evidence that he suffered an industrial injury. The preponderance of the evidence indicates that claimant's work activity did not cause any change in the underlying condition. The claimant's work activity may have produced symptoms, but the work activity did not affect his condition. The Supreme Court has ruled in the case of Gibson v. SAIF, 288 Or 45, ____ P2d ____ (1979), that if claimant's symptoms require medical care and produce at least temporary disability, the claim is not compensable. The Court stated in that case: "Since the work activity did not cause any change in the underlying disease, the claim for medical services required to treat symptoms and for any claim disability by reason of those symptoms is not compensable." Therefore, the Board finds that the mere recurrence of symptoms are not compensable as a consequence of an industrial injury because no injury, in fact, has been proven. Therefore, the Board reverses the Referee's order setting aside the employer's denial, remanding the claim to it for acceptance and payment of compensation, and awarding claimant's attorney a reasonable attorney's fee.

ORDER

The Referee's order, dated August 31, 1979, is reversed in its entirety.

The employer's denial, dated July 17, 1978, is reinstated.

WCB CASE NO. 79-3388 March 5, 1980

DAVID B. BENNETT, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.

On December 19, 1979 the Board received a request for review from the claimant of the Referee's Opinion and Order. On February 26, 1980 Referee Seifert signed a stipulation which dismissed all of claimant's requests for hearing including the above claim. Therefore, the Board finds that claimant's request for Board review should be dismissed.

IT IS SO ORDERED.

WCB CASE NO. 77-7541 March 5, 1980

RONALD McDANIEL, CLAIMANT
Bradford J. Aspell, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which granted him an increased award of compensation for a total equal to 67.5° for 50% loss of the left foot. Claimant contends he is entitled to compensation for total loss of the left foot.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. The employer in this matter requested that the order of the Referee be affirmed. The Board is not disposed to give more relief than asked for. Anderson v. West Union Village Square, _____ Or App _____, _____ P2d _____ (decided November 26, 1979).

ORDER

The order of the Referee, dated August 6, 1979, is affirmed.

SAIF CLAIM NO. ZC 177316 March 5, 1980

ELBERT E. PIETROK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his lower back on March 24, 1969. The claim was originally closed by a Determination Order, dated July 28, 1969, with an award of compensation for temporary total disability only. Claimant's aggravation rights have expired.

Based on a letter of Dr. Poulson, dated April 12, 1978, which stated claimant's surgery in February 1978 was necessitated by the original injury, the Board reopened claimant's claim by its Own Motion Order of April 27, 1978. Time loss benefits commenced on February 3, 1978, the date of the myelogram performed by Dr. Poulson. A laminectomy of three levels (L3-4-5) was performed on February 21, 1978. Claimant continued to be seen periodically by Dr. Paulson and he was found to be medically stationary on December 12, 1979. Dr. Paulson found impairment of 16% due to loss of motion of the dorsolumbar spine and 10% impairment due to two deranged discs for a total of 24% impairment of the whole man.

Claimant was able to return to work as a nightwatchman on November 11, 1978.

On January 31, 1980 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on February 22, 1980, recommended claimant be granted additional compensation for temporary total disability from February 3, 1978 through November 9, 1978, less time worked, and temporary partial disability from November 10, 1978 through December 12, 1979, the date Dr. Poulson found his condition stationary. It was also recommended that claimant be granted compensation for permanent partial disability equal to 25%.

The Board concurs.

ORDER

Claimant is hereby granted additional compensation for temporary total disability from February 3, 1978 through November 9, 1978, less time worked, and temporary partial disability from November 10, 1978 through December 12, 1979. less time worked. Claimant is also granted compensation equal to 25% unscheduled permanent partial disability for his injury sustained on March 24, 1969.

WCB CASE NO. 79-320 March 5, 1980
WCB CASE NO. 78-9930

FAYE L. ROBERTS, CLAIMANT
Mike Stebbins, Claimant's Atty.
Motion To Withdraw Request For Review

Faye L. Roberts appears and moves the Board for an order dismissing her request for review on the grounds of her wish to have it withdrawn.

IT IS SO ORDERED this 5th day of March, 1980.

SAIF CLAIM NO. TC 372355 March 5, 1980

HOWARD RUBEN, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on May 23, 1972 when he tripped over a root in a flower bed. The claim was initially closed on November 3, 1972 with an award equal to 10% unscheduled disability. Claimant's aggravation rights have expired.

Two Determination Orders and a Stipulation have given claimant awards totalling 90% unscheduled back disability.

Claimant's claim was reopened by Stipulation when he entered the Portland Pain Clinic on May 10, 1978. On August 18, 1978 Dr. Degge found claimant's condition stationary with his residuals rated as being severe. He found claimant totally disabled for gainful activity. The claim was closed on September 28, 1978 with no increased award.

Claimant was examined by Dr. Donald Smith on November 22, 1978. He felt that claimant should have conservative treatment with the possibility of surgery in the future. He placed claimant in a compression-flexion type plastic jacket. A Stipulation, dated April 3, 1979, set aside the September 1978 Determination Order and reinstated temporary total disability benefits commencing August 18, 1978 and continuing until claimant is found to be medically stationary.

Claimant was seen on January 11, 1980 by Dr. Smith who found claimant had a high level of impairment which was probably in the moderately severe to severe range. He indicated claimant's movement was limited so that he had almost complete restriction within the lumbar jacket cast. He found claimant's condition was stationary at that time.

On January 31, 1980 the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted compensation for temporary total disability from May 10, 1978 through January 11, 1980. It also felt that claimant's earning capacity was not affected because he is presently retired. Based on his impairment alone, it felt he had been adequately compensated by the award for 90% disability.

The Board, after thoroughly considering the evidence before it, concludes that claimant is permanently and totally disabled. Claimant is 68 years old and apparently well motivated. He has now found himself in a position where he can no longer do any of his former occupations. Based on his age, work background and physical disability, the Board concludes that claimant should be granted compensation for permanent total disability as of January 11, 1980, the date he became medically stationary.

ORDER

Claimant is hereby granted compensation for temporary total disability from May 10, 1978 through January 11, 1980, less time worked. Claimant is also granted compensation for permanent total disability for his injury sustained on May 23, 1972, commencing on January 11, 1980.

Claimant's attorney has already been awarded a reasonable attorney's fee for the award of temporary total disability by the April 3, 1979 Stipulation. Claimant's attorney is also granted an attorney's fee equal to 25% of the increased compensation granted by this order, not to exceed $3,000.

CLAIM NO. C 373434 March 5, 1980

IRIS YOUNG, CLAIMANT
Doblie & Francesconi, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained to her back on May 4, 1972. The Board, after thorough consideration of the evidence before it, concluded that claimant's condition did not warrant a reopening and any necessary medical treatment could be handled under the provisions of ORS 656.245. Claimant's request for own motion relief was denied by the Board's order, dated January 21, 1980.

On January 25, 1980 claimant, by and through her attorney, requested the Board reconsider its Own Motion Order. She indicated that the attached medical reports of Drs. Danielson and Todd discredited the report of the Orthopaedic Consultants of October 16, 1979 upon which the Board, claimant felt, relied heavily. Much discussion by both Drs. Danielson and Todd involved claimant's normal myelogram and positive discogram. The Orthopaedic Consultants concluded that the normal myelogram did not support the other doctors' conclusion that surgery was indicated. However, Drs. Danielson and Todd stated unequivocally that the discogram revealed a C5-6 herniated nucleus pulposus and corrective surgery was recommended.

The Board, on January 31, 1980, requested that the Fund advise the Board of its position with respect to this claim. The Fund, on February 20, 1980, stated it position remained unchanged. It felt claimant should not have surgery at this point because her symptoms are not of sufficient severity to warrant it.

The Board, in its letter to claimant's attorney of February 22, 1980, indicated that claimant's request for reconsideration would be treated as a new request for own motion relief.

The Board, after thorough consideration of the medical documents before it, concludes that there is now sufficient medical basis for the recommended surgery. The Board feels that claimant's claim for an injury sustained on May 4, 1972 should be reopened as of the date she enters the hospital for the surgery recommended by Dr. Danielson and Dr. Todd and should remain open until closed under the provisions of ORS 656.278. Claimant's attorney is entitled to a fee for his services equal to 25% of the increased compensation for temporary total disability granted by this order, not to exceed $750.

IT IS SO ORDERED.

WCB CASE NO. 78-9538 March 6, 1980
WCB CASE NO. 78-9969

Mitchell D. Konell, Claimant
Robert J. Miller, Sr., Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The claimant seeks review by the Board of the order of the Referee which vacated, set aside and reversed the Proposed and Final Order of the Workers' Compensation Department which found Bruce Konell a non-complying employer and which affirmed the denial of claimant's claim.

FACTS

On November 16, 1978 the Workers' Compensation Department's Compliance Division issued its Proposed and Final Order declaring Bruce Konell a non-complying employer during the period December 18, 1977 to December 24, 1977.

Bruce Konell, the alleged employer, testified at the hearing that claimant, Mitchell Konell, was his nephew. Two years prior claimant had moved in with him and stayed for 6-7 months and performed odd jobs for him including assisting him in his landscaping business. Claimant's pay was his room and board.

In November 1977, this witness purchased 10 acres of land and was to put in a house and plant nursery stock. In December 1977, claimant came to him and asked him for work and Bruce Konell said okay and put claimant to work cutting firewood for $3.00 an hour. This firewood was for Bruce Konell's own personal use. He testified he would only need claimant for two weeks at the most. Claimant worked two days and was paid each night.

Bruce Konell testified that on the date of injury, December 23, 1977, claimant cut firewood in the morning and was limbing trees in the afternoon. He testified he was clearing land for his house and nursery stock. He further testified that after the injury he took claimant to the hospital and when he was discharged claimant stayed with him.

In 1978 Bruce Konell sold $19,500 worth of timber to Stimson. He also took out workers' compensation insurance just before the hearing.

Emanuel Konell is Bruce Konell's 72-year-old father and he testified that he helped his son out whenever he felt like it but never for pay. He had helped his son get started in the landscaping business. He testified that December 23, 1977 was the first day of timber falling and he did all of the falling. He testified that claimant was injured by one of the trees that he fell. He also testified claimant was paid $3.00 an hour.

Michell Konell, the claimant, testified he has been on his own since age 15. In 1976 he lived with Bruce Konell for 7-8 months and helped in the landscaping business shoveling dirt, digging holes to plant trees, lawn work, etc., and was paid in cash every Friday night.

Claimant testified he worked for Bruce Konell in March 1977 for four months for $3.50 an hour and was paid each Friday. Also, his cousin Daren worked there as did his grandfather Emanuel Konell. They kept track of their hours and were paid for their work.

Claimant testified he started working for Bruce Konell on December 21, 1977 cutting firewood and stacking it. Bruce Konell would then take it to his house and sell it; he knew Bruce Konell sold it because he had "For Sale" signs on it at his house. Claimant said he was never told how much he was to be paid and he never was paid.

On December 23 he limbed trees until the injury which occurred when Emanuel Konell had cut a tree which struck another tree which struck claimant on the left forearm, fracturing it.

Claimant testified further that Bruce Konell paid his expenses and Bruce Konell told him to tell the insurance company he was just up there in his Sunday clothes looking the property over. Claimant testified he thought that Bruce and Emanuel Konell had been falling trees for about three weeks when he got there. Claimant said Bruce Konell told him repeatedly not to report the injury.

On recall examination, Bruce Konell testified he paid claimant daily and on the date of injury he gave claimant's pay of $20 to claimant's brother. He said he also never told claimant how long he could work there. He admitted that he did try to sell the firewood but he sold none. He also admitted claimant's cousin Daren did work for him off and on.

A Workers' Compensation Department memo indicates Bruce Konell's business was logging. Bruce Konell acknowledged that he provided all of the equipment used and had full direction and control over claimant's activities. He admitted to no payroll records or taking out any deductions from the pay.

On Bruce Konell's 1977 and 1978 tax returns he listed his principal occupation as construction.

On December 5, 1978 the Fund issued its denial of claimant's claim which was filed on August 23, 1978.

The Referee found that Bruce Konell was not an employer and claimant was not a subject worker as the employment was casual and he affirmed the denial of the Fund and set aside and reversed the Workers' Compensation Department's Proposed and Final Order.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, finds that although there were many conflicts in the testimony of the witnesses, there are certain facts basically agreed to.

Bruce Konell was involved in two basic business ventures in 1977-78; his landscaping business and clearing a piece of property he owned producing timber which he later sold to Stimson Lumber Company.

The testimony establishes that claimant was hired at $3.00 an hour to cut firewood and limb the fallen timber. Bruce Konell provided the equipment and had direct control over the work activities.

There is also total agreement that on December 23, 1977 while claimant was limbing trees he was injured by a falling tree on Bruce Konell's property.

The Referee was correct in his finding that claimant's injury arose out of and in the scope of his employment with Bruce Konell, but the Board disagrees with the Referee's finding that claimant's employment was casual and therefore he was not a subject worker.

ORS 656.027 defines casual as referring "only to employments where the work in any 30-day period, without regard to the number of workers employed, involves a total labor cost of less than $200".

The testimony indicates claimant would have worked more than just a few days, even assuming that Bruce Konell was going on vacation on January 5 or 6, 1978.

The amount of work involved in clearing the property indicates that claimant would easily have continued working but for the injury, until at least January 5 or 6.

Therefore, at $24 a day, the total labor cost exceeds $200 and takes the employment out of the casual definition.

The Board concludes that the Proposed and Final Order issued by the Workers' Compensation Department on November 16, 1978 is affirmed and Bruce Konell is declared a non-complying employer from December 18 to December 24, 1977. Further, Mitchell Konell, claimant was a subject worker on December 23, 1977 and is entitled to the benefits of ORS 656.001 to ORS 656.794.

ORDER

The order of the Referee, dated July 27, 1979, is reversed.

The Proposed and Final Order of November 16, 1978 is affirmed.

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation to which he is entitled until closed pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services both at the hearing and at Board review a sum equal to $1,000, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-9630 March 6, 1980

VIOLET B. McKINNON, CLAIMANT
Tooze, Kerr, Peterson, Marshall
& Shenker, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks review by the Board of the order of the Referee which set aside the Determination Order of November 28, 1978 and remanded claimant's claim to it for acceptance and the payment of compensation as required by law until closure.

FACTS

Claimant, presently age 60, was employed as a record demonstrator for Fred Meyers when on December 30, 1969 five juveniles attacked her pushing her to the floor, beating and kicking her.

At the time of the injury claimant had pre-existing diabetes condition which was well controlled.

Claimant subsequently developed a foot ulcer and was hospitalized on February 8, 1971. The diagnosis was diabetic neuropathic ulcer left foot with possible osteomyelitis.

A Second Determination Order, dated October 14, 1971, granted claimant compensation for temporary total disability to September 28, 1971 and indicated that the first Determination Order was dated March 24, 1970 for aggravation purposes.

In February 1972, claimant was hospitalized for cellulitis of the left foot leading to recurrent diabetic neuropathic ulcer.

Clamant appealed the Second Determination Order and, after a hearing, an Opinion and Order of June 1, 1972 reopened claimant's claim effective September 29, 1971.

In November 1972, Dr. Post reported claimant had "continuing problems with hematomas and poorly bears weight bearing" and he felt she could only hold a job not requiring prolonged standing or walking. Claimant's foot problem was a recurrent breakdown of tissue. Dr. Post found claimant medically stationary on November 22.

A Third Determination Order granted claimant further compensation for temporary total disability but made no award for permanent partial disability.

On January 19, 1973, Dr. Post opined that claimant's neuropathic ulcer was related to her underlying diabetes and that claimant's traumatic injury to her foot would have healed without any disability if it were not for the diabetes; however, her diabetes had not affected her pre-existing back condition.

Claimant appealed the Third Determination Order and also the compensability of her back condition. The Opinion and Order granted her 60% loss of the left foot and also found that the back condition was unrelated to her industrial injury.

The Board issued an Order on Review, dated April 16, 1974, which affirmed the Referee's finding that the back condition was unrelated but reversed the Referee's award of 60% loss of the left foot. Claimant, thereafter, appealed to the Circuit Court and by a Judgment Order of July 22, 1974 the court granted her 50% loss of the left foot.

During these appeals, claimant filed a claim for aggravation and was hospitalized for swelling of her left foot and then developed a staph infection. By a stipulation of the parties of November 13, 1974 her claim was reopened for aggravation.

On February 12, 1974, the Fourth Determination Order granted claimant compensation for temporary total disability to August 14, 1974.

In October 1975, Dr. Post reported that because of repeated episodes of tissue breakdown and wound drainage he was recommending a first metatarsal ray resection. On October 7 this resection surgery was performed. On October 27 claimant's left great toe was surgically amputated.

By January 1976, Dr. Post was becoming quite concerned with what he called "smouldering hind-foot osteomyelitis" and he was considering foot amputation. On April 17, 1976 claimant was hospitalized and given intravenous antibiotics to attempt to stop the osteomyelitis.

On January 5, 1977 claimant was examined by the Orthopaedic Consultants who diagnosed repeated surgeries for left foot chronic ulcers, amputation of left great toe, diabetes with neuropathy left and right leg, aterial sclerosis obliterans bilateral, and moderate functional overlay. They found claimant's condition was not medically stationary and that she needed continued treatment by Dr. Post. They felt that the changes in her diabetes control were related to her industrial injury.

On March 8, 1977, claimant went into a diabetic coma and fell, fracturing four ribs.

The Orthopaedic Consultants re-examined claimant on June 28, 1977 and again found her condition was not medically stationary. They felt claimant could not return to her regular occupation or to any occupation and that she needed continued medical supervision for the remainder of her life.

By October 1977, Dr. Post still found claimant with ongoing symptomatology and thought she was not medically stationary.

The third examination by the Orthopaedic Consultants was performed on November 18, 1977. Claimant at that time still had a foot infection and whenever she was taken off of the antibiotics her condition worsened. The physicians felt her claim could not be closed until she demonstrated freedom from infection and was antibiotic free for about six months.

On March 10, 1978 Dr. Post reported that claimant continued to do poorly. Her symptoms were pain and swelling with prolonged standing and pain at rest. He felt claimant's condition had not changed in the past several months so her condition could be considered stationary but she would require continued care. The doctor opined that her impairment was comparable to loss by amputation of the left leg below the knee. She was unable to work at even a sedentary occupation.

Dr. Belknap, who had examined claimant in January 1978, felt that she would never be cured. He concurred with Dr. Post's March 1978 opinion.

A Board's Own Motion Determination granted claimant compensation for temporary total disability from October 6, 1975 through April 10, 1978 and an additional award of 40% loss of the left foot. This Own Motion Determination was vacated on November 9, 1978 as claimant's aggravation rights had not expired.

A Fifth Determination Order of November 28, 1978 granted claimant the same award as granted by the Board's vacated Own Motion Determination.

The Referee found that the medical evidence indicated claimant's condition was still not medically stationary and he set aside the Fifth Determination Order and remanded the claim to the Fund for processing.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, would reverse the Referee's order. The Board finds that claimant's treating physician, Dr. Post, found claimant's condition to be stationary as of March 10, 1978 (although the Determination Order's termination of temporary total disability compensation was April 10, 1978 and was in error).

The Board further finds that as a consequence of the injury claimant's diabetic condition, a systemic disorder, has been materially and permanently worsened. The "uncontrollable" diabetes combined with the left foot disability permanently incapacitates her from regularly performing work at a gainful and suitable occupation. The claimant is entitled to an award of permanent total disability.

The carrier is allowed to offset any award made by the Referee's order and this order.

ORDER

The order of the Referee, dated July 13, 1979, is reversed.

The Fifth Determination Order, dated November 28, 1978, is hereby modified and claimant is granted an award of permanent total disability effective March 11, 1978.

The Fund is allowed to offset payments of temporary total disability against this award of permanent total disability.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

CLAIM NO. B 830 C 322870 March 6, 1980

FRANCIS C. WELLS, CLIAMANT
Murphy, Anderson & Cegavske,
Claimant's Attys.
Long, Neuner, Dole, Caley
& Kolberg, Employer's Attys.
Own Motion Determination

Claimant sustained a compensable injury on July 15, 1968. His claim was closed on May 25, 1970 and his aggravation rights have expired. Claimant has been granted an award equal to 30° for 20% loss of the left leg.

By a Board's Own Motion Order, dated January 11, 1978, claimant's claim was reopened as of the date he entered the hospital for the surgery recommended by Dr. Slocum.

On April 19, 1978, claimant underwent surgery on his left knee. He returned to work on October 17, 1978 and on October 20 was officially released for light work by his physician. On July 16, 1979, Dr. Slocum found claimant's condition to be medically stationary. He indicated claimant complained of constant pain, some swelling and stiffness. He is unable to run, jump or kneel and has difficulty climbing stairs. He felt claimant was in need of no further treatment. He recommended claim closure with a moderately severe permanent partial disability.

On January 20, 1980 the carrier requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional compensation for temporary total disability from April 18, 1978 through October 16, 1978 and temporary partial disability from October 17, 1978 through July 16, 1979 and for one day only on December 14, 1979 when claimant was examined again by Dr. Slocum. It also recommended that claimant be granted additional compensation equal to 45° for 30% loss of the left leg.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 18, 1978 through October 16, 1978 and temporary partial disability from October 17, 1978 through July 16, 1979 and for one day only on December 14, 1979. Claimant is also granted compensation equal to 45° for 30% loss of the left leg. These awards are in addition to all previous awards granted claimant.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-6241 March 6, 1980
WCB CASE NO. 78-9042

JANET WEST, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which remanded claimant's claim against Childrens Services Division, State of Oregon, for psychiatric disability to it for acceptance and payment of compensation and other benefits and awarded her attorney a fee of $800. The Fund contends this was in error.

Claimant seeks Board review of that portion of the Referee's order which granted claimant's attorney a fee of $800. Claimant contends the attorney fee awarded was inadequate compensation for the attorney's work.

FACTS

Claimant, a 31-year-old caseworker for Childrens Services Division, alleges she sustained a psychiatric disability due to on-the-job stress. Claimant also worked on a part-time basis as a receptionist in a health spa and suffered a compensable injury to her low back; that case is not a part of this appeal. The medical evidence in this record does discuss that injury and its affects on the claimant.

In September 1978, the Orthopaedic Consultants examined claimant for her spa injury and found she had functional overlay with depression which was probably severe.

Also, in September 1978, Dr. Arden Synder, a psychologist, diagnosed claimant as suffering from reactive depression, psychophysiological reaction and marital/family discord. Dr. Snyder indicated claimant was divorced and had a profile that suggested a negative self-image, extremely fragile ego-strength and few emotional resources for coping with stress. He stated claimant saw herself as physically ill.

Dr. Barbara Radmore, a psychiatrist, in September 1978, examined claimant at claimant's attorney's request and indicated claimant had been able to adapt to her situation prior to 1978 although raised in a "classically dysfunctional family". In January 1978 claimant was advised by Dr. George Barton her slurred speech, blurring vision and other symptoms were the result of stress. He suggested the stress of her job at Childrens Services Division was contributing to these conditions and suggested she quit this job. Claimant indicated because of financial problems she could not quit. In fact, because of her financial problems she had to take a part-time job at the health spa. All of this caused claimant to fall behind in her regular work. Claimant said she took work home. Eventually, due to disruption, she left her home for short period of time and had her phone disconnected. She said her supervisor tried unsuccessfully to contact her by phone and sent co-workers to her home to obtain files needed in the office. Claimant perceived her supervisor felt she was "off her rocker". She felt blocked in her efforts to get additional training and felt her supervisors did not feel she was competent to do her work. Dr. Radmore reported claimant exhibited considerable agitation and depression, superimposed upon a passive-dependent personality. Dr. Radmore also indicated most of claimant's current problems were the result of problems claimant identified as arising out of her relations at work with her supervisor, which has been characterized as denigration and loss of self esteem. It was Dr. Radmore's opinion that even if claimant's financial and physical pressures were relieved, she could not return to work. Dr. Radmore felt the degree of stress and discomfort at work were such claimant should remain off work.

On January 2, 1979, Dr. Edward Colbach indicated claimant had numerous and complex emotional problems and that claimant's feeling about her job had begun to deteriorate during the past few years. Claimant indicated she had developed communication problems with her supervisor in 1978. Claimant said she could not return to work and since 1968 had developed spasms in her hands, which had worsened recently. Claimant related this worsening to stress at work. She felt isolated and unappreciated at work and unable to communicate with her supervisor. Dr. Colbach stated during his examination claimant cried frequently and appeared quite depressed. He could not relate claimant's condition to her work. Dr. Colbach noted that she had some adjustment problems throughout her life, but was able to function on her job until her stress level was surpassed. It was noted claimant had financial difficulties and had been working two jobs at the time her psychiatric troubles began. It was Dr. Colbach's opinion there was no clear answer as to whether claimant's job at Childrens Services Division was a material contribution factor to her present emotional instability.

Dr. Colbach, in February 1979, indicated claimant was generally emotionally unstable and the personality conflict at Childrens Services Division and her minor injury at the health spa constituted two of a number of problems in her life. Dr. Colbach felt claimant took most of life's difficulties quite hard and tended "to make mountains out of molehills". Dr. Colbach did not find any evidence that these two events caused any kind of permanent worsening of her pre-existing personality deficits. Dr. Radmore disagreed with this last statement and felt claimant had experienced some degree of permanent damage.

Mr. Mark Anderson, claimant's supervisor, testified claimant left work in April 1978 and had taken some of her case files with her, ostensibly to work on them at home. In June he and others attempted to contact her. They tried to reach her by telephone and also went to her home to determine how she was doing and obtain the case files. He stated claimant returned to work on July 5, 1978, but he felt claimant's financial problems, her home being partially remodeled and her father being in the area all seemed to bother claimant. He met with claimant and discussed these problems and tried to make suggestions. Mr. Anderson felt claimant's work was satisfactory after she returned to work. He reduced claimant's case load during the period of July through November 1978.

The Referee found that the preponderance of the evidence supported the claim for probable permanent emotional disability by way of aggravation of a pre-existing condition and found that claim compensable.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses that portion of the Referee's order appealed by the Fund. The Board does not find that the evidence in this case establishes by a preponderance of the evidence that claimant's claim for her emotional disability is compensable. The Court of Appeals in the case of James v. SAIF, _____ Or App _____, _____ P2d _____ (decided February 11, 1980), set forth the test to be applied in determining the compensability of emotional conditions. In determining a causal connection between the emotional condition and the work place, the Court held that the stimulus that generated the mental condition need not be an extraordinary unanticipated event or events; that the conditions of employment, claimed to be the precipitating cause of the mental disability need not be unusual in order for the disability to be compensable; and that in cases where claimant had a pre-existing emotional disorder, the four-part test set forth in Weller v. Union Carbide, 288 Or 27, _____ P2d _____ (1979), had to be met. In Knoetzel v. SAIF, 37 Or App 627, _____ P2d _____ (1978), the Court held that the "triggering" incident in that case was not any more real than numerous other incidents related by claimant, either fanciful or clear misinterpretation of real ones or that he was, in fact, harrassed by his fellow employees. The Court did not find that claim compensable.

The Board, in this case, does not have any evidence of an on-the-job "triggering incident". Claimant perceived she had difficulty with her supervisor and perceived that she was not doing a competent job. The facts indicate claimant was doing her job adequately and that her supervisor and co-workers were concerned about her. There is no evidence that claimant's work activity and conditions caused a worsening of her underlying disease resulting in an increase in her symptoms to the extent that it produced disability or required medical services.

Dr. Colbach opined claimant's work at the Childrens Services Division did not aggravate her pre-existing condition. On the other hand, Dr. Radmore opined that stress and discomfort at work, related to her by claimant as a problem with her supervisor, denigration and her loss of self esteem, were such that he felt claimant should remain off work. The Board finds that these problems did not exist and were perceived to exist by claimant. Therefore, after considering all of the evidence and reviewing the case law, the Board finds that claimant has not established by a preponderance of the evidence that her mental condition and resulting disability are compensable as arising out of and in the course of her employment and affirms the Fund's denial.

ORDER

The Referee's order, dated September 25, 1979, is modified.

That portion of the Referee's order which found claimant's claim for psychiatric disability resulting from her employment with Childrens Services Division to be compensable and remanded to the State Accident Insurance Fund and awarded claimant's attorney a fee of $800 is reversed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-5195 March 10, 1980

MARY E. BLANCHE, CLAIMANT
Anson & Creighton, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

On January 11, 1980 claimant requested Board review of the Referee's order in this case.

On February 8, 1980, claimant moved the Board to remand this case to the Referee for the Referee's consideration of additional evidence that was "newly discovered and not available at the time of the hearing".

On February 19, 1980, the State Accident Insurance Fund (Fund) indicated that it opposed claimant's motion. The Fund contended that the offered evidence was neither newly discovered nor unavailable at the time of the hearing.

The evidence claimant wished the Referee to consider, upon a remand from the Board, consisted of a medical report from a doctor which had been secured by claimant's counsel after the hearing and after claimant's counsel had supplied various information to the doctor. There was no evidence that this report could not have been secured prior to the hearing.

The Board does not find, based on the arguments of the parties and the facts in this case, sufficient grounds upon which to remand this case to the Referee. Therefore, the Board would deny claimant's motion.

ORDER

Claimant's motion to remand this case to the Referee, dated February 8, 1980, is denied.

WCB CASE NO. 77-7751 March 10, 1980

WALTER BROWN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Cheney & Kelley, Employer's Attys.
Order Denying Motion

Claimant had been injured in 1967 while employed by Balzer Machinery, whose workers' compensation coverage was provided by Industrial Indemnity. Claimant also had been injured in 1974 while employed by ABC Roofing Company whose workers' compensation insurer is the State Accident Insurance Fund (Fund).

On February 2, 1979, claimant had requested his claim for the 1967 injury be opened under the Board's own motion jurisdiction. This was opposed by the insurance carrier, Industrial Indemnity, which contended claimant had sustained a new injury. Claimant requested that this matter be consolidated with a hearing which was set contesting an award of disability for the 1974 injury. Therefore, the Board remanded the own motion request to be consolidated with the hearing on the 1974 injury.

After the hearing, the Referee, on November 13, 1979, entered an order finding claimant was permanently and totally disabled.

Further, the Referee found that the ABC Roofing Company injury was responsible for claimant's permanent total disability and ordered the Fund to commence paying compensation for permanent total disability. The Fund timely requested Board review of this order. The Referee also, in a separate order, recommended that the Board deny claimant's request for own motion relief.

On December 5, 1979, the Board entered an order denying the own motion relief requested by claimant.

Industrial Indemnity and Balzer Machinery, on January 24, 1980, requested that the Board dismiss the Fund's request for review, This motion was based on the Referee's and the Board's orders.

The Board would deny this motion. The Board feels that since Industrial Indemnity and Balzer Machinery were parties to that hearing, they are parties to the appeal from that hearing. It is the feeling of the Board, that in fairness to all the parties and to prevent any injustice from occurring, Industrial Indemnity and Balzer Machinery should remain parties to the appeal.

ORDER

The motion to dismiss the request for review as to Industrial Indemnity and Balzer Machinery is denied.

CLAIM NO. D53-122440 March 10, 1980

PATSY E. MATHES CARPENTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her neck on February 23, 1968. On April 22, 1968 a Determination Order was issued ordering temporary total disability to March 29, 1968. Claimant's aggravation rights have expired.

On March 29, 1974, claimant was hospitalized for cervical traction. On September 9, 1975, claimant was rehospitalized and underwent cervical fusion.

On July 8, 1977, the Board, under its own motion jurisdiction, reopened this claim, effective September 9, 1975, the date claimant was first hospitalized for cervical surgery.

In January 1977, Dr. Donald T. Smith opined that claimant had a mild permanent impairment which constituted approximately 5% of the whole man on the basis of ankylosis of two elements of the cervical spine following the removal of the cervical disc. In March 1977, after a myelogram, Dr. Smith performed an anterior cervical discectomy and interbody fusion. The diagnosis was cervical spondylosis, C4-5. Dr. Smith felt that claimant would have a modest increase in her permanent partial disability because of this additional treatment.

In June 1977, Dr. Smith had indicated that he had examined claimant on June 10, 1977 and that "she was instructed with respect to activities, and can generally speaking, do most anything she wants". On January 15, 1980, Dr. Smith reported he had again examined claimant and found that her condition had improved. He noted claimant had continuing difficulty with her low back condition which was related to a separate injury. He felt claimant's condition was medically stationary.

On January 31, 1980, the carrier requested a determination of claimant's current disability. On February 19, 1980, the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional temporary total disability from March 29, 1974 through April 8, 1974; from September 9, 1975 through April 1, 1976 less amounts paid under a separate claim number; and from March 5, 1977 through June 10, 1977, less time worked; and an award of additional compensation equal to 10% loss of function of the neck for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 29, 1974 through April 8, 1974 and from September 9, 1975 through April 1, 1976, less amounts paid in claim number B53-124467 and further compensation from March 5, 1977 through June 10, 1977, less time worked. Claimant is also granted compensation equal to 10% loss of function of the neck. These awards are in addition to any awards previously granted under this claim, although the record does indicate how much of the compensation for temporary total disability has already been paid.

CLAIM NO. C 402099 March 10, 1980

EDWIN EVENSIZER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 17, 1972, claimant sustained a compensable injury to his right wrist. The original diagnosis was "old fracture of right navicular with osteoporosis and re-fracture". Claimant's claim was initially closed by a Determination Order, dated May 17, 1974, which granted time loss benefits and compensation equal to 22.5° for 15% loss of the right forearm. On October 8, 1974, a Stipulation granted an additional award equal to 17.85° for loss of the right forearm.

On June 28, 1979 claimant underwent surgery consisting of radial styloidectomy of the right wrist. Two days later Dr. Fredric Davis indicated claimant was free of symptoms and his pain was under control with Tylenol #3. In a report from Dr. Davis' office, dated July 17, 1979, it was stated that claimant would be off work for approximately one more month.

ORDER

The motion to dismiss the request for review as to Industrial Indemnity and Balzer Machinery is denied.

CLAIM NO. D53-122440 March 10, 1980

PATSY E. MATHES CARPENTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her neck on February 23, 1968. On April 22, 1968 a Determination Order was issued ordering temporary total disability to March 29, 1968. Claimant's aggravation rights have expired.

On March 29, 1974, claimant was hospitalized for cervical traction. On September 9, 1975, claimant was rehospitalized and underwent cervical fusion.

On July 8, 1977, the Board, under its own motion jurisdiction, reopened this claim, effective September 9, 1975, the date claimant was first hospitalized for cervical surgery.

In January 1977, Dr. Donald T. Smith opined that claimant had a mild permanent impairment which constituted approximately 5% of the whole man on the basis of ankylosis of two elements of the cervical spine following the removal of the cervical disc. In March 1977, after a myelogram, Dr. Smith performed an anterior cervical discectomy and interbody fusion. The diagnosis was cervical spondylosis, C4-5. Dr. Smith felt that claimant would have a modest increase in her permanent partial disability because of this additional treatment.

In June 1977, Dr. Smith had indicated that he had examined claimant on June 10, 1977 and that "she was instructed with respect to activities, and can generally speaking, do most anything she wants". On January 15, 1980, Dr. Smith reported he had again examined claimant and found that her condition had improved. He noted claimant had continuing difficulty with her low back condition which was related to a separate injury. He felt claimant's condition was medically stationary.

On January 31, 1980, the carrier requested a determination of claimant's current disability. On February 19, 1980, the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional temporary total disability from March 29, 1974 through April 8, 1974; from September 9, 1975 through April 1, 1976 less amounts paid under a separate claim number; and from March 5, 1977 through June 10, 1977, less time worked; and an award of additional compensation equal to 10% loss of function of the neck for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 29, 1974 through April 8, 1974 and from September 9, 1975 through April 1, 1976, less amounts paid in claim number B53-124467 and further compensation from March 5, 1977 through June 10, 1977, less time worked. Claimant is also granted compensation equal to 10% loss of function of the neck. These awards are in addition to any awards previously granted under this claim, although the record does indicate how much of the compensation for temporary total disability has already been paid.

CLAIM NO. C 402099 March 10, 1980

EDWIN EVENSIZER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 17, 1972, claimant sustained a compensable injury to his right wrist. The original diagnosis was "old fracture of right navicular with osteoporosis and re-fracture". Claimant's claim was initially closed by a Determination Order, dated May 17, 1974, which granted time loss benefits and compensation equal to 22.5° for 15% loss of the right forearm. On October 8, 1974, a Stipulation granted an additional award equal to 17.85° for loss of the right forearm.

On June 28, 1979 claimant underwent surgery consisting of radial styloidectomy of the right wrist. Two days later Dr. Fredric Davis indicated claimant was free of symptoms and his pain was under control with Tylenol #3. In a report from Dr. Davis' office, dated July 17, 1979, it was stated that claimant would be off work for approximately one more month.

The Fund voluntarily reopened claimant's claim commencing June 27, 1979, the date claimant was hospitalized for the surgery. Claimant's post-operative course was not complicated and Dr. Davis released him for work on October 8, 1979.

The Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on February 11, 1980, recommended claimant be granted additional compensation for time loss from June 18, 1979 through October 7, 1979 with no additional award for permanent disability.

The Board agrees with the Evaluation Division's recommendation except that claimant is entitled to compensation for temporary total disability from June 27, 1979, the date he was hospitalized, rather than from June 18.

ORDER

Claimant is hereby granted additional compensation for temporary total disability from June 27, 1979 through October 7, 1979, less time worked. The record indicates that most of this award has been already paid out by the Fund.

WCB CASE NO. 78-4461 March 10, 1980

MILTON HILL, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On May 15, 1978, the Board issued its Order on Review which reversed the Referee's order, dated November 27, 1978, which granted an additional award of compensation equal to 48° for 15% unscheduled disability. Claimant, at the time of the hearing, was enrolled in a vocational rehabilitation program. The majority of the Board felt the hearing was premature and that after claimant had finished his vocational rehabilitation program, the claim would again be closed and a Second Determination Order would be issued giving claimant the right to appeal that Determination Order.

Claimant requested judicial review of the Board's order. On November 19, 1979, the Court of Appeals reversed and remanded the case to the Board citing the case of Minor v. Delta Trucking Lines, _____ Or App _____, _____ P2d _____ (November 5, 1979). The facts in that case were similar and the Court held claimant was entitled to a hearing.

On February 6, 1980, the Board received a copy of the Judgment and Mandate from the Court of Appeals remanding the claim to it for further proceedings pursuant to its decision of November 19, 1979. Therefore, the Board, in compliance with the Court of Appeals' decision, would affirm and adopt the Referee's order, a copy of which is attached hereto.

ORDER

The Board affirms and adopts the Referee's order, dated November 27, 1978.

Claimant's attorney is hereby granted a reasonable attorney's fee in the amount of $300, payable by the carrier.

WCB CASE NO. 79-8406 March 10, 1980

BILLY IRVIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On January 25, 1980, the Board received a letter, dated February 21, 1979 from the claimant. The letter is entitled "Notice of Appeal" and the remainder of the letter is illegible. It does not contain any evidence or proof that it was served on the other parties to the proceeding before the Referee. On January 28, 1980, the Board advised claimant that he had to serve this notice on the other parties. The Board requested he do this and certify that he had done it. Claimant has not complied.

Therefore, the Board would dismiss what it had construed as claimant's request for review on the basis claimant failed to serve the other parties to the proceeding before the Referee, in compliance with ORS 656.295.

ORDER

Claimant's "Request for Review", dated February 21, 1979, is dismissed.

CLAIM NO. KA 858050 March 10, 1980

CLIFFORD MAULSEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On April 28, 1961, claimant sustained compensable injuries when he was involved in a motor vehicle accident. Claimant injured his cervical spine and fractured his left leg. In October 1964, a Determination Order awarded claimant compensation equal to 20% of the left arm, 50% of the left leg and 20% unscheduled disability for the neck and shoulder injury. Claimant's aggravation rights have expired.

In 1970, Dr. J. Gordon Daines indicated claimant complained of severe pain in the cervical spine with radiation into the right shoulder and down the left arm. He indicated that Dr. Edward Kiefer had removed a cervical disc.

In December 1976, Dr. Daines reported claimant returned complaining of left leg pain. X-rays revealed a non-union of the fracture.

On February 11, 1977, Dr. Daines removed a rod which had been inserted after the original injury and compression plating and bone grafting were performed. Dr. Howard Johnson released claimant for work on July 18, 1977.

On January 13, 1978, Dr. Johnson performed additional surgery. Claimant returned to work on March 20, 1978.

On February 8, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. On February 22, 1980, the Evaluation Division of the Workers' Compensation Department recommended claimant be granted compensation for temporary total disability from February 11, 1977 through July 17, 1977 and from January 12, 1978 through March 19, 1978 and a total award of 70% loss of use of the left leg in lieu of the award granted in October 1974.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 11, 1977 through July 17, 1977 and from January 12, 1978 through March 19, 1978, less time worked. Claimant is also granted additional compensation equal to 20% loss of the left leg. The record indicates that all of the award for temporary total disability has been paid.

WCB CASE NO. 801327 March 10, 1980

JAMES D. TURNBULL, CLAIMAMT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant has requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on July 22, 1969. Claimant's aggravation rights have expired.

Claimant forwarded several medical reports to the Board in support of his position. On December 11, 1978, Dr. John White indicated claimant had a herniated disc at C6-7 on the right and recommended that a myelogram be done. He related claimant's condition to his 1969 injury. The myelogram was done in December 1978 and an anterior discectomy and fusion at C5-6 was performed on January 2, 1979. On April 16, 1979, Dr. White stated that claimant was doing well. He felt that the 1969 injury was "somewhat" responsible for claimant's current condition, but he was unable to state unequivocally that that was so.

On January 8, 1980, the Board advised the self-insured employer of claimant's request for own motion relief and asked it to advise the Board of its position within 20 days. Pacific Northwest Bell, on January 25, 1980, informed the Board that it did not believe claimant's cervical disc disease and surgery were a result of his July 1969 industrial injury.

WCB 80-1327 is pending in the Hearings Division. This request for hearing was the result of the employer's denial of medical care and treatment for the 1969 injury.

The Board believes it would be in the best interest of all the parties if the above hearing and claimant's request for own motion relief were consolidated. Therefore, claimant's own motion request is remanded to the Hearings Division to be consolidated for hearing with WCB Case No. 80-1327. The

Referee shall take evidence on both claims to determine if claimant's current disability is related to his June 22, 1969 industrial injury and, if so, whether the necessary medical treatment can be provided under the provisions of ORS 656.245 or the claim should be reopened under ORS 656.278. Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation concerning claimant's request for own motion relief. A final and appealable order should be prepared on the issue of the carrier's denial of claimant's request for medical care and treatment under ORS 656.245.

WCB CASE NO. 78-2167 March 11, 1980

LANORA BAIN, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The claimant and employer seek Board review of the Referee's order which reopened claimant's claim for her upper back, low back and left hip effective April 7, 1978 and found claimant's left knee condition was not compensable. Claimant contends the left knee condition is compensable.

The employer contends claimant was not entitled to have her claim reopened as of April 7, 1978.

FACTS

Claimant, a 40-year-old meat wrapper, alleges she sustained injuries to her back and legs on July 29, 1976 when she slipped and fell on something on the floor and struck her head. The injuries were diagnosed as cervical subluxation, lumbar sprain and pulled muscles in both legs. Dr. Victor Johnson, D.C., reported claimant continued to work and did not miss any work. Dr. Johnson indicated however, that claimant continued to have problems with her neck and lower extremities. He felt claimant would suffer "permanent disability impairment".

Dr. Jerry Becker, in February 1978, stated claimant complained of neck, back and leg pain after her fall. Claimant said she had daily neck pain, made worse by doing housework and low back pain, made worse by lifting, mopping and stooping. Dr. Becker diagnosed "chronic cervicodorsal and lumbosacral strain symptoms with mild sciatic like symptoms". He did not feel claimant had a herniated disc. He felt her condition was medically stationary.

A Determination Order, dated March 16, 1978, did not award claimant any compensation for temporary total disability or permanent partial disability.

On April 7, 1978, Dr. Rex Howard, D.C., reported claimant's condition was not medically stationary. He released her to modified employment on a part-time basis.

Dr. Mohammed Hoda, in June 1978, saw claimant for pain in the left lower extremity. He diagnosed "degenerative arthritis medial compartment of the left knee, aggravated by injury". In September 1978, Dr. Hoda examined claimant and reported "Her knee is bothering her most when she is working as she has to stand most of the time wrapping meat in a cooler which itself aggravates her knee". Dr. Hoda recommended that she change jobs and "she should not work in a cooler and not stand on her feet all the time". He went on to report "she should have a job that part of the time she would be able to sit".

On November 7, 1978, Dr. Howard reported claimant was off work at his insistance. He diagnosed chronic cervical strain and sprain, lumbar strain and left hip strain with associated myofascitis. Dr. Howard reported that even though he had recommended part time work, claimant had continued to work on a full time basis until he had insisted she stop working.

Dr. Hoda, in February 1979, indicated the slip and fall in July 29, 1978 had temporarily increased claimant's symptoms (aggravated) of her arthritic knee. On May 1, 1979, Dr. Hoda was deposed and opined that there was no causal relationship between claimant's arthritic left knee condition and her injury of July 29, 1976. He felt that the left leg (knee) condition was due to normal degeneration associated with degenerative arthritis of the left knee.

At the hearing, claimant testified she began missing some work due to her injuries in April 1978. She also testified she has continuing difficulties with her upper back, low back and left leg. Claimant and a representative of the employer indicated claimant had worked on a part time basis from April 1978 to September 1978.

The Referee found that based on all the evidence: (1) claimant's claim was not prematurely closed by the Determination Order, dated March 16, 1978; (2) claimant was entitled to have her claim reopened as of April 7, 1978 until closed; (3) claimant's left leg (knee) condition was not the responsibility of the employer; and (4) claimant was not entitled to an award of penalties and attorney's fees because the preponderance of the evidence did not disclose any misconduct on the part of the carrier.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the Referee's order. The evidence indicates that claimant worked on a part time basis after April 7, 1978. Dr. Howard recommended claimant work on a part time basis and on November 7, 1978 reported claimant was off work at his insistence. The Board finds, as the Referee did, that claimant is entitled to have her claim reopened as of April 7, 1978 until closed pursuant to ORS 656.268, but less time worked from April 7, 1978 through November 7, 1978. The Board concurs with the remainder of the Referee's order.

ORDER

The Referee's order, dated September 28, 1978, is modified.

Claimant's claim for her upper back, low back, and left hip condition, arising out of her injury of July 29, 1976, is remanded to the employer and its insurer to be reopened effective April 7, 1978 and for payment of compensation and benefits to which claimant is entitled until the claim is closed, pursuant to ORS 656.268, but less time worked from April 7, 1978 through November 7, 1978.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-682 March 11, 1980

OSCAR F. COOK, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) and claimant both seek Board review of the Referee's order which awarded claimant additional compensation equal to 96° for 30% unscheduled disability for his back injury. The Fund contends the award is excessive and claimant contends the award is insufficient.

FACTS

Claimant, a 30-year-old timber cutter, sustained a compensable injury to his back on August 22, 1975 when while walking down hill, he slipped and sat down hard "jamming his tailbone up against his second vertebrae". The injury was diagnosed as a compression of the L5-S1 interspace.

In September 1975, Dr. James Brooke indicated claimant complained of pain in his low back and hips. He felt claimant had a subsiding acute low back strain which had aggravated a pre-existing mild sacroiliitis. Claimant indicated he did not have any previous back injuries.

On January 26, 1976, Dr. S. Schachner diagnosed a chronic "old" back strain. He felt claimant needed a job change. He felt claimant should not engage in work requiring strenuous physical activities, heavy lifting or carrying, but could work in a job requiring standing.

Claimant was referred for job training. He advised the counselor he had a high school education and had worked in the woods and done some construction work. Claimant began a training program in automobile mechanics, with an on-the-job training program of small engine repair.

Claimant completed the vocational rehabilitation program on January 3, 1979.

In April 1977, Dr. Arthur Hockey examined claimant and diagnosed chronic lumbosacral strain. He found no evidence of a herniated disc.

A Determination Order, dated January 17, 1979, awarded claimant compensation for temporary total disability and compensation equal to 16° for 5% unscheduled disability for his low back injury.

In April 1979, Dr. David Ott, D. C., diagnosed a chronic traumatic lumbosacral strain and commenced to treat claimant. On July 23, 1979, he reported claimant had improved and was medically stationary.

On July 25, 1979, Dr. Chester Cornog reported claimant's chronic lumbar strain syndrome was "medically stable and stationary at this time". He felt there had been no change in claimant's back condition since January 1979. Claimant complained to Dr. Cornog of continued low back pain. Dr. Cornog diagnosed a chronic lumbar sprain. He felt claimant's pain "more than likely" was caused by the sacralization of L5, which was a congenital condition existing prior to the August 1975 injury. He felt claimant had no significant back disability due to the August 1975 injury.

At the hearing, claimant testified he had unsuccessfully applied at seventeen places for work as an auto mechanic. He did not apply at service stations because the pay was too low. He said he worked part-time with his wife and two children, picking up and splitting salvage timber into firewood. He runs the saw and splits the wood. His truck has a self-loader. His family stacks the wood. He said he works two to three hours a day every other day.

The Referee found, based on all of the evidence, that claimant was entitled to an award of additional compensation equal to 96° for 30% unscheduled disability for his back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the Referee's order. The medical evidence indicates claimant has a chronic lumbosacral strain. The medical doctors feel claimant should avoid his previous types of employment or employment requiring heavy lifting or carrying. The other evidence indicates claimant is now 34 years old, has a high school education and has completed a vocational rehabilitation program. The Board concludes that based on all of the evidence in this case the Referee's award is too high. The Board finds, based on this evidence, that claimant is entitled to an award of compensation equal to 64° for 20% unscheduled disability for his back injury. This is in lieu of all previous awards for unscheduled disability for this injury.

ORDER

The Referee's order, dated September 19, 1979, is modified.

Claimant is hereby awarded compensation equal 64° for 20% unscheduled disability for his back injury. This is in lieu of all previous awards for unscheduled disability for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-4193 March 11, 1980
WCB CASE NO. 78-6819

HARRY HAMILTON, CLAIMANT
David R. Vandenberg, Jr.,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF.

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's Amended Opinion and Order on Reconsideration which disallowed its denial dated May 8, 1978 on behalf of Stukel Rock and Paving, Inc., remanded the claim for claimant's low back injury to it for acceptance and payment of compensation and awarded a $2,000 attorney's fee. The Fund contends that claimant's work at Stukel Rock and Paving, Inc. (Stukel) in September 1977 was not a material contributing cause of his back problems and that the claim was barred because it had been prejudiced by claimant's failure to give timely notice of a claim for this industrial injury to the employer.

FACTS

Claimant, a 29-year-old laborer, alleges he sustained a back injury on September 13, 1977 while shoveling asphalt out of a dump truck for Stukel. He filed his claim for this injury on March 21, 1978.

Claimant had a back injury while pulling on the green-chain for another employer in August 1976. This injury was diagnosed as a lumbar strain with an intermittent facet syndrome. In November 1976, Dr. Laubengayer indicated claimant continued to experience low back pain.

Dr. Benjamin Balme, in January 1977, reported that claimant could return to work, but that claimant said he did not feel he would be able to return to work. Dr. Balme did not feel claimant would have any permanent disability as a result of this injury.

Dr. Robert Garrison, D. C., found claimant's condition to be medically stationary on March 11, 1977, but did not feel claimant could return to his previous line of employment.

On September 8, 1977, Dr. Balme indicated claimant had returned with recurrent low back pain. Claimant said the onset of the pain occurred on a Monday after he had washed his vehicles. Claimant returned later in September with continuing back pain. Dr. Balme felt this was "an aggravation of the original industrial claim".

Dr. Thomas Klump, in October 1977, was given a history by claimant of claimant having a low back injury approximately one year previous and returning to work driving a truck. Claimant said he went to work for Stukel in early September and on the first and second of September noticed an increase in his back pain. He indicated he was off work on Monday the 6th of September. On Tuesday he said he had jumped out of a truck, gone to the back of the truck and began shoveling when he twisted and experienced severe pain in his back, right buttock, and right calf. Dr. Klump felt claimant had a protruded disc at the L4-5 level on the right side. Claimant did not work after September 6, 1977. A myelogram performed on November 2, 1977 revealed a protruded intervertebral disc at the L4-5 level on the right side. On November 4, 1977, Dr. Klump performed a "right hemilaminectomy with excision of large protruded intervertebral disc".

Dr. Balme, who assisted in claimant's surgery, indicated in November 1977 that it was difficult to state what specific incident over the past year had precipitated claimant's current problems. He felt it was difficult "to isolate his injury of 1976 and deny that this is associated with his present problems".

Dr. Klump, in December 1977, opined claimant's work driving a truck doing one job aggravated claimant's back and his job at Stukel finally severely aggravated it.

A hearing was held on January 18, 1978 on claimant's 1976 injury. A Determination Order, dated April 13, 1977, had awarded claimant compensation for temporary total disability only. The Referee found that claimant had suffered an independent intervening incident after the original injury which made the employer not responsible for continuing medical treatment. The Referee found the incident triggering claimant's hospitalization occurred while he was working for Stukel. Therefore, the Referee affirmed the denial of that employer and affirmed the Determination Order.

On April 14, 1978, Dr. Klump reported claimant had been released for regular work and that he did not expect any permanent impairment to result.

On May 8, 1978, the Fund denied claimant's claim on the basis that no injury had occurred while claimant was employed at Stukel and further the claim was not timely filed.

In July 1978, Dr. Klump opined that the incident of September 13, 1977 was not a new injury, "but merely aggravated a pre-existing problem". In September 1978, Dr. Balme reported that he felt claimant's reinjury in 1977 had aggravated his previous condition.

Claimant had sustained other injuries to his back in June 1978 and August 1978 which are not part of this appeal.

In his deposition, Dr. Balme stated that on January 17, 1977 claimant had back pain, but no leg pain. Then he said claimant first had leg pains after the September 1977 injury. On cross-examination, he testified claimant had no leg problems when examined on September 15, 1977, but did when examined on September 26, 1977. Dr. Balme opined that claimant's need for surgery was related to his 1976 injury and the other injuries were just "further insults". He felt claimant had no herniated disc on September 8, 1977.

Claimant testified that after his August 1976 injury he was off work eight months. He said he next worked as a truck driver from June 1, 1977 to September 1, 1977 and then went to work for Stukel on Setember 2, 1977, a Friday, as a laborer shoveling asphalt. That night his back felt sore and tight. Over the weekend, claimant and his wife washed their vehicles. On Monday, claimant stated he felt the same as he did on Friday and called his doctor. He said the doctor told him to stay off a week and so he called Mr. Thompson a part owner of Stukel and told him his back hurt and he was going to be absent for a week on his doctor's advice. Claimant alleges that Mr. Thompson told him not to tell his co-workers about his back problems and to tell them he fell off of a horse.

On September 13, 1977, claimant returned to work and went out on a job in Tulelake, California. Claimant said he was in the back of a dump truck shoveling asphalt and went to lift the shovel and collapsed. He said he had extreme back pain which radiated into his right leg. Claimant said he was helped out of the truck and assisted by a co-worker. He testified Mr. Thompson was called on the radio and came to the work site. Claimant was unable to tell him what happened and was driven to Klamath Falls. Claimant indicated he never worked for Stukel after the 13th of September, 1977. Claimant's wife corroborated what his condition was after the September 1977 incident. She testified claimant never rode horses.

Mr. Gailey, the dispatcher for Stukel, testified he saw claimant on the morning of September 13, 1977 and that claimant acted as if his back was hurting him. He said he asked claimant about it and claimant said a horse had thrown him over the weekend.

Mr. Guggenmas, a co-worker of claimant, testified he drove claimant and Mr. Weese to Tulelake. He said claimant told him he had taken pain medication for his back. Mr. Guggenmas felt claimant appeared to be in pain. He said at the time of the alleged injury claimant climbed out of the back of the truck and said his back was hurting. He told claimant to lie down. Mr. Thompson was not called on the radio, because the crew had no radio. He said claimant did not mention being injured.

Mr. Weese, the other co-worker, testified he felt something was wrong with claimant while driving to the job. He said claimant told him he had fallen off a horse over the weekend. He said claimant, at the time of the alleged injury, climbed out of the truck unaided and laid down. He said claimant had been shoveling for about 30 minutes.

Mr. Thompson testified claimant was hired to pay off some money owed to Stukel for a driveway they had poured for him. He said he had driven to Tulelake to direct the work and upon his arrival saw claimant lying down. He asked claimant what was wrong and claimant said he didn't feel well. He drove claimant to Klamath Falls and on the way claimant told him he hadn't felt well when he came to work.

He asked claimant if he had been injured and claimant said he had been bucked off of a horse and landed on a pole. Mr. Thompson denied he knew claimant had a prior back injury. He said claimant had worked September 2, 1977 and then was off 10 days because he was sick.

At the hearing in January 1978, claimant testified his back had bothered him throughout his employment as a truck driver and that he had hurt his back on the weekend preceeding September 13, 1977. At this hearing, claimant denied having any continuing back pain and denied he injured his back over the weekend. On cross-examination, he denied he had any back pain after his alleged injury on September 13, 1977 and had only right leg pain. On direct examination, he had testified he had low back pain while shoveling.

The Referee, after reconsidering his first Opinion and Order, found claimant had proven by a preponderance of the evidence he sustained a compensable injury on September 13, 1977. The Referee found the claim was not timely filed, but since no prejudice had been shown, the bar to the claim was removed. Therefore, the Referee set aside the Fund's denial and remanded the claim for the September 13, 1977 injury to it for acceptance and payment of compensation and awarded claimant's attorney a fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses that portion of the Referee's order which was appealed. The Board finds that claimant has failed to prove he sustained a compensable injury on September 13, 1977 while employed by Stukel. The preponderance of the medical evidence indicates that claimant did not sustain any injury on September 13, 1977. The testimony of all the witnesses tends to establish that on that date claimant had gone to work with a painful back and could not continue to work once he got to the job. Further, the Board finds claimant's co-workers' testimony and Mr. Thompson's testimony more persuasive as to what had occurred over the weekend. Claimant told all of these people he had been bucked off of a horse and had not felt well when he came to work. Further, claimant's testimony at this hearing as compared to that at the prior hearing, leads the Board to question claimant's credibility. There are inconsistencies in his testimony. Therefore, the Board based on the entire record does not find claimant has proven by a preponderance of the evidence that he sustained a compensable injury on September 13, 1977 and reverses that portion of the Referee's order which so found.

ORDER

The Referee's order, dated September 28, 1979, is modified.

That portion of the Referee's order which set aside the State Accident Insurance Fund's denial, dated May 8, 1978, on behalf of Stukel Rock and Paving, Inc., remanded the claim for the low back injury of September 13, 1977 to it for acceptance and payment of compensation and awarded claimant's attorney a fee of $2,000 is reversed.

The denial of the Fund on behalf of Stukel Rock and Paving, Inc., dated May 8, 1978, is affirmed.

The remainder of the Referee's award is affirmed.

WCB CASE NO. Unknown March 11, 1980

KARL D. HOGANSEN, CLAIMANT
Allan H. Coons, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Stipulation & Order

Claimant, claimant's attorney, and the attorney or other authorized representative of the employer's insurer hereby move the Workers' Compensation Board for an Order approving the following stipulated settlement:

1. The terms of this settlement dispose of all issues between the parties except those specifically reserved herein for later decision (if any), and the pending request for hearing is withdrawn.

2. Through his attorney, claimant filed a Request for Hearing/Aggravation Application which was mailed to SAIF January 25, 1980, with a copy to the Workers' Compensation Board mailed the same day.

3. Claimant has consulted Monte Ellison, M.D., on referral from his former treating physician, Stanley James, M.D., and further surgery for the compensable condition has been recommended. The worsening of claimant's condition and the need for surgery was medically verified January 24, 1980.

4. The last arrangement of compensation in this case was made by Determination Order mailed June 10, 1974, more than five years prior to the date of the Request for Hearing/Aggravation Application. Therefore, the Hearing Division has jurisdiction only over the question of claimant's entitlement to receive further medical care and treatment. Under the terms of this stipulation, the issue of further medical care and treatment will be subsumed under a general reopening of the claim.

5. Claimant and SAIF hereby request the Hearing Division to dismiss the pending Request for Hearing in consideration of the terms and provisions of this agreement.

6. Claimant and SAIF request the Commissioners of the Workers Compensation Board to approve a reopening of the claim under the provisions of ORS 656.278. The reopening of the claim shall be for payment of further medical care and treatment for the compensable condition and for payment of temporary total disability commending January 24, 1980, to continue thereafter as warranted, until closure is authorized by the Workers' Compensation Board in the further exercise of its own motion authority.

7. Claimant's attorney shall receive a fee equal to 25 percent of the retroactively and prospectively payable time loss, limited to a maximum attorney fee of $500.

THE REQUEST FOR HEARING ON THIS MATTER IS HEREBY DISMISSED UNDER THE TERMS AND CONDITIONS OF THE FOREGOING STIPULATED AGREEMENT; PROVIDED, HOWEVER, THAT THOSE ELEMENTS OF THE FOREGOING STIPULATION AND AGREEMENT WHICH FALL WITHIN THE JURISDICTION OF THE COMMISSIONERS OF THE WORKERS' COMPENSATION BOARD ARE NOT DISPOSED OF BY THE APPROVAL OF THE UNDERSIGNED REFEREE OF THE HEARING DIVISION; THAT PORTION OF THE STIPULATION AND AGREEMENT IS SUBMITTED TO THE COMMISSIONERS OF THE WORKERS' COMPENSATION BOARD FOR THEIR CONSIDERATION.

IT IS HEREBY ORDERED THAT BASED ON THE AGREEMENT OF THE PARTIES, THIS CLAIM SHALL BE REOPENED FOR PAYMENT OF FURTHER MEDICAL TREATMENT AND TEMPORARY TOTAL DISABILITY, AS INDICATED, COMMENCING JANUARY 24, 1980, TO CONTINUE THEREAFTER AS WARRANTED. THIS REOPENING AND THE SUBSEQUENT CLOSURE OF THE CLAIM, WHEN APPROPRIATE, IS DONE UNDER THE AUTHORITY OF ORS 656.278. THE ATTORNEY FEE PROVIDED IN THE ABOVE STIPULATION AGREEMENT IS HEREBY APPROVED.

WCB CASE NO. 78-83 March 11, 1980

MARTIN SIEGLER, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which set aside its denial and remanded claimant's claim for an occupational disease to it for acceptance and payment of compensation as provided by law and granted claimant's attorney a fee. The Fund contends its denial of the occupational disease claim should have been affirmed.

FACTS

Claimant, a 30-year-old forming room supervisor in a battery manufacturing plant, alleges he developed lead poisoning due to his work. He said he worked in this plant for five years and on one occasion had to crawl inside a lead oxide tank and scrape the walls. After doing this, claimant indicated he tasted lead for several days even though he wore protective equipment. Claimant stated his respirator clogged up repeatedly and eventually he had to hold his breath and work for as long as he could before emerging from the tank to breathe. He said dust filled the inside of the tank and billowed out of it as well. He believed he worked in this manner for two to three hours. Claimant said his handlebar mustache interferred with the fitting of the respirator.

Dr. Duane Thompson, in September 1977, diagnosed lead poisoning and related it to industrial exposure. He reported that tissue (hair) analysis revealed a lead level of 19 and that a normal result would be from 0-2.0. Claimant was treated with intravenous EDTA chelation therapy. Dr. Thompson found claimant had 24 hour lead-urine level of 70 before treatment and a level of 625 after treatment. The normal level was up to 100.

Toxicology test of samples taken on September 20, 1977 revealed claimant's blood level of lead was 0.22 micrograms per milligram and of samples taken on September 22, 1977 0.25 micrograms per milligram. The normal range was from 0.20 to 0.50 micrograms per milligram.

On October 11, 1977, Dr. Thompson indicated that when he had seen claimant in August 1977, claimant complained of fatigue, lack of energy, nervousness and gastrointestinal irritability. Dr. Thompson requested authorization for additional testing after speaking with Dr. George Harwood, medical examiner for the Fund.

On October 14, 1977, Dr. Harwood reported after speaking with the plant manager and Mr. George Baker, an industrial hygienist, he did not see any need for additional testing based on the low level of lead in claimant's blood.

The Fund denied the claim on November 16, 1977.

Dr. Forest Rieke, in January 1978, reported the hair analysis was not agreed upon by experts for use in testing. He felt claimant showed "the type of elevation of body burden and blood lead expected in a battery shop worker. He carries an increased body burden of lead, insufficient to cause illness but subject to aggravation". Dr. Rieke could only speculate as to the cause of claimant's symptoms in late summer and early fall of 1977 for which claimant had been treated. He felt claimant's symptoms may have been due to excessive lead absorption. A lab test of claimant's urine before chelation revealed a level of lead of 170 micrograms per liter; eight hours after therapy 740 micrograms per liter; and sixteen hours after therapy 200 micrograms per liter.

Dr. Thomas Mancuso, research professor at the University of Pittsburg, in June 1978, told claimant that systems of chronic lead poisoning could gradually appear. He further indicated that lead levels 10 times higher after chelation meant there was abnormal lead in the body and consistent with lead poisoning.

Dr. N. D. Smith, a specialist in internal medicine, was deposed. Dr. Smith first examined claimant on September 22, 1977. Claimant testified during this deposition regarding the episode of cleaning out the tank. Dr. Smith felt claimant probably had lead exposure, but not lead toxicity. Dr. Smith indicated he relied on the blood test as being more diagnostic. Claimant's blood test for lead were in the normal range. He did not feel claimant was in need of chelation therapy. He stated he did not know whether claimant had lead poisoning which was symptomatic in August 1977. In his opinion, it was very unlikely for a person to have lead toxicity if the urine lead level was normal before chelation. He noted it was possible claimant's blood lead was normal at the time he had seen him because of the chelation treatments.

Dr. Robert Armbruster was also deposed. He stated hair analysis is absolutely meaningless as a diagnostic tool. He felt claimant may have suffered from lead exposure for an hour or so, but found no indication of lead intoxication. Dr. Armbruster indicated that besides the lead taste, one exposed to enough lead, would have other symptoms right away rather than months later. He felt the 740 microgram reading Dr. Rieke reported was a little higher than he expected. He could not explain the difference between the readings Dr. Thompson obtained and those Dr. Rieke obtained. Dr. Armbruster stated that there was sometimes a problem with contamination of the containers and techniques of analysis.

Dr. Thompson was also deposed. He first examined claimant in August 1977. Claimant reported he had felt tired and run down, irritable, and had been having stomach problems for several months. Dr. Thompson felt these were classic symptoms of lead intoxication. He stated that based on his test and Dr. Rieke's test, he concluded claimant was "loaded with lead". He felt claimant's work in the tank had caused claimant to inhale large amounts of lead. His diagnosis was lead poisoning.

The Referee found that based on all the evidence in this case claimant's exposure to lead at work resulted in symptoms and the necessity for seeking medical treatment. Further, the Referee found that claimant suffered from a disease that arose out of and in the course of his employment, and to which he was not ordinarily subjected or exposed other than during his employment. Therefore, the Referee set aside the denial and remanded the claim to the Fund for acceptance and payment of benefits.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board finds the opinions of Drs. Smith and Armbruster more persuasive in this case. The hair analysis technique used by Dr. Thompson appears to be a questionable technique.

Dr. Smith, after listening to claimant's description of his work in the tank and after reviewing the normal blood test for lead, opined claimant probably had lead exposure, but not lead intoxication. He stated it was unlikely for a person to have lead toxicity if the urine lead level was normal before chelation.

Dr. Armbruster did not feel the hair analysis was meaningful. He felt claimant may have suffered from lead exposure for about an hour or so, but found no indication of lead intoxication.

Dr. Thompson's opinion is based on his test and examinations. The test he used does not appear to be accepted in the medical community as being of much use for diagnostic purposes. The Board does not find his opinion based in part on this test, to be more persuasive than that of Drs. Smith and Armbruster.

Dr. Rieke felt claimant had an elevated blood lead expected of battery shop workers, but at the time of the examination was insufficient to cause illness. The Board concludes that based on claimant's work with this employer for five years, his cleaning of the tank, and the medical evidence, it cannot conclude that claimant has proven by a preponderance of the evidence his claim for an occupational disease. Therefore, the Board would reverse the Referee's order and affirm the denial of the Fund.

ORDER

The Referee's order, dated August 2, 1979, is reversed in its entirety.

The State Accident Insurance Fund's denial, dated November 16, 1977, is affirmed.

WCB CASE NO. 78-7847 March 13, 1980

MARTHA BEAN, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 78-64 DIR March 13, 1980

JOHN T. CHECKAL, CLAIMANT
Harold W. Adams, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Employer's Attys.
Order

The Workers' Compensation Department requested Board review of the Referee's order which denied its Motion to Dismiss.

This case concerns an order issued by the Director of the Workers' Compensation Department which reduced the billing of Dr. John T. Checkal, D.C., from $2,310.00 to $1,501.00 pursuant to OAR 436-69-410. The appeal notice referred the parties to ORS chapter 183. Dr. Checkal appealed the Director's order and a hearing was set and held before a Referee of the Workers' Compensation Board.

On June 19, 1979, the Referee entered an order continuing the case and directing the resetting of the case for further hearing.

On June 18, 1979, the Workers' Compensation Department moved to dismiss the case. On July 31, 1979, the Referee entered his order denying the motion and setting forth appeal rights advising the parties they could appeal to the Workers' Compensation Board if they were dissatisfied with the order.

The Board, after reviewing the record in this case, concurs with the Referee's decision to deny the Workers' Compensation Department's motion. The Board finds, however, this order is not in fact a final and appealable order, but merely an interim order. Further, the Board does not feel it is the correct party to rule on any issue in this case. These proceedings are controlled by ORS chapter 183. Under chapter 183, the Board and the Department rules, a party aggrieved by an order of the Department can request a hearing before a Referee of the Workers' Compensation Board. Once the Referee has entered a final order, any person adversely affected or aggrieved by the order or any party to the agency order is entitled to judicial review of the final order. The Board finds the Referee's order is not a final order and is not appealable. The Board further finds it is not the correct body to which such appeals should be taken. Therefore, the Board would dismiss the Workers' Compensation Department's request for review and refer this matter to the Referee for an additional hearing and the issuance of a final order which would be subject to judicial review.

WCB CASE NO. 78-2003 March 13, 1980

FRANCIS A. EASTBURN, CLAIMANT
A.C. Roll, Claimant's Atty.
Kaufman & McMinimee, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which granted claimant an award of additional compensation equal to 80° for 25% unscheduled disability for his low back injury. Claimant had previously been granted an award of compensation of 40% for unscheduled disability for his back injury and an award of compensation of 15% for the loss of the left leg. The employer contends this increased award is excessive.

FACTS

Claimant, a 58-year-old maintenance man, sustained a compensable injury to his low back on August 22, 1975. The injury occurred when he slipped while lifting on a barrel of oil. The injury was first diagnosed as an acute lumbar facet syndrome. In February 1976, Dr. Zavin reported claimant could return to work with limited lifting and bending. He felt claimant had a mild permanent partial disability as a result of this injury.

In March 1976, Dr. Samuel Scheinberg opined claimant's condition was medically stationary. His final diagnosis was a mild to moderate lumbosacral strain.

A Determination Order, dated April 6, 1976, as amended on April 8, 1976, awarded claimant compensation for temporary total disability and compensation equal to 48° for 15% unscheduled disability and compensation equal to 22.5° for 15% scheduled disability to the left leg. Claimant appealed this Determination Order.

A hearing was held in August 1976. The Referee granted claimant compensation equal to 128° for 40% unscheduled disability and compensation equal to 22.5° for 15% scheduled disability of the left leg in lieu of the previous award granted by the Determination Order. This order was affirmed by the Board and not appealed further.

The claim was reopened in December 1976 on the basis of an aggravation. Another hearing was held on the issue of temporary total disability, penalties and attorney's fees. The Referee granted additional compensation for temporary total disability, penalties and attorney's fees. This order was affirmed on review.

Dr. Harry Beckwith, in March 1977, opined claimant had an aggravation of his condition in December 1976 and felt the claim should be reopened. He felt claimant was "disabled for the type of work he knew how to do".

In July 1977, Dr. Lawrence Zavin diagnosed chronic lumbosacral strain and possible L5 nerve root irritation. He felt claimant should be provided job placement assistnace "in an attempt to find some type of work involving reduced amounts of twisting, bending and lifting".

Dr. Zavin, in February 1978, felt claimant's condition was somewhat worse than in June 1977 because of acute tenderness at the left sacroiliac region.

Claimant was examined in San Francisco, California at the employer's request by Dr. Knox Finley. Dr. Finley opined, based upon his findings, claimant had recovered from his 1975 injury, but did find claimant had a psychological problem. He felt claimant could return to work and found no objective findings to relate claimant's condition to his 1975 injury. Dr. Finley felt the psychological problems were related to the medical attention claimant was receiving and the non-taxable disability payments which amount to more than claimant would make if he worked, all of which was contributing to claimant's lack of motivation to return to work. Dr. Zavin concurred with this report. However, Dr. Zavin indicated he agreed claimant had minimal impairment. Dr. Zavin had examined claimant in September 1978 and found no change in his condition.

In May 1978, Dr. Beckwith reported he had seen claimant in December 1977, February 1978 and April 1978 primarily for a varicose problem. He noted claimant had had exacerbations of his back problem without any specific activity producing them. He did not feel claimant's condition was stationary. Dr. Beckwith did not agree with Dr. Finley's conclusions because of the recurring exacerbations claimant experienced. In January 1979, Dr. Beckwith indicated claimant had limitations in walking, standing, kneeling, lifting, pulling and should not stoop.

A Determination Order, dated August 18, 1978, awarded additional compensation for temporary total disability.

Dr. Finley testified at the hearing he felt claimant had recovered from his injury and could return to work. He did not feel there was anything psychologically wrong with claimant and felt claimant was not motivated to return to work. In his examination, Dr. Finley felt claimant had manifested a hysterical component.

Claimant testified he had back pain which was increased by twisting, walking and raking, prolonged sitting and riding. He said he sometimes had left leg pain and this had caused him to fall. In December 1975, claimant indicated he had tried to establish a route selling wine, but was unable to continue it because of back and leg pain. His previous work experience has been in logging and mill work.

The Referee concluded claimant was not permanently and totally disabled. The Referee found claimant could not return to his previous employment or similar jobs and, based on the evidence in this case, granted claimant an award of additional compensation equal to 80° for 25% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the Referee's award of additional compensation and restore the Determination Order, dated August 18, 1978. The Board finds the preponderance of the evidence does not indicate claimant has suffered any more loss of wage earning capacity as a result of the aggravation of his original injury. Claimant was barred from his previous type of employment and related types of employment prior to his condition aggravating. Further, the preponderance of the evidence indicates the limitations placed on claimant were the same before the first claim closure as they are now. Dr. Beckwith, in July 1978, indicated at times claimant's examination was essentially normal and at other times he had areas of muscle spasm and local areas of difficulty in the lumbosacral area. The Board finds claimant has not proven by the preponderance of the evidence he has sustained an additional loss of wage earning capacity and reverses the Referee's award of additional compensation for unscheduled disability.

ORDER

The Referee's order, dated June 19, 1979, is reversed in its entirety.

The Determination Order, dated August 18, 1978, is reinstated and affirmed.

WCB CASE NO. 79-1607 March 13, 1980

ROBERT C. EMBERSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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. Claimant's attorney is not entitled to an attorney's fee at Board level.

WCB CASE NO. 79-3277 March 13, 1980

GARY D. MACOMBER, CLAIMANT
Gracey & Roeschlaub, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) and claimant seek Board review of the Referee's order which awarded claimant compensation equal to 32° for 10% unscheduled disability for his low back injury; awarded claimant compensation for temporary total disability from January 19, 1979 through March 5, 1979, less time worked; denied claimant's request for penalties and attorney fees for the Fund's unreasonable conduct; and granted claimant's attorney a fee out of the increased compensation awarded. The Fund contends the award of compensation for unscheduled disability is not supported by the evidence.

Claimant contends he is entitled to penalties and attorney's fees for the Fund's unreasonable conduct in terminating his compensation for temporary total disability on January 19, 1979.

FACTS

Claimant, a 23-year-old kitchen worker, sustained a compensable injury to his low back on December 27, 1978 when he slipped and fell while walking into a cooler. This injury was diagnosed as a lumbosacral strain. On December 29, 1978, Dr. Charles Wilson reported that claimant's condition was not medically stationary and that he was unable to return to regular employment.

On January 26, 1979, Dr. Winfield Needham reported that he had last seen claimant on January 9 and that claimant had not kept an appointment scheduled for January 19, 1979. On March 5, 1979, Dr. Needham reported that he had examined claimant on that date and that claimant was not released for regular work. On March 28, 1979, Dr. Needham reported he had not seen claimant between January 19 and March 5, 1979 and was unable to verify time loss. He did verify time loss after the March 5, 1979 date.

On March 20, 1979, Dr. Grant Lawton reported that claimant complained of constant pain which was aggravated by prolonged sitting, standing, bending, or lifting. He felt claimant sustained a contusion and soft tissue strain. Dr. Lawton recommended claimant begin an exercise program and hoped, at that point, to get him either into physical therapy or some type of back therapy program. Dr. Lawton released claimant for regular work on April 16, 1979.

On July 10, 1979, Dr. Lawton reported that claimant had returned to work as a cook in a restaurant. Claimant related a slow, steady improvement in his condition over a two month period. He still complained of a constant mild low back ache which tended to get worse towards the end of the day and was aggravated by any repeated bending or lifting. Dr. Lawton opined that claimant's condition was medically stationary and that claimant had essentially fully recovered from his industrial injury. He felt that claimant had some continuing symptoms of a chronic strain which would improve with improved body mechanics and an exercise program.

A Determination Order, dated August 7, 1979, awarded claimant compensation for temporary total disability from December 27, 1978 through January 19, 1979 and from March 5, 1979 through April 15, 1979.

Claimant has an 11th grade education and some training in food service supervisory type of work. He testified he has followed restaurant work since he was sixteen years old, performing various jobs. He indicated that after his injury he was required to take a less demanding position in this field because of his physical limitations. He stated that his current employer has modified his job so that he is not required to lift any more than 10 pounds, allows him to rest more frequently than other workers thus minimizing the amount of standing he does on the job. Claimant feels that if he worked for anyone else and took as many breaks as he does in his present job that he probably would be terminated.

Claimant stated that he had not received any compensation for temporary total disability from January 19, 1979 through March 5, 1979. He indicated he was neither medically stationary nor released for work during this period. The evidence indicates the Fund had "suspended" claimant's payments during this period of time. The evidence further indicates that the Fund did not make an application to the Workers' Compensation Department for authorization to suspend or terminate claimant's temporary total disability compensation.

The Referee found, based on all the evidence, that claimant had sustained minimal loss of wage earning capacity. He granted claimant an award of compensation equal to 32° for 10% unscheduled disability for his low back injury. The Referee further found that claimant was entitled to compensation for temporary total disability from January 19, 1979 through March 5, 1979, less time worked. The Referee found that claimant was not medically stationary nor released for work during that time period. The Referee further found that the Fund had not been authorized by the Workers' Compensation Department to suspend or terminate time loss benefits. The Referee concluded the Fund's suspension of compensation payments was not unreasonable and found that claimant was not entitled to penalties or attorney's fees.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, would modify the Referee's order. In this claim, the Board finds the claimant has failed to prove by a preponderance of the evidence that he has suffered a loss of wage earning capacity. Dr. Lawton, in his last report, indicated that claimant had fully recovered from his industrial injury and would continue to improve. Claimant continues to complain of a mild low back ache, but the Board concludes this continuing problem does not support a finding of loss of wage earning capacity. Therefore, the Board would reverse that portion of the Referee's order which granted claimant an award of compensation equal to 32° for 10% unscheduled low back disability.

The Board finds the acts of the Fund in unilaterally terminating claimant's compensation for temporary total disability were unreasonable. The Fund did not pay temporary total disability benefits from January 19, 1979 through March 5, 1979. The Fund did not make an application as required under the rules to suspend compensation. (OAR 436-54-284 and 286.) Claimant testified because of his loss of income he suffered considerable financial hardships. The Board finds the acts of the Fund in this case were unreasonable and justifies the awarding of a penalty equal to 5% of the compensation awarded for the period of January 19, 1979 through March 5, 1979, less time worked, and an attorney fee equal to $50. In making this finding the Board has considered the unreasonable conduct of the claimant as a mitigating factor. Nonetheless, the Fund did not follow the rules of procedure adopted by the Workers' Compensation Department. The claimant's actions although unreasonable were not sufficient to excuse the Fund from compliance with OAR 436-54-284 and 286.

The Board finds the Referee erred by not awarding claimant's attorney a fee out of the additional compensation for temporary total disability. The Board would award claimant's attorney a fee out of this increased compensation equal to 25% of the additional temporary total disability not to exceed $750.

ORDER

The Referee's order, dated October 10, 1979, is modified.

The Board would affirm the Referee's award of compensation for temporary total disability for the period January 19, 1979 through March 5, 1979, less time worked, and would award a penalty equal to 5% of this amount and an attorney fee equal to $50 for the Fund's unilateral termination of claimant's benefits. Claimant's attorney is also entitled to an attorney's fee equal to 25% of the compensation for temporary total disability granted by the Referee's order and affirmed by this order, payable out of said compensation as paid, not to exceed $750.

The remainder of the Referee's order which granted claimant an award of compensation equal to 32° for 10% unscheduled low back disability, and awarded his attorney an attorney fee equal to 25% of the increased permanent disability not to exceed $2,000 is reversed.

CLAIM NO. C 392277 March 17, 1980

SUSAN L. AULT, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 11, 1979, claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on August 30, 1972. Claimant's claim was originally closed by a Determination Order, dated October 30, 1972, and her aggravation rights have expired. Attached to the request were medical reports in support thereof.

On September 7, 1979, Dr. Patrick Golden indicated claimant was suffering from chronic low back strain which he was unable to unequivocally relate to her 1972 injury. Dr. Larry Jackson, on September 10, 1979, stated claimant's condition was possibly related to her 1972 injury although he could not state for sure. He found that her chronic obesity contributed greatly to her condition.

On December 13, 1979 the Board asked the Fund to advise it of the Fund's position within 20 days. The Fund requested time to have claimant examined by the Orthopaedic Consultants.

On February 4, 1980, the Orthopaedic Consultants diagnosed "(1) Chronic lumbosacral strain, (2) Mild S1 radiculopathy on the right side -- old and stable, (3) Severe exogenous obesity, and (4) Functional overlay, moderately severe". They found her condition stationary and recommended no further care. They related her condition to the 1972 industrial injury but could find no evidence of a worsening since the last closure of her claim. The Fund advised the Board, based on that report, that it would oppose the reopening of claimant's claim.

The Board, after thoroughly considering the evidence before it, concludes that claimant has failed to prove her condition has worsened since the last award or arrangement of compensation. Claimant's request for own motion relief for the August 30, 1972 industrial injury should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-4521 March 17, 1980

FRANK ERICKSON, CLAIMANT
Haviland, deSchwinitz, Stark
& Hammack, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the denial issued by the State Accident Insurance Fund (Fund). Claimant contends that he sustained a compensable injury.

FACTS

Claimant, a 47-year-old truck driver, alleges he sustained a compensable injury to his back on March 29, 1978 when he slipped and fell off a truck. At first claimant did not tell any of his co-workers or his employer that he had slipped and fallen, because he thought he was going to be all right. He had a conversation on the day of the alleged injury with the employer and there was a discussion about claimant taking two salary advances.

Claimant testified the next morning he was unable to get out of bed and either he or his wife had called to advise his employer he wouldn't be able to work. The second day after the alleged injury, claimant said he called the employer. The employer was mad at claimant and fired him. Claimant asked if his wife could pick up his check and the employer said she could.

Since claimant's wife did not know how to get to the employer's place of business, claimant accompanied her to pick up the check. Claimant's wife picked up the check and the employer asked her where claimant was. Claimant's wife told him claimant was in bed, when in fact he was across the street from the employer's place of business in a restaurant.

On the way home, claimant and his wife were seen by the employer. There was discussion between them. Claimant had not seen a doctor, so the employer took him to one.

Claimant testified that because the employer's place of business was outside of the Portland area, claimant and his wife were preparing to move prior to claimant's being fired. After claimant was fired, claimant obtained a job in Yreka.

The employer testified claimant told him about the alleged injury two days after it had allegedly occurred.

On March 31, 1978, Dr. Claus Martin reported he examined claimant and diagnosed a contusion sprain of the lower back. Claimant told the doctor he fell off the step of a truck on March 29, 1979. Claimant indicated this was the last day he worked.

On April 27, 1978, the Fund denied claimant's claim. The Fund concluded there was insufficient evidence that claimant had been injured on March 29, 1978 in the course and scope of his employment with this employer.

Dr. Ralph Thompson, on May 4, 1978, indicated that claimant gave a history of an injury on March 27, 1978. He indicated claimant had had severe sciatica scoliosis with a list to the right and pain which radiated into the right leg. Dr. Thompson reported the x-rays were normal, however, he strongly suspected a herniated disc in the low back area. A myelogram was performed and revealed defects at the L4-5 and L5-S1 levels which were consistent with herniated nucleus pulposi. On May 9, 1978, Dr. Thompson performed a laminotomy and excision of the disc. His final diagnosis was a herniated nucleus pulposus at the L4 and L5 levels on the right side.

On June 8, 1979, Dr. A. F. Martin reported claimant complained of residual back and right leg pain which claimant attributed to an accident on March 27, 1978. Claimant indicated he had never had any relief of the pain in his right leg and had been unable to return to work.

At the hearing, claimant testified on March 19, 1978 he had bought a motorcycle for his son. He indicated because of difficulty with the motorcycle he had gotten on it and accidently kicked the clutch in gear causing the bike to take off and go about 10 feet before running into some holly bushes. Claimant said that his face was scratched. He indicated he did not fall off the bike. Claimant's wife corroborated his testimony.

Claimant testified the date he injured his back while at work with this employer was March 29, 1978. His co-workers testified the last day claimant worked was March 27. However, the employer testified that the last day claimant worked was March 29, 1978.

The Referee found, based on all the evidence that claimant had not proven by a preponderance of the evidence that he had sustained a disabling injury arising out of and during the course of his employment. Therefore, the Referee affirmed the denial of the Fund.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, reverses the Referee's order. The Board finds there is no evidence indicating the motorcycle incident referred to caused any injury to claimant's back. Dr. Martin first examined claimant on March 31, 1978 and was advised by the claimant that he had been injured on March 29, 1978. Claimant also advised the doctor that the last day he had worked was on the 29th of March, 1978. The employer also testified that the last day claimant worked was March 29, 1978. The Board finds, based on all the evidence in this case, claimant has proven by a preponderance of the evidence that he did sustain a disabling injury which arose out of and during the course of his employment with this employer. Therefore, the Board would set aside the denial issued by the Fund and remand this claim to it for acceptance and payment of compensation under the Workers' Compensation law until closed pursuant to ORS 656.268.

ORDER

The Referee's order, dated July 16, 1979, is reversed.

The letter of denial issued by the State Accident Insurance Fund on April 27, 1978 is set aside and the claim is remanded to it for acceptance and payment of benefits under the Workers' Compensation law until the claim is closed pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services both at hearing level and at the Board level a sum of $750, payable by the Fund.

SAIF CLAIM NO. C 58054 March 17, 1980

JACK J. FISHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On January 31, 1967, claimant sustained an injury to his right elbow. A Determination Order, dated February 23, 1968, granted claimant an award of 5% loss of use of the right arm. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with the right arm and his claim was subsequently reopened and closed repeatedly resulting in claimant being awarded a total of 15% loss of use of the right arm.

On February 13, 1979, Dr. Thad Stanford performed a lysis and transposed the right ulnar nerve. On February 14, 1979, the claim was reopened by an Own Motion Order. On June 4, 1979 claimant returned to work.

On January 9, 1980, Dr. Stanford reported that the claimant had undergone nerve block injections by Dr. John Roth which did not help him. He noted that claimant had a job which had been modified so he did not have to do heavy repeated lifting with his arm. He indicated that such activity caused the claimant a great deal of trouble. Dr. Stanford did not feel claimant should do heavy or repeated lifting and should not lift over 15 to 20 pounds except on rare occasions. He felt claimant's condition was medically stationary.

On January 24, 1980, the Fund requested a determination of claimant's current disability. On March 4, 1980, the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted an award of additional temporary total disability from February 12, 1979 through June 3, 1979 and further awarded an additional 5% permanent partial disability of the right arm.

The Board concurs with the Evaluation Division's recommendation concerning additional temporary total disability. However, the Board does not concur with the Evaluation Division's recommendation of an additional 5% permanent partial disability of the right arm. The Board finds, based on the limitations set forth by Dr. Stanford, claimant has sustained a greater loss of use due to this injury. Therefore, the Board would award claimant an additional award of 15% permanent partial disability of the right arm.

ORDER

Claimant is hereby granted an award of compensation for additional temporary total disability from February 12, 1979 through June 3, 1979 and an additional award of 15% permanent partial disability for loss of use of the right arm.

SAIF CLAIM NO. YC 26513 March 17, 1980

ELDREDGE E. GRAHAM, JR., CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 8, 1966, claimant sustained a compensable injury to his back. His claim was first closed in October 1966 and his aggravation rights have expired. On November 8, 1978, the Workers' Compensation Board entered an Own Motion Determination granting claimant compensation for temporary total disability from October 13, 1967 through Octboer 22, 1967, from December 6, 1976 through April 25, 1977 and temporary partial disability from April 26, 1977 through September 13, 1978. Claimant was also granted an additional 20% loss of an arm by separation for his unscheduled disability.

On February 27, 1980, the Fund advised the Board that it had received a report from Dr. Howard Johnson requesting authorization for a refusion. It indicated it did not oppose reopening claimant's claim for this surgery.

The Board finds that claimant's claim should be reopened as of the date he enters the hospital for the surgery recommended by Dr. Howard Johnson and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-1611 March 17, 1980

PATRICIA E. HARRIS, CLAIMANT
Morley, Thomas & Kingsley,
Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks Board review of the Referee's order which granted claimant compensation equal to 64° for 20% unscheduled disability, granted compensation for temporary total disability from December 13, 1978 to January 3, 1979 and ordered that medical services for the low back subsequent to claim closure by paid under ORS 656.245.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

The Board finds that technically this claim should have been reopened when claimant was hospitalized and paid time loss and medical benefits. After claimant was stationary, the claim should have been referred to the Evaluation Division of the Workers' Compensation Department for evaluation. In this case and based on the facts herein, the Board concludes it is not necessary to remand this case to the Referee to refer this case to the Evaluation Division. The Board finds that when a claimant is paid compensation for temporary total disability, the claim cannot be handled similar to the case where a claimant is provided only additional medical care under ORS 656.245. In situations where compensation for temporary total disability is paid, a carrier should reopen the claim until closed under ORS 656.268.

ORDER

The order of the Referee, dated October 30, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $200, payable by the carrier.

SAIF CLAIM NO. AA 784379 March 17, 1980

IRENE C. PANEK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to her left lower leg on February 10, 1960. Claimant underwent several surgeries and has received awards totalling 55% loss of the left foot. Her aggravation rights have expired.

Claimant's claim was reopened for further treatment on November 7, 1977. After treatment by Dr. Bietz, her claim was closed on April 6, 1978 with compensation for temporary total disability only.

Claimant, by and through her attorney, requested the Board to increase her award of compensation to 85% based on the medical evidence and the fact that she has been unable to engage in gainful activity since the last reopening. Mr. Robert Helms, Sheridan City Superintendent, also forwarded several medical reports to the Board in support of claimant's contention. The Board, after thoroughly considering the evidence before it, felt claimant had been adequately compensated by the award of 55% and denied her request to increase the award.

Subsequently, the Board was furnished with a report of Dr. Bietz, dated September 24, 1979, which indicated that claimant was suffering from repeated breakdown of ulcerations on her ankle and it was, therefore, impossible for her to return to work. He felt she was permanently disabled.

On October 15, 1979, the Board advised the Fund that it had received the letter from Dr. Bietz and asked it to advise the Board of its position within 20 days. On October 19, 1979 the Fund indicated it felt Dr. Bietz's report did not "constitute new or conflicting evidence regarding permanent impairment" and, therefore, it recommended the Board deny own motion relief. On October 26, 1979, the Board requested the Fund make arrangements to have claimant examined by a doctor of its choice and upon receipt of that report it would make its decision.

On February 28, 1980, the Fund forwarded to the Board a report from Dr. Calvin J. Collins, dated December 11, 1979. Dr. Collins indicated that claimant continues to suffer from a post-phlebitic problem with stasis dermatitis and ulcers. He recommended treatment with a Primer Boot until her condition heals with the possibility of bedrest and elevation becoming necessary. He felt she was totally disabled from work. Dr. Bietz, on February 4, 1980, advised the Fund that claimant's condition was medically stationary. He felt she would not be able to work unless she could stay off her feet and keep them elevated throughout the work shift. He stated that her overweight condition was a factor in her continuing disability. The Fund advised the Board claimant's condition could be treated under the provisions of ORS 656.245 and it felt that own motion relief should be denied.

The Board, after thoroughly considering the medical evidence before it, concludes that claimant has been adequately compensated by the awards totalling 55% for loss of the left foot. It feels that any medical treatment which would be necessary in the future could be provided under ORS 656.245 and, therefore, there is no reason to reopen her claim. Claimant's request for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. Unknown March 17, 1980

A.K. STONE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 21, 1972, claimant sustained a compensable injury to his head, left shoulder, left hip and back. His claim was first closed on June 7, 1974 and his aggravation rights have expired. Claimant continued to have back problems throughout the years. On January 2, 1980, claimant failed to return to work after a vacation because of his back pain. He felt a trial period off work would be beneficial and the doctors who examined him agreed with this. Claimant's complaints include pain in getting up in the morning with a decline in vigor as the week progresses. Claimant is concerned that all of his spare time is spent trying to recuperate enough so that he can continue working.

On February 12, 1980, the self-insured employer indicated it had no objection to reopening claimant's claim commencing January 2, 1980.

The Board, after considering the evidence before it, concludes that claimant's claim should be reopened as of January 2, 1980 and until closed pursuant to ORS 656.278, less time worked.

IT IS SO ORDERED.

WCB CASE NO. 78-6896 March 17, 1980

LORRAINE WRIGHT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' 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. 79-3081 March 19, 1980

LORA J. BROWN, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which remanded the claim to it for acceptance as a compensable injury, awarded penalties and an attorney's fee for its unreasonable denial and an attorney fee to claimant's counsel for prevailing and overcoming the denial. The Fund contends its denial was not unreasonable and that the denial should be affirmed.

FACTS

Claimant, a 21-year-old greenchain puller, alleges an injury to her left knee on January 3, 1979 when she tripped over a sticker and fell striking her knee. Dr. R. L. Falk diagnosed a "bruised, strained/sprained" left knee. Dr. Falk felt claimant could return to work, but should not perform work requiring use of the left knee.

On January 15, 1979, Dr. Keith Woolpert felt claimant would be able to return to work in two weeks. He also diagnosed a knee strain. He had noted claimant complained of tenderness in the knee. Claimant gave a history of injuring the knee at work on January 3, 1979.

On March 2, 1979, the Fund denied responsibility for additional medical care and time loss. The Fund noted it had accepted the January 3, 1979 accident and claimed that injury had caused no time loss. It would continue to pay any medical expenses related to the January 3, 1979 injury. However, it had information that indicated claimant had injured her left knee in an off-the-job incident on January 6, 1979. Therefore, it denied responsibility for claimant's left knee condition dating from the January 6, 1979 incident.

At the hearing, various witnesses testified they had observed claimant dancing on January 6, 1979 from approximately 10:00 p.m. until 2:00 a.m. They testified claimant did not appear to have any difficulty with her knee.

Claimant admitted dancing. She testified that she returned to work on January 4, 1979, but her employer advised her there was no work available for her within her restrictions.

The Referee found there was no evidence of an intervening incident between January 3, 1979 and January 15, 1979. The Referee found both physicians connected the knee strain to her fall at work. Therefore, the Referee remanded the claim to the Fund for acceptance as a compensable injury, effective January 3, 1979; assessed a sum equal to 25% of the compensation due for temporary total disability as a penalty for its unreasonable denial; and awarded claimant's attorney the sum of $850 as a fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's finding the claim compensable. However, the Board does not find that the Fund's act in this case rise to the level of unreasonable resistance. Claimant's condition was stationary at the time the denial was made. An insurance carrier can deny a claim after it has first accepted it. Therefore, the Board, based on all the evidence in this case, would reverse the Referee's awarding of penalties and an attorney's fee in this case, but would affirm the remainder of the Referee's order.

ORDER

The Referee's order, dated October 10, 1979, is modified.

That portion of the Referee's order which awarded claimant an amount equal to 25% of compensation due for temporary total disability, as a penalty for unreasonable denial, pursuant to ORS 656.262(8) is reversed and the award of attorney fees is modified. Claimant's attorney is hereby awarded the sum of $500 as and for a reasonable attorney fee for overcoming the denial. The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $100, payable by the Fund.

WCB CASE NO. 78-5805 March 19, 1980

AHMAD NOOR KOJAH, CLAIMANT
Malagon & Yates, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Amended Order On Review

An Order on Review was issued in the above entitled matter on March 10, 1980. On page five of this order it erroneously indicates that it was entered on February 10. Therefore, the Board amends that portion of the order so that it correctly reads "this 10th day of March, 1980"; claimant's appeal rights shall run from that date. The remainder of the order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 77-5296 March 19, 1980

WILLADEAN PACHECO, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which set aside its denial of May 9, 1978 and remanded claimant's aggravation claim to it for acceptance and payment of compensation and other benefits and awarded claimant's attorney a fee. The Fund contends that its denial should have been affirmed.

FACTS

Claimant, a 41-year-old belt worker, sustained a compensable injury to her neck, back, right shoulder and hand on December 12, 1973 when she slipped and fell striking her back and right shoulder. This injury was diagnosed as an acute cervical strain, lumbosacral strain, and a strain and contusion of the right shoulder and hand. A myelogram was performed in April 1974 and no significant pathology was found.

On April 30, 1974, Dr. Albert Winkler indicated that claimant complained of numbness and tingling in the right leg, weakness of the right leg, give away tendency of the right leg, pain in her neck with decreased range of motion and headaches. He felt claimant was unable to work.

In August 1974, Dr. James Mason, medical examiner at the Disability Prevention Center, reported that claimant complained of pain in the neck, right shoulder, right arm, right back, right leg and numbness in the right hand, swelling in her right foot, headaches and a numb, burning sensation in the interscapular area. Dr. Julia Perkins, a psychologist, reported claimant viewed her injury as a very significant event in her life and was upset by the persistence of pain. She felt the injury had moderately influenced claimant's current upset. Dr. Mason felt that claimant's condition was stationary. In his opinion the total physical disability was "mild". He felt a job change was necessary, but considered claimant's motivation "grossly suspect". He felt that claimant should avoid any work which required excessive lifting, bending, or twisting or excessive use of her arms. Dr. Mason noted that the claimant grossly exaggerated or "distorted" during certain portions of the examination.

In October 1975, claimant began a training program to become a barber.

In February 1975, Dr. Winkler indicated he would like to see claimant return to work which would have limited bending, lifting, twisting and a limitation of other "excessive stresses".

A Determination Order, dated March 4, 1975, awarded claimant temporary total disability compensation and compensation equal to 64° for 20% unscheduled disability for her back-neck and right shoulder injury.

Claimant was dissatisfied with this award and requested a hearing. The matter was settled by a stipulation, dated July 7, 1975, which awarded claimant an additional award of compensation equal to 48° for 15% unscheduled disability for her injury to her back, neck and right shoulder.

In June 1976, claimant completed her barber training program. She obtained a job at her sister's barber shop, then opened her own shop in Dayton, but stated that her arm began to bother her, causing her to cease working.

On November 4, 1976, Dr Winkler indicated that claimant had advised she had been unable to work since June 11, 1976. He reported she had attempted to go to work on September 7, 1976, but was unable to work because of pain in her right arm and leg. Claimant complained of having severe headaches, pain in her right shoulder with tenderness across her upper back including the "trapezius muscle, deltoid and brachiaradialis muscle" and tenderness of the right sacroiliac joint. Claimant advised the doctor that on June 12, 1976 she had caught her right arm in a car door which caused her a lot of pain in the arm and aggravated her other injuries.

The State Accident Insurance Fund treated this letter as a request for reopening on the basis of aggravation claim. On November 17, 1976, the Fund denied claimant's aggravation claim. Claimant requested a hearing on this denial.

On February 2, 1977, Dr. Winkler reported claimant continued to complain of pain in various parts of her body. He felt claimant had "worsened" and her condition was gradually deteriorating.

In April 1977, Dr. John Burr reported he found no organic basis for claimant's "tremendous symptom complex, which she subjectively has". He felt claimant suffered from emotional overlay and from worry and fear. He felt that the claimant would be unable to return to gainful employment.

On April 18, 1977, an order was entered which recited that the Fund had agreed to pay claimant an additional award of compensation equal to 16° for 5% unscheduled disability. This was the last arrangement or award of compensation.

In February 1978, Dr. Winkler reported claimant continued to complain of pain in the shoulder and neck. She also complained of severe pain in the right rhomboid muscle, pain in the low back area and around the sacroiliac joint. He felt that claimant's pain was aggravated by emotional distress. He doubted if claimant would be able to do any full time barber work because of the neck and shoulder pain.

On April 6, 1978, Dr. Winkler requested the claim be reopened because of an "aggravation" of claimant's condition. He indicated she had been unable to do her work as a barber because of increasing pain in her neck and shoulders. He felt this type of work activity was detrimental to her health and was going to cause her more pain and discomfort.

On April 28, 1978, Dr. Joe Much, medical consultant for the Fund, opined that claimant's condition had not worsened. On May 9, 1978, the Fund denied claimant's request to have her claim reopened.

In July 1978, Dr. Stephen Stolzberg opined that all of claimant's complaints were attributable to her cervical spondylosis condition. He found that claimant had neither clinical nor electrophysiological evidence of a radiculopathy. He opined the pain arose from the degenerative process in the vertebral column.

On December 23, 1975, claimant had been involved in a head-on collision with another vehicle. She suffered a cervical muscle strain and a sprain of the trapezius muscles. She testified this bothered her for approximately two weeks.

On August 20, 1979, Dr. Winkler reported that claimant continued to have complaints of pain in the right shoulder, right side of the neck and difficulty in performing any type of repetitive activities. He felt that most of claimant's neck problems were related to the spondylosis of her cervical vertebrae. He noted the degenerative changes had increased since her injury, and felt this was a continuing and long-lasting "affair".

At the hearing, claimant testified, in her opinion, her condition has gradually worsened since February 1978. She testified she was not able to control the clippers while she was barbering. She indicated her problems are in the same area she was having problems with following her 1973 injury. She stated she has had to cut down the hours she works at her barbershop because of this condition.

Dr. Winkler was deposed and testified he diagnosed claimant's condition as "spondylosis'. He indicated, to the extent of reasonable medical probability, claimant's incident when she slipped and fell against the car exacerbated her shoulder condition and caused the arm condition. Dr. Winkler stated he had been advised that claimant had merely slipped and hit her shoulder, neck and head on a car door in 1975. He did not know she had been involved in a motor vehicle accident. He indicated he did not find any objective signs that claimant had a herniated disc. He indicated claimant's reflexes and neurological examination were normal. However, he felt, within reasonable medical probability, claimant's 1973 injury was a material contributing factor to her resulting symptomatology. Dr. Winkler opined claimant's condition had worsened since February 1978. He based his opinion on the fact that after February 1978 she experienced problems performing her usual work activities whereas before February 1978 she had not had such problems. He found no atrophy in the upper extremity. Later, in his deposition, he indicated that claimant's symptoms from closing the car door on her arm in June 1976 were separate from the symptoms from her slip and fall which had occurred sometime in 1974. He indicated in the 1974 injury she struck the car door with her head and shoulder areas. Dr. Winkler could not determine if absent the intervening injuries claimant's condition would have continued to deteriorate to the point that it was at the time of the depostion. He did not feel that after claimant's car injury her condition returned to the same point she had been prior to this injury. Dr. Winkler agreed with the contradicting statements proposed to him by counsel for the Fund and counsel for the claimant. On the one hand, he agreed claimant's condition was worse in January 1978 than it was sometime before that, but he was not assigning any specific cause to it. He did not determine whether her problem was a natural progression of the underlying condition, an aggravation of the industrial injury, or an aggravation of the condition caused by intervening injuries. However, on the other hand, he indicated it would be fair to state that the industrial injury of 1973 was a material contributing factor to the worsening of the condition which he had noted in his reports.

The Referee found that Dr. Winkler's opinion and request for reopening were persuasive. He found the neck and back problems had worsened since the last arrangement of compensation. Therefore, the Referee set aside the denial of May 9, 1978 and remanded the claim to the Fund for acceptance and payment of compensation and benefits, and awarded claimant's attorney a fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board is unable to find, based on all the evidence in this case, that claimant's condition has worsened since her last arrangement or award of compensation. Claimant exaggerates her symptoms and her restrictions. All the medical reports, including Dr. Winkler's, indicate there is no objective evidence establishing that claimant's condition has worsened. The Board finds Dr. Winkler's testimony and his deposition is equivocal. He agrees with both the statement proposed to him by the Fund and the statement proposed to him by the claimant's attorney. Based upon the totality of the evidence in this case, the Board is unable to find claimant has proven by a preponderance of the evidence that her condition has worsened since her last arrangement or award of compensation. Therefore, the Board affirms the denial of the State Accident Insurance Fund and reverses the Referee's order.

ORDER

The Referee's order, dated September 26, 1979, is reversed.

The denial issued by the State Accident Insurance Fund on May 9, 1978 is affirmed.

WCB CASE NO. 78-5874 March 19, 1980

MELVIN VERHOEF, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of his claim for ataxia.

FACTS

Claimant, a 41-year-old parking lot monitor, suffered a compensable injury on May 24, 1978 when he was pushed down onto the pavement by a customer. Claimant had low back and hip pain.

In June 1978, Dr. Luther Stumme indicated claimant had a history of some evidence of mental retardation and seizures. Based on claimant's history, he felt claimant had one or two grand mal seizures. Dr. Stumme diagnosed: "(1) Cerebral palsy with probably a Moderate Degree of Mental Retardation; (2) History of Adult Onset Seizure Disorder; (3) Possible Dilantin Overdose with Secondary Ataxia and Falling; (4) Hearing Loss, etiology Unknown". Claimant had been given dilantin to control his seizures. Dr. Stumme felt claimant's ataxia was due to a Dilantin overdose. He felt claimant's low back and hip condition were improving. X-rays of the low back were within normal limits.

Claimant was hospitalized in June 1978 by Dr. Clarence Yand. Dr. Yand reported claimant had a history of slight retardation and mild spastic paralysis of the lower extremities and to some extent the upper extremities. Claimant was able to walk and to work with these handicaps. Dr. Yand reported claimant had been using Dilantin for five years to suppress motor convulsive seizures. Claimant complained of difficulty walking due to pain and increased spastic muscular paralysis in the muscle of the low back, right thigh, and oblique muscle of the right lower abdomen down into the groin. Dr. Yand observed claimant walked with difficulty and complained of pain in the right hip, right thigh and right groin, but claimant was able to walk with a limp. He noted claimant had a definite ataxia and spastic partial paralysis of his legs and to a lesser extent his arms and hands.

On June 27, 1978, Dr. Yand reported claimant had noticed increasing difficulty in walking, increased low back and right hip pain, and a tendency to stumble and to fall repeatedly. He found there had been a misunderstanding about how much Dilantin claimant was supposed to take. Claimant had been taking six times as much Dilantin as he was supposed to. Dr. Yand diagnosed ataxia due to excessive drug ingestion and ataxia due to spastic paralysis of the lower extremities.

In July 1978, Dr. Joe Much, medical consultant for the Fund, opined that the cause of the ataxia was not the pushing incident.

On July 24, 1978, the Fund denied claimant's claim for the ataxia.

Claimant testified he was given Diazepan after this injury. He felt there was a relationship between his use of this medication and his falling.

The Referee found claimant had failed to prove his ataxia was related to his injury of May 24, 1978 and affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after reviewing all of the evidence including the medical reports, the letters in the file, and the transcript of the hearing, agrees with the Referee's decision. There is no question a misunderstanding developed about the amount of Dilantin claimant was supposed to take and that he did take too much Dilantin resulting in an overdose. The overdose resulted in claimant's ataxia and increased falling down. There is insufficient evidence that this condition is related to claimant's injury in the parking lot or that the Diazepan medication caused it.

The Board would suggest claimant contact the Fund because his claim for the low back and hip is still accepted. Claimant is entitled to have a determination of disability made on it when claimant's condition is stationary. Also, he is entitled to continuing medical care and treatment for those injuries.

The Board would suggest that the Field Services Division contact claimant or that claimant contact the Field Services Division for assistance in proceeding with his claim and his re-employment.

ORDER

The Referee's order, dated September 13, 1979, is affirmed.

WCB CASE NO. 78-1967 March 19, 1980

MICHAEL W. WERTZ, CLAIMANT
Velure, Heysell & Pocock, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which granted claimant an award of compensation equal to 64° for 20% unscheduled disability for his left eye injury. It contends this award is incorrect because claimant also had received an award of compensation for a scheduled disability to the same eye and claimant is not entitled to both awards.

FACTS

Claimant, a 19-year-old laborer, was struck in the left eye on July 24, 1976 by a piece of steel. Dr. John Retzlaff diagnosed a "retained intraocular foreign body, associated with corneal lens and iris laceration". Dr. Retzlaff removed the piece of steel and repaired the laceration to the left eye.

On August 17, 1976, Dr. Retzlaff performed a "lensectomy with roto-extractor with iridectomy". By November 1976, he reported claimant's eye was comfortable and claimant was on minimal medication. He advised claimant he could return to full time work. Dr. Retzlaff indicated claimant had very poor vision in the eye centrally which impaired his depth perception somewhat. Claimant's peripheral vision was fair.

In May 1977, Dr. Retzlaff fitted claimant's left eye with a contact lens. This corrected the vision in the eye to 20/100. Claimant's vision in the right eye, uncorrected, was 20/25. Dr. Retzlaff reported the left eye showed a well-healed centrally located scar and slight atrophy of the iris. He felt claimant was not in need of corneal transplant unless the eye condition worsened.

On October 31, 1977, Dr. Retzlaff reported claimant's claim was ready for closure. He felt claimant had a permanent decrease in central acuity in the eye and the eye was aphakic. Claimant reported he was getting along satisfactorily and felt he had adequate depth perception.

A Determination Order, dated January 27, 1978, awarded claimant compensation for temporary total disability and an award of compensation equal to 75° for 75% loss of vision in his left eye.

At the hearing, claimant, his mother, and his father, testified he has continuing difficulty with the eye. Claimant said in January 1978 he worked in an auto parts store. This required reading small print six out of the eight hours he worked. He stated this made his eyes burn and water, obstructing his sight and caused him intense headaches for which he had taken aspirin and lain down. Because he was unable to keep up with his work, claimant was terminated. He indicated his "slowness" was due to his eye problems. Claimant also indicated he has difficulty with his depth perception; has semi-double vision; and has difficulty driving at night because the glare of oncoming cars headlights cause him to develop headaches. He testified he is leary of returning to school, because he is not sure he could tolerate the reading required. Since losing the auto parts job, claimant says he has been depressed because he wants to do work other than manual labor and the problem he has with the eye is frustrating his desire. He has worked in the woods and operated heavy equipment.

Claimant's mother testified claimant has changed from a cheerful and non-complaining person to one who becomes easily frustrated. She said he was enthusiastic about the auto parts job, but becomes depressed and defiant when he was unable to perform the job.

The Referee found that award of 75% scheduled disability was correct. However, the Referee found, based on all the evidence, claimant was entitled to an additional award of compensation equal to 64° for 20% unscheduled disability for his injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the Referee's award of unscheduled disability. The medical evidence in the record does not support claimant's testimony. Further, any loss of depth perception, loss of vision, or double vision, the claimant may have are contemplated by and included in the scheduled disability award. In order to be granted an unscheduled disability award, the claimant must prove the eye condition caused disability not contemplated by the schedule for such injury and that disability had resulted in a loss of wage earning capacity. The preponderance of the evidence in this case does not establish claimant has proved entitlement to unscheduled disability. The evidence establishes only that claimant has a loss of vision for which he has been compensated. Therefore, the Board concludes the Referee's award of compensation equal to 64° for 20% should be reversed.

ORDER

The Referee's order, dated October 16, 1978, is modified.

That portion of the Referee's order which granted claimant an award of compensation equal to 64° for 20% unscheduled disability for his injury of July 24, 1976 and awarded his attorney a fee out of this increased compensation is reversed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-7152 March 20, 1980

STANLEY CHANDLER, CLAIMANT
A.C. Roll, Claimant's Atty.
Schwabe, Williamson, Wyatt,
Moore & Roberts, Employer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order, as supplemented, which awarded claimant compensation for permanent and total disability and granted his attorney a fee.

FACTS

Claimant, a 60-year-old truck driver, injured his back on September 10, 1975 while building fire trails. Dr. James Dinneen diagnosed a grade one spondylolisthesis with mild nerve root compression.

On March 28, 1977, claimant, while throwing a wrapper over a load of logs, developed back pain. Dr. Russell Keizer diagnosed: "degenerative osteoarthritic changes with spondylisthesis".

Dr. Keizer, on April 18, 1977, reported claimant had a lumbosacral spine strain due to his injury of March 28, 1977, superimposed on degenerative osteoarthritic changes and spondylolisthesis of L5-S1. At that time, he felt there had been some instability of claimant's back and "aggravation resulting from the present injury". Dr. Keizer found evidence of neuroradiculopathy in the left lower extremity.

On May 9, 1977, claimant underwent a myelogram which revealed a small defect at the L4-5 level.

Claimant continued to complain of low back pain and left leg pain. By July 1977, Dr. Keizer felt claimant was gradually improving and was not in need of surgery.

On October 5, 1977, Dr. Keizer reported claimant's condition was medically stationary. He reported claimant was able to sit in a recliner for 1-2 hours, stand 30 minutes, could climb and descend stairs without much difficulty; stand on a concrete floor for 30-40 minutes and had no trouble sleeping. It was his feeling claimant was "fit for some type of gainful employment within the limits of his back condition". In November 1977, Dr. Keizer felt claimant was fit for employment which did not involve prolonged standing or walking, forward bending, no lifting over 15 pounds, stooping, crouching or crawling. He felt claimant had a 60% impairment due to strain of the lumbosacral area.

In June 1978, Dr. Keizer, who had reviewed a job description, felt claimant could work as a handyman, although it might aggravate his condition. This job involved painting signs, fire equipment and driving a small truck to pick up tools and equipment.

Also, in June 1978, the Field Services Division notified claimant of his non-referral for vocational assistance. This was based on the employer's efforts to "taylor" a job to his physical limitations.

On July 7, 1978, the Orthopaedic Consultants reported claimant's condition was medically stationary and he was unable to return to his previous occupation, and probably would not tolerate any type of occupation very well. They reported claimant said his back pain was aggravated by riding in a motor vehicle. They opined the total loss of function in the low back was moderate but as related to this injury was mild.

In August 1978, Dr. Keizer indicated he agreed with the Orthopaedic Consultants. However, after he examined claimant again, he felt claimant's impairment would not enable him to return to any type of employment, at that time.

A Determination Order, dated September 6, 1978, awarded claimant temporary total disability compensation and compensation equal to 64° for 20% unscheduled disability for his low back injury.

Claimant testified he has neither worked nor sought work since this injury. He stated he has a high school education and also has real estate license, which he does not use. At the time of the hearing, claimant was receiving social security and union benefits. He also receives a percentage of the profits from an auto repair shop he owns and is a dealer for wood stoves. The wood stove dealership requires claimant, after taking an order, to drive to Portland, pick up the stove, and then deliver it. He also receives income from a boarder in his home. Claimant denied doing any work in the automobile shop, but his wife testified he occasionally performed tuneups.

The employer created a position to match claimant's physical limitations. This job of handyman required claimant to drive a pickup out to fires, pick up and check fire extinguishers, be a flagman, deliver drinking water and lunches to fire fighters and make "parts runs". This job was offered to claimant in October 1978. Claimant refused this job without attempting it.

Dr. Keizer stated that at the present time claimant's symptoms were more subjective than objective. He felt based on reasonable medical probability claimant would have difficulty with strenuous or medium work, but could perform sedentary work. By March 1978 Dr. Keizer felt claimant's left leg was almost back to complete strength. He felt claimant should attempt sedentary work.

Clamant has a high school education with only past work experience as a truck driver and crane operator and is now 64 years of age.

The Referee found claimant could not have performed the handyman job and felt claimant could not regularly perform any job on a full-time basis. The Referee was skeptical about claimant's testimony about what he could and could not do. Further, the Referee commented claimant had neither the desire nor the inclination to work. However, the Referee awarded claimant compensation for permanent and total disability effective August 11, 1978 and authorized the employer to deduct payment for permanent partial disability from this award; awarded claimant's attorney a fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The preponderance of the medical evidence alone does not establish claimant is permanently and totally disabled. Claimant has not had any surgery performed. The Orthopaedic Consultants opined the loss of function of the back is mild. Dr. Keizer reported claimant's condition has improved and he now has more subjective symptoms than objective symptoms.

Claimant has not worked since this injury. He has not sought any employment nor attempted the modified job this employer offered him.

Claimant's testimony when compared with other evidence raises the question about his credibility. He appears to change his description of his complaints. As the Referee found, claimant's testimony about the work he does not do, when compared with other testimony and evidence indicates he is doing more than he testified he can do.

Therefore, the Board concludes that claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled. Based on all the evidence in this case, the Board finds claimant is entitled to an award of compensation equal to 224° for 70% unscheduled disability for his back injury. This is in lieu of all previous awards.

ORDER

The Referee's order, dated August 24, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 224° for 70% unscheduled disability for his low back injury of March 28, 1978. This award is in lieu of all previous awards of unscheduled disability for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-3312 March 20, 1980

CATHERINE DOCKEN, CLAIMANT
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant an additional award of compensation equal to 80° for 25% unscheduled disability for her low back injury. The Fund contends claimant is not entitled to any compensation for unscheduled disability.

FACTS

Claimant, a 31-year-old meat packer, alleges on July 29, 1976 she experienced difficulty with her back. Claimant indicated she had been pushing ham "trees" and picking up large hams out of containers.

Claimant had injured her right hip and thigh in 1966. The claim for the 1966 injury was closed by a Determination Order, dated March 11, 1968, which awarded claimant temporary total disability compensation.

Dr. C. Duane Roberts, D. C., diagnosed the 1976 injury as subluxations which caused nerve impingments in the lower dorsal and lumbar areas. On November 15, 1976, he reported claimant was released for regular work.

Claimant returned to work on November 15, 1976. Claimant had been referred to the Disability Prevention Center, but decided she did not want retraining and returned to her regular work.

Dr. Theodore Pasquesi, in November 1976, examined claimant and reported she complained of steady low back pain. He diagnosed a pre-existing "lumbar lordosis with chronic superimposed occupational disease in the form of chronic lumbar pain in a patient who had performed similar work for approximately 9 years". He felt claimant would continue to have symptoms as long as she continued to perform work requiring repetitive bending, stooping and twisting, lifting over 30 pounds, reaching overhead and having to stand all day. He felt claimant would not be able to continue her current work and should be retrained or assisted in finding a job not requiring repetitive bending, stooping, twisting, standing all day or sitting throughout an eight-hour shift and not requiring her to lift over 25 pounds.

The claimant continued to work at her regular job until late December, 1976. She stopped working because of back pain.

In May 1977, Dr. Nathan Shlim reported claimant wanted to return to work, but was unable to even do her housework. Claimant said she could get assistance at work and had a back brace to help her. Dr. Shlim found claimant's condition to be medically stationary and felt claimant had minimal disability.

A Determination Order, dated August 4, 1977, awarded claimant temporary total disability compensation.

On August 9, 1977, Dr. Roberts felt claimant should not return to her regular work and placed her on light duty as of September 1, 1977 with no heavy lifting or pushing heavy objects. He indicated claimant's condition was not stable. He stated that if light work was unavailable that vocational rehabilitation would be in the claimant's best interest.

In November 1977, the Orthopaedic Consultants reported claimant had not worked since December 1976 and continued to have low back pain. They diagnosed chronic lumbar strain superimposed upon poor postural low back condition. They felt claimant's condition was stationary and recommended claimant not return to her previous job because of the heavy lifting, pulling, and bending required. They felt she should lift no more than 15-20 pounds. In their opinion, "The degree of impairment is felt to be in the mild range as it currently exists with loss of function due to the occupational exposure being minimal".

A Stipulation, dated December 5, 1977, reopened claimant's claim effective June 1, 1977.

In January 1978 claimant was referred for vocational rehabilitation. In April 1978 she was enrolled at Clark Community College in the Junior Accountant program. The program would begin April 17, 1978 and end December 30, 1979. Although enrolled and actively participating in the retraining program, she continued to desire re-employment at her regular job. Her motivation to return to her regular job with the employer herein was primarily financial. The employer finally agreed to permit her to return to work if Dr. Pasquesi and her treating physician (Dr. Roberts) would release her.

In February 1979, Dr. Pasquesi examined claimant and reported she had no symptoms except for her pre-existing lumbar lordosis. He indicated that the limitations he placed on claimant were for her own well being and saw no reason, if claimant was "willing to pay the price of increased pain", why she could not return to her previous work. In his opinion, claimant had no impairment as the result of this incident.

Dr. Roberts reported claimant could return to her "regular work duties" on March 7, 1979. She, in fact, returned to work on March 7, 1979 and thereafter her vocational training program was terminated.

A Determination Order, dated March 30, 1979, awarded claimant additional temporary total disability compensation and compensation equal to 16° for 5% unscheduled disability for her low back injury.

In August 1979, Dr. Roberts felt claimant's restrictions were no excessive lifting or bending; she should lift using her knees and should not lift over 20 pounds. He felt claimant had an 8% impairment due to this injury.

Claimant testified she has worked regularly since returning to work. She said she and her co-workers trade jobs so she does not have to perform the heavier work. She said her prior work experience had been in cannery work. Claimant indicated she continues to wear a back brace and uses Excedrin tablets. She said she continues to have back pain and to receive chiropractic treatments.

The Referee awarded claimant additional compensation equal to 80° for 25% unscheduled disability making the total unscheduled award 30%.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The medical evidence indicates that claimant had certain physical limitations prior to her beginning her employment as a meat packer which made her unsuited for this type of work. However, due to this incident and the residuals therefrom, claimant has lost a portion of her wage earning capacity. Based on this decrease in wage earning capacity, the Board finds claimant is entitled to an award of compensation equal to 64° for 20% unscheduled disability for her low back injury. This is in lieu of and not in addition to all previous awards of unscheduled disability for her injury of July 29, 1976.

ORDER

The Referee's order, dated August 27, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for her low back injury. This is in lieu of any previous awards for unscheduled disability for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-9059 March 20, 1980

CARL A. JACKSON, CLAIMANT
Anderson, Fulton, Lavis & VanTheil,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which set aside its denial of claimant's claim for an occupational disease and remanded it to the Fund for acceptance and payment of benefits under the Workers' Compensation Law. The Fund contends the claim was not timely filed and if it was claimant has not proven his claim is compensable.

FACTS

Claimant, a 25-year-old timber faller, contends that in March 1977 while working for this employer, the area next to his worksite was sprayed with the herbicide 2,4,5,T which contains dioxin. Claimant contends his exposure to the herbicide resulted in liver damage. On May 17, 1977 he filed his claim for this condition.

On November 8, 1978, the Fund denied his claim. The denial letter set forth, as the basis for the denial, the untimeliness of the claim filing which, the Fund contended, prejudiced it.

At the hearing, claimant testified the herbicide was sprayed within 50-100 yards of where he was working. He recalled smelling the spray and thought he may have gotten some on his skin. Claimant said he began not to feel well after this spraying incident.

In May or June 1977, claimant went to Dr. Albert Aguirre, a naturopathic physician. Dr. Aguirre diagnosed hepatic cellular damage and advised claimant the condition was "life threatening". Claimant testified that sometime in June, July, or August 1977, Dr. Aguirre told him that claimant's condition was almost certainly caused by the dioxin. Claimant said he initially tried to bring some sort of action against the party responsible for the spraying, but eventually "just dropped it".

In February and June 1979, Dr. Aguirre diagnosed hepatocellular damage which he concluded was caused by the dioxin. He opined that the hepatocellular damage correlated with the dioxin spraying done in the area in which claimant was working.

The Referee found the claimant had timely filed his claim. The Referee noted claimant had been disabled in June 1977 and advised by Dr. Aguirre that the spray caused his condition. However, the Referee found claimant had not been advised by his doctor that this was an occupational disease or that it arose out of his employment. The Referee concluded claimant did not have the kind of knowledge which would lead a reasonable prudent person to know he suffered from an occupational disease so as to begin the running of the statute of limitation. Therefore, the claim was not barred. The Referee further found claimant had proven by the preponderance of the evidence he had an occupational disease and remanded the claim to the Fund.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board does not find that claimant timely filed his claim. ORS 656.807 provides:

> " . . . all occupational disease claims shall be void unless a claim is filed . . . within 180 days from the date the claimant becomes disabled or is informed by a physician he is suffering from an occupational disease whichever is later".

There is no question that claimant became disabled in June 1977 and was advised by Dr. Aguirre in June, July or August 1977 that his condition was the result of exposure to dioxin.

Claimant knew from his treating physician that the dioxin from the spraying was the cause of his illness. He knew it occurred while he was working for this employer. Claimant attempted to take steps against the party responsible for the spraying. The Board finds that based on the facts in this case claimant's claim was not timely filed and is barred.

The Board indicates for the record that if the claim were not barred, it would find claimant had proven a compensable occupational disease.

ORDER

The Referee's order, dated July 20, 1979, is reversed.

The denial of the State Accident Insurance Fund, dated November 8, 1978, is affirmed.

WCB CASE NO. 79-924 March 20, 1980

BILL E. JONES, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On August 29, 1979, claimant requested Board review of the Referee's order, dated August 28, 1979. On September 6, 1979, the State Accident Insurance Fund (Fund) filed a cross-request for review.

The Board, on January 23, 1980, received a copy of a letter from claimant's attorney requesting withdrawal of his request for review because claimant had applied for and had received a lump sum advance payment. The original of this letter was sent to the Workers' Compensation Department. Claimant's attorney, on February 12, 1980, advised the Board claimant wished to withdraw his request for review.

On February 20, 1980, the Board issued an order which dismissed the request for review and recited that the Referee's order became final.

The Board now has been advised that claimant has not received lump sum payment. Therefore, claimant requests the Board proceed to review this matter. The Fund joins in this request. Therefore, the Board sets aside and holds for naught its order, dated February 20, 1980, and reinstates both claimant's and the Fund's request for review. The Board will proceed to review this case.

IT IS SO ORDERED.

WCB CASE NO. 78-4735 March 20, 1980

JAMES J. JONES, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Employer's Attys.
Request for Review by Claimant

ISSUE ON REVIEW

Claimant seeks review by the Board of that portion of the Referee's order which affirmed Field Services Division's notice of non-referral for vocational assistance and affirmed the Determination Order's award for unscheduled disability.

FACTS

Claimant, now 40 years of age, was employed as a core feeder for Treplex, Inc. and on March 3, 1977 he lost his balance and fell on his left arm.

Claimant was initially examined by Dr. Benson who found claimant's left wrist swollen and diagnosed radiculoneuritis related more to his work of feeding core. Subsequently, Dr. Benson diagnosed acute sprain of claimant's left wrist and arm.

In April 1977 Dr. Lundsgaard found full range of neck motion and shoulders and on June 1, 1977 released claimant for work. In May 1977 claimant underwent EMG studies which revealed a mild carpal tunnel syndrome.

Claimant returned to work and by June 8 reported that within a few hours of working his fingers were numb and tingling. Dr. Lundsgaard felt claimant's symptoms were aggravated by his work. Surgery was recommended and then cancelled as the doctor felt the symptoms were not significant enough to warrant the surgery.

In October 1977, claimant had a repeat EMG which showed that the carpal tunnel syndrome had persisted and actually changed on motor conduction studies and surgery was once again recommended.

On October 31, 1977, Dr. Lundsgaard performed the carpal tunnel release surgery and on December 12, 1977 he released claimant for work not requiring lifting over 25 pounds and no prolonged twisting of the wrist for one week.

In February 1978, Dr. Franklin reported claimant was examined for increasing neck and left arm symptoms. The examination was essentially normal except for muscle spasms. On February 27, 1978 no neurological deficit was found, but electromyographic studies showed some evidence of reinnervation potentials C8-T1 of inverted muscles. The doctor felt claimant had had a mild brachial plexis injury at the time of his fall, now healed, but causing on-going muscle spasms and pain.

On March 31, 1978 Dr. Franklin found claimant was medically stationary and he recommended vocational rehabilitation. The doctor felt claimant certainly could not tolerate mill work any longer.

On March 29, 1978 Field Services Division issued its notice of non-referral on the grounds that claimant had a high school education and could physically return to work within his capabilities.

On April 13, 1978 claimant's attorney requested reconsideration of this non-referral. On May 9, 1978 Field Services again denied referral but offered claimant job reentry assistance.

Dr. Franklin reported on May 4, 1978 that claimant's primary on-going disability was related to his complaints of pain which were documented by the electromyographic studies. Claimant should embark on a job not requiring a lot of lifting or severe hyperabduction of the left upper extremity. Dr. Franklin indicated that that because claimant's symptoms were subjective he could not give specific degrees of impairment.

On June 19, 1978, the Determination Order granted claimant an award of 32° for 10% unscheduled disability to his neck and left shoulder.

Claimant was referred to the Rehabilitation Job Developers on May 26, 1978 and they reported that claimant had many interests for jobs. He did have only an eighth grade education. Claimant called them on June 19, 1978 and informed them that he had returned to the mill.

On July 27, 1978, Dr. Franklin reported claimant had been doing well until he returned to work and almost immediately he noticed neck pain and numbness of his hands. On August 15, 1978, Dr. Franklin repeated the nerve conduction studies which revealed left median distal motor latency was normal but left sensory distal latency and conduction were slowed and palm to wrist was even more abnormal than finger to wrist latency. The clinical diagnosis was recurrent carpal tunnel syndrome probably occurring because of claimant's return to mill work. Dr. Franklin urged retraining for work not involving repetitive manual use of claimant's wrist.

Dr. Franklin wrote the carrier on September 6, 1978 that claimant will continue to have symptoms as long as he works in the mill or does manual labor and that putting a percentage award on his disability had nothing to do whatever with whether claimant could work in that sort of employment at all. In that sense, the doctor reported, claimant was 100% disabled as that work makes the carpal tunnel syndrome worse.

Claimant quit the mill on July 12, 1978.

Claimant was examined by Dr. Stainsby on October 23, 1978 with his chief complaints being intermittent numbness of both hands, muscle spasms of his neck, headaches and carpal tunnel syndrome. Dr. Stainsby found no evidence of carpal tunnel syndrome left or right, but claimant did have mild sprain of the cervical area and of the left shoulder. Claimant also had some numbness and paresthesia of the ulnar distribution of both hands which he felt was not unusual with a sprained neck. Claimant's condition was felt to be medically stationary with permanent impairment to the neck and left shoulder rated as minimal and permanent impairment from carpal tunnel syndrome, which was also minimal.

After reading Dr. Stainsby's report, Dr. Franklin indicated on December 26, 1978 that claimant did have objective findings of carpal tunnel syndrome and Dr. Stainsby had had no nerve conduction tests to rely on. Claimant needed vocational rehabilitation into more sedentary work.

Claimant testified at the hearing that he has an 8th grade education with his entire work history being in the wood products industry.

At the time of the hearing for some reason this claim was still open and the parties agreed that time loss should have been suspended on October 23, 1978.

The Referee found that, in his opinion, claimant was capable of returning to mill work and he affirmed the Determination Order's award of unscheduled disability. However, the Referee found that claimant had a loss of function to his left arm and granted him 10% loss of that extremity and allowed the carrier an offset against any overpayment; he also affirmed the Field Services Division's notice of non-referral

BOARD ON DE NOVO REVIEW

The Board, on de novo review, would modify the Referee's order. The award granted by the Referee for loss function of claimant's left arm is affirmed. It was agreed at the hearing that claimant's compensation for temporary total disability should have been terminated on October 23, 1978, and at that point the claim should have been submitted to the Evaluation Division for closure. However, the Board finds that in this case all the evidence necessary to dispose of all issues was before the Referee and is now before the Board. The Board sees no useful purpose in submitting the claim to Evaluation for closure under ORS 656.268. The Board finds claimant was medically stationary on October 23, 1978 and his impairment precludes him from certain occupations for which he is otherwise trained. Based on these findings and considered together with claimant's age, his 8th grade education and his physical limitations, the Board finds claimant is entitled to an award of 80° for 25% unscheduled neck and left shoulder disability. We also strongly urge Field Services to assist this claimant in job placement.

ORDER

The Referee's order, dated March 6, 1979, is hereby modified.

Claimant is entitled to an award of 80° for 25% unscheduled disability for his loss of wage earning capacity. This award is in lieu of any previous awards he has been granted for his unscheduled disability.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-3401 March 20, 1980

ALBERT E. LIVELY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which set aside its denial of claimant's claim for a lung condition and remanded the claim to it for acceptance and awarded claimant's attorney a fee. The Fund contends this was in error.

FACTS

Claimant, a 59-year-old sawyer, filed a claim on June 15, 1978 alleging that the dust at his work caused him to experience difficulty with his lungs. He indicated his work station exposed him to a great deal of fine sawdust. If he took a few days off from work, his condition improved, but when he returned his condition worsened.

Dr. C. Boots, D. O., diagnosed intrinsic pulmonary asthma and probable reactive airway disease. He felt this condition was very likely related to claimant's work.

In September 1978, Dr. Michael Slaughter, allergy specialist, reported claimant had experienced shortness of breath for the past 2-3 years on exertion, particularly while hunting. In May, pulmonary function tests had revealed decreased dynamic flow rates. Claimant had been a non-smoker for 11 years. Dr. Slaughter diagnosed reactive airway disease with bronchitic component and apparent changes on pulmonary function studies and emerging chronic bronchitis. Claimant had no history of prior respiratory problems or allergies. Claimant wished to continue to work for his employer and Dr. Slaughter encouraged claimant to wear a mask at work and gave him medication.

The employer subsequently provided claimant with a respirator which claimant wore. He was still employed with this employer at the time of the hearing.

In January 1979, Dr. John Tuhy, based only on the medical reports and air sampling tests, opined he did not see any evidence that the work exposure was the primary cause of claimant's reactive airway disease, nor was it likely that sawdust exposure had adversely affected the course of the claimant's disease and "COPD". He felt claimant's history indicated claimant had temporary exacerbation of symptoms of the disease, but felt it would be speculative to contend that the work exposure resulted in a permanent affect.

On Febuary 22, 1979, the Fund denied this claim.

On July 6, 1979, Dr. Slaughter opined claimant's continued exposure to significant concentrations of airborne irritants over the past several years had clearly contributed to his present asthmatic bronchitis and reactive airway disease. He felt " . . . one cannot say without reservation that the smoke, dust and irritants he is exposed to have actually caused his problem since many people are able to work in this environment for years without any difficulty. The development of this condition implies some predisposition . . . Mr. Lively was not aware of this potential when he took the job and it is possible that his asthmatic bronchitis would not have developed if it had not been for his work in this environment".

The Referee, citing the case of Hutcheson v. Weyerhaeuser Company, _____ Or _____, _____ P2d _____ (November 6, 1979), found the claim compensable and set aside the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Referee correctly cited the Hutcheson case in which the Supreme Court held:

> "If the 'mill conditions' caused temporary exacerbation of his preexisting chronic obstructive pulmonary disease, sinusitis and bronchitis so as to require medical services that would not have otherwise been necessary or if that exacerbation resulted in even temporary disability, this claim is compensable."

Dr. Slaughter's opinion, which the Board finds more persuasive, further supports the Referee's decision. The Board, however, is unable to reconcile the Supreme Court's holding in Hutcheson with the Court's holdings in the Weller v. Union Carbide, 288 Or 27, _____ P2d _____ (1979), Stupfel v. Edward Hines Lumber Company, 288 Or 34, _____ P2d _____ (1979) and Gibson v. SAIF, 288 Or 45, _____ P2d _____ (1979). The Court in the Gibson case held that "Since the work activity did not cause any change in the underlying disease, the claim for medical services required to treat symptoms and for any claimed disability by reason of those symptoms is not compensable".

The Board, applying the rationale of the Hutcheson case to the facts in this case, finds the claim compensable and affirms the Referee's order.

ORDER

The Referee's order, dated November 27, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 79-656 March 20, 1980

GERALD MORGAN, CLAIMANT
Dean M. Phillips, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which reversed the carrier's denial and remanded the claim to it for acceptance of responsibility of benefits for the period of time from the date in early 1978 when claimant commenced night shift employment, to December 19, 1978. Claimant contends his claim should be determined to be completely compensable.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

The cases Weller v. Union Carbide and Stupfel v. Edward Hines Lumber Co. cited by the Referee were reviewed by the Supreme Court [288 Or 27, ____ P2d ____ (1979) and 288 Or 39, ____ P2d ____ (1979)]. Additionally, the Supreme Court also ruled on the same issue in the cases of Gibson v. SAIF, 288 Or 45, ____ P2d ____ (1979) and Hutcheson v. Weyerhaeuser Co., 288 Or 51, ____ P2d ____ (1979). The Court in Weller (supra.) held a claimant in order to prevail had to prove by the preponderance of the evidence that "(1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent it produces disability or requires medical services". Futher, the Court stated that "if a temporary worsening of the underlying disease requires medical services or results in temporary disability, that is compensable". There is no requirement that the underlying condition need be permanently worsened in order for the claim to be compensable; if these four tests are met, the claim is compensable. Therefore, based on the case law and facts in this case, the Board affirms and adopts the Referee's Opinion and Order.

ORDER

The order of the Referee, dated April 24, 1979, is affirmed.

WCB CASE NO. 79-1365 March 20, 1980
WCB CASE NO. 79-1341

JOHN L. MOTTA &
LYLE S. FORD, CLAIMANT"S
Elden M. Rosenthal, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order and supplemental order which found the two claimants were both employees of Roth Construction the day they were injured; remanded their claims to the Fund for acceptance and payment of compensation; assessed penalties and an attorney fee; established a weekly wage of $240 and awarded additional attorney fees. The Fund contends this was in error.

FACTS

In May 1978, John L. Motta, a 27-year-old carpenter, had received an eye injury on another job. His doctor suggested he return to some kind of work, even without pay to see how his balance was and if he could be released for work. Mr. Motta approached Mr. Lyle S. Ford, who allowed Mr. Motta to work with him to find out what he could do. Mr. Motta was not paid for his work. He had been with Mr. Ford for six days and was receiving compensation for temporary total disability from his eye injury at the time of this injury.

Lyle S. Ford, a 30-year-old carpenter, had a contract with a builder, Mr. Ken Brandon, to frame houses. It is conceded Ford's relationship to Brandon was that of an independent contractor.

The employees of Tim Roth Construction (Roth) were building a house across the street from the house on which Motta was working with Ford. It was a customary practice in the trade for contractors working close in an area to assist one another raise pre-constructed walls (framing) into place. On September 20, 1978, Motta and Ford had assisted the Roth's lift a wall. Both Motta and Ford and an employee of Roth were injured when the wall they were trying to lift fell on them. Claimants were taken by ambulance to the hospital where they were later visited by a Roth foreman, Mr. Colby.

Mr. Ford's injury was diagnosed as a "compression fracture L-5". Mr. Motta's injury was diagnosed as a "compression of the anterior aspect of the 7, 8, and 9 thoracic vertebra and possible compression of the anterior aspect of the 6th and 10th thoracic vertebra".

On November 28, 1978 the attorney for both claimants sent accident reports (WCD Forms 801) to Roth. Roth's workers' compensation insurance coverage was provided by the Fund.

On April 17, 1979 the Fund denied the Ford and Motta claims. The basis of its denial was that at the time of their injuries the claimants were not employees of Roth.

The testimony at the hearing indicated a customary practice in the building trade of a contractor working on a project in close proximity to other contractor's working in the area to assist one another, at least, the testimony indicates this practice is not unusual. There is no pay given to those assisting. Those who assist are under the control and guidance of those who requested the assistance.

Roth testified he had received the notices of claim from the two claimants on November 21, 1978.

On June 27, 1979 the Referee entered his Opinion and Order. The Referee found (1) at the time the injuries occurred the claimants were employees of Roth; (2) the Fund had unreasonably delayed acceptance or denial of the claims and assessed penalties and attorney's fees; (3) the Fund had failed to pay the first installment of compensation timely and had failed to continue payment until the claims were denied, and penalties and attorney's fees were assessed.

On July 10, 1979 the Fund moved for reconsideration.

A further hearing was held on July 12, 1979 to consider the Fund's motion for reconsideration, the claimants' temporary total disability rate and penalties and attorney's fees. The Referee found (1) the claimants' were full time workers at a wage each of $6.00 per hour times 40 hours for a weekly wage of $240 for the purposes of temporary total disability; (2) awarded additional attorney's fees; and (3) denied the Fund's motion for reconsideration and reinstated the Opinion and Order of June 27, 1979.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's orders. The Board finds (1) Ford was an independent contractor providing services to Mr. Brandon; (2) Ford was not an employee of Roth; (3) Motta was not an employee of Ford nor was he an employee of Roth.

Both claimants were not paid and did not expected to be paid for the assistance they provided Roth's employees. Neither claimant had any standing as to Roth except as volunteers, invited onto the Roth work site. Neither claimant was under any obligation to go onto the Roth work site to assist Roth and Roth had no power or right to compel them to do so.

ORDER

The Referee's orders, dated June 27, 1979, as supplemented by an order, dated July 11, 1979, are reversed.

The denials of the State Accident Insurance Fund, dated April 17, 1979, are affirmed.

SAIF CLAIM NO. A894787 March 20, 1980

JAY J. PRETTYMAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

In early January 1980, claimant requested the Board exercise its own motion jurisdiction to reopen his claim for his October 11, 1961 injury to his right knee. This claim was last closed on November 5, 1965. Claimant had also filed a claim for an April 22, 1979 injury to the right knee, which was accepted by Liberty Mutual Insurance Company (hereinafter referred to as Liberty). However, on January 22, 1980, Liberty denied claimant's claim.

On February 4, 1980, Dr. Robert Manley reported claimant had a work related injury involving his right knee which has resulted in chronic degeneration. Claimant had had a meniscectomy and then later a total knee replacement. Dr. Manley felt claimant's continuing problem was "work related" and a result of his injury in 1965.

On March 13, 1980, the State Accident Insurance Fund (hereinafter referred to as the Fund), advised the Board it opposed the reopening of claimant's claim under the Board's own motion jurisdiction on the grounds that claimant had suffered a new injury to his knee subsequent to the last claim closure.

Claimant advised the Board he has serious financial problems. He indicated he has been unable to work since November 13, 1979. Further, claimant advised the Board he intends to appeal the denial issued by Liberty.

The Board, after reviewing this case, finds it would be in the best interest of the parties if it remands this case to the Hearings Division. An expedited hearing shall be held to determine if claimant's current condition is related to his 1961 injury and has worsened since his last award or arrangement of compensation for that injury or if it is due to a new injury. If and when claimant requests a hearing on Liberty's denial of his claim, that hearing should be consolidated with this hearing. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceedings, together with additional evidence presented at the hearing, to be prepared and forwarded, along with the Referee's recommendation to the Board.

WCB CASE NO. 78-9268 March 20, 1980

JAMES L. VAN SICKLE, CLAIMANT
Sid Brockley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which granted him an increased award of compensation for a total of 224° for 70% unscheduled disability for his back injury. Claimant contends he is permanently and totally disabled.

FACTS

Claimant, a 36-year-old mill worker, sustained a compensable injury on June 2, 1975; while pulling lumber off the green chain, he twisted his low back. Dr. Miller examined him the following day and diagnosed a lumbosacral strain.

After undergoing treatment by Dr. Miller, a Determination Order, dated August 22, 1975, granted claimant compensation for temporary disability only.

On September 19, 1975 claimant reinjured his back and Dr. Miller stated that this was an aggravation of his earlier injury. On September 23, 1975, Dr. Edward Heusch recommended bed rest, traction and medication with the possibility of exercises. He felt the claimant would be off work for 2 to 3 months. Claimant was hospitalized for one week in late September 1975 for further treatment and evaluation by Dr. Miller and Dr. Heusch. On October 18, 1975 Dr. Miller indicated claimant had not worked since September 19, 1975 and would probably need to be retrained or seek other employment.

On December 17, 1975 Dr. Heusch found claimant's condition was medically stationary and recommended vocational rehabilitation.

A Second Determination Order, dated January 19, 1976, granted claimant additional temporary total disability compensation and an award equal to 48° for 15% unscheduled disability for his low back injury.

On March 4, 1976 claimant underwent a laminectomy with removal of a large herniated L4-5 disc.

On June 4, 1976 claimant saw Dr. Winfred Clarke with complaints of back problems. He had the feeling that he was "sort of separated in the middle of his low back" and his tailbone was hurting him. In July 1976, claimant underwent a decompressive laminectomy at L4-5 and L5-S1, left, with spinal fusion. The diagnosis was unstable arthritic lumbosacral junction. On November 16, 1976 Dr. Clarke indicated claimant's fusion was coming along well, although it was still necessary that he wear his support. He felt claimant was not yet a good candidate for rehabilitation as he needed to avoid lifting and work of any kind.

Dr Clarke continued to monitor claimant's progress and in March 1977 felt claimant was ready for a vocational rehabilitation evaluation.

Claimant was examined at the Disability Prevention Center during June and July 1977. Dr. Holm, the medical examiner at the Center, concluded claimant's physical impairment was moderate to marked with psychologic factors which contributed to his vocational impairment. He felt claimant could do light work and recommended rehabilitation.

On August 23, 1977, Dr. Clarke indicated claimant was complaining of a lot of pain in his back and "giving way" of his left leg. The fusion was found to be solid. Claimant was hospitalized in August 1977 for a period of traction and physical therapy. On October 21, 1977 Dr. Clarke found claimant's condition to be medically stationary and stated his disability was moderately severe.

A Third Determination Order, dated January 18, 1978, granted additional tempoary total disability compensation and an awrd equal to 64° for 20% unscheduled disability for claimant's low back injury.

Claimant continued to complain of a great deal of pain and spasm and a myelogram was done on March 28, 1978. Dr. Clarke was uncertain how to proceed with claimant's treatment and felt that his prognosis for return to work was very guarded. The doctor again found claimant's condition to be stationary as of September 8, 1978 and felt the only way claimant could be gainfully employed was if he were retrained in some lighter occupation.

Claimant was examined by the Orthopaedic Consultants on September 21, 1978 with complaints of a crooked back with a leaning to the left and a prominent right hip. He complained of a continuous, dull aching in the lumbosacral area which was increased with activity. He complained of a continuous pain in the left lower extremity. They found claimant's condition was stationary and he would be unable to return to his former occupation. They felt he could do very light physical or semi-sedentary work which did not require lifting over 10 pounds, pushing, pulling, bending or twisting. They found the total loss of function was in the moderate range.

A Fourth Determination Order, dated November 9, 1978, granted claimant an additional award of 10% disability for a total award equal to 144° for 45% unscheduled disability for his low back injury.

Claimant was evaluated by Mr. Richard King, a rehabilitation coordinator. He felt claimant viewed himself as hopelessly disabled and, therefore, was unwilling to cooperate with any efforts to find him work. Based upon a motivation problem, no identifiable interests, a possible alcohol problem, and claimant's unstable medical condition, Mr. King felt a formal training program would be unrealistic.

On March 8, 1979 Dr. Steven Hoff indicated claimant's complaints were definitely consistent with his symptoms and both were genuine. He felt there was very little that could be done for claimant and claimant could return to work only if the job required no lifting.

A report by Mr. King, dated May 1, 1979, indicated claimant continued to lack motivation to be trained in a job he could do. He saw himself as totally disabled with no hope of returning to gainful employment. Dr. Clarke indicated to Mr. King that claimant was stationary and could return to work that did not require repetitive bending, standing and lifting over 25 pounds.

On June 19, 1979, Dr. Clarke clarified some of Mr. King's statements indicating that claimant could not lift 5 to 10 pounds repetitively and he could lift 25 pounds only on occasion. He stated prolonged sitting was a problem and any job requiring a lot of driving would not be feasible.

At the hearing, claimant testified that he drives to Woodburn to see his mother almost every day. He is able to work in his yard and take care of his chickens. He goes on fishing trips to Estacada occasionally, going about seven times in 1978.

The Referee found claimant had a substantial disability due to his industrial injury of June 2, 1975. She also found he had a moderately severe emotional disturbance that contributes to his disability. Because claimant was not motivated to return to work, the Referee found he was not permanently and totally disabled. Based upon claimant's age, his intelligence, his past work experience and his physical impairment, the Referee granted claimant an additional award equal to 80° for a total award of 224° for 70% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, agrees with the findings and conclusion of the Referee. Claimant contends that his disability should be considered under the provisions of ORS 656.206 prior to the 1975 amendment which made motivation an important factor in such cases. The Board finds that no doctor who saw claimant felt he was permanently and totally disabled. They felt claimant would have to return to a light type of employment and, therefore, would have to go through a retraining program, but claimant could be employed at a suitable and gainful occupation. Claimant's disability was found to be in the moderate to moderately severe range. The testimony at the hearing indicates claimant engages in activities which would refute his contention that he is permanently and totally disabled. ORS 656.206(2) which was effective at the time of claimant's injury requires "unless the medical evidence of a workman's unscheduled physical impairment, coupled with other relevant factors . . . establishes prima facie, the workman's permanent total disability status, he must also establish his willingness to seek gainful and suitable regular employment." The Board does not find the medical evidence and other "relevant factors" establish claimant is permanently and totally disabled. Claimant has failed to establish "his willingness to seek gainful and suitable regular employment". The Board, after thorough consideration of the evidence before it, together with claimant's age, education, training, work experience, physical disability, and motivation, concludes that the Referee's award of 224° for 70% unscheduled disability is correct and should be affirmed.

ORDER

The Referee's order, dated July 27, 1979, is affirmed.

WCB CASE NO. 77-7786 March 21, 1980

ELSIE M. CASPER, CLAIMANT
Ringle & Herndon, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Employer
Cross-request by Claimant

ISSUE ON REVIEW

The employer and claimant seek Board review of the Referee's order which found claimant was permanently and totally disabled. The employer contends that claimant is not permanently and totally disabled. Claimant contends she is permanently and totally disabled and that her attorney is entitled to a fee for his representation of her at the Board level.

FACTS

Claimant, a then 50-year-old nurse's aide, sustained a compensable injury to her low back on February 24, 1974 while lifting a patient. Claimant testified that she had been a housewife until 1967 and had not worked outside the home. In 1967, shortly before her husband's death, she had worked as a waitress and then became a nurse's aide. This injury was originally diagonsed as an acute lumbosacral sprain. Dr. Charles Hickman released claimant for modified work on April 15, 1974.

On November 19, 1974, Dr. Edwin Robinson reported claimant complained of intermittent pain in the low back depending on her activities. Claimant reported if she attempted to lift too much she had pain and some feeling of spasm in her back and achiness in her legs. She reported that she was "careful" when performing her activities and her complaints were minimal. He diagnosed a chronic lumbar sprain and strain syndrome. He felt she had a mild loss of function of the back and should avoid "serious strains" to her back because she still showed evidence of symptoms objectively. Dr. Robinson felt that claimant's claim could be closed.

The Determination Order, dated December 31, 1974, awarded claimant temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for injury to her low back.

In February 1975, Dr. Winslow reported that claimant had severe limitations of range of motion in her back muscles due to spasms of the paraspinal muscles. He referred claimant to Dr. Cook. Dr. Robert Cook found that claimant had a recurrence of her low back pain with involvement of the left lower extremity. He prescribed physical therapy and if she did not improve he felt a myelogram should be considered. Claimant continued to work as a nurse's aide after being released for work in April 1974.

On March 3, 1975, Dr. Winslow opined that claimant should change jobs and engage in some type of employment other than nurse's aide. He indicated claimant had been hospitalized for traction from February 12 through February 27, 1974. He felt the main difficulty with claimant's work as a nurse's aide was the lifting that was required.

On April 29, 1975, claimant underwent a myelogram. This test was normal. Claimant was hospitalized after the myelogram for a severe headache and neck pain which was felt to be related to the myelogram.

In May 1975, Dr. Winslow reported that he had released claimant for regular work on March 17, 1975 but had taken her off work as of April 1, 1975 because of continuing difficulties with her back. He felt her prognosis for complete recovery from this injury was poor if she continued employment as a nurse's aide.

On June 27, 1975, Dr. Cook reported claimant was released to return to her work. He felt that claimant's problem was degenerative disc disease and felt she would need a continuing exercise program for her back.

On July 11, 1975, claimant underwent a nerve root injection. Dr. A. Solis opined that there had been apparently a successful nerve root block at the L5 and S1 levels.

Claimant was released by Dr. Cook on September 10, 1977 to return to work as a ward clerk.

On September 26, 1977, Dr. Hickman reported that x-rays of the lumbar spine showed degenerative arthritic changes and degenerative arthritic changes in claimant's cervical spine. He felt the motor vehicle accident in November 1976 resulted in an acute cervical, dorsal, and lumbar back strain on a pre-existing degenerative arthritic condition of the back. He reported that claimant was being treated conservatively after this injury and that by August 1977 had made no improvement in her condition. Claimant still reported stiffness and pain in her lumbar spine with radiation into the right hip. She also reported neck and cervical muscle tenderness. It was his opinion that claimant would never be able to return to her job and that if they were able to keep her in mild pain while doing lighter housework around the home, that they would have accomplished the most that they were able to.

On October 14, 1977, Dr. Cook reported that claimant had made several efforts to return to work. He indicated that limitations of her condition excluded her from pursuing jobs available to her in the hospital. He felt claimant should have some form of work that excluded prolonged standing, sitting, lifting, bending, etc., and that most of the hospital work available to her excluded these limitations. Claimant advised him that her symptoms had been aggravated by a motor vehicle accident. It was his opinion that claimant would have continued to experience difficulty even if she had not had the motor vehicle accident. It was his opinion that based on claimant's continuing difficulties, limited education, and vocational training deficit, that she had a limited employment capability.

On February 9, 1978, Dr. John Hardiman reported that claimant in his opinion was disabled. He felt that a great portion of claimant's disability was psychiatric in origin. It was his opinion that the likelihood of rehabilitation of claimant was "zero". He did not feel that claimant could be motivated to go to school or be cross-trained in any other form of employment. He did not feel that claimant was a candidate for surgery. It was his opinion that claimant was severely depressed. He noted that claimant had the speech and characteristics of a very old person. However, the x-rays were "surprisingly good". They appeared much like that of a 53-year-old rather than someone much older which she "acts like". The x-rays, as interpretated by Dr. Hardiman, revealed some osteoporotic changes but very little degenerative changes.

Claimant continued to have recurring low back pain. On October 24, 1975, Dr. Cook felt that claimant's condition could be considered medically stationary. He reported that she persistently had left sciatica which was marginal in degree. He did not feel that claimant was a candidate for surgery at that time.

A Determination Order, dated December 2, 1975, awarded claimant additional temporary total disability compensation.

On April 1, 1976, Dr. Cook reported that claimant continued to have trouble with her back and sciatica. He felt there were two methods to treat claimant: one was to perform surgery and the other was to retrain her in some form of work that did not require bending and lifting. It was his opinion that even if claimant had surgery she would have to refrain from bending and lifting. In July 1976, he noted that claimant had been given a different job at the hospital and was working in the hospital laundry which aggravated her back and sciatic conditions.

Claimant testified that she quit work on June 13, 1976. Claimant was released for work on September 7 and 10, 1976 by Dr. Cook.

On October 13, 1976, Dr. T. Michael Norris reported that claimant had been treated and had not responded satisfactorily. He felt that claimant was improving at a rate that was not satisfactory either for her returning to her job or for her own personal comfort. He suggested that claimant be referred to the Disability Prevention Center. Claimant refused to attend this Center.

On November 26, 1976, claimant was involved in a motor vehicle accident in which she received injury to her neck. She testified this aggravated her low back condition. Claimant testified that just before this injury a ward clerk position in the hospital became available. She felt she could have done this job, but because of the intervening automobile accident never got a chance to attempt it. She felt after the car accident she would be unable to perform it.

A Determination Order, dated February 16, 1977, awarded claimant additional temporary total disability.

Claimant had been contacted by the Vocational Rehabilitation people and in May 1978 indicated that she was not available for services due to the severity of her handicap.

In March 1978, the Orthopaedic Consultants diagnosed chronic lumbar strain by history and conversion reaction and depression. They found that claimant could squat fully and recover by pulling on a chair. No ankle jerks were found. They opined that the degree of interference from functional disturbance was considered to be moderate, manifested by inconsistencies. It was their opinion that claimant's condition was stationary and they found no physical change to indicate a loss of function other than psychological.

On March 25, 1978, Dr. Curtis Hill opined that claimant prior to the motor vehicle accident had been able physically to participate in a rehabilitation program. However, after the accident, she was not able to carry out the vocational rehabilitation training program. He did not feel this inability to carry out the rehabilitation program was related to the industrial injury.

On April 28, 1978, the Orthopaedic Consultants opined that claimant was capable of performing her regular work prior to and after the motor vehicle accident in November 1976. They again stated that claimant had no impairment except psychological which was a conversion reaction and depression. Dr. Cook agreed essentially with this report, however, he opined that claimant should be able to return to some form of work that could be performed within the limits of proper back mechanics and did not require any prolonged bending, lifting or prolonged uninterrupted sitting or standing. He felt that the automobile accident aggravated claimant's pre-existing back condition.

In March 1979, Dr. Arlen Quan, a psychiatrist, reported claimant denied that she had any psychological or psychiatric problems. He diagnosed "Depressive neurosis, chronic, mild to moderate, directly related to cessation of disability benefits". He indicated claimant viewed herself as disabled and was resentful that she was not provided adequate money on which to live. It was his opinion that claimant's depressive symptoms were probably secondarily related to her own personality structure.

Also, in March 1977, Dr. John Harris reported that claimant lived on Social Security benefits since March 1978. Claimant reported she had a 10th grade education and worked as a waitress and a nurse's aide. Dr. Harris diagnosed a chronic lumbosacral strain syndrome. He agreed with the findings of the Orthopaedic Consultants in their March 1978 report and found no evidence of a significant worsening of her complaints since then. He felt the motor vehicle accident represented only a temporary aggravation of her back problem. He felt claimant's condition was medically stationary and she was physically capable of performing sedentary work, with no repeated stooping, repetitive lifting of more than 10 pounds, prolonged sitting or standing in one position. He felt that claimant's complaints of pain during his interview were somewhat exaggerated.

At the hearing, claimant testified she has looked for no work since June 1976 because she feels she could not do the work. She testified she lays down approximately four to five hours a day.

Dr. Hickman also testified he has been treating the claimant since 1968. He reported that claimant's depression started in February 1975 with uncontrollable bouts of crying. He felt that claimant was capable of rehabilitation before her automobile accident. Dr. Hickman indicated claimant was capable of walking one mile and doing light housework at that time. He stated he recommended psychiatric care, but claimant had rejected any such treatment. It was his feeling that without the automobile accident, claimant's condition would be the same. He believed claimant was not capable of employment on the basis of 40 hours per week. It was noted by Dr. Hickman that claimant's emotional self had improved since she had been on Social Security and that most of her troubles were financial. He noted claimant also had developed congestive heart failure which did not prevent her from working. Dr. Hickman felt in October 1976 claimant could work and testified he now thinks claimant is disabled on the basis of psychiatric problems.

The Referee found based on all the evidence in this case that claimant was permanently and totally disabled.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant's physical disability alone does not establish that she is permanently and totally disabled. The medical evidence indicates that claimant has had no surgery for this injury and that a myelogram and x-rays were negative for any herniated nucleus pulposus. The medical evidence also indicates claimant's condition was medically stationary and she was capable physically of engaging in a vocational rehabilitation program prior to her motor vehicle accident in November 1976. After this motor vehicle accident, claimant was found not to be physically capable of engaging in a vocational rehabilitation program. Claimant has not sought any employment since June 1976. Claimant is now 56 years old and has a 10th grade education.

The Orthopaedic Consultants found that claimant had no low back impairment due to her injury but did have some psychological impairment. Dr. Cook concurred with this report.

The Board finds that the reports of the Orthopaedic Consultants, Drs. Cook, Harris, Robinson, Hill, and Hardiman are more persuasive in this matter than Dr. Hickman's. Dr. Hickman is a family practitioner. The other doctors are orthopedic surgeons or neurologists. Dr. Hickman found that claimant had "significant pre-existing arthritic changes". The consensus of the other medical evidence indicates that claimant had some osteoporotic changes, but very little degenerative changes. Dr. Harris found there was no disc space narrowing, arthritic spurring or other significant abnormalities on the x-rays he had seen. Claimant also underwent a myelogram which was normal.

The Board finds that the preponderance of the medical opinions of the medical specialists are more persuasive than the opinion of Dr. Hickman. The Board concludes that claimant is not permanently and totally disabled based entirely upon the physical disabilities.

Dr. Hickman opined claimant was both physically and psychologically totally disabled. Dr. Quan, a psychiatrist, diagnosed depressive neurosis, chronic, mild to moderate, directly related to a cessation of disability benefits. Claimant related this condition to the time when workers' compensation benefits ceased in February 1977. Dr. Quan opined that claimant's depression symptoms were probably related to her own personality structure. The Board does not find that claimant's psychiatric condition is related to her injury.

Therefore, based on all the evidence in this case, the Board finds claimant has not proven by a preponderance of the evidence that she is permanently and totally disabled. However, based on the same evidence, the Board finds claimant is entitled to an award of compensation equal to 192° for 60% unscheduled disability for her low back injury.

ORDER

The order of the Referee, dated September 6, 1979, is modified.

Claimant is hereby granted an award equal to 192° for 60% unscheduled disability for her back injury. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

CLAIM NO. C 402099 March 21, 1980

EDWIN EVENSIZER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determinaiton

An Own Motion Determination was issued in the above entitled matter on March 10, 1980. On page two of this order it erroneously indicates that it was entered on February 10. Therefore, the Board amends that portion of the order so that it correctly reads "this 10th day of March, 1980"; the Fund's appeal rights shall run from that date. The remainder of the order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 79-5133 March 21, 1980

PHYLLIS HAM, CLAIMANT
Wade Bettis, Jr., Claimant's Atty.
Lawrance L. Paulson, Employer's Atty.
Stipulation

Claimant, acting by and through her attorney, Wade Bettis, Jr., and the insurance carrier, Chubb Pacific, acting by and through their attoenry, Lawrance L. Paulson, hereby enter into the following proposed stipulation:

1. Claimant was injured in the course and scope of her employment on or about October 6, 1975;

2. Claimant received medical care and treatment and temporary total disability, including vocational rehabilitation assistance and the case was closed by determination order of May 21, 1979, wherein she was awarded tomporary total disability and 10 percent unscheduled permanent partial disability;

3. Claimant has suffered previous back difficulties and surgeries ans surgery was required as a result of this industrial injury;

4. Claimant, unsatisfued with the award of permenent partial disability, appealed resulting in the Opinion and Order by Referee Gayle Gemmell dated February 27, 1980, wherein the Claimant was awarded a total of 50 percent unscheduled permanent partial disability (being an increase of 40 percent unscheduled permenent partial disability);

5. Defendant insurance carrier appealed to the Workers' Compensation Board to preserve its appellate rights, however, the parties have previously agreed that defendant insurance carrier would not pursue the appeal and that the Claimant would stipulate and agree that the Workers' Compensation Board can reduce her award of permanent partial disability to a total of 40 percent unscheduled permanent partial disability (that being an increase of 30 percent over the prior Determination Order), and the matter may be dismissed, upon approval of the decrease from the Opinion and Order;

6. It was further agreed between the parties, as set out in the Opinion and Order, that Claimant's attorney, Wade Bettis, Jr., shall not receive or take any attorney fees as a result of his representation of the Claimant in this matter.

IT IS SO STIPULATED:

IT IS SO ORDERED AS FOLLOWS:

1. Claimant's Award of permanent partial disability shall be decreased to 40 percent (total) unscheduled permanent partial disability, that being an increase of 30 percent above the Determination Order of May 21, 1979;

2. Defendant, insurance carrier's appeal to the Workers' Compensation Board shall be dismissed.

DATED this 21st day of March, 1980

CLAIM NO. D 408898 March 25, 1980

KENNETH B. ERRECART, CLAIMANT
Esler & Schneider, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

Claimant, by and through his attorney, on February 6, 1980, requested the Board enter an order approving a proposed distribution of funds recovered from a third party claim. Paragraph four of the motion provided an attorney fee in addition to those granted by ORS 656.593.

On March 3, 1980, the State Accident Insurance Fund advised the Board it was opposed to claimant's motion. This was based on ORS 656.593 and OAR 438-47-095.

The Board, after reviewing claimant's request, denies the motion. The Oregon Revised Statutes and the Board's rules do not provide for the awarding or payment of attorney fees as set forth in the motion. The Board finds no reason to deviate from these rules.

ORDER

Claimant's motion for an order approving a proposed distribution of funds from a third party claim is denied.

WCB CASE NO. 78-6127 March 25, 1980

BYRON E. KELSO, CLAIMANT
David Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant additional compensation for a total award of 192° for 60% low back disability and found that claimant was not entitled to compensation for his cervical and mid back regions. The Fund contends the award is excessive. Claimant cross-appeals contending he is entitled to a minimal award ofr his cervical and mid back condition and possibly an additional award for the low back condition.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board notes that if the Oregon rehabilitation system is ever going to be successful, all parties, including claimant, his or her attorney, and the people providing the rehabilitative services, must cooperate to the fullest. Without this cooperation, the system is doomed to failure from the very beginning.

ORDER

The order of the Referee, dated October 26, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

SAIF CLAIM NO. ZA 462295 March 25, 1980

CREIGHTON M. PYE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his head and neck on February 17, 1955 when he was struck by a falling limb. Claimant suffered a skull fracture, hemorrhage about the right eye and dental injuries. Claimant also developed vision problems, cervical pain, severe headaches and seizures. On March 19, 1976, this claim was closed by a Determination Order which granted claimant temporary total disability compensation and compensation equal to 75% loss of function of an arm for unscheduled disability. Claimant's aggravation rights have expired.

Claimant continued to have difficulty and the claim was reopened. A Second Determination Order, dated May 12, 1959, granted claimant additional temporary total disability compensation.

On May 1, 1979, claimant suffered a cerebral hemorrhage with grand mal epileptic seizures and was hospitalized. On November 17, 1979, the Board entered an Own Motion Order reopening this claim effective the date claimant was hospitalized.

Claimant was hospitalized for three days after the May 1978 incident. Dr. Mario Campagna prescribed medication to control the seizures. He opined the seizures were related to the 1955 injury. Dr. Donald Smith shared this opinion.

Dr. Smith, in February 1979, reported claimant was 61 years old. After examining claimant, he felt claimant's condition was stationary, however, did not feel the convulsive disorder was under adequate control. Considering claimant's age, he did not feel claimant's condition would improve, "but will actually show progression". Dr. Smith felt claimant had significant impairment which approached if it was not actually sufficient to result in claimant's total disability.

In May 1979, Dr. Barbara Radmore, a psychiatrist, opined claimant had a significant psychiatric disorder. Dr. Radmore felt claimant exhibited manifestations of a chronic brain syndrome which was the direct result of his 1955 injury and its sequelae. It was her opinion claimant was totally disabled and that the chronic brain syndrome would only worsen with the passage of time. Dr. Radmore felt claimant's depressions might be treated, but did not anticipate a full recovery.

In February 1980, Dr. Radmore indicated claimant's condition was not stationary and was continuing to deteriorate.

On February 21, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 11, 1980, recommended claimant be granted additional temporary total disability compensation from May 1, 1978 and be found permanently and totally disabled.

The Board finds that claimant is entitled to an award of compensation for permanent and total disability effective May 1, 1978. The record indicates the Fund has paid claimant temporary total disability compensation from May 1, 1978. It is entitled to credit these payments against claimant's award of permanent total disability.

ORDER

Claimant is hereby granted an award of compensation equal to permanent and total disability, effective May 1, 1978. The State Accident Insurance Fund is entitled to a credit for payments of temporary total disability compensation it paid from May 1, 1978 against this award.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-1631 March 25, 1980

DAVID W. SHEPHERD, CLAIMANT
Frank J. Susak, Claimant's Atty.
David Horne, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of that portion of the Referee's order which affirmed the employer's denial of his claim for his left knee condition. Claimant contends he has proven by a preponderance of the evidence that on January 23, 1979, he suffered an injury to his left knee.

FACTS

Claimant, a 32-year-old construction laborer, alleges that on January 23, 1979, while cutting down a tree, the tree unexpectedly began to fall, he ran to avoid injury, lost his balance, slipped and fell "folding" his left leg under him. On January 25, 1979, Dr. Norman Logan diagnosed a left knee contusion. Claimant felt this aggravated a prior left knee injury which had occurred in May 1978.

In regard to the May 1978 left knee injury, Dr. Logan had reported claimant was injured in a ditch cave-in. Claimant said he had felt his left knee "snap" and heard a loud "pop". The diagnosis was a suspected tear of the medial collateral ligaments of the left knee and contusion of the left ankle. On May 25, 1978, claimant underwent an arthrotomy with repair of the deep portions of the medial collateral ligaments of the left knee.

In December 1978, claimant had indicated he had no knee pain, could jog, but could not run fast. On January 2, 1979, Dr. Logan reported claimant had been released to return to work on January 3, 1979. Dr. Logan felt if claimant continued to have no difficulty, that in six weeks the claim could be closed.

An arthrogram of the left knee was done February 5, 1979, and revealed the menisci were intact.

On April 18, 1979, this claim was denied.

At the hearing, claimant testified the tree he was cutting started to split and he ran to avoid being hurt. He finished his shift on that day, but his leg became more stiff the longer he worked. The next day claimant said his leg was swollen and he was unable to work. Claimant testified he advised his supervisor, Mr. David Briley, of the January 23, 1979 accident and the injury to his left knee.

Mr. Briley testified at the hearing that he had seen claimant sitting by the chainsaw on January 23, 1979 and claimant had said his legs were "weak" and "rubbery". Mr. Briley said claimant made no statement about slipping and injuring his knee. He stated that after work he and claimant had walked approximately 1500 feet and over a 30-foot dike and that claimant had carried a chainsaw. He did not observe claimant having any physical difficulties. Mr. Briley also testified he had seen claimant cut up firewood from a slash pile on January 22, 1979 and the next day had observed him back up his pick-up to the slash pile. He said the tree claimant was cutting on January 23, 1979 at work did not split.

Claimant testified he spoke with a friend on January 23, 1979 about the accident and had told the friend of his injury before leaving for home after work. This friend was not called to testify. The claimant also testified that on January 23, 1979 he was unable to cut firewood because his chainsaw wouldn't start.

The Referee concluded, based on all the evidence, the incident did not occur as claimant alleged. Therefore, the Referee affirmed the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. Claimant has not proven by the preponderance of the evidence that he injured his knee as alleged on January 23, 1979 or aggravated his pre-existing knee condition. The Board concludes claimant has not met his burden of proof. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated August 29, 1979, is affirmed.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

WCB CASE NO. 79-940 March 25, 1980

ROY L. THOMPSON, CLAIMANT
Velure, Heysell & Pocock, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which set aside its denial of claimant's claim for a myocardial infarction and coronary artery disease and ordered it to accept the claim for these conditions and awarded claimant's attorney a fee. The Fund contends the Referee erred in so doing.

FACTS

Claimant, a 52-year-old police sergeant, alleges that he sustained a myocardial infarction on September 16, 1978 due to the stress of his job. He had been employed as a police officer since July 1957. Claimant had finished his shift on September 14, 1978 and gone home. On September 15, 1978, he did not work. On the 16th of September 1978, claimant was repairing the roof of a building on his property with metal roofing material. Claimant indicated that he had almost finished his roofing chore when he felt the onset of chest pain. He was taken to the hospital where Dr. J. T. Brandenburg diagnosed an inferior wall myocardial infarction of some magnitude. He was treated by Dr. Brandenburg and discharged home but was re-hospitalized on October 17, 1978 with additional chest pains.

On October 31, 1978 Dr. R. A. Schaefer indicated that claimant had a history of hypertension since he was 18 years old and had been using multiple medications. Claimant also had a history of heavy smoking and a kidney problem. Claimant's father had died at the age of 70 of a myocardial infarction. His mother was living at the age of 77 in good health except for palpatations. Dr. Schaefer reported that claimant had sustained an acute myocardial infarction on September 16, 1978 and continued to have persisting angina pectoris. Claimant also continued to have difficulty with intermittent periods of depression and gout. He indicated that claimant also had a renal insufficiency and hypertension.

On November 7, 1978, claimant had surgery for a coronary artery bypass.

Claimant testified that he was first employed by the City of Medford as a patrolman with the police department in 1953. He worked until 1956 when he quit because of a kidney difficulty and returned to work as a patrolman in 1957. In early 1960, claimant was promoted to property officer and was in charge of care of police records, property taken from persons in custody of the police, and jail care. Claimant indicated that he felt there was some stress from this job which he held from 1962 to 1975. He testified the stress was due to the fact that there was always "a lot of work which had to be kept up with". Claimant indicated that in 1975 the police department was reorganized and he was given the option of either returning to active patrol duty as a sergeant or taking a reduction in rank to patrolman and retaining his desk job. Claimant said he reluctantly agreed to the transfer as a sergeant to active "street" police work. Claimant testified that after his return in 1975 to patrol work, he began to experience difficulty because of changes in laws and a change in the community attitude regarding law enforcement. He said that his supervising lieutenant was working on a procedure manual and did not give any type of direction. He testified this lack of direction put more and more on his shoulders "in the way of getting the job done". Claimant was also worried about returning to street police work because of his age and reduced reflexes. He said that he also had difficulty working with the younger officers, because they were better educated and because he did not agree, philosophically, with their approach to law enforcement. He also testified to a great deal of frustration because, as a supervisor, he received complaints about department practices and policies but had no authority to take corrective action. There was also continuing discussion of the possibility the city would consolidate the Police and Fire Departments. He was advised that if this consolidation occurred, that possibly he would be reduced in rank to patrolman.

After the transfer to patrol work, claimant indicated he frequently became so frustrated by the end of his shift that after he returned home he would burst into tears. He frequently remarked to his wife that he disliked his job. He felt he was under severe emotional stress from the time he was transferred from property officer to patrol duty all because of the aggravating conditions he experienced when he returned to patrol work.

In December 1978, Dr. Brandenburg indicated he had first treated claimant in 1971 for his hypertention. He reported claimant continued to be borderline hypertensive until 1975. During 1975 he indicated that tests showed very high blood pressure immediately after claimant came off work. The blood pressure would return to normal levels while claimant was hospitalized. Dr. Brandenburg felt that claimant's employment was a police officer with the stresses that "he knew" claimant endured as a patrolman, "materially contributed to the advancement of his hypertension with secondary atherosclerotic heart disease, ultimately resulting in a myocardial infarction and then open heart surgery". He felt the stress itself was a contributor to the coronary sclerosis and that reduction of stress or avoidance of stress was accepted treatment for anyone who had heart trouble.

In January 1979, Dr. Schaefer reported that claimant had a number of risk factors, such as heavy smoking, hypertension and borderline hypercholesterolemia. He noted that claimant had been at times significantly depressed and also that claim- had found his job stressful. Dr. Schaefer felt that emotional stress was "relatively less potent" of a risk factor than the other risk factors he enumerated. He felt that while it was true that emotional stress did tend to exacerbate hypertension and that hypertension is a "potent risk factor" for the development of coronary artery disease, he was unable to comment on the possible role of job stress played in aggravating claimant's hypertension. He felt Dr. Brandenburg was in a better position to comment on causal relationship.

On January 25, 1979, the Fund denied claimant's claim.

On March 14, 1979, Dr. Weldon J. Walker reported that claimant had had difficulty with his kidney and that it was eventually removed in 1961 or 1962. He also indicated that claimant had a history of high normal or elevated blood pressure during his entire adult life and had moderately severe hypertension in recent years. The history he had

been given was that claimant had been under treatment for hypertension for approximately eight years prior to his heart attack. Claimant also had a history of considerable depression and had been treated for that with medication. Claimant also indicated he had a diet which consisted of fairly high fat and meat content. Claimant's father and also an uncle had died of myocardial infarctions. Dr. Walker diagnosed: arteriosclerotic heart disease, severe, with prior bypass surgery; hypertension, moderate; impaired renal function with prior right nephrectomy, and recurrent gout. Dr. Walker felt that claimant had had most of the major risk factors for coronary heart disease over a protracted period of time. He noted it was felt that coronary occlusion and myocardial infarctions usually were the end result of a slowly progressive narrowing of the coronary arteries over a period of many years with cholesterol deposits and other fatty substances and that symptoms become manifest only after one or more of the major arteries became 70% or more narrowed. It was his opinion that claimant had many proven risk factors for coronary disease over much of his adult life and that these were the major factors causing his September 16, 1978 heart attack. He noted that claimant's "hypertension certainly contributed and probably his renal disease was a major contributing factor to that hypertension". It was his opinion that stress was not a major factor in contributing to claimant's September 16, 1978 heart attack and subsequent heart surgery.

Dr. Brandenburg listened to claimant's entire testimony at the hearing regarding his activities just prior to the onset of the anginal pain. He did not find they were particularly significant.

The Referee concluded that, along with other apparently material contributing factors in this case, the stress of an emotional nature imposed upon claimant by his work circumstances after his transfer out of the property room in 1975 and before his myocardial infarction in September 1978 were material contributing factors to claimant's present heart condition, both in terms of infarction and in terms of necessity of his having coronary bypass surgery. Therefore, the Referee set aside the Fund's denial and remanded the claim to it for acceptance and payment of compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's Opinion and Order. The Board finds that Dr. Brandenburg, as claimant's treating physician in this case, is more persuasive than Dr. Walker. Dr. Schaefer deferred to Dr. Brandenburg on the question of medical causation. Dr. Brandenburg opined claimant's employment as a police officer with the stresses associated with the job, materially contributed to the advancement of claimant's hypertension with secondary atherosclerotic heart disease, ultimately resulting in a myocardial infarction and then open heart surgery, leaving claimant with an enlarged, scarred heart. He noted that it was felt by many in the field of cardiovascular medicine that stress itself was a contributor to coronary arteriosclerosis and that it was certainly part of the accepted treatment of anyone dealing with heart trouble to advise people to avoid stress. Dr. Walker, on the other hand, felt stress was not a factor contributing to claimant's myocardial infarction and subsequent heart surgery. The Board finds that Dr. Brandenburg's opinion in this case is more persuasive than that of Dr. Walker and would, therefore, affirm the Referee's order.

ORDER

The Referee's order, dated August 20, 1979, is affirmed.

Claimant's attorney is awarded a sum of $300 as and for a reasonable attorney's fee for his services at the Board level.

WCB CASE NO. 79-2296 March 25, 1980

ALLIE M. WATSON, CLAIMANT
David R. Vandenberg, Jr., Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which affirmed the employer's denial of her claim.

FACTS

Claimant, a 53-year-old mill worker, alleges that on February 21, 1979 she sustained a compensable injury to her left arm. Claimant indicated she was sawing some "sticks" she found on the mill floor that were too long for the trash box when she caught her sleeve in the saw pulling her arm into it. This injury was diagnosed as an extensive laceration of the left forearm.

On March 1, 1979, the employer denied the claim.

At the hearing, claimant testified she worked for this employer on the 7:30 a.m. to 4:30 a.m. shift. She said she always arrived early and cleaned the ladies' restroom. On February 21, 1979, after cleaning the restroom, claimant indicated she was proceeding to the grinding room, prior to her shift beginning, when she saw some "sticks" on the floor. Since they would not fit into a waste bin, she started to cut them with a saw when her sleeve because entangled in the saw, injuring her arm. Claimant stated she always had done this type of activity before and after the whistle blew beginning and ending her shift.

After this injury, claimant was off work 14 days. When she returned to work her employer suspended her for unauthorized use of the saw.

There was testimony about employees "cutting pitch". This meant cutting up scraps of wood called "pitch sticks" into lengths the employee could pack out and take home. The employer had allowed employees to take this wood for use as firewood. However, this practice had been prohibited by the employer prior to claimant's injury.

The medical supervisor testified she examined claimant at 7:05 a.m. Claimant told her she had cut her arm on the saw while "cutting pitch".

The planer mill foreman testified the employees all were aware they were not supposed to use the equipment unless they had been authorized to do so. He testified the claimant was not authorized to start the saw before working hours. He said he heard claimant tell the nurse she injured her arm "cutting pitch". When he examined the area around the saw he did not see any "pitch stick".

The Referee found claimant's operation of the saw was for her own personal benefit and did not arise out of or occur in the course of her employment. Therefore, the Referee affirmed the employer's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. Claimant was a laborer with this employer and on the day of the injury her job was "pulling moulding". Her job did not include operating saws. Claimant had not been authorized to use the saw. The employer expressly forbid the unauthorized use of the equipment and had so advised the employee before this injury. The preponderance of the evidence indicates claimant was injured while performing an act for her personal benefit and had violated the employer's expressed prohibition against the unauthorized use of equipment. The use of equipment before her shift began whether for personal reasons or not was neither authorized nor condoned by the employer.

Therefore, the Board finds claimant's injury is not compensable. The Board concludes, based on the evidence in this case, claimant's injury did not arise out of nor occur in the course of her employment. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated August 29, 1979, is affirmed.

CLAIM NO. D53-158838 March 26, 1980

ROLF W. FERCHLAND, CLAIMANT
Starr & Vinson, Claimant's Attys.
Samuel A. Hall, Jr., Claimant's Atty.
David O. Horn, Employer's Atty.
Disputed Claim Settlement

Claimant, claimant's attorney, and the attorney or other authorized representative of the employer's insurer hereby move the Workers' Compensation Board for an Order approving the following stipulated settlement:

1. The terms of this settlement dispose of all issues between the parties except those specifically reserved herein for later decision (if any), and the pending request for hearing is withdrawn.

2. The claimant suffered a compensable injury to his low back and this claim was accepted and assigned claim number D53-158838. Subsequesntly, the claimant developed cervical and upper back symptoms which were related to a diagnosed herniated disc in the neck.

3. The claimant contends that a herniated cervical disc and related symptoms and treatment are also attributable to the industrial accident which caused the compensable low back injury. The workers' compensation carrier for the employer has denied this claim.

4. A bona fide dispute exists between the parties and they are desirous of resolving this dispute without further litigation.

5. At this time the claimant complaings of severe disabling cervical and upper back symptoms which prevent him from performing his regular work activity and that his cervical and upper back disabilities are presently his primary disabling condition.

6. The employer, by and through its workers' compensation insurance carrier, EMPLOYERS INSURANCE OF WAUSAU, agrees to pay to the claimant the sum of $30,000 in a lump sum upon the filing of this stipulation and order. Payment of said sum is not an acceptance, nor recognition of any responsibility for said cervical and upper back disabilities complained by the claimant. It is specifically agreed between the parties that the denial which was issued in the above entitled matter, relating to the claimant's cervical and upper back disabilities, shall remain in full force and effect.

7. It is specifically agreed between the parties that the workers' compensation carrier, EMPLOYERS INSURANCE OF WAUSAU, shall not be responsible for any residual disabilities or loss of earning capacity attributable to the claimant's cervical and upper back injuries and residual disabilities.

8. Should EMPLOYERS INSURANCE OF WAUSAU become obligated to the claimant for permanent total disability benefits by reason of injuries and disabilities suffered by the claimant pursuant to this claim (No. D53-158838), EMPLOYERS INSURANCE OF WAUSAU shall be entitled to an offset of $30,000 against said payment of permanent total disability benefits.

9. The claimant's attorney shall be entitled to a reasonable attorney's fee in the amount of $4,000 of the money made payable by paragraph 6 of this stipulation, said fee computed according to the Workers' Compensation Act and the rules and regulations of the Workers' Compensation Board. Said fee is to be paid out of and not in addition to the monies made payable by paragraph 6 of this stipulation. Said claim shall be submitted to the Closing and Evaluation Division upon determinaiton that the claimant's compensable low back disabilities have become medically stationary.

10. It is agreed between the the parties that the claimant's unscheduled disability attributable to his low back injuries shall be rated at 35% of unscheduled permanent partial disability, this being an increase of 25% (80°) above and beyond the 10% of unscheduled permanent partial disability awarded by the Determinaiton Order of February 17, 1976. It is further agreed that there will be no increase for scheduled permanent partial disability through this order for claimant's right leg.

11. The claimant's Attorney shall be entitled to a reasonable attorney's fee in the amount of 25% ($1,400.00) of the increased compensation made payable by paragraph 10. Said fee is to be paid out of and not in addition to the monies made payable by paragraph 10.

IT IS SO STIPULATED this 13th day of February, 1980

IT IS SO ORDERED this 26th day of March, 1980.

WCB CASE NO. 78-3079 March 27, 1980

TITO AGUIRRE, CLAIMANT
Philip Hayter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) has requested Board review of the Referee's amended order entered after this case had been remanded to the Referee by the Board which: (1) set aside its denial of March 16, 1978; (2) remanded the claim to it for acceptance of the claim as a disabling injury effective May 6, 1976; (3) ordered it to pay compensation for temporary total disability, less time worked, and all other benefits including medical benefits until the claim was closed; (4) ordered the Fund to pay a penalty equal to 10% of the amounts due for temporary total disability compensation and medical benefits between January 5, 1978 and March 16, 1978 for its unreasonable delay in making denial and for its unreasonable failure to make the time loss and medical payments within 14 days after January 5, 1978; and (5) awarded claimant's counsel a fee of $1,250. The Fund contends that the Board's remanding of the case and the Referee's order were in error and that the attorney fee awarded was excessive.

FACTS

Claimant, a 25-year-old meter reader, sustained an injury to his low back on February 19, 1973 when he slipped and fell on the sidewalk. Dr. E. B. Bossatti diagnosed this injury as a strained sacroiliac. On February 28, 1973 he released claimant for work. On March 5, 1973 he reported that claimant's condition was medically stationary. Claimant testified he lost no time from work due to this injury.

On August 30, 1974, claimant was struck by a motor vehicle while riding a bicycle. Claimant suffered various contusions and abrasions and complained of pain in the lumbosacral area.

Dr. John Dierdorff, on April 6, 1976, reported claimant had tenderness in "the left soleus muscle extending up to the origin in the lower dorsal region and extending to the crest of the ilium on the left". He diagnosed chronic lumbar myofacial strain. He indicated that he had been injured in 1974 and had last worked on September 12, 1974.

Dr. Dierdorff, on September 10, 1976, reported that claimant gave a history of injury on February 19, 1973 while working and since then has had repeated treatment for low back pain and discomfort. He indicated that claimant had sustained a recent injury following a fall from a telephone pole which had exacerbated his symptoms. A myelogram was performed which revealed an extradural defect at the L5-S1 level.

On May 24, 1976, Dr. Mohammed Hoda reported claimant complained of pain in the low back with radiation of pain in the left lower extremity. Dr. Hoda diagnosed a herniated disc at the L5-S1 level. The history of accident claimant gave to Dr. Hoda was the same history that claimant testified to at the hearing; that is, while walking on the sidewalk he had slipped and fallen on his left buttock. The EMG tests were normal. In May 1977, Dr. Hoda advised claimant's attorney that claimant had been injured on February 19, 1973 and not in 1974 as he had previously reported. This change in the date of the injury occurred after claimant changed the date on an information form he had filled out for Dr. Hoda.

On March 16, 1978, the Fund denied reopening of claimant's claim.

In August 1978, Dr. Hoda indicated that the relationship of claimant's present back injury to his previous injury on the job was established solely on claimant's history and the fact he had filed a claim with the employer at that time. Dr. Hoda indicated that there was no worsening of claimant's condition and he did not believe that claimant needed any surgical treatment. He felt claimant should be able to do light work that did not require any lifting, repetitive bending or stooping, or twisting of his back.

After a hearing the Referee affirmed the Fund's denial. Claimant requested Board review of the Referee's order. The Board remanded this case to the Referee for the purposes of considering post-hearing evidence consisting of a report from Dr. Dierdorff, dated September 12, 1978.

Dr. Dierdorff, in the September 12, 1978 report, indicated that he had incorrectly "assumed" the claimant had fallen from a telephone pole. His records, he reported, were silent on "direct causalogy for his accident or the exact condition involved". He asked the Referee withdraw from the records his previous statement of a fall from a telephone pole.

A second hearing was held and the Referee, after considering this additional evidence; (1) set aside the Fund's denial of March 16, 1978; (2) remanded the claim to it to be accepted as a disabling claim effective May 6, 1976; (3) ordered the Fund to pay all temporary total disability compensation, less time worked, and all other benefits until the claim was closed; (4) awarded claimant a penalty of 10% of all temporary total disability compensation and medical benefits between January 5, 1978 and March 16, 1978 for unreasonable delay in making a denial and for its unreasonable failure to make the payments for temporary total disability and medical benefits within 14 days after January 5, 1978; and (5) awarded claimant's attorney a fee of $1,250.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board finds the claimant has failed to prove his claim by a preponderance of the evidence. The denial issued by the State Accident Insurance Fund is affirmed.

The Board finds the condition for which claimant now seeks treatment has not been proved to be a direct result of the original injury. The original injury was diagnosed as a strained sacroiliac. Claimant did not suffer any loss of time from work. He next sought treatment after he was struck by a car in August 1974. At that time he reported pain in the lumbosacral area.

When he first saw Dr. Dierdorff he indicated that he had been injured in 1974 and that he had last worked on September 12, 1974, 12 days after being struck by the car. On May 6, 1976 Dr. Dierdorff diagnosed a chronic lumbar myofacial strain. Dr. Dierdorff indicated the date of injury had been 1974. In September 1976 Dr. Dierdorff corrected the date of injury to February 19, 1973, however, he also indicated claimant had been injured in a fall from a telephone pole. Later, Dr. Dierdorff said his records did not reflect how claimant had been injured. Dr. Dierdorff treated claimant for a condition relating to the lumbosacral area and not to the sacroiliac area.

Dr. Hoda indicates in his first report that claimant had no serious injuries to his low back before 1974. He reported that claimant definitely had a herniated disc at L5-S1 which had been confirmed by a myelogram. He could not state with reasonable medical probability that claimant's present problems were related to the injury of 1974. Later he was advised by the claimant that the injury had occurred on February 19, 1973 and not 1974. Dr. Hoda, in August 1978, indicated any relationship of claimant's present back injury to his previous injury on the job was established solely by history and the fact a claim had been filed with the employer.

The Board finds that Dr. Dierdorff's report of May 6, 1976 was a claim for aggravation. The Fund did not act on this claim until they denied it on March 16, 1978. Claimant is entitled to temporary total disability for this period, less time worked. The Board also would assess a penalty equal to 10% of the temporary total disability compensation due for this period as a penalty for the Fund's unreasonable delay in making the denial. Claimant's attorney is awarded an amount equal to 25% of the temporary total disability compensation not to exceed $750.

The Board finds its remand of this case to the Referee to consider the additional evidence was correct.

ORDER

The Referee's order, dated November 19, 1979, is reversed in its entirety.

Claimant is hereby awarded compensation for temporary total disability from May 6, 1976 through March 16, 1978, less time worked, and an amount equal to 10% of this compensation as a penalty for the Fund's unreasonable delay in denying this claim. Claimant's attorney's is awarded a sum equal to 25% of the tempoary total disability compensation awarded, not to exceed $750.

WCB CASE NO. 78-10,067 March 27, 1980

EDWARD HARRIS, CLAIMANT
Alan H. Tuhy, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which approved the State Accident Insurance Fund's (Fund) denial of his claim for a right shoulder condition.

FACTS

Claimant, a 54-year-old carpenter, alleges on September 8, 1978 he sustained an injury to his right shoulder while carrying sheets of plywood up some stairs. Claimant stated the stairway had low overhead clearance with a sharp turn at the top of the stairs.

Dr. Charles Hathaway, D.C., diagnosed "1. Traumatic cervical strain/sprain, 2. Bicepital tendonitis [sic]". Claimant explained to Dr. Hathaway he had injured his shoulder on September 7, 1978. On October 6, 1978, Dr. Hathaway indicated claimant was released for regular work and his condition was medically stationary.

On November 2, 1978, the Fund denied this claim.

In December 1978, Dr. Hathaway indicated claimant had stated that on September 7, 1978 he had lost his balance while carrying lumber on his shoulder and hyperextended his neck and shoulder. Claimant denied having any previous shoulder injury, but admitted having a previous neck and thoracic injury. Dr. Hathaway felt claimant's symptomatology was consistent with the accident he described.

On April 20, 1979, Dr. William Parsons indicated claimant told him that on September 8, 1978, after carrying some 4' x 8' sheets of plywood he had experienced pain in the right shoulder. Since his release for work claimant indicated he had worked continuously, although he continued to have shoulder pain.

On May 25, 1979, Dr. Howard Geist reported claimant told him that on September 8, 1978 he carried heavy sheets of plywood up a staircase. Claimant denied falling or jarring his shoulder. While doing this activity, claimant stated he experienced a "stinging" in the right shoulder. Dr. Geist indicates claimant had no history of past right shoulder difficulty, but contradictorily states he did. The diagnosis was "chronic supraspinatus and bicipital tendinitis, right shoulder". Dr. Geist felt claimant's tendinitis could have been employment related.

At the hearing, claimant testified he was working with Mr. David Lee one day carrying sheets of plywood up a flight of stairs, when he experienced a "stinging and burning" in his right shoulder. He said he continued to work and the pain became progressively worse, requiring him to see Dr. Hathaway on September 18, 1978. He denied telling Dr. Hathaway he had lost his balance when he was injured. Claimant indicated he told his foreman his shoulder was sore and he "must be getting old", but later said he told his foreman he injured his shoulder. Also, he said he told Mr. Lee he injured the shoulder. As to the date of the injury, claimant indicated he was unsure of the exact date and after discussing it with the company secretary, arrived at September 8, 1978. Claimant's wife corroborated his testimony.

Claimant's supervisor testified he kept a written record which indicated he knew nothing of claimant's alleged injury and that claimant carried plywood on September 12, 1978.

The Referee found inconsistencies in the histories given the doctors by claimant and his testimony. The Referee found no persuasive medical opinion relating claimant's symptoms to his work activity. Therefore, the Referee concluded the weight of the evidence failed to establish claimant suffered a compensable injury to his right shoulder on September 8, 1978 and affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board does not find the inconsistencies in this case are that serious. Claimant's testimony regarding the date of injury establishes he is not sure of the date and arrived at September 8, 1978 after discussing this matter with a company secretary. The evidence clearly indicates claimant experienced pain in his right shoulder after carrying plywood up a staircase.

The medical evidence establishes, in the Board's opinion, claimant's right shoulder condition is related to his employment. Dr. Hathaway finds claimant's symptomatology was consistent with the accident he described. Dr. Geist opined claimant's condition could have been employment related. The Board finds the greater weight of the evidence relates claimant's right shoulder condition to his work.

Therefore, the Board concludes claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his right shoulder as alleged in September 1978 and reverses the Referee's order. The Board does not find the denial was unreasonable.

ORDER

The Referee's order, dated November 1, 1979, is reversed.

The State Accident Insurance Fund's denial, dated November 2, 1978, is set aside and claimant's claim is remanded to it for acceptance and payment of compensation and other benefits until the claim is closed pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services both at the hearing and at Board review a sum equal to $750, payable by the Fund.

WCB CASE NO. 78-6381 March 27, 1980

BEATRICE B. SHEWMAKER, CLAIMANT
Kirkpatrick & Howe, Claimant's Attys.
Kennedy, King & McClurg, Employer's Attys.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 78-8691 March 28, 1980

TAYLOR PARKER, CLAIMANT
Rhoten, Rhoten & Speerstra,
Claimant's Attys.
G. Howard Cliff, Employer's Atty.
Request for Review by Employer
Cross-appeal by Claimant

ISSUE ON REVIEW

The employer and claimant seek Board review of that portion of the Referee's order which granted claimant an additional award of compensation equal to 48° for 15% unscheduled disability for his back injury. The employer contends this award is excessive. Claimant contends his condition was not medically stationary on September 12, 1978 and is still not and if it is the award granted by the Referee is not adequate.

FACTS

Claimant, a 40-year-old truck driver, sustained a compensable injury to his left hip, left shoulder and neck on November 11, 1977 when he missed a step on the truck and fell to the ground, landing on his left shoulder. Dr. Robert Kelly diagnosed a "muscle strain glutious".

On November 29, 1977, Dr. Herbert Spady diagnosed sprains of the lumbar and cervical spine regions. He felt claimant might have some nerve root irritation in the cervical spine. In March 1978, Dr. Spady reported claimant had had previous episodes of back pain for which he had made a "satisfactory recovery" and claimant had returned to work. Dr. Spady felt claimant would not be able to return to work involving a significant amount of back bending and lifting. In May 1978, Dr. Spady opined the prognosis for complete relief of claimant's back symptoms appeared to be poor and claimant needed a job modification. On July 7, 1978, Dr. Spady reported claimant's condition was medically stationary.

In July 1978, Dr. J. Edward Field, medical examiner at the Disability Prevention Center, reported claimant complained of pain in both legs, the low back, the neck and both shoulders, and of impaired motion of the shoulders. He diagnosed a lumbosacral and cervical muscle strain. Claimant said he had an 8th grade education. He indicated he had worked at a variety of jobs including trucking, working in oil fields, selling door to door and manager of a tire shop. In August 1978, Dr. Field concluded claimant would most likely not return to truck driving. Claimant planned to begin an on-the-job training program to become an apartment house manager.

On September 27, 1978, the Orthopaedic Consultants opined claimant's condition was medically stationary. They felt claimant should be able to return to his previous occupation with limitations, or some other occupation. They felt claimant needed vocational assistance. Claimant's total loss of function of the back and due to this injury was rated as mild. They opined the total loss of function of the neck was minimal.

A Determination Order, dated October 19, 1978, awarded claimant temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his low back and neck injury.

In January 1979, claimant was advised by the Field Services Division he would not be referred for vocational rehabilitation. On February 21, 1979, claimant was notified of a withdrawal of employment reentry assistance.

The Field Services Division, on February 28, 1979, reported claimant working as a dispatcher for another employer. The Field Services Division did not find claimant to be a vocationally handicapped worker and would not authorize a vocational rehabilitation program.

On March 12, 1979, Dr. Thomas Erdman, D.C., reported claimant's condition was not medically stationary. He felt claimant could return to modified employment with no heavy lifting. Claimant complained of constant pain and stiffness in the neck, between the shoulders and arms, low back pain, intermittent numbness and tingling in both arms and both legs, and headaches.

Dr. Spady, on March 26, 1979, opined the chiropractic treatments were not curative and they were not advisable for claimant's condition. The Orthopaedic Consultants agreed with this.

On August 28, 1979, Dr. Spady reported claimant had been working since January 1979 as a truck driver. Claimant complained of periodic episodes of leg pain, back pain and pain in the knee. He felt claimant's condition had not significantly changed since his closing examination. He stated it was expected claimant would have episodes of worsening and episodes of improvement with his type of back problem. He felt the chiropractic treatments were palliative and did not recommend any further treatment.

In 1963, claimant had injured his back and right shoulder in another industrial injury. Claimant received an award of temporary total disability and compensation equal to 36-1/4° for 25% loss function of an arm for unscheduled disability for his injury.

Claimant testified he still has low back pain radiating into his right leg expecially after prolonged periods of sitting. He said this pain interfers with his sleep, his ability to stand, sit, walk, climb and bend. Claimant said he did not have any restrictions on his activities prior to the 1977 injury. He said he works about 55-60 hours per week at his current job. He stated he was also a very competent mechanic. He commented he was taking no medication.

The Referee found, based on all the evidence, claimant was entitled to an increase of compensation equal to 48° for 15% unscheduled disability for this injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order and restores the Determination Order, dated October 19, 1978. The Board finds the preponderance of the evidence in this case does not establish claimant has suffered a loss of wage earning capacity in addition to that for which he was compensated by the Determination Order. Claimant has returned to his previous form of employment and is able to function very well in it with minimal difficulties. The preponderance of the medical evidence indicates claimant has a mild disability. The Board feels, based on all the evidence, the award of compensation granted by the Determination Order correctly compensated claimant for his loss of wage earning capacity due to this injury. Therefore, the Board reverses that portion of the Referee's order which granted claimant an additional award of compensation equal to 48° for 15% and restores the Determination Order.

The Board concurs with the Referee's finds that claimant's condition was medically stationary as of September 12, 1978.

ORDER

The Referee's order, dated October 11, 1979, is modified.

That portion of the Referee's order which granted claimant an award of additional compensation equal to 48° for 15% unscheduled disability for his back injury and granted claimant's attorney a fee out of this increased compensation is reversed.

The Determination Order, dated October 19, 1978, is reinstated and restored.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-2194 March 28, 1980

MONIQUE SCARBOROUGH, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The claimant seeks Board review of the Referee's order which affirmed the employer's denial of her claim for her right shoulder condition. Claimant contends she has proven that this condition was related to her work and that her work materially and permanently aggravated this condition.

FACTS

In August 1976, claimant had been off work for a condition diagnosed as bursitis of the right shoulder. Dr. Ellerbrook noted claimant continued to have difficulty with pain in her legs and right arm into August of 1977.

On September 13, 1977, Dr. Ellerbrook reported claimant continued to complain of pain in the hip and arm. Claimant reported she first began to have difficulty with her right shoulder and elbow about a year previously. Claimant said raising her arm caused pain and that her right elbow was stiff and painful. Dr. Ellerbrook reported claimant also complained of tenderness over the left posterior trochanter area. His diagnosis was multiple tendinitis of the right shoulder, elbow and left hip. He injected the areas with xylocaine and depo-medrol.

Dr. John Thompson indicated, on September 20, 1977, he had examined claimant and felt she had chronic tendinitis of the right shoulder, epicondylitis of the right elbow and a trochanteric bursitis of the left hip.

On September 28, Dr. Ellerbrook indicated he was not sure if claimant's tendinitis condition arose from her employment. On the same date, Dr. Thompson indicated it was his opinion that the multiple tendinitis of the right shoulder, elbow and left hip were not related to claimant's employment.

On October 10, 1977, claimant filed a claim for pain in the left leg, right elbow and shoulder. She indicated her job of "fritting" required standing for long periods of time and use of the right arm constantly "to frit and dag." Claimant was a 48-year-old production operator for this employer. She indicated this condition had gradually developed since sometime in July 1975. Claimant stopped working for this employer on September 2, 1977.

Also, in October 1977, Dr. William Peltzer, D.C., indicated claimant's condition was brought on by her employment. He diagnosed a right shoulder bursitis and mild tendinitis of the right shoulder girdle.

On February 21, 1978, the Orthopaedic Consultants indicated claimant had reported experiencing pain in the right wrist in 1975 while performing her usual job with this employer. She indicated she continued to work and after several days the symptoms disappeared. However, either at the end of 1975 or in early 1976, claimant said she began to notice pain in the region of her right shoulder. She said this pain seemed to be brought on initially by raising her arm overhead. The Orthopaedic Consultants reported claimant was 5'1" and weighed approximately 153 pounds. They diagnosed bilateral chronic subacromial bursitis and capsulitis with calcification and left trochanteric bursitis. It was their opinion that claimant's condition was not stationary and that she was in need of further treatment. They noted the diagnosis they arrived at did not fit the criteria normally applied for an occupational disease and there was no history of a specific injury at any time involving either the wrist, elbow, shoulder or hip. They felt the history of pain in the right shoulder was undoubtedly irritated by her particular job as described to them by the claimant. She had indicated her job required repetitive use of the arms above the waist level. They did not feel that this should be classified as an on-the-job injury.

On March 7, 1978, the claimant's claim was denied.

In June 1978, Dr. Thompson, after seeing films depicting claimant's job, indicated he still was of the opinion that her problem was not related to her employment. He indicated he agreed with the report of the Orthopaedic Consultants and with their opinion that the diagnosis did not fit the criteria normally applied to an occupational disease. He did not believe the activities represented on the film materially contributed to claimant's problem. Dr. Thompson did agree with the Orthopaedic Consultants that the pain in the right shoulder was undoubtedly irritated by her job. He also agreed that this injury should not be classified as an on-the-job injury.

On July 31, 1978, the Orthopaedic Consultants, after reviewing the same film, reported they did not feel that the criterium for an occupational disease was met in that the specific activity did not produce similar complaints in the majority of individuals performing this activity. However, they noted the film depicted an individual who repeatedly abducted the right shoulder from 45° to close to a complete range of abduction. It was their opinion that this type of repetitive activity in an individual who has any type of a pericapsulitis or irritation of the shoulder cuff, with or without calcification, would undoubtedly aggravate this condition by repetitiously performing a job requiring abduction, as depicted in the film. In November 1978, the Orthopaedic Consultants opined the repetitious activity that they observed in the films would not ordinarily produce symptoms in a shoulder that was normal in all respects, but in a shoulder with underlying disease, such activity could irritate the underlying condition and thus produce symptoms.

The employer's insurer commenced payment of temporary total disability on October 19, 1977 and continued paying temporary total disability until March 7, 1978 when the claim was denied.

The Referee found claimant's right shoulder at least had been "aggravated" by the work; i.e., the work caused symptoms. However, he found that the claimant had failed to prove that the work originally caused or permanently worsened her condition. He found claimant's right shoulder condition was made more symptomatic by her work, but that it had not permanently worsened because of the work and affirmed the denial. The Referee further found the employer's insurer was not subject to a penalty because it had commenced payment well within 14 days of the assertion of the claim.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The case relied upon by the Referee in reaching his decision was reviewed by the Supreme Court. The Supreme Court, in Weller v. Union Carbide, 288 Or 27, _____ P2d _____ (1979), held that claimant had to prove by a preponderance of the evidence that: "(1) his work activity conditions (2) cause a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent that it produced disability or requires medical services". The Supreme Court held that this worsening need not be permanent. The Court held that a temporary worsening of the underlying disease which required medical services or resulted in temporary disability, was compensable. Citing Stupfel v. Edward Hines Lumber Company, 288 Or 39, _____ P2d _____ (1979). The Supreme Court further, in the case of Hutchison v. Weyerhaeuser Company, 288 Or 51, _____ P2d _____ (1979) stated, in discussing the claim for an occupational respiratory disease resulting from breathing dust and smoke at work: "If the 'mill conditions' caused temporary exacerabation of his pre-existing chronic obstructive pulmonary disease, sinitis and bronchitis so as to require medical services that would not have been otherwise necessary or that exacerbation resulted in even temporary disability, this claim is compensable". The Referee, in this case, found that claimant's right shoulder condition was made more symptomatic by her work. The Board agrees with this conclusion. Based on the rationale of the cases cited above, the Board concludes claimant's work caused an aggravation of her symptoms and caused her to quit work and seek medical care. Therefore, the Board concludes that claimant has proven that her claim for the right shoulder condition is compensable. The Board, therefore, would reverse the Referee's order.

ORDER

The Referee's order, dated December 19, 1978, is reversed.

Claimant's claim for a right shoulder condition is hereby remanded to the employer for acceptance and payment of compensation and other benefits until the claim is closed pursuant to ORS 656.268.

Claimant's attorney is granted as a reasonable attorney's fee for his services both at the hearing and on Board review a sum equal to $750, payable by the employer.

WCB CASE NO. 78-5466 March 29, 1980

ROBERT V. MAGEE, CLAIMANT
Alan L. Ludwick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks review by the Board of the order of the Referee which remanded claimant's claim to it for acceptance and the payment of compensation as required by law.

FACTS

Claimant was in a partnership in a business called Gooden Magee which did concrete work.

On the date of the injury, December 7, 1977, claimant and his wife were driving down Main Street in Springfield in their own personal automobile and were stopped for a school bus and were rear-ended by another vehicle which severely injured claimant causing "enormous paralysis" and which put him in a wheelchair.

Claimant and his wife were on their way to a Eugene engineering firm to sign papers on a sub-division owned exclusively by claimant and his wife and not a part of Gooden Magee. They were then going to the Fund's office on a business call to check into materials they had received from the Fund regarding a workers' compensation claim of one of their employees whose back injury was denied by the Fund.

Claimant testified that he and his wife left their residence on 57th Street in Springfield at around 8 a.m. The engineering firm was located on Willamette and 14th Streets in Eugene. Thereafter they were going to the Fund's office because of their concern over an employee named Luse's attorney fee agreement which indicated Gooden Magee would pay attorney fees win or lose. Claimant testified he had discussed this claim with Gooden but Gooden was not concerned about it.

Claimant testified that they would have gone to the Fund's office even if they had not had to go to the engineering firm. Claimant testified in December 1977 he thought the Fund's office was on 13th and Willamette but the morning of the injury his wife informed him it was located on Centennial Loop.

Claimant testified that their plan after visiting the Fund's office was to go home as there was no work to do in his business that day.

Upon cross-examination, claimant testified that his house was located about one block from freeway I-105, which was probably a more convenient and quicker route into Eugene.

Claimant's wife, who had been excluded during claimant's testimony, testified she had correspondence regarding the Luse case on her lap at the time of the injury. She turned this correspondence over to Mrs. Gooden at the hospital. The correspondence had been addressed to Mr. Gooden's house, which was the business address. She further testified she had talked to the Goodens the night before and they were not at all concerned about the claim, but she had questions and was concerned and that was why they were going to the Fund's office. Claimant's wife was not involved in claimant's business.

Mrs. Magee further testified that she thought the Fund office was located at 13th and Willamette but on the morning of the injury her husband informed her it was located on Centennial Loop.

A Fund's claims consultant testified that the file on Luse was sent to the Salem office on October 6 and Mr. Luse's request for hearing was dated October 7, 1977.

A Fund claim adjustor testified there was no claims adjustment office in Eugene until February 1978.

The Referee found claimant and his wife were credible witnesses and found this trip was a dual purpose trip in that claimant was going to the engineering firm on a personal mission and then to the Fund's office for a purpose related to his business.

He remanded the claim to the Fund for acceptance and an attorney's fee of $1,250.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, finds that the evidence indicates a number of things that cause concern. The Luse request for hearing and attorney fee agreement must have been received by claimant in October or November at the latest. It, therefore, is difficult to understand, if claimant was so concerned about this agreement, why an earlier contact was not made with the Fund's office either by phone or personal visit.

Another concern is that claimant testified he and his wife left their residence about 8 a.m. and the police report indicates the accident occurred somewhere around 8:55 (claimant testified 8:30 or 9:00 a.m.). It is obvious that in that amount of time they would have gone much further than Main Street in Springfield.

Further, the route chosen was by personal choice and was unreasonable when considered in light of claimant's testimony that they were to be at the engineering firm shortly after 8 a.m. and yet they chose to go through Springfield, Glenwood, etc., rather than to take I-105 a block or so from their residence, which is the quickest and the most convenient route.

The last point is that despite the accident which occurred, the engineering firm got the signature of claimant's wife the following day but investigating their employee's claim was never completed.

For the foregoing recitals, the Board concludes that the dual purpose rule has not been satisfied in this case and that the preponderance of the evidence does not establish the purported business purpose of the trip. The Board, therefore, concludes that the injury occurred while the claimant was engaged in a personal mission, unrelated to the employment.

ORDER

The order of the Referee, dated August 6, 1979, is reversed.

The Fund's denial, dated May 24, 1978, is affirmed.

SAIF CLAIM NO. C 379597 March 31, 1980

A. LOUISE BABB, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 11, 1979, claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for her low back injury. On January 25, 1972, claimant had injured her low back while moving freight in a stockroom. A Determination Order, dated August 3, 1973, originally closed claimant's claim with temporary total disability compensation and compensation equal to 16° for 5% unscheduled disability for her low back injury. Claimant's aggravation rights have expired.

Claimant, in her motion to the Board, stated that since her last award or arrangement of compensation, she attempted employment, but her physical condition had deteriorated to the point where she was totally unable to work. Attached to this request was a report from Dr. Timothy Mahoney.

On October 29, 1979, Dr. Mahoney indicated that claimant had had a flare-up of her low back pain for approximately three months. He noted claimant had never had complete relief of her pain following her lumbar laminectomy in 1975. After this 1975 surgery, claimant continued to have chiropractic adjustments which had not significantly improved her condition. Claimant stated that she was unable to bend or to do any lifting. Further, she indicated that remaining in one position for any prolonged period of time increased her back discomfort. Dr. Mahoney found claimant's neurological evaluation was entirely normal. He diagnosed that claimant had an exacerbation of her chronic low back pain which was probably muscular in origin. He did not feel that claimant was capable of working at that time.

On December 13, 1979, the Board requested the State Accident Insurance Fund (hereinafter referred to as the Fund) advise the Board of its position regarding the claimant's request for own motion reopening. On December 27, 1979, the Fund advised that they desired to have claimant examined by an independent medical consultant.

The Orthopaedic Consultants, on February 12, 1980, reported claimant complained of constant pain in her back and right buttock. She also indicated that the pain extended down both legs. They diagnosed a status post-hemilaminectomy with exploration of L4-5 and L5-S1 disc spaces, chronic lumbosacral sprain, and functional overlay. They opined that claimant's condition was medically stationary and that her condition had not objectively worsened since her claim was closed. They noted claimant did have evidence of degenerative intervertebral disc disease radiographically as documented by the disc narrowing at L5-S1 level and probable space narrowing at L4,5. They felt that her current problems were a continuation of her degenerative intervertebral disc disease, which apparently became symptomatic in January of 1972.

The Fund, on March 6, 1980, advised the Board that it opposed the issuance of an order reopening this claim for medical treatment and time loss compensation.

The Board, after thoroughly considering the evidence before it, finds it is not sufficient to warrant a reopening of claimant's claim at this time. The Board notes that claimant is entitled to continuing care under ORS 656.245 for any medical treatment related to her original injury. The Board finds the request by claimant for own motion relief should be denied.

IT IS SO ORDERED.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal.

SAIF CLAIM NO. C 145914 March 31, 1980

WILLIAM M. BROD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On September 12, 1968, claimant sustained a compensable injury to his right knee. His claim was initially closed by a Determination Order, dated December 19, 1969, which awarded him temporary total disability compensation and 23° for partial loss of the right leg. This Determination Order was appealed and resulted in claimant being awarded compensation equal to 32° for unscheduled disability for a right hip condition and 8° for scheduled disability of the right leg. These awards were in lieu of the previous awards. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with his right hip. On October 23, 1978, Dr. Richard Zimmerman performed a total right hip replacement.

By an Own Motion Order, dated February 2, 1979, the Board reopened this claim effective the date claimant was hospitalized for the surgery performed by Dr. Zimmerman.

On February 5, 1980, Dr. John Hardiman opined claimant's hip condition was significantly worse now than in 1971. He felt this condition would continue to deteriorate. Dr. Hardiman felt claimant would eventually need additional surgery. He felt claimant had a 100% loss of function of the right lower extremity "as if he were amputated with a hip disarticulation".

On February 27, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 10, 1980, recommended claimant be granted additional temporary total disability from October 23, 1978 through February 5, 1980; an award of 25% unscheduled disability to the right hip; and an award as a 20% scheduled disability of the right lower extremity in lieu of all previous awards.

The Board concurs with the Evaluation Division that the medical evidence indicates claimant's condition is probably medically stationary.

The Board agrees with the Evaluation Division's recommendation regarding the award of additional temporary total disability compensation and the award of scheduled disability. However, the Board finds the evidence indicates claimant is entitled to more unscheduled disability than recommended by the Evaluation Division.

The Board concludes claimant is entitled to an award of compensation of 35% unscheduled disability for the right hip, in lieu of all previous awards of unscheduled disability.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from October 23, 1978 through February 5, 1980; compensation equal to 20% scheduled disability of the right lower extremity; compensation equal to 35% unscheduled disability to the right hip. The awards of scheduled disability and unscheduled disability are in lieu of all previous awards.

SAIF CLAIM NO. ZODC 2300 March 31, 1980

RAY C. CLARK, JR., CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On April 1, 1967, claimant suffered compensable injuries to both of his elbows. A Determination Order, dated April 6, 1970, awarded claimant tempoary total disability compensation and compensation equal to 7° for partial loss of the left arm and 15° for partial loss of the right arm. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with his elbows. On October 25, 1978, Dr. William Mayhall performed bilateral epicondylectomies and ulnar nerve transposition for ulnar neuritis and epicondylitis. On December 7, 1978, the Board under its own motion jurisdiction reopened this claim. Claimant returned to work on February 21, 1979.

Dr. Mayhall indicates it would be best if claimant avoided heavy lifting. In February 1980, Dr. Mayhall found no abnormalities in his exam "except for the abnormal contour at the proximal ulnar status-post medial epicondylectomy". He felt claimant's condition was medically stationary.

On February 21, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 19, 1980, recommended claimant be granted additional temporary total disability compensation from October 25, 1978 through February 20, 1979 and additional permanent partial disability of 5% additional permanent partial disability for the right arm and 5% additional permanent partial disability for the left arm.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from October 25, 1978 through February 20, 1979, less time worked and compensation for 5% loss of the right arm and 5% loss of the left arm. These awards are in addition to any previous awards claimant may have already received. The record indicates that the temporary total disability award has already been paid out.

CLAIM NO. D 58084 March 31, 1980

JACK J. FISHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On March 17, 1980, the Board entered its Own Motion Determination in the above entitled matter. It has been brought to the Board's attention that the Claim No. cited in the heading was incorrect. Therefore, Claim No. "C58054" should be corrected to read "D58084". The remainder of the order is affirmed.

WCB CASE NO. 79-3401 March 31, 1980

ALBERT E. LIVELY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On March 21, 1980, the State Accident Insurance Fund (Fund) moved the Board to reconsider its order entered on March 20, 1980. The Board, in its order, had indicated it was unable to reconcile two cases decided by the Supreme Court. The Fund argues the cases are easily reconcilable and the real problem is distinguishing them. It contends claimant must prove by the greater weight of the evidence that the work activity and conditions "caused" a worsening of the underlying "disease". In this case, it argues claimant had failed to meet his burden.

The Board does not find the cases cited in its March 20, 1980 order as "easily reconcilable" as does the Fund.

In this case, the medical evidence, as the Board interprets it, indicates claimant had no pre-existing condition before he began work with this employer and that the condition he now has arose out of and in the course of his employment. The Board finds Dr. Slaughter's opinion to be more persuasive than that of Dr. Tuhy. Therefore, the Board affirms its previous order, entered March 20, 1980.

SAIF CLAIM NO. EC 276636 March 31, 1980

CHARLES EDWARD MUELLER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On November 16, 1970, claimant sustained an injury to his low back. He underwent a laminectomy and discectomy with fusion at the L5-S1 level. His claim was originally closed by a Determination Order, dated April 11, 1972, which granted him an award of compensation equal to 80° for 25% unscheduled disability for his low back injury. A Stipulation, dated October 26, 1972, increased this award to 96° for 30% unscheduled disability.

Claimant continued to have difficulty with his back and the claim, on April 9, 1975, was reopened. Claimant underwent a second laminectomy and discectomy at the L4-5 level and exploration of the L3-L4 level. A Determination Order, dated October 21, 1975, awarded claimant additional temporary total disability compensation. A Stipulation, dated April 26, 1976, increased the award 48° for 15% unscheduled disability making the total award of compensation equal to 144° for 45% unscheduled low back disability.

Claimant continued to have difficulty with his low back. On April 4, 1979, the Board reopened claimant's claim under its own motion jurisdiction. The effective date of the reopening was February 27, 1979.

Claimant received conservative treatment from Dr. William R. Parsons. On August 23, 1979, Dr. Parsons released claimant to his regular work. Claimant returned to his regular work on that date. In December 1979, Dr. Parsons reported that in his opinion claimant's condition was medically stationary. He suggested claimant be examined by the Orthopaedic Consultants.

On February 19, 1980, the Orthopaedic Consultants reported that claimant's condition was medically stationary. They opined claimant could continue to engage in the light to medium work which he was doing at that time. It was their feeling that the physical impairment was at the moderate level at that time due to claimant's previous back injury and surgery. They felt claimant would show a gradual improvement in his condition and no further surgical or conservative treatment was necessary at that time.

On March 4, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 18, 1980, recommended that claimant be granted an award of additional temporary total disability compensation from February 27, 1979, through August 22, 1979 and no additional award of permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from February 27, 1979 through August 22, 1979, less time worked. The record indicates that claimant has already been granted this compensation.

CLAIM NO. C 179627 March 31, 1980

CHARLES F. PETERSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 21, 1969, claimant sustained an injury to his right foot. A Determination Order, dated March 16, 1970, originally closed claimant's claim. The claim was subsequently reopened and closed by a Determination Order, dated August 7, 1975, which granted claimant additional temporary total disability compensation and compensation equal to 6.75° for 5% loss of his right foot. Claimant's aggravation rights have expired.

In January 1980, Dr. George McNeill reported that claimant had a fusion of a first metatarsal-phalangeal in the greater toe on the right. He reported claimant had done well until about six weeks prior to the January examination; about that time the claimant had noticed some swelling, aching, and drainage in the area of the great toe. X-rays revealed a partial arthrodesis of the great toe and that the screw which had been used for the arthrodesis had broken at its mid points. It was Dr. McNeill's opinion that the screw should be removed.

On February 11, 1980, the Fund authorized Dr. McNeill to provide the treatment as recommended. The Fund agreed it appeared the current problem directly related to the injury of April 21, 1969 and, authorized the recommended treatment under ORS 656.245. The Fund requested that Dr. McNeill advise of any time loss so they could submit the matter to the Board.

Dr. McNeill's office advised the Fund that claimant was hospitalized on February 24, 1980, surgery was scheduled for February 25, 1980, and that claimant would be disabled for about two weeks.

On March 24, 1980, the Fund advised the Board it would not oppose an own motion order reopening this claim for the recent surgery and the approximately two weeks time loss.

The Board, after giving consideration to the evidence in this matter, concludes that the claim should be reopened as of the date claimant was hospitalized for the surgery proposed by Dr. McNeill and until his claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. D53-124543 March 31, 1980

LEO P. SHAFFER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On July 26, 1968, claimant sustained a compensable injury to his head. This injury required extensive treatment for multiple facial and skull fractures and lacerations. This claim was first closed on June 18, 1973 with an award of compensation for permanent partial disability equal to 15% loss of hearing of the left ear, 25% loss of hearing in the right ear, and 25% unscheduled disability for his head and shoulder disability. This award was increased by an Opinion and Order, dated November 8, 1974, which granted claimant permanent partial disability awards equal to 22.5% loss of hearing in the left ear and 34.5% loss of hearing in the right ear for 46° binaural hearing loss and 160° unscheduled disability for his eye, head, shoulder and back injury. This was in lieu of the amounts granted by the Determination Order. Claimant's aggravation rights have expired.

On January 17, 1979, claimant was admitted by Dr. Harry Mittelman to Stanford University Medical Center for additional medical treatment. Dr. Mittelman performed a tympanoplasty using a total ossicular replacement prosthesis from the tympanic membrane to the oval window. Claimant underwent additional surgeries on March 26, 1979, April 2, 1979, and on April 21, 1979. Dr. Mittelman related the need for these surgeries to claimant's original injury in 1968.

The Board reopened claimant's claim by an Own Motion Order, dated May 8, 1979, and ordered the payment of temporary total disability compensation to begin January 17, 1979 until the claim was closed pursuant to the provisions of ORS 656.278.

Dr. Mittelman released claimant on February 5, 1980 to return to his regular work. On February 8, 1980, Dr. Mittelman reported that claimant's condition was medically stationary.

On February 19, 1980, Employers Insurance of Wausau requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 20, 1980, recommended that claimant's claim be closed and that he be granted additional temporary total disability compensation from January 17, 1979 through February 3, 1980, and temporary partial disability compensation from February 4, 1980 through February 8, 1980.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from January 17, 1979 through February 3, 1980, and temporary partial disability compensation from February 4, 1980 through February 8, 1980, less time worked.

CLAIM NO. UNKNOWN March 31, 1980

A.K. STONE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On March 17, 1980, the Board entered its Own Motion Order in the above entitled matter. An error on page two of said order should be corrected. Under the "Appeal Notice" section, both references to the State Accident Insurance Fund should be changed to read "self-insured employer". The remainder of the Own Motion Order is affirmed.

CLAIM NO. 3W-10-4895 March 31, 1980

MARGARET VAN LANEN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, SMith, Griffith
& Hallmark, Employer's Attys.
Own Motion Order

Claimant sustained a compensable injury on May 25, 1972 to her back. Her claim was originally closed by a Determination Order, dated October 17, 1972, which granted her no award of permanent disability. Claimant's claim was reopened and closed and subsequently a stipulation was entered into resulting in claimant being granted a total award equal to 128° for 40% unscheduled disability for a low back injury.

On March 11, 1980, claimant, by and through her attorney, requested the Board exercise its own motion jurisdiction and reopen her claim for this injury. Attached to this request were copies of medical reports from Dr. Robert Berselli.

On July 27, 1979, Dr. Berselli reported claimant continued to complain of persistent, worsening low back pain. X-rays revealed a first degree spondylolisthesis of L5, S1 with bilateral spondylolitic defects of the pars interarticularis of L5. He felt that claimant would probably have to have a spinal fusion. Claimant continued to have difficulty with low back pain and on January 4, 1980 Dr. Berselli reported that a CT scan revealed a possible disc protrusion on the right side at the L5-S1 level. He suggested claimant undergo exploration of the L5-S1 disc space, possible discectomy, and an L4-S1 spinal fusion for treatment of her spondylolisthesis.

On March 13, 1980, the Board requested that Farmers Insurance Group, the workers' compensation insurance carrier for this employer, advise the Board of its position regarding claimant's request. On March 13, 1980, the carrier advised the Board that it was opposed to the reopening of claimant's claim. This was based upon a report of Dr. Berselli, dated February 20, 1980, in which he indicated he could not say with any medical certainty whether or not claimant's current condition was caused by her employment with this employer and her reported injury of May 25, 1972.

The Board, after reviewing all the evidence in this file, finds that reopening claimant's claim under its own motion jurisdiction is not warranted at this time. Therefore, the Board would deny claimant's request.

IT IS SO ORDERED.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal.

CLAIM NO. HD 277686 March 31, 1980

LESLEY YOUNG, CLAIMANT
Williams, Stark, Hiefield,
Norville & Griffin, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On March 14, 1980, claimant requested the Board exercise its own motion jurisdiction and reopen his claim for a February 16, 1978 back injury. In his request, the claimant indicates a Determination Order of December 31, 1979 awarded him temporary total disability compensation through November 5, 1979. Claimant has requested a hearing on that order.

Claimant's aggravation rights have not expired.

On March 18, 1980, the Board requested that the State Accident Insurance Fund (hereinafter referred to as the Fund) comment on claimant's March 14, 1980 request. On March 19, 1980, the Fund responded to the Board pointing out that the claimant's request for own motion relief is premature. The claimant's aggravation rights have not expired. The evidence supports the Fund's contention, therefore, the claimant's request for own motion relief is denied.

IT IS SO ORDERED.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal.

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Treva Anderson, 26 Van Natta's 419 (1979)----------242
Weert Frerichs, 25 Van Natta's 508 (1978)----------347
Carroll Lane, Jr., 25 Van Natta's 24 (1978)----------465

MEMORANDUM OPINIONS
NOT PUBLISHED IN THIS VOLUME

WCB Numbers given for your convenience in ordering from the Worker's Compensation Board

S. Akin: Affirmed 75% low back, aggravation denial---78-3907
E. Allen: Affirmed PTD----------78-4443
B. Anderson: Affirmed: widow's benefits----------78-7017
C. Ankele: Affirmed: 25% low back----------79-1918
L. Arrant: Affirmed: 75% PPD----------78-6904
D. Austin: Affirmed: 20% leg----------78-8828
B. Autwell: Affirmed: order for acceptance of knee condition----------Unknown
O. Baca: Affirmed: denial of heart attack----------79-2971
R. Baldwin: Affirmed: dismissal of request for hearing as untimely----------78-10,046
78-7473
L. Barker: Affirmed: order to accept aggravation claim----------78-7292
L. Barnes: Affirmed: order for acceptance----------77-7694
78-5626
R. Barnhardt: Affirmed: PTD----------76-2677
M. Beckley: Affirmed: denial of aggravation---------79-2803
G. Bedsaul: Affirmed: denial of occupational disease----------78-8096
D. Beeler: Affirmed: 15% low back----------78-6398
J. Benevidez: Affirmed: PTD----------78-6159
B. Bennett: Affirmed: TTD----------78-9756
V. Berov: Affirmed: 209° & 25% psychological disability----------79-674
S. Bidwell: Affirmed: denial of pinched muscle claim----------78-8953
R. Bigsby: Affirmed: denial of motion to dismiss as untimely----------77-3976
G. Boles: Affirmed: 40% low back----------79-5505
M. Bradford: Affirmed: denial of rheumatoid arthritis developing from dermatitis----------78-8782
D. Brainerd: Affirmed: order to accept claim--------79-15
D. Britton: Affirmed: denial for aggravation; no abuse of discretion----------78-2797
J. Brooks: Affirmed: 50% shoulder----------77-6908
J. Brooks: Affirmed: 10% back----------79-676
K. Brown: Affirmed: TTD & 5% PPD----------78-7223
J. Bruemmer: Affirmed: order for acceptance---------79-237
L. Butler: Affirmed: denial----------79-517
E. Byers (nee Pool): Affirmed: denial of shoulder bursitis----------79-2551

R. Cardona: Affirmed: 5% unscheduled psychological disability----------79-274
O. Carmack: Affirmed: 90% unscheduled----------78-9145
C. Carridk: Affirmed: order for acceptance of claim---78-10,041
78-10,042
J. Casciato: Affirmed: compensation for time loss only----------79-1553
A. Castator: Affirmed: stipulation amended to include penalties and fees----------78-9102
E. Charlson: Affirmed: 55% leg----------78-7648
E. Charlson: Affirmed: order for acceptance, Penalties and fees----------79-2691
E. Chaschin: Affirmed: denial of occupational disease-78-8056
H. Christopher: Affirmed: denial----------78-9809
B. Clark: Affirmed: denial of aggravation----------79-2444
L. Coble: Affirmed: 20% low back----------78-5222
F. Collins: Affirmed: order to accept aggravation, penalties, medical bills, non-referral for Vocational Rehabilitation----------78-8437
78-8438
B. Colwell: Affirmed: denial of epicondylitis---------79-22
R. Cook: Affirmed: denial----------78-9562
R. Copus: Affirmed: denial of reopening----------79-1125
M. Croft: Affirmed: order for acceptance and adjustment between insurance companies----------78-7892
W. Crosby: Affirmed: 60% back----------79-2274
B. Crownover: Affirmed: denial----------79-789
B. Davis: Affirmed: order for acceptance of aggravation claim----------78-8435
A. Dean: Affirmed: dismissal of request for hearing as untimely----------79-6347
R. Dickson: Affirmed:
S. Dix: Affirmed: penalties and fees; no entitlement to jacuzzi----------78-5995
L. Donaldson: Affirmed: 15% shoulder; 5% penalty------77-6860
W. Dykes: Affirmed: denial on basis claimant wasn't subject employee----------78-6306
E. Emmy: Affirmed: denial----------78-4188
M. Enos: Affirmed: denial of occupational disease-----79-752
B. Estes: Affirmed: 35% finger----------78-5189
J. Fagans: Affirmed: PTD----------79-2900
D. Farmer: Affirmed: no PPD----------79-3819
R. Fischer: Affirmed: 25% low back----------78-9712
L. Fletcher: Affirmed: order for SAIF to accept claim, reimburse Pacific Motor Trucking----------78-2873
78-4902
R. Flick: Affirmed: 25% right hand, 20% left hand-----78-1726
G. Fluker: Affirmed: 15% low back----------78-1037
K. Fowler: Affirmed: 25% back----------79-1765
H. Fuller: Affirmed: determination order for 10% hand-79-180

R. Gale: Affirmed: denials of two aggravations and one new injury----------78-3762
78-6678
78-7337
W. Gardner: Affirmed: PTD----------78-3093
V. Garrison: Affirmed: no PPD----------78-9569
78-9570
C. Gastaldi: Affirmed: order to accept claim----------79-1342
D. Geary: Affirmed: order for claim acceptance----------77-7778-E
R. Geisler: Affirmed: order for acceptance of occupational disease claim----------78-9571
D. Glazier: Affirmed: 25% back----------78-4257
D. Goff: Affirmed: order to accept aggravation----------79-24
79-25
J. Gordon: Affirmed: denial of PPD----------78-8066
M. Grable: Affirmed: denial of aggravation----------79-866
W. Grace: Affirmed: denial----------79-689
E. Grahan: Affirmed: 20% PPD; transportation costs and penalties----------78-6355
J. Gray: Affirmed: denial of penalties and fees; dismissal----------79-971
79-3924
W. Greene: Affirmed: denial of claim----------78-9818
F. Hall: Affirmed: order of acceptance for SAIF, denial by Safeco----------78-9088
78-9087
A. Hanawalt: Affirmed: order for acceptance of claim----79-1132
A. Hargon: Affirmed: 10% leg----------78-8294
C. Hart: Affirmed: PTD----------78-4908
D. Hagar: Affirmed: 5% eye----------79-2154
L. Henderson: Affirmed: denial----------78-7718
J. Henneman: Affirmed: TTD and 10% foot----------78-8444
C. Hill: Affirmed: 40% low back----------78-3647
F. Hobbs: Affirmed: 35% PPD----------79-1348
A. Hornaday: Affirmed: 40% middle finger----------79-1211
R. Hornaday: Affirmed: order for acceptance of claim----78-5156
E. Hubbard: Affirmed: order for acceptance of wrist claim----------79-1614
C. Huff: Affirmed: order for claim acceptance----------78-2329
J. Humberg: Affirmed: 15% left shoulder----------79-1351
N. Huntley: Affirmed: no PPD----------79-443
F. Jackson: Affirmed: denial----------78-8531
S. Jensen: Affirmed: denial----------79-4582
C. Jones: Affirmed: order for claim acceptance----------79-532
Calvin Jones: Affirmed: PTD----------79-222-E
H. Jones: Affirmed: 10% back----------78-10,071
S. Jones: Affirmed: denial----------78-9133
P. Joye: Affirmed: 60% back----------78-4573

I. Karam: Affirmed: 10% low back----------78-7758
C. Kitts: Affirmed: denial----------79-1519
D. Kliever: Affirmed: order for acceptance of claim-Unknown
E. Knowles: Affirmed: denial of aggravation---------78-7535
R. Koppert: Affirmed: 35% unscheduled PPD----------79-2412
W.G. Krueger: Affirmed: dismissal of request for hearing----------75-1351
E. Kunkel: Affirmed: denial of heart-ulcer condition and assessed penalties and fees----------75-4558
S. Laam: Affirmed: no PPD----------78-5252
D. Lake: Affirmed: penalties of 15% and 25%---------78-353
E. Leach: Affirmed: 95% arm----------78-3513
W. Lead, II: Affirmed: order for acceptance, penalties and fees----------78-3979
W. Legg: Affirmed: no PPD----------79-1990
K. Lenz: Affirmed: order to accept neck condition---79-1730
K. Lidoff: Affirmed: order for acceptance of claim; interim compensation----------78-8590
A. Loveless: Affirmed: time loss only and denial of arm claim----------78-9674
R. Lusted: Affirmed: partial denial for "Reiter's" syndrome----------79-1849
M. Luster: Affirmed: 75%----------79-982
K. Lynn: Affirmed: no PPD----------77-7760
S. Lyons: Affirmed: 25% neck-shoulder----------78-7357
J. Matthews: Affirmed: order for employer to pay medical, penalty, attorney's fee----------78-4716
J. McCourtney: Affirmed: denail for psychiatric condition, and grants attorney's fee----------78-4984
K. McCurdy: Affirmed: denial----------79-1815
J. McKenzie: Affirmed: 50% unscheduled PPD----------79-311
R. Minor: Affirmed: denial----------78-4584
D. Minyard: Affirmed: 10% unscheduled----------79-98
C. Moore: Affirmed: 40% unscheduled, 70% left leg, 80% right foot----------79-573
R. Moore: Affirmed: 30% back----------79-574
T. Moore: Affirmed: TTD, PPD and aggravation rights--78-10,079
S. Mowrey: Affirmed: denial on grounds claimant was not employee----------78-997
W. Mozingo: Affirmed: no PPD for shoulder----------79-197
A. Mueller: Affirmed: PTD----------79-1670
L. Muilenburg: Affirmed: 5% back----------78-9975
E. Murrill: Affirmed: 20% shoulder----------78-7909
78-4926
M. Nakachi: Affirmed: 10% unscheduled----------78-6654
J. Osmus: Affirmed: 15% forearm----------78-9881
D. Parkhurst: Affirmed: order for acceptance penalties and fees----------79-1228
C. Penland: Affirmed: denials of 245 treatment, psychiatric condition; affirmed interim compensation, penalty----------78-5267

C. Phelps: Affirmed: 35% leg----------79-833
R. Pierce: Affirmed: order for acceptance of cliam--78-6883
T. Poole: Affirmed: 50% back----------77-4771
T. Potter: Affirmed: 25% arm----------78-6452
C. Powers: Affirmed: denial of aggravation----------76-6573
G. Primmer: Affirmed: ----------78-7327
R. Rake: Affirmed: dismissal for hearing; Jones Act Jurisdiction probable----------79-800
J. Randall: Affirmed: denial of new injury with continental; no remand for industrial indemnity-----78-7818
78-7328E
F. Reedy: Affirmed: 15% low back----------79-3704
R. Richards: Affirmed: order setting aside acceptance; determination order negated----------78-1056E
79-3601
D. Rickard: Affirmed: carrier not responsible after April 1, 1979; no PPD----------79-3437
D. Roberts: Affirmed: no PPD for low back injury----79-618
L. Rogers: Affirmed: 15% low back----------78-7731
S. Rogers: Affirmed: attorney's fees but no widow's benefits----------78-7602
J. Roten: Affirmed: 20% head, neck, shoulder and larynx----------78-9455
R. Roy: Affirmed: order for acceptance----------77-1254
J. St. Onge: Affirmed: order to accept aggravation--79-3113
P. Saxton: Affirmed: no PPD----------78-8202
R. Schmitt: Affirmed: 15%face; 10% left hand, 5% right hand----------79-2372
K. Schreinol: Affirmed: no TTD during certain period----------78-1204
J. Scott: Affirmed: 75% heart----------78-9258
R. Sexton: Affirmed: denial----------78-7545
R. Shoemaker: Affirmed: 52.5° leg----------77-7924
G. Shoffitt: Affirmed: 20% back----------79-624
W. Siemens: Affirmed: denial of PPD----------78-7939
S. Sixkiller: Affirmed: PTD----------78-4169
A. Smith: Affirmed: denial for occupational disease-78-7577
D. Smith: Affirmed: stipulation not to be set aside-78-5042
M. Smith: Affirmed: denial----------78-29
W. Smith: Affirmed: PTD----------78-4753
K. Sorenson: Affirmed: order for acceptance of claim by Gilmore Steel and denial by European Health Spa----------78-4596
78-10,255
M. Spain: Affirmed: 10% PPD----------79-1864
G. Spencer: Affirmed: denial of aggravation----------79-936
A. Stacks: Affirmed: 15% back----------77-6218
K. Stanley: Affirmed: denial for back claim----------75-4594
G. Stenerson: Affirmed: 5% low back----------78-3481
A. Stevens: Affirmed: order for payment of medical expenses----------78-2100

G. Stevens: Affirmed: 50% back----------79-4426
L. Stewart: Affirmed: 5% low back----------78-8400
J. Stogsdill: Affirmed: 80% unscheduled----------78-1095
J. Storm: Affirmed: no award of compensation---------79-1312
J. Strano: Affirmed: 30% back----------78-10,090
R. Stritt: Affirmed: 25% PPD----------78-2135
R. Sumpter: Affirmed: 27° foot and ankle----------79-842
R. Taylor: Affirmed: 20% unscheduled PPD----------78-8318
J. Themins: Affirmed: fall was compensable consequence of injury----------78-7734
78-10,040
D. Thomas: Affirmed: determination order----------79-939
H. Thomas: Affirmed: 50% back----------78-9642
W. Thomas: Affirmed: denial----------78-8985
E. Thompson: Affirmed: 15% unscheduled and time loss-78-7871-E
C. Tolbert: Affirmed:----------78-5729
K. Tompkins: Affirmed: no additional PPD to 7.5° award----------77-1164
J. Turner: Affirmed: claim not timely filed----------79-782
W. Turner: Affirmed: 20% arm and 30% unscheduled PPD-78-5980
J. Utterback: Affirmed: aggravation with Wausau; SAIF's denial affirmed----------79-262
79-1325
W. Vernon: Affirmed: 75% low back----------78-9937
R. Walton: Affirmed: denial of new injury, acceptance of aggravation----------78-9408
79-380
S. Walton: Affirmed: 20% low back----------79-1429
K. Way: Affirmed: denial----------78-9645
Eugene Wells: Affirmed: new injury with industrial indemnity; Wausau's denial affirmed----------79-2174
J. West: Affirmed: 20% abdomen----------78-5655
B. Wilson: Affirmed: 75% unscheduled----------78-6193
R. Wilson: Affirmed: order to accept aggravation claim----------79-2925
D. Woodworth: Affirmed: 10% unscheduled----------76-4618
R. York: Affirmed: 5% neck----------78-2242
79-424
S. Young: Affirmed: denial for occupational disease--78-3316
I. Zastoupil: Affirmed: order remanding claim for fatal benefits for acceptance----------79-330
G. Zorich: Affirmed: order for acceptance of claim by Safeco and denial of aggravation against mission--79-587